

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the arbitration proceeding between

**CASINOS AUSTRIA INTERNATIONAL GMBH AND CASINOS AUSTRIA
AKTIENGESELLSCHAFT**

Claimants

AND

ARGENTINE REPUBLIC

Respondent

ICSID Case No. ARB/14/32

DECISION ON JURISDICTION

Members of the Tribunal

Prof. Dr. Hans van Houtte, President

Prof. Dr. Stephan W. Schill, Arbitrator

Dr. Santiago Torres Bernárdez, Arbitrator

Secretary of the Tribunal

Ms. Alicia Martín Blanco

Date of dispatch to the Parties: 29 June 2018

REPRESENTATION OF THE PARTIES

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I. INTRODUCTION

1. The present dispute arises out of the revocation, in 2013, of an exclusive 30-year license granted, in 1999, to the Argentine company *Entretenimientos y Juegos de Azar S.A.* (“**ENJASA**”) for the operation of gaming facilities and lottery activities in the Argentine Province of Salta. ENJASA was established by the Government of the Province of Salta in 1999 as part of a process of privatizing the Province’s gaming and lottery sector and developing tourism in the region. Following a public tender and various changes in the ownership structure, ENJASA became majority owned and controlled by Claimants, *Casinos Austria International GmbH* (“**CAI**”), a limited liability company established under the laws of Austria, and *Casinos Austria Aktiengesellschaft* (“**CASAG**”), a share-company established under the laws of Austria (jointly “**Casinos**” or “**Claimants**”).
2. Claimants contend that the revocation of ENJASA’s license, followed by the transfer of its gaming and lottery operations and personnel to a number of new gaming operators effectively destroyed their investment in Argentina. They invoke the violation of their rights as foreign investors under the Argentina-Austria BIT, namely not to be expropriated without compensation, to receive fair and equitable treatment, and to enjoy national treatment,¹ and seek damages from the Argentine Republic (“**Argentina**” or “**Respondent**”) for such breach.
3. The jurisdictional basis of the present proceedings rests on Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which is in force between the Argentine Republic and the Republic of Austria. Pursuant to Article 25(1) of the ICSID Convention,

[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another

¹ See Memorial on the Merits, Section III, subsections 3-5. The Tribunal notes that Claimants’ allegations of discriminatory treatment were brought as a claim for breach of national treatment (*see* Memorial on the Merits, paras. 437-441). Moreover, a breach of the most-favoured-nation clause (*see* Request for Arbitration, para. 65) was not repeated in the Memorial on the Merits, but was invoked with regard to the Tribunal’s Arbitral jurisdiction. Claimants had also invoked a violation of the standard of full protection and security under the Argentina-Austria BIT (*see* Request for Arbitration, para. 56), but they have not further pursued that claim.

Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

4. Claimants claim that the conditions of Article 25(1) of the ICSID Convention are fulfilled. They also contend that, by initiating the present proceedings, they have accepted, Respondent's consent to this arbitration contained in Article 8 of the Argentina-Austria BIT. Article 8 provides, in its two authentic languages, Spanish and German, as follows:²

ARTIKEL 8

Beilegung von Investitionsstreitigkeiten

(1) Jede Meinungsverschiedenheit aus Investitionen zwischen einem Investor der einen Vertragspartei und der anderen Vertragspartei betreffend die von diesem Abkommen geregelten Angelegenheiten wird, soweit wie möglich, durch freundschaftliche Konsultationen zwischen den Streitparteien beigelegt.

(2) Führen diese Konsultationen innerhalb von sechs Monaten zu keiner Regelung, kann die Meinungsverschiedenheit dem zuständigen Verwaltungs- oder Gerichtsverfahren der Vertragspartei, in deren Hoheitsgebiet die Investition getätigt wurde, unterbreitet werden.

(3) Die Meinungsverschiedenheit kann einem Schiedsgericht in folgenden Fällen unterbreitet werden:

a) falls nach Ablauf einer Frist von 18 Monaten ab Mitteilung über die Einleitung des Verfahrens bei den vorgenannten Behörden keine meritorische Entscheidung getroffen wurde;

b) falls eine solche Entscheidung getroffen wurde, aber die Meinungsverschiedenheit weiterbesteht. In diesem Fall werden die betreffenden vorher auf nationaler Ebene gefällten Entscheidungen durch die Anrufung des Schiedsgerichtes wirkungslos;

c) falls die beiden Streitparteien sich in diesem Sinne geeinigt haben.

(4) Zu diesem Zweck gibt jede Vertragspartei nach den Bestimmungen dieses Abkommens ihre vorherige und unwiderrufliche Zustimmung, wonach jede Meinungsverschiedenheit diesem Schiedsverfahren unterbreitet wird. Ab Einleitung eines Schiedsverfahrens ergreift jede Streitpartei alle gebotenen

ARTICULO 8

Solución de controversias relativas a las inversiones

(1) Toda controversia relativa a las inversiones entre un inversor de una de las Partes Contratantes y la otra Parte Contratante sobre las materias regidas por el presente Convenio será, en la medida de lo posible, solucionada por consultas amistosas entre las partes en la controversia.

(2) Si estas consultas no aportaran una solución en un plazo de seis meses, la controversia podrá ser sometida a la jurisdicción administrativa o judicial competente de la Parte Contratante en cuyo territorio se realizó la inversión.

(3) La controversia podrá ser sometida a un tribunal arbitral en los casos siguientes:

a) cuando no haya una decisión sobre el fondo, luego de la expiración de un plazo de dieciocho meses contados a partir de la notificación de la iniciación del procedimiento ante la jurisdicción arriba citada;

b) cuando tal decisión haya sido emitida pero la controversia subsista. En tal caso, el recurso al tribunal de arbitraje privará de efectos a las decisiones correspondientes adoptadas con anterioridad en el ámbito nacional;

c) cuando las dos partes en la controversia lo hayan así convenido.

(4) Con este fin, cada Parte Contratante otorga, en las condiciones del presente Convenio, su consentimiento anticipado e irrevocable para que cada controversia sea sometida a este arbitraje. A partir del comienzo de un procedimiento de arbitraje, cada parte en la controversia tomará todas las medidas requeridas para su desistimiento de la instancia judicial en curso.

² Exhibit C-002.

Maßnahmen, um sich von dem laufenden Gerichtsverfahren zurückzuziehen.

(5) Im Falle der Beantragung eines internationalen Schiedsverfahrens kann die Meinungsverschiedenheit nach Wahl des Investors vor eines der nächstehend genannten Schiedsorgane getragen werden:

- vor das Internationale Zentrum für die Beilegung von Investitionsstreitigkeiten (ICSID), welches durch die Konvention über die Beilegung von Investitionsstreitigkeiten zwischen Staaten und Staatsangehörigen anderer Staaten, die am 18. März 1965 in Washington zur Unterzeichnung aufgelegt wurde, geschaffen wurde, wenn jeder der Vertragsparteien dieser beigetreten sein wird. Solange diese Bedingung nicht erfüllt ist, stimmt jede Vertragspartei zu, daß die Meinungsverschiedenheit dem Schiedsverfahren nach der ergänzenden ICSID-Schiedsordnung unterbreitet wird;

- vor ein ad-hoc-Schiedsgericht, das nach der UNCITRAL-Schiedsordnung eingerichtet wird.

(6) Das Schiedsorgan entscheidet auf der Grundlage der Rechtsordnung jener Vertragspartei, die Streitpartei ist, einschließlich der Regeln des internationalen Privatrechtes, der Bestimmungen dieses Abkommens, der Bestimmungen allfälliger besonderer über die Investition geschlossener Abkommen, sowie der einschlägigen Grundsätze des Völkerrechts.

(7) Der Schiedsspruch ist endgültig und bindend; er wird nach innerstaatlichem Recht vollstreckt; jede Vertragspartei stellt die Anerkennung und Durchsetzung des Schiedsspruches in Übereinstimmung mit ihren einschlägigen Rechtsvorschriften sicher.

(8) Die Vertragspartei, die Streitpartei ist, macht in keinem Stadium des Vergleichs- oder Schiedsverfahrens oder der Durchsetzung eines Schiedsspruchs als Einwand geltend, daß der Investor, der die andere Streitpartei bildet, auf Grund einer Garantie bezüglich aller oder Teile seiner Verluste eine Entschädigung erhalten habe.

(5) En caso de recurso al arbitraje internacional, la controversia podrá ser llevada ante uno de los órganos de arbitraje designados a continuación, a elección del inversor:

- al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.), creado por el “Convenio sobre Arreglo de Diferencias relativas a las inversiones entre Estados y nacionales de otros Estados”, abierto a la firma en Washington, el 18 de marzo de 1965, cuando cada Estado parte en el presente Convenio haya adherido a aquél. Mientras esta condición no se cumpla, cada Parte Contratante da su consentimiento para que la controversia sea sometida al arbitraje conforme con el reglamento del mecanismo complementario del C.I.A.D.I.;

- a un tribunal de arbitraje “ad hoc”, establecido de acuerdo con las reglas de arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (C.N.U.D.M.I.).

(6) El órgano arbitral decidirá en base al derecho de la Parte Contratante que sea parte en la controversia – incluidas las normas de derecho internacional privado –, en base a las disposiciones del presente Convenio y a los términos de eventuales acuerdos específicos concluidos con relación a la inversión, como así también según los principios del derecho internacional en la materia.

(7) La sentencia será definitiva y obligatoria y será ejecutada de conformidad con la legislación nacional; cada Parte Contratante garantiza el reconocimiento y ejecución de la sentencia arbitral de conformidad con sus respectivas disposiciones legales.

(8) En ninguna etapa del procedimiento de conciliación o de arbitraje o de la ejecución de una sentencia arbitral, la Parte Contratante, que sea parte en una controversia, planteará excepciones, por el hecho de que el inversor que sea parte contraria en la controversia haya percibido, en virtud de una garantía, una indemnización que cubra total o parcialmente sus pérdidas.

5. The Parties were unable to agree on a translation of the German and Spanish original of Article 8 of the BIT into English, just as they could not agree on the translation of other provisions of the BIT,³ or of key documents for the present case. Yet, at least with respect to Article 8 of the BIT, in the Tribunal’s view, the differences between the Parties’s

³ Revised version of the translations of Exhibits C-001 and A RA-01.

respective translations are minor and make no difference in interpreting and applying that provision in the case at hand. The Tribunal therefore sees no need to settle on one version of the English translation. Instead it will use the English translation as far as agreed between the Parties and note any differences, whenever necessary, by attributing the translation to the respective Party in brackets. The translation of Article 8 of the BIT into English with the Parties' respective differences is as follows:

ARTICLE 8

Settlement of Investment Disputes

(1) Any dispute with regard to investments between an investor of one of the Contracting Parties and the other Contracting Party concerning any subject matter governed by this Agreement shall, as far as possible, be settled through amicable consultations between the parties to the dispute.

(2) If the dispute cannot be settled through consultations within a term of six months, the dispute may be submitted to the competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment was made.

(3) The dispute may be submitted to an arbitral tribunal in any of the following cases:

a) where, after a period of eighteen months has elapsed from the date of notification of the initiation of the proceeding before the afore-mentioned jurisdiction [Respondent]/authorities [Claimants], no decision was rendered on the merits;

b) where such decision has been rendered, but the parties are still in dispute [Respondent]/the dispute persists [Claimants]. In such case, recourse to the arbitral tribunal shall render ineffective any decision previously adopted at the national level;

c) where the parties to the dispute have so agreed.

(4) To such effect, under the terms of this Agreement, each Contracting Party irrevocably consents in advance to the submission of any dispute to arbitration. From the commencement of an arbitration proceeding, each party to the dispute shall take all the required measures to withdraw any [Respondent]/the [Claimants] pending judicial proceedings.

(5) Whenever the dispute is referred to international arbitration, it may be submitted, at the investor's choice, either to:

- the International Centre for Settlement of Investment Disputes (ICSID) established under the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States," opened for signature in Washington, on March 18, 1965, when both Contracting Parties have acceded to said Convention. Until such time as this requirement is met, each Contracting Party agrees to submit the dispute to arbitration in accordance with the ICSID Additional Facility Rules;
- to an "ad hoc" arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

(6) The arbitral tribunal shall decide the dispute in accordance with the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws [Respondent]/private international law rules [Claimants], the provisions of this Agreement, and the terms of any specific agreements concluded in relation to such an investment, if any, as well as the applicable principles of international law.

(7) The award shall be final and binding and shall be enforced in accordance with the national legislation; each Contracting Party undertakes to recognize and enforce the award in accordance with its respective legal provisions.

(8) A Contracting Party which is a party to a dispute shall not, at any stage of a conciliation or arbitration proceeding or enforcement of an award, raise objections grounded on the fact that the investor who is the other party to the dispute has received indemnity by virtue of a guarantee in respect of all or some of its losses.

6. Respondent objects to the jurisdiction of the present tribunal. In her view, the jurisdictional requirements under Article 25(1) of the ICSID Convention and under the Argentina-Austria BIT are not met. In Respondent's view, Claimants have not demonstrated a *prima facie* violation of the Argentina-Austria BIT, have not complied with the conditions of Respondent's consent under Article 8 of the BIT, and have not shown that the Tribunal has jurisdiction *ratione materiae* under both the BIT and the ICSID Convention.

II. PROCEDURAL HISTORY

7. On 4 December 2014, ICSID received a request for arbitration from Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft against the Argentine Republic (the “**Request**”).
8. On 18 December 2014, the Secretary-General of ICSID registered the Request in accordance with Article 36 of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(c) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“**Institution Rules**”).
9. By correspondence of 3 December 2014, 29 December 2014, 13 January 2015, and 15 January 2015, the Parties agreed that the Tribunal would be comprised of three arbitrators; one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the Parties.
10. By letter of 13 January 2015, Claimants appointed Prof. Dr. Stephan Schill, a national of Germany, as an arbitrator in this case. Prof. Schill accepted his appointment on 26 January 2015.
11. By letter of 13 February 2015, Respondent appointed Dr. Santiago Torres Bernárdez, a national of Spain, as arbitrator in this case. Dr. Torres Bernárdez accepted his appointment on 23 February 2015.
12. On 31 March 2015, Claimants informed the Secretary-General that the Parties had reached an agreement to appoint Prof. Dr. Hans van Houtte as President of the Tribunal. Respondent confirmed the agreement on the same date. Prof. van Houtte accepted his appointment on 3 April 2015.
13. On 6 April 2015, the Secretary-General, in accordance with Rule 6 of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Giuliana Canè, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. Following Ms. Canè’s departure from

the Centre, on 15 January 2016, in accordance with ICSID Administrative and Financial Regulation 25, the Secretary-General appointed Ms. Alicia Martín Blanco, ICSID Legal Counsel, as Secretary of the Tribunal.

14. In accordance with ICSID Arbitration Rules 13(1) and 20(1), the Tribunal held a first session and preliminary procedural consultation with the Parties on 5 June 2015 by teleconference. The following persons were present at the session:

Members of the Tribunal:

Prof. Dr. Hans van Houtte	President
Prof. Dr. Stephan W. Schill	Arbitrator
Dr. Santiago Torres Bernárdez	Arbitrator

ICSID Secretariat:

Ms. Giuliana Canè	Secretary of the Tribunal, ICSID
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Participating on behalf of the Claimants:

Ms. Claudia Dotter	Casinos Austria AG
Mr. Andreas Schreiner	Casinos Austria International GmbH
Mr. Florian Haugeneder	Counsel
Mr. Emmanuel Kaufman	Counsel

Participating on behalf of the Respondent:

Mr. Horacio P. Diez	Subprocurador del Tesoro de la Nación
Mr. Carlos Mihanovich	Procuración del Tesoro de la Nación
Mr. Sebastián Green Martínez	Procuración del Tesoro de la Nación

15. Following the first session, on 23 June 2015, the Tribunal issued Procedural Order No. 1 recording the agreements of the Parties and the Tribunal's decisions on procedural matters. Procedural Order No. 1 provided, inter alia, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Paris, France. Procedural Order No. 1 also set out the schedule of the proceedings included as Annex A to that order.
16. On 2 October 2015, Claimants submitted their Memorial on the Merits.
17. By communication of 29 January 2016, Respondent requested the Tribunal to order Claimants to produce certain documents. On 4 February 2016, Claimants submitted observations to Respondent's request for production of documents, and Respondent filed a response to Claimants' observations on 5 February 2016. Having considered the Parties'

communications, the Tribunal issued Procedural Order No. 2 on 11 February 2016 on document production.

18. On 15 March 2016, Respondent submitted her Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits. It included a request to treat the objections to the jurisdiction of the Centre and/or the competence of the Tribunal as a preliminary matter. On 8 April 2016, Claimants presented observations in opposition to Respondent's request to bifurcate the proceeding.
19. Having considered the Parties' observations, on 25 April 2016, the Tribunal issued Procedural Order No. 3 ruling that Respondent's objections would be heard as a preliminary question. The Tribunal noted that "the objections to jurisdiction as submitted by Respondent are largely separate from the merits of the dispute and, if successful, would dispose of the case in its entirety." Furthermore, the Tribunal noted that it had reached its decision on bifurcation having considered "Respondent's full arguments on jurisdiction but not having seen Claimants' response to these arguments," and thus reserved the possibility of "joining any objections to the jurisdiction of the Centre and/or the competence of the Tribunal to the merits phase once it has received Claimants' counter-arguments on jurisdiction."
20. On 26 July 2016, Claimants submitted their Counter-Memorial on Jurisdiction.
21. On 11 October 2016, Respondent filed her Reply on Objections to Jurisdiction.
22. On 23 December 2016, Claimants filed their Rejoinder on Jurisdiction.
23. On 23 February 2017, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by teleconference. The following persons were present at the conference:

On behalf of the Tribunal:

Prof. Dr. Hans van Houtte

President of the Tribunal

ICSID Secretariat:

Ms. Alicia Martín Blanco

Secretary of the Tribunal

Representing the Claimants:

Mr. Florian Haugeneder

Counsel

Mr. Emmanuel Kaufman

Counsel

Ms. Selma Tiric Counsel

Representing the Respondent:

Dra. Silvina Sandra González Napolitano Procuración del Tesoro de la Nación
Ms. Mariana Mabel Lozza Procuración del Tesoro de la Nación
Mr. Tomás Braceras Procuración del Tesoro de la Nación

24. Following the pre-hearing organizational conference, on 13 March 2017, the Tribunal issued Procedural Order No. 4 regarding the organization of the hearing.
25. A hearing on jurisdiction was held in Paris, France, from 23 to 25 March 2017 (the “**Hearing**”). The following persons were present at the Hearing:

Tribunal:

Prof. Dr. Hans van Houtte President
Prof. Dr. Stephan W. Schill Arbitrator
Dr. Santiago Torres Bernárdez Arbitrator

ICSID Secretariat:

Ms. Alicia Martín Blanco Secretary of the Tribunal

For Claimants:

Mr. Florian Haugeneder Counsel
Mr. Emmanuel Kaufman Counsel
Ms. Selma Tiric Counsel
Mr. Tobias Schaffner Counsel
Ms. Jovana Lakic Counsel
Ms. Claudia Dotter Casinos Austria AG
Mr. Dietmar Hoscher Casinos Austria AG
Mr. Alexander Tucek Casinos Austria International GmbH
Mr. Andreas Schreiner Witness
Prof. Fernando García Pullés Expert Witness
Prof. Alberto B. Bianchi Expert Witness

For Respondent:

Dr. Carlos Francisco Balbín Procuración del Tesoro de la Nación
Dra. Silvina Sandra González Napolitano Procuración del Tesoro de la Nación
Ms. Mariana Mabel Lozza Procuración del Tesoro de la Nación
Mr. Tomás Braceras Procuración del Tesoro de la Nación
Ms. María Soledad Romero Caporale Procuración del Tesoro de la Nación
Ms. Alejandra Mackluf Procuración del Tesoro de la Nación
Ms. Valeria Etchechoury Procuración del Tesoro de la Nación
Ms. Belén Ibañez Procuración del Tesoro de la Nación
Mr. Nicolás Duhalde Procuración del Tesoro de la Nación
Mr. Javier Hernán Wajtraub Witness

Prof. Ismael Mata

Expert Witness

26. During the Hearing, the following persons were examined:

Witness and expert testimony submitted by Claimants:

Mr. Andreas Schreiner	Witness
Mr. Alexander Tucek	Witness
Prof. Fernando García Pullés	Expert Witness
Prof. Alberto B. Bianchi	Expert Witness

Witness and expert testimony submitted by Respondent:

Mr. Javier Hernán Wajtraub	Witness
Prof. Ismael Mata	Expert Witness

27. On 7 April 2017, Claimants submitted a request for leave to submit new documents. Respondent opposed Claimants' request on 21 April 2017 and, in case it should be granted, requested and reserved in turn its right to request leave to submit responsive documents. Having considered the Parties' communications, on 5 May 2017, the Tribunal issued a decision granting Claimants' request to submit new documents, granting Respondent's request to submit one additional document and inviting Respondent to identify any other responsive documents, which Respondent did on 23 May 2017. Claimants confirmed on 26 May 2017 that they did not object to the submission of the new responsive documents identified by Respondent, which the Tribunal subsequently admitted on 16 June 2017.
28. On 23 and 24 May 2017, the Parties submitted their agreed corrections to the Hearing Transcript.
29. On 23 June 2017, the Parties submitted simultaneous Post-Hearing Briefs. On the same date, Claimants indicated that the Parties had agreed to submit revised translations of certain exhibits on 10 July 2017. On that date, Claimants submitted courtesy revised translations. On 12 July 2017, Respondent stated that, while the Parties had agreed on the date the translations of certain exhibits would have to be submitted, they had been unable to agree on the content of those translations. In their respective Post-Hearing Briefs, the Parties thus relied on their own translations or corrections to the other Party's translations. Claimants confirmed, on 14 July 2017, that they had no further comments on the translations of certain exhibits prepared by Respondent and observed that Claimants stood

by their own translations with regard to some other exhibits for which both Parties had made their own translations.

III. REQUEST FOR RELIEF

1. Respondent

30. Respondent objects to the jurisdiction of the present Tribunal based on three counts. They comprise, as further detailed below: first, the lack of a *prima facie* violation of the Argentina-Austria BIT; second, the lack of compliance by Claimants with the conditions to Respondent's consent under Article 8 of the BIT; and third, the lack of the Tribunal's jurisdiction *ratione materiae*. Respondent therefore requests the Tribunal regarding this phase of the proceeding:⁴

- i. to declare that this dispute falls outside the jurisdiction of the Centre and the competence of the Tribunal and that it is inadmissible;
- ii. to reject each and every one of the claims put forward by Claimants; and
- iii. to order Claimants to pay for all costs and expenses arising from this arbitration proceeding.

2. Claimants

31. Claimants, in turn, counter these objections, by arguing, as detailed further below, that, first, they have set out a *prima facie* claim for breach of the Argentina-Austria BIT; second, that Respondent has validly consented to the present proceedings under Article 8 of the BIT; and third, that the Tribunal has jurisdiction *ratione materiae* and should proceed to analyze the claims on the merits. Regarding this phase of the proceeding, Claimants therefore make the following request:⁵

- i. The ICSID has jurisdiction and the Arbitral Tribunal

⁴ Reply on Jurisdiction, para. 215; Respondent's Post-Hearing Brief, para. 134.

⁵ Rejoinder on Jurisdiction, para. 230; Claimants' Post-Hearing Brief, para. 443.

competence over the dispute.

- ii. Claimants' claims are admissible and the Argentine Republic's objections are rejected.
- iii. The Argentine Republic is ordered to pay to Claimants all costs, expenses and fees (including internal costs) relating to the jurisdictional phase of the arbitration and appropriate interest thereon.

IV. FACTS OF THE CASE

32. The facts of the case, to the extent they are relevant for questions of admissibility jurisdiction, are largely uncontested. They are summarized in this section for the limited purpose of the present Decision. This summary does not constitute an exhaustive account of the facts, nor should it be taken as prejudging any issues of fact or law considered by the Tribunal on the merits.

1. The Privatization of the Gaming Sector in the Province of Salta

33. Since the 1970s, gaming facilities and lottery activities in the Province of Salta, located in the Northwestern part of Argentina, were operated directly by, or under the control of, Banco de Préstamos y Asistencia Social (“**BPAS**”), an autonomous entity fully owned by the Province of Salta.⁶
34. In December 1995, the Province of Salta passed the “Principles for the Restructuring of BPAS” as part of its Law No. 6836. This Law foresaw the restructuring of BPAS, including the possible privatization of BPAS’ gaming and lottery operations.⁷
35. On 7 September 1998, the Executive of the Province of Salta passed Decree No. 2126/98.⁸ This Decree created ENJASA, a company with limited liability under Argentine law.

⁶ Memorial on the Merits, paras. 10-14; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 134-135.

⁷ See Exhibit C-045.

⁸ Memorial on the Merits, paras. 19-24; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 137-139.

ENJASA's single purpose was the management, commercialization and exploitation of games of chance in the Province of Salta, which was formerly within the competence of BPAS. ENJASA was to have a duration of 30 years. 90% of its shares of capital stock (so-called Class A-shares) were to be offered to the public at large through a public offering; the remaining 10% were marked for a joint ownership participation program for employees of BPAS.

36. On 30 December 1998, Law No. 7020 of the Province of Salta entered into force. It provides for the regulatory framework for the gaming and lottery sector in the Province.⁹ The Law creates the regulatory agency overseeing the gaming and lottery sector in the Province of Salta, called Ente Regulator del Juego de Azar (“ENREJA”) (see Article 31). The agency is tasked, inter alia, with regulating the conduct of operators of games of chance, including by issuing operating rules and overseeing compliance with the laws and regulations in force (see Articles 3, 32 and 33). The obligations encompass, amongst others, the prohibition to hire operators without the authorization of ENREJA, the obligation to ensure that operation and maintenance of gaming facilities comply with the law, and the requirement to appoint an individual responsible for anti-money laundering measures (see Article 5). ENREJA also disposes of disciplinary and sanctioning powers, which include the issuance of warnings, the imposition of fines, disqualification, and the suspension and revocation of operating licenses (Article 13). Licenses for the operation of games of chance, however, were not issued by ENREJA itself, but remained under the responsibility of the Executive of the Province of Salta (Article 4).
37. On 1 September 1999, the Executive of the Province of Salta passed Decree No. 3616/99.¹⁰ This Decree conferred an exclusive license to ENJASA for the operation of games of chance for a term of 30 years. The terms of the license provided that any breach of the conditions of the license, of Law No. 7020, and of any regulation issued by ENREJA were to be sanctioned with the penalties and sentencing provided for in Law No. 7020 (see Article 5.1 of the License). Furthermore, the license specified its causes of extinction and

⁹ Memorial on the Merits, paras. 25-27; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 140-147.

¹⁰ Memorial on the Merits, paras. 28-30; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 148-157.

forfeiture (see Article 6 of the License). These included the lapse of the license term, non-compliance with the payment of the license fee, non-compliance with the obligations imposed under Article 5 of Law No. 7020, the exploitation of any game of chance without prior authorization by ENREJA, the cession or transfer, in full or in parts, of the operations covered by the license without prior authorization of the Executive, and the bankruptcy of the licensee.

38. Equally on 1 September 1999, by Resolution No. 411/99, the Ministry of Production and Employment of the Province of Salta approved the Terms and Conditions for the Call for a National and International Public Tender to offer all Class A-shares of ENJASA for sale.¹¹ Participants in the tender needed to have at least ten years experience in the operation of casinos and games of chance. Moreover, they had to submit a tourism development investment plan that included the number of employees to be hired and the amount of investments to be made, and they had to stipulate a yearly license fee to be paid to the Province for the term of the license.

39. Article 8.3 of the Terms and Conditions contained the following clause:¹²

8.3. JURISDICCION

8.3.1. Todos los interesados se someten a la jurisdicción de los Tribunales ordinarios competentes de la Ciudad de Salta con renuncia a cualquier otra Jurisdicción.

¹¹ Memorial on the Merits, paras. 31-34; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 158-162.

¹² Exhibit C-030; Exhibit A RA 02. The Parties could not agree on a translation into English of this clause. Their respective translations are as follows:

Claimants' Translation

8.3. JURISDICTION

8.3.1. All interested parties shall submit themselves to the jurisdiction of the competent ordinary Tribunals of the City of Salta, waiving any other Jurisdiction.

8.3.2. The acquisition of these Bidding Terms and Conditions entails the acceptance of this Jurisdiction in all the documentation related to this Bidding Process and the Transfer Agreement.

Respondent's Translation

8.3. JURISDICTION

8.3.1. All interested parties shall submit to the jurisdiction of the competent ordinary courts of the City of Salta, waiving any other Jurisdiction.

8.3.2. The acquisition of these Bidding Terms and Conditions implies the acceptance of this Jurisdiction with respect to any and all the documentation related to this Bidding Process and the Stock Purchase Agreement.

8.3.2. La adquisición del presente importa la aceptación de esta Jurisdicción en toda la documentación relacionada con esta Licitación y el Contrato de Transferencia.

40. The only participant in the public tender was the Unión Transitoria de Empresas (“**UTE**”), a joint venture under Argentine law consisting of Casinos Austria International Holding GmbH (“**CAIH**”) with a 5% participation, Boldt Sociedad Anónima (“**Boldt S.A.**”) with a 5% participation, and Iberlux International Sociedad Anónima (“**Iberlux Int. S.A.**”) with a 90% participation. The UTE’s bid included an offer on the license fee to be paid for the 30-year period (consisting initially of payments of USD 2,200,000 for the first three years and USD 3,500,000 for the following 27 years) and a plan to invest USD 20,770,000 in tourism development in the Province of Salta.¹³ This included the commitment to build a five-star hotel as well as hoteling and gastronomy schools in the City of Salta and to establish a fund for the promotion of tourism and culture in the Province. Following a request by the Ministry of Production and Employment, the bid was then revised, resulting in an offer with higher annual payments for the license of USD 2,500,000 per year for the first three years, and USD 4,100,000 per year for the following 27 years.
41. On 31 January 2000, the tender was awarded to the UTE by Resolution 20/00 based on the conditions of the revised offer.¹⁴

2. The Participation of Claimants in ENJASA

42. On 15 February 2000, by Decree No. 419/00 the Executive of the Province of Salta¹⁵ approved the Transfer Agreement which transferred the tendered shares in ENJASA to the UTE. The Transfer Agreement also extended the sanctions of Law No. 7020 to the buyer’s breaches of the Transfer Agreement, the bid, or any other documentation that formed part

¹³ Memorial on the Merits, paras. 35-39. Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 163-167.

¹⁴ Memorial on the Merits, para. 40; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 168.

¹⁵ Memorial on the Merits, para. 40; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 169-175.

of the tender (see Article 7.1.2 of the Transfer Agreement). Furthermore, Article 13 of the Transfer Agreement provided:¹⁶

ARTICULO DECIMO TERCERO: LEY APLICABLE Y JURISDICCION

13.1. Este contrato será interpretado de conformidad con la Ley Argentina y regulado por ella. A todos los efectos derivados del mismo las partes aceptan la jurisdicción exclusiva de los Tribunales Ordinarios de la Provincia de Salta, con renuncia a todo otro fuero o jurisdicción.

43. The UTE later requested that the shares be transferred to Leisure & Entertainment S.A. (“**L&E**”), a stock corporation under Argentine law, formed by the members of the UTE in accordance with their respective participation in the UTE (i.e., CAIH with 5%, Boldt S.A. with 5%, and Iberlux Int. S.A. with 90%). ENREJA authorized this transfer, and consequently ownership of the Class A-shares of ENJASA was registered in the name of L&E in the company register.¹⁷
44. The remaining 10% of the shares in ENJASA continued to be held by the Province of Salta in order to implement the planned joint ownership participation program for former BPAS employees. However, on 19 October 2009, most of the beneficiaries of the joint ownership participation program authorized the Government of Salta to sell these shares. On 4 November 2009, L&E and the Province of Salta entered into an agreement for the purchase of these shares. Under this agreement and its successive amendments, L&E purchased almost all of the remaining shares in ENJASA, with the exception of a minor participation of 0.06% which remained with the Province of Salta under the joint ownership participation program because some of the former employees of BPAS had not agreed to the sale of their shares to L&E.¹⁸

¹⁶ Exhibit A RA 11. The Parties agreed on the following translation of this clause: “ARTICLE XIII: GOVERNING LAW AND JURISDICTION 13.1. This Agreement shall be construed and governed by the laws of Argentina. To any effect derived therefrom, the parties submit themselves to the exclusive jurisdiction of the Ordinary Courts of the province of Salta, waiving any other forum or jurisdiction.”

¹⁷ Memorial on the Merits, para. 50; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 176.

¹⁸ Exhibit C-080. Memorial on the Merits, paras. 57-62; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 177.

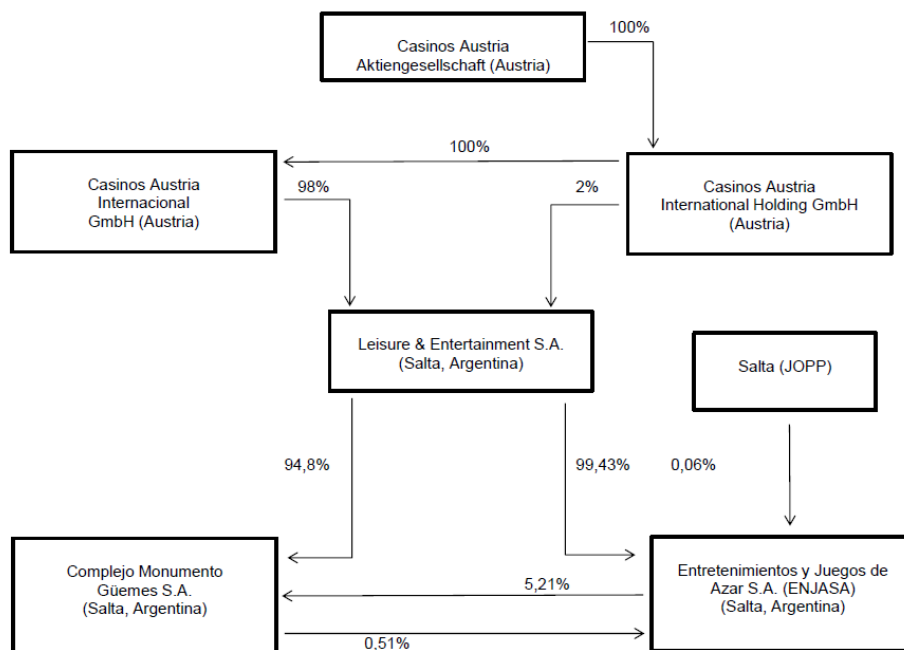
45. At the end of 2009, a minor participation in ENJASA was transferred by L&E to Complejo Monumento Güemes Sociedad Anónima (“**CMG**”), a share-company with its seat in Argentina owned by L&E (94.79%) and ENJASA (5.21 %). CMG currently holds a 0.51 shareholding in ENJASA.¹⁹
46. As a result of the above transactions, L&E currently holds 99.94% of the shares in ENJASA. The remaining 0.06% of the shares in ENJASA are still subject to the joint ownership participation program.
47. The ownership structure of L&E also changed over the course of the years.²⁰ While Claimants, or rather their predecessors within the Casinos Group, held 5% of the shares in L&E from February 2000 to 2007, their participation increased to 60% in February 2007 as a result of purchasing 55% of L&E shares from Iberlux Int. S.A.
48. On 15 November 2013, CAI purchased the remaining 40% of the shares in L&E from Iberlux Int. S.A.; CAI then transferred 2% of the shares in L&E to CAIH, whose sole shareholder is CASAG. Thus, at present, CAI directly holds 98% of L&E. CASAG in turn indirectly holds 2% of L&E through its participation in CAIH and the remaining 98% through its participation in CAI. Consequently, CASAG indirectly controls 100% of L&E. Through L&E, CAI and CASAG in turn indirectly hold 99.94% of ENJASA’s shares.
49. The current ownership structure in ENJASA therefore looks as follows:²¹

¹⁹ Memorial on the Merits, para. 60, fn 85.

²⁰ Memorial on the Merits, paras. 50-56.

²¹ See Exhibit C-017.

ENJASA's ownership structure (2014)



50. Through this structure, significant investments were made in the gaming, lottery and tourism sector in the Province of Salta. Claimants summarize these as follows:

The gaming and lottery business in the Province of Salta grew significantly as a result of the privatisation and the influx of capital provided by Claimants. This can be shown by a comparison between the situation before the privatisation and at the time of the revocation. In February 2000, before the privatisation, there were two casinos authorized to operate in Salta and 27 slot machine halls with 316 machines. None of these were operated by ENJASA. Moreover, in 1999 ENJASA had 239 employees, as evidenced by Article 1.1.1 of the Bidding Terms and Conditions. By the time of the revocation of the licence in August 2013, ENJASA operated four casinos, 15 slot machine halls and 14 lottery games, and in total 1,376 slot machines and 46 gaming tables. ENJASA was also one of the most significant employers in the Province, which crucially lacks domestic and foreign investment. When the licence was revoked,

ENJASA had 750 employees, 600 of whom were transferred by governmental decree to other operators.²²

51. Furthermore, in August 2005, ENJASA opened the Sheraton Hotel Salta, the first five-star hotel in the region. Claimants claim that ENJASA invested more than USD 20,000,000 in the construction of the hotel. Although the hotel allegedly never generated any profits, it was part of the investment program that was promised to be undertaken as part of the privatization process. In addition, ENJASA sponsored two schools, one for hotel trade and one for gastronomy, and created the “ENJASA Foundation” for the promotion and research of cultural, tourist, hotel and gourmet activities in the Province of Salta, equally in fulfilment of the promises made in the course of the privatization of ENJASA.²³ Respondent agrees that all obligations to invest in tourism undertaken under the Transfer Agreement had been fulfilled.²⁴
52. ENJASA also complied with its obligations to pay the license fee that was agreed with the Province of Salta.²⁵ This fee, which was originally agreed as a fixed fee in USD for the entire license term, was renegotiated in 2008 at the request of the Province of Salta through an agency created specifically for the review and renegotiation of public contracts and licenses, called Unidad de Revisión y Renegociación de Contratos y Licencias otorgadas por la Administración (“UNIREN”). The resulting agreement between ENJASA and UNIREN of 7 May 2008 was ratified by the Government of Salta through Decree No. 3428/08.²⁶ As a consequence, the fee was changed from a fixed to a dynamic fee, which was calculated as a percentage of the annual income of ENJASA.

²² Claimants’ Post-Hearing Brief, para. 13. See for further detail on ENJASA’s gaming and lottery operations, Memorial on the Merits, paras. 80-120.

²³ Memorial on the Merits, paras. 121-133.

²⁴ See Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 182.

²⁵ Memorial on the Merits, paras. 134-137.

²⁶ Memorial on the Merits, paras. 157-186; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 178-184.

3. The Revocation of ENJASA's Exclusive License

53. On 11 December 2012, ENREJA opened three separate investigations into alleged breaches of ENJASA of its obligations under the regulatory framework governing the operations of games of chance.²⁷ One investigation related to compliance of ENJASA with its obligations concerning anti-money laundering in the administration of a lottery game (Resolution No. 380/12 of ENREJA), one to compliance with anti-money laundering rules in the operation of one of ENJASA's casinos (Resolution No. 381/12 of ENREJA), and one to compliance with ENJASA's obligation not to hire operators without ENREJA's authorization (Resolution No. 384/12 of ENREJA).
54. ENJASA responded to the investigations initiated through Resolutions Nos. 380/12 and 381/12 on 2 January 2013.²⁸ Its response to the investigation under Resolution No. 384/12 followed on 28 June 2013.²⁹
55. On 13 August 2013, in Resolution No. 240/13, ENREJA made a joint determination on all three investigations.³⁰ In all instances, ENREJA concluded, ENJASA had violated its obligations under the regulatory framework in place. ENJASA had violated anti-money laundering provisions and had breached the obligation not to hire operators without ENREJA's authorization. In light of previous instances of non-compliance with the regulatory framework, ENREJA concluded that the appropriate sanction was the revocation of ENJASA's license.
56. Equally on 13 August 2013, by Decree No. 2348/13, the Governor of Salta ordered ENREJA to prepare a transition plan to transfer ENJASA's operations, including its employees, to new operators.³¹

²⁷ Memorial on the Merits, paras. 228-236; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 382-448.

²⁸ Memorial on the Merits, paras. 242-287.

²⁹ Memorial on the Merits, paras. 288-317.

³⁰ See Exhibit C-031; See Memorial on the Merits, para. 31.

³¹ See Exhibit C-222; See Memorial on the Merits, paras. 318-319; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 478-480.

4. Developments after the Revocation of ENJASA's License

57. On 27 August 2013, a meeting took place between Mr. Tucek, the CEO of CAI, and representatives of the Government of the Province of Salta. During this meeting, Claimants assert:

[...] Mr Tucek was informed that the government of Salta believed that the level of involvement of CAI and CASAG in ENJASA was not sufficient and that the participation of Iberlux Int. S.A. in L&E was not considered a positive aspect.

The government of Salta was of the opinion that CAI's and CASAG's partner in L&E was a strawman of Mr Romero, the former Governor of Salta, and political rival of Mr Juan Manuel Urtubey.

Based on this information, Mr Tucek recommended to CAI's management board to increase CAI's participation in L&E and, therefore, its indirect ownership share in ENJASA.³²

58. Following this meeting, the purchase by Claimants of the remaining 40% of the shares in L&E from Iberlux Int. S.A. was concluded on 15 November 2013.³³
59. On 28 August 2013, ENJASA filed a Recourse for Reconsideration against Resolution No. 240/13.³⁴ In this Recourse, ENJASA argued that Resolution No. 240/13 was unlawful and should be revoked. ENJASA, inter alia, claimed that several of the investigated instances, which were found to be in breach of the regulatory framework, had prescribed under the statute of limitations; that ENJASA had not hired "operators" in the meaning of Law No. 7020, but merely contracted out certain services to third parties, or had engaged persons that were allowed to operate games of chance under preexisting authorizations issued by BPAS; and that ENJASA had not breached any anti-money laundering rules. ENJASA further claimed that Resolution No. 240/13 was passed in breach of its right to be heard, that the Resolution's motivation was insufficient, was based on the retroactive application

³² Memorial on the Merits, paras. 334-336.

³³ *See supra* para. 48.

³⁴ Exhibit C-213. *See* Memorial on the Merits, paras. 329-330; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 466-470.

of certain regulatory rules, and constituted a disproportionate reaction to minor breaches or simple human errors. ENJASA's recourse also mentioned the reservation of any rights arising under the Argentina-Austria BIT.

60. On 5 September 2013, ENJASA requested interim relief before the First Instance Court of Salta, asking for the suspension of the implementation of Resolution No. 240/13 pending its Recourse for Reconsideration.³⁵ This request was granted on 4 October 2013.³⁶
61. On 19 November 2013, ENREJA passed Resolution No. 315/13, dismissing ENJASA's Recourse for Reconsideration.³⁷ In it, ENREJA addressed the arguments brought by ENJASA in its Recourse for Reconsideration and rejected them as unfounded.
62. On 20 November 2013, a meeting between Mr. Tucek and Mr. Schreiner of Casinos and representatives of ENREJA and the Province of Salta took place. During this meeting the modalities of transition of ENJASA's operations to new operators were discussed. Claimants claim that Mr. De Angelis, the Province's Minister of Environment and Sustainable Development, offered Claimants to continue operating one of the casinos, "Casino Salta", an offer Claimants claim to have declined because it was not economically feasible.³⁸ Subsequently, the Province of Salta allegedly extended an offer to continue operating one additional casino, an offer Claimants claim to have denied as well.
63. On 20 November 2013, by Decree No. 3330/13, the Government of the Province of Salta approved the Temporary Plan for the exploitation of games of chance prepared by ENREJA.³⁹ The Plan established conditions for the issuance of new operator licenses. It contained a list of 11 individuals and entities that were to receive such licenses, several of

³⁵ Exhibit C-214; Exhibit A RA 77. *See* Memorial on the Merits, para. 331; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 481.

³⁶ Exhibit C-215, Exhibit A RA 78. *See* Memorial on the Merits, para. 332; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 481.

³⁷ Exhibit C-032. *See* Memorial on the Merits, paras. 342-346; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 471.

³⁸ Memorial on the Merits, paras. 356-357.

³⁹ Exhibit C-033. *See* Memorial on the Merits, paras. 347-350; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 490-492.

which ENJASA had contracted before to operate its gaming activities and which ENREJA considered were hired by ENJASA without ENREJA's authorization.

64. On 26 November 2013, ENJASA requested the extension of the interim relief granted by the First Instance Court of Salta, pending an Action for Annulment of Resolutions Nos. 240/13 and 315/13 ENJASA had brought in the same court.⁴⁰ The request for interim relief was rejected on 23 December 2013.⁴¹
65. On 28 and 29 November 2013, by Resolutions Nos. 332-339/13, ENREJA implemented the Transition Plan in relation to several of the new operators and approved the transfer of employees of ENJASA to those new operators.⁴²
66. On 3 December 2013, ENJASA filed a Recourse for Revocation of Decree No. 3330/13. This recourse was rejected as inadmissible by Decree No. 1002/16 on 12 July 2016.⁴³
67. On 12 December 2013, ENJASA filed Recourses for Revocation of ENREJA's Resolutions Nos. 332-339/13. These recourses appear to be still undecided.⁴⁴
68. On 30 December 2013, ENREJA passed Resolution No. 364/13, with which it implemented the Transition Plan for Casino Salta, and approved the transfer of ENJASA's employees to a new operator.⁴⁵
69. On 5 February 2014, ENJASA filed an Action for Annulment of Resolutions Nos. 240/13 and 315/13 and of Decrees Nos. 2348/13 and 330/13 with the First Instance Court of Salta.⁴⁶ In this recourse, ENJASA not only claimed that the revocation of its operating license was contrary to domestic law; it also invoked breach of the Argentina-Austria BIT.⁴⁷ In particular, ENJASA argued that the Argentina-Austria BIT was applicable

⁴⁰ See Exhibit A RA 153.

⁴¹ Exhibit C-288.

⁴² Exhibits C-034 through C-041. See Memorial on the Merits, paras. 351-353; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 495.

⁴³ See Exhibit C-289.

⁴⁴ See Claimants' Post-Hearing Brief, para. 326.

⁴⁵ Memorial on the Merits, para. 358; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 497.

⁴⁶ See Exhibit C-221. See Memorial on the Merits, para. 361; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 472.

⁴⁷ See Exhibit C-221, pp. 130-131.

because ENJASA's shares were indirectly owned by CAI, thus qualifying as an investment in the sense of Article 1(1) of the BIT, which was owned by a covered investor in the sense of Article 1(2)(b) of the BIT. Furthermore, ENJASA argued that the conduct of ENREJA and of the Province of Salta was attributable under public international law to the Republic of Argentina and resulted in an uncompensated expropriation contrary to Article 4 of the BIT and in a breach of fair and equitable treatment contrary to Article 2(1) of the BIT. This action is still pending.

70. On 30 April 2014, CAI sent a letter to Respondent, putting the latter officially on notice of the dispute under the Argentina-Austria BIT, inviting her to conduct amicable consultations, and accepting her offer to submit the dispute to arbitration under Article 8 of the Argentina-Austria BIT.⁴⁸
71. On 29 May 2014, the Province of Salta issued Decree No. 1502/14, granting ten-year licenses to the new operators as determined in Decree No. 3330/13.⁴⁹
72. On 24 June 2014, ENJASA filed a Recourse for Revocation of Decree No. 1502/14. This recourse was dismissed on 12 July 2016.⁵⁰
73. On 7 August 2014, CASAG requested Respondent to be joined into the amicable consultations initiated by CAI and accepted Respondent's offer to arbitrate under Article 8 of the Argentina-Austria BIT.⁵¹
74. Until 21 October 2014, Claimants sent, in addition to its letters of 30 April and 7 August 2014, five further letters to Respondent and the Governor of the Province of Salta relating to the present dispute.
75. In parallel to the letters sent to Respondent, Mr. Wajntraub, a lawyer representing the Province of Salta, got in touch with Claimants on 22 October 2014 to discuss the dispute relating to the revocation of ENJASA's license. Following several email exchanges, a

⁴⁸ See Exhibit C-008.

⁴⁹ See Exhibit C-176. See Memorial on the Merits, para. 362; Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 504.

⁵⁰ See Exhibit C-289.

⁵¹ See Exhibit C-012.

meeting between Mr Wajntraub and Claimants' counsel took place in Vienna on 13 March 2015, without however reaching any conclusion regarding the dispute.

V. ARGUMENTS OF THE PARTIES

1. Respondent

76. Respondent contends that the Tribunal does not have jurisdiction on the grounds that:

there is no *prima facie* claim for violation of the Argentina-Austria BIT, that Claimants have not accepted the offer made by the Argentine Republic to submit disputes to arbitration, and that Claimants are not the owners of the asset which they invoke as investment and which was affected by the revocation—that is to say, ENJASA's licence.⁵²

A. *There is no claim for a prima facie violation of the BIT*

77. Respondent argues that there is no *prima facie* jurisdiction because none of the claims are objectively capable of constituting breaches of the BIT. Instead, in Respondent's view, the essence of the dispute concerns the revocation of ENJASA's license, which makes it into a contractual, rather than a treaty claim, for which recourse must be had in contractual forum rather than the one provided for under the Argentina-Austria BIT.⁵³

(i) *The Tribunal does not have jurisdiction over claims that prima facie are not objectively based on the BIT*

78. Respondent contends that Claimants' claims are entirely based on the revocation of the Licence to operate games of chance on the Province of Salta granted to ENJASA.⁵⁴ For Respondent, these claims, as argued, do not constitute claims under the BIT but are, in essence, contractual claims that are only characterized by Claimants as BIT claims.⁵⁵ Argentina disputes Claimants' assertion that the Tribunal's analysis at this stage should be limited to considering whether the facts as presented are capable of constituting a breach

⁵² Reply on Jurisdiction, para. 1.

⁵³ Respondent's Post-Hearing Brief, para. 1.

⁵⁴ Respondent's Post-Hearing Brief, paras. 2-23.

⁵⁵ Respondent's Post-Hearing Brief, paras. 24-26.

of the BIT standards. To the contrary, in order to establish a *prima facie* connection with the Treaty, Respondent considers Claimants' legal characterization of their claims should not be accepted as such and without analysis, but the claims need to be objectively connected to concrete violations of the substantive standards of treatment laid down in the BIT.⁵⁶

(ii) *None of the claims are based prima facie on the BIT*

79. According to Respondent, the direct and indirect expropriation claims, as well as the claims concerning fair and equitable treatment and national treatment, are all based on a breach of the Licence and its consequences, and therefore constitute contract claims (or claims relating to the application of the regulatory framework governing the Licence). This is confirmed by the terms of the Licence itself which governs, together with domestic law, the consequences of a breach such that:

any claim involving actions by ENREJA, taken in accordance with the legal framework of the Licence, constitutes a claim under the provisions of the Bidding Terms (insofar as it regulates the exercise of the Licence) and the Licence itself (which sets forth obligations of the Licensee and potential sanctions to be applied by ENREJA).⁵⁷

Such claims, in Respondent's view, are not treaty claims. The distinction between contract claims and treaty claims has long been recognized by arbitral tribunals with the conclusion that contract claims by themselves do not sustain a claim for breach of an international treaty.⁵⁸

(iii) *ICSID arbitration is not the proper forum for this dispute*

80. Furthermore, since there is no *prima facie* violation of the BIT, Respondent also contends, the proper forum for the present dispute are the courts of the Province of Salta, as provided for in the forum selection clause of the Bidding Terms and Conditions and the Transfer

⁵⁶ Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 38; Reply on Jurisdiction, paras. 17-20.

⁵⁷ Reply on Jurisdiction, paras. 29-34.

⁵⁸ Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 40-44; Reply on Jurisdiction, paras. 21-28.

Agreement. Because the Bidding Terms and Conditions contain rules regarding the exercise of the Licence, and the claim concerns the exercise of the Licence, the proper forum is the jurisdiction which covers the exercise of the Licence.⁵⁹

81. Respondent also clarifies that she does not argue that a forum selection clause in a contract necessarily precludes an arbitral tribunal's jurisdiction for claims under a BIT. Instead, what Respondent argues is that, since there are no claims for breach of the BIT, it is the contractual forum, namely the courts of the Province of Salta, that is competent to hear the present dispute.⁶⁰
82. In Respondent's view, the fact that provincial courts have jurisdiction over the present dispute is further confirmed by Claimants' submission of a judicial claim to these very courts in order to comply with Article 8 of the BIT. For Respondent, Claimants cannot "on the one hand, [submit] a judicial claim to the province's courts under the BIT and, on the other hand, [argue] that the provincial forum is not appropriate to hear their claim under the BIT." In the same sense, Respondent argues, Claimants cannot expect to rely on the legal framework applicable to the Licence to ascertain the existence of an investment, while at the same time disregarding the forum selection clause included in the same provisions.⁶¹
83. Finally, Respondent rejects Claimants' argument that the dispute is beyond the scope *ratione personae* of the forum selection clause in the Bidding Terms and Conditions and the Transfer Agreement. According to Respondent, the clause is applicable to Claimants; to argue otherwise is contrary to Argentine law.⁶²

⁵⁹ Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 45-50; Reply on Jurisdiction, paras. 35-37; Respondent's Post-Hearing Brief, paras. 27-34.

⁶⁰ Reply on Jurisdiction, paras. 38-40.

⁶¹ Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 49; Reply on Jurisdiction, paras. 41-44 (quote at para. 42).

⁶² Reply on Jurisdiction, paras. 45-48.

B. There is no consent to arbitrate because Claimants failed to accept Argentina's offer to arbitrate in the BIT

84. Respondent further contends that consent to arbitration under the BIT was never perfected as Claimants failed to comply with the conditions for consent listed in Article 8 of the BIT.⁶³

(i) Article 8 of the BIT contains compulsory jurisdictional requirements and is part of Respondent's offer to arbitrate

85. In Respondent's view, the unilateral consent given in the BIT constitutes an offer to arbitrate subject to several conditions. An investor must accept this offer on the terms on which it was made. This means that an investor must comply with these conditions in order to perfect consent. An acceptance purportedly given under different or modified terms is not capable of perfecting consent.⁶⁴

86. In Respondent's view, the compulsory nature of the conditions is "irrespective of whether the investor believes them to be useful or convenient."⁶⁵ In addition to being compulsory, these conditions are cumulative and must be fulfilled in a certain order: first, there must be an attempt to settle the dispute through negotiations with the State during a period of six months; second, if the dispute is not resolved through negotiations, it must be submitted to the domestic courts of the host State; third, if the dispute persists after 18 months, either because no decision was rendered on the merits or because the parties are still in dispute despite such decision having been rendered, the investor must withdraw the domestic claim before bringing a claim to international arbitration.⁶⁶

⁶³ Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, para. 51; Reply on Jurisdiction, para. 49; Respondent's Post-Hearing Brief, para. 36.

⁶⁴ Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 55-63; Reply on Jurisdiction, paras. 50-54 and 57-59.

⁶⁵ Reply on Jurisdiction, paras. 55-56.

⁶⁶ Reply on Jurisdiction, paras. 60 and 62-67.

(ii) *Claimants did not accept the offer on the terms on which it was made*

87. Respondent contends that Claimants not only failed to comply with the conditions individually, but they also failed to follow the sequence of the provisions by submitting the dispute to domestic courts before engaging in amicable negotiations with the State.

a) Claimants failed to follow the order of the jurisdictional requirements

88. According to Respondent, even though Claimants purport to have submitted the dispute to domestic courts months after they commenced amicable negotiations, the facts prove that Claimants filed a complaint with the courts of the Province of Salta on 5 February 2014 – almost three months before they notified the dispute and started negotiations on 30 April 2014.⁶⁷ However, under Article 8 of the BIT, settlement negotiations of six months had to precede recourse to domestic courts.

b) Claimants failed to meet the requirement of amicable negotiations for six months

89. Respondent further contends that the six-months period is not merely a cooling-off period, but a period during which the parties must attempt to settle the dispute amicably as a precondition for the submission of the dispute to the Argentine courts.

90. Respondent disputes Claimants' contention that negotiations must only be attempted whenever possible and contends that Claimants' statement that negotiations would have been ineffective is speculative and aimed at justifying Claimants' failure to meet the negotiation requirement.⁶⁸

91. Instead, what follows from witness testimony, in Respondent's view, is that the Argentine authorities were willing to engage in consultations and that it was Claimants who did not intend to resolve the dispute through negotiations.⁶⁹

⁶⁷ Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 72-77; Reply on Jurisdiction, paras. 68-73; Respondent's Post-Hearing Brief, para. 49.

⁶⁸ Reply on Jurisdiction, para. 79.

⁶⁹ Reply on Jurisdiction, paras. 80-84; Respondent's Post-Hearing Brief, para. 66.

c) Claimants failed to meet the requirement of submission to the competent administrative or judicial jurisdiction for 18 months

92. Respondent also disputes Claimants' allegations that under Article 8 of the BIT, resort to domestic jurisdiction is not entirely unconditional; that there is no requirement to submit to domestic jurisdiction when there are no competent administrative authorities or courts; and that the term "dispute" is to be understood broadly, such that the action filed by Claimants on 28 August 2013 complied with the requirements of Article 8(2) of the BIT. On the contrary, Respondent contends that the submission to domestic jurisdiction is mandatory and that Claimants' reliance of the word "may" in Article 8(2) of the BIT is deliberately taken out of context, that there were competent courts and administrative authorities to address Claimants' grievance, and that the term "dispute" submitted domestically could not be different from that submitted to international arbitration. Consequently, in Respondent's view, Article 8 of the BIT does not permit unrestricted access to ICSID jurisdiction.⁷⁰
93. First, Respondent relies on the *Wintershall* case in support of its argument that an offer to arbitrate given by a State can only be accepted by an investor in a way that meets all conditions of the offer.⁷¹ Respondent contends that the term "may" does not mean that recourse to domestic courts is discretionary. To the contrary, a contextual reading of Article 8(2) of the BIT indicates that it does not contain options, but requires a mandatory sequential recourse to local courts, as a second step after amicable consultations, prior to submission of the dispute to international arbitration. The only circumstance in which submission to domestic court proceedings would not be required is if the Parties had agreed to disregard this step, which is not the case with the present dispute. Failing such agreement, Respondent emphasizes, recourse to local courts constitutes a jurisdictional requirement. Moreover, Respondent points out that international tribunals have found that

⁷⁰ Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 70-89; Reply on Jurisdiction, paras. 85-87.

⁷¹ Reply on Jurisdiction, paras. 88-89 (relying on *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), paras. 116-117 (AL RA 38)).

the absence of imperative language does not equal the absence of a mandatory requirement nor mean that the treaty language can be ignored.⁷²

94. Second, Respondent contends that “there are numerous jurisdictional forums available to which Claimants can resort to submit this dispute” at the domestic level in Argentina. In particular, “it is clear that the courts of the Province of Salta [...] are the ‘competent’ forum pursuant to Article 8(2) of the BIT,” as demonstrated by the fact that “the Bidding Terms, the Agreement and the License explicitly stipulated that any dispute concerning the License must be submitted to the courts of the Province of Salta” and by the fact that Claimants themselves made use of those courts. According to Argentina, the courts of the Province of Salta were not only competent to hear disputes concerning the License, but “also to apply the BIT.” Respondent further disputes the argument that exhaustion of administrative remedies would have been required to bring the relevant action before Argentine courts. It points out that no exhaustion of administrative remedies is required when the judicial action is intended to challenge a final act of individual scope that is “carried out by the Executive Power or the higher authority of a decentralized entity.”⁷³
95. Respondent also counters Claimants’ argument that the Request for Reconsideration that ENJASA had submitted against ENREJA’s Resolution No. 240/13 qualified as a submission of the dispute to an administrative jurisdiction in the sense of Article 8(2) of the BIT, and that the subsequent dismissal of that recourse through ENREJA’s Resolution No. 315/13 constituted a decision on the merits,⁷⁴ which allowed recourse to international arbitration under Article 8(3)(b) of the BIT. In this respect, Respondent argues that what Claimants filed was not a claim for breach of the BIT by the State, but a Request for Reconsideration that concerned an unrelated claim between different parties and that could not have possibly resolved the dispute under the BIT. Consequently, ENJASA’s administrative recourses were insufficient to meet the BIT’s requirement to have recourse to a domestic jurisdiction. ENJASA’s recourse against Resolutions Nos. 240/13 and 315/13 in the courts of Salta, in turn, did not meet the requirements under the BIT for prior

⁷² Reply on Jurisdiction, paras. 90-100.

⁷³ Reply on Jurisdiction, paras. 101-113; Respondent’s Post-Hearing Brief, paras. 80, 82-86.

⁷⁴ Respondent’s Post-Hearing Brief, para. 88.

submission to domestic courts, because that recourse was filed on 5 February 2014, which is only 10 months before the dispute was submitted to ICSID arbitration – as opposed to the 18 months required by Article 8(3)(a) of the BIT.⁷⁵

96. Respondent further rejects Claimants’ argument that prior submission of the dispute to Argentine courts was not necessary, due to futility, because Argentine courts were allegedly unable to resolve that dispute within the 18-months timeframe established in the BIT. According to Respondent, this argument is refuted by the “numerous decisions rendered by the Argentine courts in less than eighteen months, both final and interim, and in both summary and ordinary proceedings.” Moreover, Respondent argues that Claimants had at their disposal “numerous abbreviated means to have the dispute heard” in domestic courts. In addition, there is no applicable “guarantee” in the BIT or elsewhere that the dispute should be resolved within 18 months.⁷⁶

97. Third, Respondent argues that the dispute filed with domestic courts cannot be different from that which is submitted to international arbitration, as this would defeat the purpose of giving local courts an opportunity to resolve the dispute. Respondent contends that the facts, cause of action, and the parties in the present proceedings and those before domestic courts had to be the same; the term “dispute”, in Respondent’s view, could not be interpreted broadly, as suggested by Claimants, to include just any dispute related to the investment in question without identity of the parties and of the cause of action. Respondent considers that the dispute submitted by ENJASA to local courts was different from the one submitted to the present arbitration proceedings, and therefore failed to meet the requirements of the BIT.⁷⁷

d) Alternatively, if the request filed with local courts is considered compliant with the terms of Article 8, Claimants still failed to withdraw from the pending judicial proceeding

98. Respondent finally refers to Article 8(4) of the BIT, which requires disputing parties to take all required measures to withdraw from any pending judicial proceedings. Respondent

⁷⁵ Reply on Jurisdiction, paras. 114-119.

⁷⁶ Reply on Jurisdiction, paras. 120-124; Respondent’s Post-Hearing Brief, paras. 97-99.

⁷⁷ Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 82-86; Reply on Jurisdiction, paras. 126-133; Respondent’s Post-Hearing Brief, paras. 69-79.

contends that this is a requirement of the host State's consent in the BIT. For Respondent, it is significant that this requirement is included in few of its BITs and in only one of Austria's BITs, thus denoting its essential nature. Respondent notes that ENJASA continues to pursue domestic court proceedings rather than having taken all required measures to withdraw from such proceedings. In Respondent's view, this is not only in contravention of the express terms of Article 8(4), but also "irreconcilable with Article 26 of the ICSID Convention." Claimants therefore have failed to accept the terms of Argentina's offer to arbitrate contained in Article 8 of the BIT.⁷⁸

(iii) *Claimants cannot rely on the most-favoured-nation (MFN) clause to perfect consent*

99. According to Respondent, Claimants having failed to accept the terms of the offer to arbitrate in Article 8 of the BIT, their belated reliance on the MFN clause is untimely; in addition, the clause does not apply to matters of jurisdiction.⁷⁹

a) Reliance on the MFN clause is inadmissible because it is untimely

100. Respondent contends that, for the first time in their Counter-Memorial on Jurisdiction did Claimants invoke the BIT's MFN clause. According to Respondent, Claimants' belated submission is "contrary to the general legal principle establishing that no one may set himself in contradiction to his own previous conduct (*non concedit venire contra factum proprium*, estoppel)," which forms part of, or is recognized in, the Argentine legal system, as well as contrary to "the principle of good faith, which is firmly established in international law."⁸⁰ Claimants' reliance on the MFN clause is therefore inadmissible.

101. Respondent further contends that Claimants' belated invocation "seriously impairs the Argentine Republic's right of defence" as it makes the jurisdiction of the Centre "a moving target" for Respondent to address.⁸¹

⁷⁸ Reply on Jurisdiction, paras. 138-144; Respondent's Post-Hearing Brief, paras. 101-105 (quote at *id.*, para. 104).

⁷⁹ Reply on Jurisdiction, para. 145; Respondent's Post-Hearing Brief, paras. 107-115.

⁸⁰ Reply on Jurisdiction, paras. 146-150; Respondent's Post-Hearing Brief, para. 107.

⁸¹ Reply on Jurisdiction, para. 151; Respondent's Post-Hearing Brief, para. 108.

b) The MFN clause does not apply to jurisdiction

102. According to Respondent, an MFN clause does not apply to matters of jurisdiction because it is not an arbitration agreement and it is not part of the offer to arbitrate. For an MFN clause to apply to issues of jurisdiction it is necessary that the relevant treaty records “the clear and unequivocal intention of the State Parties” to consent to the use of the MFN clause in this manner, an aspect that is not shown in the present treaty.⁸²
103. Previous treaties concluded separately by Argentina and Austria did not include the requirement that the dispute be submitted to local courts for 18 months. Therefore, in Respondent’s view, “at the time when the BIT was executed, it would have been impossible for the parties to intend that the MFN clause be interpreted as sought by Claimants, since such interpretation would have deprived the dispute settlement provision of any effect as from the entry into force of the Treaty.”⁸³ In addition, the dispute settlement mechanisms of the relevant treaties are incompatible, in that the Argentina-Austria BIT includes a jurisdictional requirement to submit the dispute to the local courts, whereas the Argentina-Denmark BIT contains a fork-in-the-road provision. There is also no evidence that the treatment invoked through the MFN clause would be beneficial to the Claimants.⁸⁴
104. Furthermore, Respondent counters Claimants’ reliance on the *Maffezini* case,⁸⁵ arguing that this decision should not be taken into account as good precedent, because both Spain and Argentina had confirmed their position, resulting in an “authentic interpretation”, that the MFN clause in question, contrary to the finding of the tribunal in that case, was inapplicable to dispute settlement provisions.⁸⁶ Similarly, other States had established expressly in subsequent treaties the non-applicability of MFN clauses to dispute settlement

⁸² Reply on Jurisdiction, para. 152; Respondent’s Post-Hearing Brief, para. 109.

⁸³ Reply on Jurisdiction, para. 153; Respondent’s Post-Hearing Brief, paras. 110-112.

⁸⁴ Respondent’s Post-Hearing Brief, paras. 113-115.

⁸⁵ *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 January 2000) (AL RA 44).

⁸⁶ Reply on Jurisdiction, paras. 154-156.

mechanisms “as a consequence of the decisions in which the MFN clause was wrongly interpreted on the basis of *Maffezini*.”⁸⁷

105. Listing investment cases that have rejected this approach, Respondent contends that ICSID cases that have accepted the applicability of the MFN clause to dispute settlement provisions are in the minority. Respondent further refers to the *Wintershall* case,⁸⁸ where the tribunal analysed this disparity of approaches and found that the tribunal in *Maffezini*, proceeding on a presumption incorrectly derived from the *Ambatielos* case,⁸⁹ incorrectly decided that dispute resolution provisions fell within the scope of MFN provisions unless there was clear evidence to the contrary.⁹⁰ Respondent finally observes that its approach is also in line with the views of the International Court of Justice (ICJ) on this issue.⁹¹

C. *There is no jurisdiction racione materiae*

106. Respondent does not deny that a shareholding may constitute an investment under the BIT, but contends that Claimants have not put forward a claim concerning their rights as indirect shareholders.⁹² In any event, the claim pertaining to the 40% stake acquired in L&E after the revocation of the License, which is the event identified by Claimants as the starting point of the dispute, is inadmissible as it would constitute an abuse of process.⁹³ Respondent further contends that Claimants’ indirect shareholding does not transform them into owners of ENJASA’s assets – in particular the License.⁹⁴ For Respondent, Claimants incorrectly allege that ENJASA’s operating license was their investment (although in their various submissions, Claimants have presented different versions of what constituted their alleged investment). However, since the Licence was held by ENJASA and not by Claimants, Respondent argues that Claimants did not own an investment protected under

⁸⁷ Reply on Jurisdiction, para. 157.

⁸⁸ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008) (AL RA 38).

⁸⁹ *Ambatielos (Greece v. United Kingdom)*, Judgment (19 May 1953), ICJ Reports 1953, p. 10 (AL RA 235).

⁹⁰ Reply on Jurisdiction, paras. 158-166.

⁹¹ Reply on Jurisdiction, para. 167.

⁹² Respondent’s Post-Hearing Brief, para. 123.

⁹³ Respondent’s Post-Hearing Brief, para. 122; Hearing Transcript of 23 March 2017, pp. 108-109.

⁹⁴ Respondent’s Post-Hearing Brief, para. 123.

the ICSID Convention and the BIT.⁹⁵ Respondent concludes that the revocation of the License cannot be submitted as a breach under the BIT.

(i) *The License is not an investment protected under the BIT and Claimants are not its holders*

107. Respondent first of all contends that the License does not constitute an investment protected under the BIT, given that the BIT's definition of investment only includes concessions conferred by public law "to explore and exploit natural resources," which the License is not. In any case, Respondent argues, the issue "is not whether a Licence is an investment according to the definition of Article 1(1) of the Argentina-Austria BIT, but whether the License that constitutes the subject matter of their claim is an investment owned by Claimants." According to Respondent, Claimants have failed to establish an ownership link between a protected investment and a protected investor under the Treaty. This is true for all of ENJASA's assets claimed to constitute investments.⁹⁶ Under the BIT and the ICSID Convention, such ownership by the claimant, who must be a national of a State party to the treaties in question, is required to enjoy protection.
108. Respondent points to the fact that, for Claimants' experts, the investment consisted of the indirect shareholding in ENJASA, not of the License held by ENJASA.⁹⁷ Under Argentine law, the economic rights of the shareholders did not entail ownership of the corporate assets: "[a] shareholder is the holder or owner of its shares, but this does not mean it is the owner of the assets of the corporation." Because the BIT required that the "contents and scope of the rights relating to the various categories of assets [...] be determined by the laws (...) of the Contracting Party," Respondent concludes that it followed from the limitations established by the Argentine Companies Act No. 19550 on the economic rights of shareholders that Claimants, as ENJASA's shareholders, did not own the License

⁹⁵ Reply on Jurisdiction, paras. 169-173.

⁹⁶ Reply on Jurisdiction, paras. 174-177; Respondent's Post-Hearing Brief, paras. 120-121.

⁹⁷ According to Argentina, the same follows from the fact that Claimants address the issue of the legality of the investment merely with regard to the shareholding in L&E, but not with regard to the Licence. *See* Reply on Jurisdiction, para. 185.

granted to ENJASA and, therefore, the License could not be Claimants' investment under the BIT.⁹⁸

109. Respondent further contends that the above conclusion is confirmed by the BIT's definition of investor, by its provision on dispute settlement, and by the BIT's standards of protection. These provisions all make clear that "the only protected investments are those owned by an investor that are affected by measures that allegedly breach the Argentina-Austria BIT," while excluding disputes "in relation to measures affecting assets that are not owned by that investor or that do not constitute an investment."⁹⁹
110. Respondent concludes from the above that Claimants' claim before this Tribunal is "invalid" because the dispute does not arise directly from an investment protected under the ICSID Convention and the BIT of which Claimants are the owners.¹⁰⁰

(ii) Claimants have no standing to bring an action in respect of the assets of ENJASA

111. Respondent further contends that the principle that shareholders may not bring an action concerning the rights of the companies of which they are shareholders is a principle recognized by international law.
112. In this context, Respondent relies on arbitration awards and ICJ judgments rendered to the effect that shareholders are not entitled to bring an action in respect of the rights of the companies in which they hold shares, regardless of whether the shareholding is direct or indirect. Moreover, Respondent observes, the distinction between a company and its shareholders is widely recognized by legal systems, and is also acknowledged by Claimants.¹⁰¹
113. Respondent infers from the terminology used by Claimants, namely that it holds "direct and indirect assets," that Claimants are not the holders of the Licence, the casinos, the slot

⁹⁸ Reply on Jurisdiction, paras. 178-181.

⁹⁹ Reply on Jurisdiction, paras. 182-185.

¹⁰⁰ Reply on Jurisdiction, para. 186.

¹⁰¹ Reply on Jurisdiction, paras. 188-192; Respondent's Post-Hearing Brief, para. 123 (*Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), paras. 142-144 (AL RA 152)).

machine halls, and the lottery operations, nor are they employers of the relevant employees. As a consequence, Claimants cannot bring action regarding measures that may have affected alleged investments related to them, but which they did not directly hold.¹⁰² In Respondent's view, Claimants' argument that the Licence is part of their operations, as well as their reliance on *CSOB v. Slovak Republic*, are to no avail as CSOB directly owned the operation in respect of which it submitted its claim.¹⁰³

114. Respondent also points to Article 4(3) of the BIT, which provides that a shareholder may bring a claim concerning certain assets of the company in which it holds shares. According to Respondent, however, this article establishes two requirements: (a) that the affected asset of the company constitutes a "financial asset", and (b) that the challenged measure qualifies as an expropriation.¹⁰⁴
115. Regarding the first requirement, Respondent refers to a discrepancy between the Spanish and German versions of the BIT, being the Treaty's authentic languages. While the Spanish version refers to "*activos financieros*", the German version uses the term "*Vermögenswerte*". Claimants' translation into English of the relevant part of the BIT refers only to "assets" and not to "financial assets", the scope of the latter term being more limited. If Claimants were to hold that "assets" is an accurate translation of the German text, in Respondent's view, an interpretation under the Vienna Convention on the Law of Treaties would confirm that the narrower notion of "financial assets" best reconciles the texts. Respondent also adds that this limitation "is no obstacle to the achievement of the object and purpose of the BIT," as established in the treaty's Preamble.¹⁰⁵ Consequently, in Respondent's view, the protection of shareholders under the BIT is limited to situations where "financial assets" of their company were expropriated. ENJASA's license, however, did not qualify as such a "financial asset".

¹⁰² Reply on Jurisdiction, paras. 193-195.

¹⁰³ Reply on Jurisdiction, paras. 196-197 (referring to *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999), para. 75 (AL RA 153)).

¹⁰⁴ Reply on Jurisdiction, para. 198; Respondent's Post-Hearing Brief, paras. 125-132.

¹⁰⁵ Reply on Jurisdiction, paras. 199-211.

116. Regarding the second requirement, Respondent argues that even if one considered that actions may be brought by shareholders in respect of company assets under Article 4(3) of the BIT, this provision would limit those actions to claims for expropriation, and exclude claims concerning the standards of fair and equitable treatment and national treatment from the jurisdiction of the Tribunal.¹⁰⁶

2. Claimants

117. Claimants counter all of Respondent's objections to the Tribunal's jurisdiction. They argue that they have made out a *prima facie* claim for the violation of the BIT, that Respondent has validly consented to the present arbitration proceedings in Article 8 of the BIT, and that the Tribunal has jurisdiction *ratione materiae*.

A. *Prima facie* claim for the violation of the BIT

118. Claimants claim that the revocation of its exclusive license was only superficially based on alleged violations of anti-money laundering rules and the hiring of operators without ENREJA's authorization. Instead, they argue, the motive for the revocation was to oust Claimants from the operation of gaming facilities and lottery activities in Salta in order to distribute their business to new operators at conditions more favourable to the Province.

119. To make this case, Claimants allege that Resolution No. 240/13 was passed arbitrarily following a letter sent to ENREJA by Videodrome S.A., a company which had leased slot machines to ENJASA and which had been in a joint venture with ENJASA for the installation and exploitation of slot machines in one casino in Salta since 2001. Claimants contend, Videodrome S.A. suggested to ENREJA that it could operate gaming facilities in Salta at more favorable conditions than ENJASA. Claimants claim that this letter contributed to the decision to oust ENJASA from its position in the gaming sector in the Province.

120. Moreover, Claimants argue that political rivalries in the Province of Salta played a role in the revocation of ENJASA's license. To this end, they claim that, during a meeting with representatives of the Province of Salta on 27 August 2013, Mr. Tucek was informed that

¹⁰⁶ Reply on Jurisdiction, paras. 212-213.

the real reason behind the revocation of ENJASA's license was the participation in L&E of the Uruguayan company Iberlux Int. S.A., which was allegedly held by a strawman of the former Governor of the Province of Salta, a political rival of the present Governor. For Claimants, the purchase of the remaining 40% shares in L&E from Iberlux Int. S.A. in November 2013 was a step towards reinstalling ENJASA exclusive license.

121. Claimants therefore claim that the revocation of the License was not a case of *bona fide* enforcement of the laws in place in Salta, but “a coordinated action of ENREJA and the government of Salta to create the impression that the revocation was justified and urgent.”¹⁰⁷

122. In a nutshell, Claimants describe their claim as follows:

In 2013, the government of Salta took a series of orchestrated administrative measures leading to the revocation of [ENJASA's] gaming licence. The revocation of the licence was based on fabricated breaches of the regulatory framework and of anti-money laundering provisions, in total disregard of the actual facts and of ENJASA's due process rights. Following the revocation of the licence, some of ENJASA's former local business partners were awarded the rights to operate the gaming businesses previously held by ENJASA under its exclusive licence. Most of ENJASA's employees were assigned to the new operators. The administrative proceedings initiated against ENJASA by the provincial authorities were part of a concerted plan to take over the Claimants' investment without the payment of compensation.

As a consequence of the arbitrary and unlawful revocation of the license, ENJASA could not any longer carry on its business. ENJASA's operations were shut down and its management was forced to wind up its remaining assets. The Claimants effectively lost their investment.¹⁰⁸

123. Against this background, Claimants argue that the claim brought in the present proceedings meets the test for a *prima facie* claim. Under that test, Claimants argue that their claims qualify as treaty claims that are subject to the jurisdiction of the present Tribunal. While

¹⁰⁷ Memorial on the Merits, para. 320.

¹⁰⁸ Request for Arbitration, paras. 9-10.

taking the revocation of ENJASA's license as their starting point, Claimants consider their claims to qualify as constituting treaty claims, not contract claims. Furthermore, Claimants argue, the jurisdiction of the present Tribunal is also not barred by the forum selection clauses that are contained in the Bidding Terms and Conditions and the Transfer Agreement concluded with the Province of Salta during ENJASA's privatization.

(i) *The claims brought are treaty claims*

124. Claimants argue that under the *prima facie* test applied in international dispute settlement, including in investment treaty arbitration, the Tribunal must only ascertain, as stated in *SGS v. Philippines*, whether “the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT.”¹⁰⁹ This test, Claimants continue, “is two pronged. First, it requires tribunals to base their jurisdictional decision on the facts ‘*as pleaded*’ or ‘*as alleged*’ by the claimant. [...] Second, it then requires the tribunal to determine whether the facts pleaded by the claimant ‘*fairly raise questions of breach*’ or ‘*may constitute possible breaches of*’ one or more substantive treaty provisions.”¹¹⁰ Hence, it is for Claimants to characterize their case and to show that breach of the BIT based on the alleged facts in question is “reasonably arguable on its face” or “sufficiently serious to proceed to a full hearing on the merits” or that they have “a reasonable possibility as pleaded.”¹¹¹
125. Under the test thus set out, Claimants are of the view that the facts they allege are capable of resulting in a breach of the BIT, namely the prohibition of direct and indirect expropriations without compensation in Article 4 of the BIT, the fair and equitable

¹⁰⁹ Rejoinder on Jurisdiction, para. 68; Claimants' Post-Hearing Brief, para. 66 (both quoting *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004), para. 157 (AL RA 25)). *See also* Counter-Memorial on Jurisdiction, paras. 62-65.

¹¹⁰ Claimants' Post-Hearing Brief, para. 68 (emphases in the original).

¹¹¹ Counter-Memorial on Jurisdiction, para. 64 (quoting *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), para. 91 (CL-050), and *Chevron Corporation and Texaco Petroleum Co. v. The Republic of Ecuador*, PCA Case No. 2009-23, UNCITRAL, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) Part IV, p. 2, paras. 4.7, 4.8 (CL -052)).

treatment standard in Article 2(1) of the BIT, and the national treatment standard in Article 3(1) of the BIT.¹¹² In Claimants' view, their claims therefore fulfill the *prima facie* test.¹¹³

126. Claimants also reject Respondent's qualification of the alleged facts as constituting a contract claim. First, they dispute Respondent's qualification of the License granted to ENJASA as a contract; instead they argue that the License was granted unilaterally by an administrative act of the Executive Branch of the Province of Salta under public law.¹¹⁴ Second, rather than constituting an exercise of a contractual right by the Province, the revocation of the License was, Claimants contend, an exercise of public authority by ENREJA in the exercise of its statutory powers under Law No. 7020.¹¹⁵
127. Third, Claimants point out that they are not asking for relief under the License or any (other) contractual arrangements, but consider that the facts alleged qualify as a breach of the BIT. In particular, they argue that the License was not revoked for a legitimate public purpose, but as a result of a "coordinated action of ENREJA and the Government of Salta" through the use of "orchestrated administrative proceedings."¹¹⁶ For Claimants, these administrative proceedings had the sole purpose of ousting ENJASA from the operation of gaming facilities and lottery activities under its exclusive license and to redistribute ENJASA operations to other operators under conditions more favorable for the Province of Salta. In Claimants' view, the revocation of ENJASA's license through Resolution No. 240/13 was only a pretext; it was not based on legitimate grounds.¹¹⁷ It was taken in breach of domestic law and in violation of due process, of the principle of proportionality, and of the prohibition to apply regulatory requirements retroactively.¹¹⁸
128. As a result of the revocation of ENJASA's license and the subsequent transfer of its operations to new operators, Claimants argue, their investment in Argentina was destroyed

¹¹² Counter-Memorial on Jurisdiction, paras. 66-88; Rejoinder on Jurisdiction, paras. 74-78; Claimants' Post-Hearing Brief, para. 124-157.

¹¹³ Claimants' Post-Hearing Brief, paras. 137, 145, 157 and 174.

¹¹⁴ Claimants' Post-Hearing Brief, paras. 99-103.

¹¹⁵ Claimants' Post-Hearing Brief, paras. 104-119; 158-173.

¹¹⁶ Memorial on the Merits, paras. 320 and 322.

¹¹⁷ See Claimants' Post-Hearing Brief, paras. 85-95.

¹¹⁸ See Claimants' Post-Hearing Brief, para. 123.

and their assets transferred to other operators.¹¹⁹ Furthermore, none of the new operators were subject to the same conditions that had been applied to ENJASA; the new operators also did not have to participate in a comparable public tender; their operations were also not subject to similar harassment and reviews of their compliance with anti-money laundering regulations. Finally, the new operators were awarded new operating licenses although some of them had been participants in what ENREJA had considered as an unlawful hiring of operators by ENJASA.¹²⁰

129. These facts, Claimants allege, constitute (1) a (direct and indirect) expropriation of their investment without compensation in violation of Article 4 of the BIT,¹²¹ (2) a breach of the fair and equitable treatment standard, in particular its requirements of transparency, stability and protection of legitimate expectations, procedural propriety and due process, good faith, and freedom from coercion and harassment,¹²² and (3) a breach of national treatment in light of the more favorable treatment the new operators had received as compared to ENJASA.¹²³

(ii) *The forum selection clauses do not bar jurisdiction*

130. Claimants also counter Respondent's argument that the forum selection clauses in favor of the exclusive jurisdiction of the courts of the Province of Salta, contained in Article 8.3 of the Bidding Terms and Conditions and in Article 13.1 of the Transfer Agreement, constitute a bar to the jurisdiction of the present Tribunal. Claimants forward two arguments in this respect.¹²⁴
131. First, Claimants point out that these forum selection clauses do not apply *ratione personae* to the parties to the present proceedings. They only apply to disputes between the Province

¹¹⁹ Claimants' Post-Hearing Brief, paras. 120-122.

¹²⁰ See Counter-Memorial on Jurisdiction, paras. 86-88.

¹²¹ Counter-Memorial on Jurisdiction, paras. 68-83; Claimants' Post-Hearing Brief, paras. 124-137.

¹²² Counter-Memorial on Jurisdiction, paras. 84-85; Claimants' Post-Hearing Brief, paras. 138-145.

¹²³ Counter-Memorial on Jurisdiction, paras. 86-88; Claimants' Post-Hearing Brief, paras. 146-157.

¹²⁴ Counter-Memorial on Jurisdiction, paras. 89-98; Rejoinder on Jurisdiction, paras. 79-89; Claimants' Post-Hearing Brief, para. 189.

of Salta and the UTE, that is, CAIH, Boldt S.A, and Iberlux Int. S.A., and Claimants as their successors.¹²⁵

132. Second, Claimants argue that the forum selection clauses do not apply *ratione materiae* to the dispute at hand because the dispute before the Tribunal “does not relate to the Bidding Terms and Conditions, the performance of the licence and the transfer of ENJASA’s shares. Rather, it relates to the Argentine Republic’s breaches of obligations under international law and, in particular, the BIT.”¹²⁶ To this end, Claimants point out that the revocation of the License was a regulatory act which took place in the exercise of ENREJA’s police powers.¹²⁷ In Claimants’ view, the revocation of the License was therefore clearly not of a contractual nature. Moreover, the reference in the Bidding Terms and Conditions and the Transfer Agreement to the need for the licensee to comply with the obligations stipulated in Law No. 7020 did not make the revocation of the License a contractual matter.
133. In addition, Claimants point out that the practice of arbitral tribunals in investment treaty arbitrations confirms that “[a]s a general rule, a forum selection clause in a contract with the host state does not bar the submission of claims pursuant to the dispute resolution clause of an international investment protection treaty.”¹²⁸ In this context, Claimants refer to decisions by arbitral tribunals rendered against both Respondent and other States.¹²⁹

B. Respondent consented validly to the present proceedings under Article 8 of the BIT

134. Claimants also contend that they validly accepted Respondent’s offer to arbitrate under Article 8 of the BIT. To this effect, they argue that strict compliance with the various procedural requirements of Article 8 “is not a condition for the validity of the Parties’

¹²⁵ Counter-Memorial on Jurisdiction, para. 90; Rejoinder on Jurisdiction, para. 86.

¹²⁶ Counter-Memorial on Jurisdiction, para. 91.

¹²⁷ Rejoinder on Jurisdiction, paras. 80-81.

¹²⁸ Counter-Memorial on Jurisdiction, paras. 94-97.

¹²⁹ Claimants make reference to *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003), para. 76 (AL RA 13); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002), para. 101 (AL RA 22); and *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005), para. 112 (CL-082), as well as to a large number of tribunal decisions in cases against other respondents).

consent to arbitration.”¹³⁰ Instead, for Claimants, compliance with Article 8 of the BIT raises merely questions of admissibility.¹³¹

135. For Claimants, the dispute arose with the passing of Resolution No. 240/13, not with Resolution No. 315/13. In this light, Claimants argue that they complied with the requirement to engage in amicable consultations under Article 8(1) of the BIT prior to submitting the dispute to domestic administrative authorities under Article 8(2) of the BIT, and that they obtained in those administrative proceedings a decision on the merits that allowed them to access international arbitration pursuant to Article 8(3) of the BIT. Claimants therefore contend that they did not violate the sequence of procedural steps required under Article 8(1) through (3) of the BIT. Claimants add that recourse to any other domestic remedy, as suggested by the Respondent, was either not possible or futile. Claimants also argue that Article 8(4) of the BIT, which requires the withdrawal of proceedings before domestic courts once the international arbitral tribunal is installed, does not constitute a bar to the Tribunal’s jurisdiction.
136. In the alternative, Claimants point out that by now ENJASA’s judicial claim against Resolution No. 315/13 had been pending undecidedly in the courts of Salta for more than 18 months. Moreover, the MFN clause in Article 3 of the BIT would grant them jurisdiction anyway.

¹³⁰ Rejoinder on Jurisdiction, para. 91.

¹³¹ Claimants’ Post-Hearing Brief, para. 194 (invoking *Urbaser S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 December 2012), para. 192 (AL RA 41); *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), paras. 582-583 (CL-131); *Teinver S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012), para. 135 (CL-137); *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (19 December 2008), para. 112 (AL RA 158); *Giovanni Alemanni and Others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014), para. 317 (CL-149); *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003), para. 184 (CL-009); *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), paras. 99-100 (CL-013); *Ethyl Corporation v. Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998), p. 42, para. 84 (CL-132)).

(i) *Compliance with the requirement for amicable consultations (Article 8(1) of the BIT)*

137. Claimants first point out that Article 8(1) of the BIT only requires to engage in amicable consultations “as far as possible”. This indicates that the BIT does not require unconditional consultations.¹³²
138. Claimants also consider that they complied with the consultation requirement under different perspectives. Claimants contend that the meeting on 27 August 2013 between Mr. Tucek of CAI and representatives of the Province of Salta, during which a solution to the dispute was attempted, already qualified as a start of amicable consultations; it was followed by further meetings between these parties.¹³³ Given that the conduct of the Province of Salta was attributable to Respondent under international law, negotiations conducted with the Province should be considered, Claimants argue, as negotiations between Claimants and Respondent.¹³⁴
139. Claimants further contend that CAI’s letter to the Argentine Republic of 30 April 2014, followed by seven further letters sent to the Argentine Republic and the Governor of the Province of Salta, also continued the consultations.¹³⁵
140. Claimants also argue that their efforts at finding a negotiated solution of the dispute were genuine.¹³⁶ Respondent’s arguments to the contrary, in particular in connection with the correspondence and contact with Mr. Wajntraub, in Claimants’ view, did not show otherwise, as Mr. Wajntraub allegedly had not engaged in constructive discussions.

¹³² Counter-Memorial on Jurisdiction, paras. 107-123 (still relying on a slightly different translation of Article 8(1) of the Argentina-Austria BIT into English which stated “whenever possible”); Rejoinder on Jurisdiction, paras. 95-108; Claimants’ Post-Hearing Brief, paras. 196-252.

¹³³ Claimants’ Post-Hearing Brief, paras. 223-233.

¹³⁴ Claimants’ Post-Hearing Brief, paras. 239-242.

¹³⁵ Claimants’ Post-Hearing Brief, para. 235.

¹³⁶ Claimants’ Post-Hearing Brief, para. 238.

(ii) Compliance with requirement to submit the dispute to a domestic jurisdiction (Article 8(2) and (3) of the BIT)

141. Claimants further contend that they fulfilled their obligation under Article 8(2) of the BIT to submit the dispute to the competent administrative or judicial jurisdiction.¹³⁷ They assert that ENJASA's Recourse for Reconsideration of Resolution No. 240/13 was a recourse to the competent administrative jurisdiction.¹³⁸ In this context, Claimants point out that "competent administrative jurisdiction" is a term which the BIT – unlike most other BITs to which either Argentina or Austria are party – specifically mentions. Furthermore, Claimants assert that the amicable consultations started before the dispute was submitted. Yet, as they only were required under Article 8(2) of the BIT to conduct amicable consultations "as far as possible" before submitting the dispute to the domestic authorities, they were not required to consult for full six months given that the Recourse for Reconsideration had to be introduced under domestic law within 15 days after the passing of Resolution No. 240/13. In such circumstances, Claimants argue, the six-months consultation period could not be viewed as a mandatory waiting period.¹³⁹
142. Claimants further point out that in ENJASA's Recourse for Reconsideration the same issues as those in the present arbitration were raised.¹⁴⁰ For Claimants, the dispute raised in ENJASA's administrative recourse was, for purposes of compliance with Article 8(2) and (3) of the BIT, the same dispute as the one pending in the present arbitration. By contrast, in Claimants' view, if the scope of a dispute were construed "as narrow as proposed by the Argentine Republic, [this] would mean that a resort to domestic administrative jurisdiction could never, or only in exceptional circumstances, resolve an investment dispute. This result would be contrary to the text, context and object and purpose of Article 8 [of the] BIT."¹⁴¹ In other words, Article 8 of the BIT does not require, Claimants contend, that a completely identical dispute, covering the same parties and the

¹³⁷ Counter-Memorial on Jurisdiction, paras. 132-136; Rejoinder on Jurisdiction, paras. 109-126; Claimants' Post-Hearing Brief, paras. 253-288.

¹³⁸ Rejoinder on Jurisdiction, para. 113; Claimants' Post-Hearing Brief, paras. 264-272.

¹³⁹ Counter-Memorial on Jurisdiction, para. 114.

¹⁴⁰ Rejoinder on Jurisdiction, paras. 114-118; Claimants' Post-Hearing Brief, paras. 256-263.

¹⁴¹ Rejoinder on Jurisdiction, para. 115.

same causes of action as the one before the present Tribunal, had to be submitted to the competent domestic administrative or judicial authorities. All that Article 8 of the BIT required is that “the pleaded facts are substantially similar and concern the same protected investment.”¹⁴² In this context, Claimants refer to arbitral jurisprudence, including in particular decisions on jurisdiction in *Philip Morris v. Uruguay* and *Teinver v. Argentina*, to confirm their position.¹⁴³

143. Claimants also point out that ENJASA’s Recourse for Reconsideration already had referred to the Argentina-Austria BIT.¹⁴⁴
144. Claimants further argue that they complied with Article 8(3) of the BIT, which allows to proceed to international arbitration either if no decision on the merits has been reached within 18 months, as stipulated in Article 8(3)(a) of the BIT, or once a decision on the merits was rendered, but the dispute persists, as stipulated in Article 8(3)(b) of the BIT. The latter, in Claimants’ view, happened with Resolution No. 315/13,¹⁴⁵ which they view as a “decision on the merits” on ENJASA’s Recourse for Reconsideration against Resolution No. 240/13. The fact that Resolution No. 315/13 could still be appealed, in turn, did not alter this situation. In this context, in Claimants’ opinion, Respondent confuses the notion of a “decision on the merits,” as required by Article 8(3) of the BIT, and the notion of a “final”, that is, an unappealable, decision.¹⁴⁶

(iii) Claimants respected the sequence of procedural steps under Article 8 of the BIT

145. In response to Respondent’s argument that Article 8 of the BIT required that the different procedural requirements (i.e., consultation, submission to domestic authorities, and finally

¹⁴² Claimants’ Post-Hearing Brief, para. 258.

¹⁴³ Rejoinder on Jurisdiction, paras. 118 (citing *Philip Morris Brands SARL et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), paras. 105, 106, 110, 113 (CL-134); *Teinver S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012), para. 132 (CL-137)); Claimants’ Post-Hearing Brief, paras. 260-262.

¹⁴⁴ Counter-Memorial on Jurisdiction, para. 136.

¹⁴⁵ Counter-Memorial on Jurisdiction, paras. 137-138; Rejoinder on Jurisdiction, paras. 130-139; Claimants’ Post-Hearing Brief, paras. 289-294.

¹⁴⁶ Rejoinder on Jurisdiction, paras. 130-132.

international arbitration) be followed in sequence, Claimants submit that the deadlines under Argentine domestic law had to be taken into account. Thus, if Article 8(2) of the BIT required domestic recourses, such recourses must be understood to be had “in accordance with the applicable time-limits and procedures under domestic law: if the domestic law and procedures are not respected, any domestic remedy is futile.”¹⁴⁷ Similarly, if domestic law required the initiation of remedies within certain time limits, it would be non-sensical to require that consultations under Article 8(1) be conducted beforehand for as long as six months, as stipulated in Article 8(2) of the BIT.

146. Claimants put the dilemma Respondent’s interpretation of Article 8 of the BIT creates as follows:

Accepting, for the sake of argument, the Argentine Republic’s allegations, Claimants could have never fulfilled both the requirement to engage in amicable consultations and to resort to the domestic administrative authorities or courts. Had Claimants not filed a recourse within 15 days from the revocation of the licence, all further domestic remedies would have been barred. On the other hand, the compliance with the 15-days deadline would, in the Argentine Republic’s view, “contaminate” amicable consultations. The Argentine Republic construed a *catch-22* situation.¹⁴⁸

147. All in all, Claimants argue that they have taken all procedural steps required under Argentine law to contest the revocation of ENJASA’s license and to enforce their rights under the BIT. If compliance with the domestic recourse requirement sits squarely with a strict reading of Article 8 of the BIT, requiring compliance with the latter, in Claimants’ view, would constitute bad faith.¹⁴⁹

(iv) Recourse to domestic courts as suggested by Respondent is either impossible or futile

148. In addition, and arguing that the dispute as submitted to the present Tribunal had to be fully identical in terms of the parties, the subject-matter and the causes of action to the

¹⁴⁷ Claimants’ Post-Hearing Brief, para. 297.

¹⁴⁸ Counter-Memorial on Jurisdiction, para. 141.

¹⁴⁹ Counter-Memorial on Jurisdiction, paras. 139-142.

dispute submitted to a domestic administrative or judicial jurisdiction, Claimants argue that Argentina's domestic legal system did not provide for any such recourse.¹⁵⁰ Claimants instead argue that each of the domestic procedural options Respondent listed to this effect was unable to grant the compensation Claimants are seeking for breach of the BIT through the present arbitration.

149. Furthermore, even assuming that an Argentine court had jurisdiction to hear a damages claim based on the breach of the Argentina-Austria BIT, Claimants point out that it would be futile for them to pursue such a claim. Invoking the decisions on jurisdiction in *Urbaser v. Argentina* and *Abaclat v. Argentina*, as well as a study prepared by the Treasury Attorney-General Office of the Argentine Republic, Claimants argue that "there is no realistic possibility of securing a court decision on damages claims within 18 months in the Argentine Republic."¹⁵¹ To require Claimants nevertheless to pursue such remedies would not meet the very purpose of the requirement in question, which is identical to the *raison d'être* of the requirement to exhaust local remedies, namely to give the local courts an occasion to provide a remedy.¹⁵²

(v) *Article 8(4) of the BIT does not bar jurisdiction*

150. Claimants also reject Respondent's argument that Article 8(4) of the BIT, which requires the withdrawal of domestic proceedings in case of recourse to international arbitration, operates as a bar to the jurisdiction of the present Tribunal.¹⁵³ In Claimants' view, the obligation to withdraw does not exist before commencing international arbitration proceedings; on the contrary, the "initiation of arbitration proceedings is a prerequisite for the obligation to take all measures to withdraw the pending judicial claim."¹⁵⁴ Furthermore,

¹⁵⁰ Counter-Memorial on Jurisdiction, paras. 143-165; Rejoinder on Jurisdiction, paras. 159-195; Claimants' Post-Hearing Brief, paras. 330-386.

¹⁵¹ Rejoinder on Jurisdiction, paras. 196-205 (quote at para. 196) (citing *Urbaser S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 December 2012), para. 192 (AL RA 41); and *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), paras. 582-583 (CL-131)); Claimants' Post-Hearing Brief, paras. 387-394; Counter-Memorial on Jurisdiction, paras. 166-175.

¹⁵² Claimants' Post-Hearing Brief, paras. 387-389.

¹⁵³ Rejoinder on Jurisdiction, paras. 144-158; Claimants' Post-Hearing Brief, paras. 401-408.

¹⁵⁴ Rejoinder on Jurisdiction, para. 150; Claimants' Post-Hearing Brief, para. 402.

any such obligation could only arise once the jurisdiction of the arbitral tribunal was confirmed. Otherwise, given that a withdrawal of ENJASA's domestic proceedings would be with prejudice, Claimants would risk losing both their domestic recourse and their recourse to international arbitration if the arbitral tribunal was to decline jurisdiction.¹⁵⁵ This would be contrary to the stated purposes of the Argentina-Austria BIT to afford protection to foreign investors.¹⁵⁶

(vi) *First alternative: A dispute has now been pending in domestic courts for 18 months without decision on the merits*

151. In the first alternative, Claimants point out that even if the Tribunal were to find that ENJASA's Recourse for Reconsideration against Resolution No. 240/13 did not comply with Article 8(2) of the BIT, ENJASA subsequently submitted, on 5 February 2014, an Action for Annulment against Resolutions Nos. 240/13 and 315/13 in the domestic courts in Salta.¹⁵⁷ This Action, Claimants point out, has been pending without decision for more than 18 months now. Relying on several arbitral decisions, for Claimants it is at the time the Tribunal renders a decision on jurisdiction that any pre-arbitral procedural requirement had to be fulfilled; the non-fulfilment of any such requirement at the time the arbitration proceedings were started, by contrast, was not an obstacle to a positive finding of jurisdiction.¹⁵⁸ Cases relied upon by Respondent, which declined jurisdiction for non-compliance with the requirement to litigate in domestic courts for 18 months, such as *Wintershall v. Argentina*, *Impregilo v. Argentina*, *Daimler v. Argentina*, and *ICS v. Argentina*, in turn, should be distinguished as in none of those cases had claimants, or their local subsidiaries, actually initiated any domestic proceedings at all.¹⁵⁹ After all, in

¹⁵⁵ Rejoinder on Jurisdiction, paras. 151-157; Claimants' Post-Hearing Brief, paras. 403-406.

¹⁵⁶ Rejoinder on Jurisdiction, para. 152.

¹⁵⁷ Rejoinder on Jurisdiction, para. 140; Claimants' Post-Hearing Brief, paras. 395-400.

¹⁵⁸ Rejoinder on Jurisdiction, para. 141 (relying on *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011), para. 220 (CL-151); *Philip Morris Brands SARL et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), para. 144 (CL-134); *Teinver S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012), para. 135 (CL-137); and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 343 (CL-031)).

¹⁵⁹ Rejoinder on Jurisdiction, para. 141 (distinguishing *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), paras. 8, 18.3, and 156 (AL RA 38); *Impregilo S.p.A. v.*

Claimants' view, it would make little sense and be inefficient for the Tribunal to decline jurisdiction on this ground since Claimants could immediately resubmit their case to arbitration as the 18 months of litigating in domestic courts had now expired.

(vii) *Second alternative: Jurisdiction based on the MFN clause in Article 3 of the BIT*

152. Should the Tribunal find any non-compliance with Article 8 of the BIT to bar jurisdiction, Claimants invoke, in the second alternative, the MFN clause in Article 3 of the Argentina-Austria BIT as a basis for jurisdiction. Under this clause, Claimants consider to be entitled to the same favorable treatment in terms of dispute settlement as Danish investors under the BIT between Argentina and Denmark. Under Article 9(2) of that treaty, no prior recourse to local courts or administrative authorities for 18 months was necessary.¹⁶⁰
153. In response to Respondent's first objection regarding MFN treatment, Claimants argue that their invocation of the MFN clause in the Argentina-Austria BIT was timely. It occurred, they point out, in their first submission following Respondent's objections to jurisdiction (i.e., Claimants' Counter-Memorial on Jurisdiction), as required by Rule 31(3) of the ICSID Arbitration Rules.¹⁶¹
154. Claimants further argue, in response to Respondent's second objection regarding MFN treatment, that the term "treatment" in Article 3 of the Argentina-Austria BIT was sufficiently wide to "encompas[s] any conduct of the host State that affects the investor's investment, which includes its access to dispute settlement."¹⁶² For Claimants, this interpretation is confirmed by the fact that Article 3(2) of the BIT explicitly excluded from

Argentine Republic, ICSID Case No. ARB/07/17, Award (21 June 2011), paras. 13-48, 94 (AL RA 46); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), paras. 190-191 (AL RA 96); and *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, UNCITRAL, Award on Jurisdiction (10 February 2012), para. 269 (AL RA 40)).

¹⁶⁰ Counter-Memorial on Jurisdiction, paras. 176-185; Rejoinder on Jurisdiction, paras. 206-229; Claimants' Post-Hearing Brief, paras. 412-442.

¹⁶¹ Rejoinder on Jurisdiction, paras. 216-221; Claimants' Post-Hearing Brief, paras. 414-421 (relying on *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction (October 2007), para. 53 (CL-156)).

¹⁶² Rejoinder on Jurisdiction, para. 224; Counter-Memorial on Jurisdiction, para. 183; Claimants' Post-Hearing Brief, para. 429.

MFN treatment benefits arising under a customs union, a common market, and similar projects of regional economic integration, benefits in the area of taxation, regulations to facilitate border traffic, and specific benefits for preferential financing granted under Argentina's BITs with Italy and Spain.¹⁶³

155. Finally, Claimants point to the “prevailing practice” in investment treaty arbitration under which “the most favoured treatment also applies to dispute settlement and, in particular, to procedural obstacles (such as the requirement to resort to local courts or administrative authorities for a fixed period of time).”¹⁶⁴ Contrary decisions were, in Claimants’ view, either “driven by the particularities of the case”¹⁶⁵ or were based on differently worded BITs.¹⁶⁶

C. *Jurisdiction ratione materiae*

156. Claimants also counter Respondent’s third objection concerning the Tribunal’s jurisdiction *ratione materiae*. They contend they had made an investment in Argentina both in the sense of Article 25(1) of the ICSID Convention and under Article 1 of the BIT. Claimants argue that the BIT is not limited to the protection of their rights as shareholders in L&E or ENJASA, but that the protection of the BIT extends to the assets of ENJASA, including most importantly its exclusive license. Furthermore, Claimants consider the present dispute to arise directly out of their investment in Argentina.

(i) *Claimants’ investment in the Province of Salta*

157. Claimants point out that they “were engaged in a complex investment operation” in Argentina.¹⁶⁷ This operation consisted of a variety of directly and indirectly held assets in Argentina, including Claimants’ shares in L&E, their indirect ownership of ENJASA (through L&E), as well as the rights held, and operations conducted, by ENJASA. The latter included, most importantly, ENJASA exclusive license to operate games of chance

¹⁶³ Counter-Memorial on Jurisdiction, para. 183; Claimants’ Post-Hearing Brief, paras. 433-434.

¹⁶⁴ Counter-Memorial on Jurisdiction, para. 181.

¹⁶⁵ Claimants’ Post-Hearing Brief, para. 436.

¹⁶⁶ Claimants’ Post-Hearing Brief, paras. 430-431 (discussing *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), para. 224 (AL RA 96)).

¹⁶⁷ Claimants’ Post-Hearing Brief, para. 6; similarly, Rejoinder on Jurisdiction, para. 17.

in the Province of Salta, which was the basis for operating four casinos, fifteen slot machine halls, and fourteen lottery games, with a total of approximately 750 employees.¹⁶⁸

158. Furthermore, Claimants point out that, in line with the investment plan that was part of the public tender for acquiring ENJASA, they had invested more than USD 20 million in the construction of a five-star hotel in Salta, sponsored two schools for hotel trade and gastronomy, and established the ENJASA Foundation.¹⁶⁹ The latter had as its objective, inter alia, “the promotion and research of cultural, tourist, hotel and gourmet activities in the province of Salta and the region to achieve its national [and] international expansion.”¹⁷⁰

159. It is these activities as a whole that Claimants present as their investment, in economic and legal terms. Consequently, Respondent’s

attempt to separate the licence from the other assets belonging to Claimants’ investment has no merit. ENJASA’s licence was an essential part of Claimants’ investment operation, forming an organic unit. The investment operation was only possible on the basis of the exclusive gaming and lottery licence granted to ENJASA by the Province of Salta pursuant to Decree No. 2126/1999. The licence was the *conditio sine qua non* of the investment.¹⁷¹

(ii) *Claimants’ activities qualify as an investment under Article 25(1) of the ICSID Convention and under Article 1 of the BIT*

160. Their engagement in Argentina constitutes, Claimants argue, an investment in the sense of Article 25(1) of the ICSID Convention. It meets, Claimants explain, all of the so-called *Salini* characteristics, including the need for a certain duration, regularity of profits and

¹⁶⁸ Counter-Memorial on Jurisdiction, para. 30.

¹⁶⁹ Memorial on the Merits, paras. 121-133; Counter-Memorial on Jurisdiction, para. 30.

¹⁷⁰ Memorial on the Merits, para. 132.

¹⁷¹ Counter-Memorial on Jurisdiction, para. 34 (internal citation omitted). Similarly, Claimants’ Post-Hearing Brief, para. 16 (“The entire investment operation of Claimants in the Argentine Republic was inseparably connected to ENJASA’s exclusive licence. Without ENJASA’s licence, the operation of gaming and lottery business was not possible. The licence was the *conditio sine qua non* of ENJASA’s existence and operation.”).

returns, the assumption of risk, the making of a substantial commitment, and a contribution to the development of the host State.¹⁷²

161. Claimants further argue that several assets that formed part of their complex operation qualify as investments under Article 1 of the BIT, such as their shareholdings and participations in ENJASA and L&E.¹⁷³
162. In addition, Claimants consider that ENJASA's license and "all assets constituting the economic value of the shares of [ENJASA and L&E]" qualify as investments in the sense of Article 1(1) of the BIT.¹⁷⁴ ENJASA's license, Claimants argue, qualifies as an investment pursuant to Article 1(1)(e) given that the BIT protected assets "in any sector of the economy."¹⁷⁵ Other assets of ENJASA and L&E were also protected under the BIT, Claimants contend, as "[i]t follows from the broad definition of the term investment in the BIT that the treaty not only protects shareholdings and any form of participation, but all assets constituting the economic value of the shares."¹⁷⁶
163. The distinction Respondent attempts to make in this respect between the rights of the company, and the rights of its shareholders, in Claimants' view, is relevant only for the protection of shareholders under customary international law, but had been superseded by BITs.¹⁷⁷ As consistently held by investment treaty tribunals, under BITs, "[s]hareholder protection extends from the ownership of shares to an action that affects the economic value of the shares because it affects the assets held by the corporation."¹⁷⁸ Consequently, Claimants contend, their standing is not limited to bringing claims for breaches of their shareholder rights.

(iii) Article 4(3) of the BIT confirms the wide scope of protection

164. Claimants further point out that Article 4(3) of the BIT specifically confirmed that the protection of shareholders in locally incorporated companies extended beyond their

¹⁷² Counter-Memorial on Jurisdiction, para. 37; Claimants' Post-Hearing Brief, paras. 17-26.

¹⁷³ Rejoinder on Jurisdiction, paras. 24-27; Claimants' Post-Hearing Brief, paras. 34-41.

¹⁷⁴ Claimants' Post-Hearing Brief, para. 30.

¹⁷⁵ Claimants' Post-Hearing Brief, paras. 31-32.

¹⁷⁶ Claimants' Post-Hearing Brief, para. 42.

¹⁷⁷ Rejoinder on Jurisdiction, paras. 30-41; Claimants' Post-Hearing Brief, paras. 44-45.

¹⁷⁸ Rejoinder on Jurisdiction, para. 30.

shareholding, and included assets held by the company. According to that provision, Claimants argue, shareholders were protected against the direct and indirect expropriation of assets held by a locally incorporated company.

165. As to the difference in the wording of the Spanish and German versions of the Argentina-Austria BIT, Claimants argue that the use of the Spanish term “*activos financieros*” was “in all likelihood, a translation mistake and the two authentic language versions, although using a different term, both mean to protect all assets and not just financial assets.”¹⁷⁹ In Claimants’ view:

the term “*activos financieros*” does not mean assets used in financial activities (such as banking), but rather assets having a financial value and thus being part of an investment. This interpretation is corroborated both by the immediate context of the term, a provision granting (financial) compensation for expropriation, as well as by the larger context of a treaty granting protection for any asset invested in any sector of the economy.¹⁸⁰

166. Also the object and purpose of the treaty, Claimants continue, suggested no reason to limit Article 4(3) of the BIT to the protection of a narrow class of assets,¹⁸¹ in particular considering that the German version of the BIT used the same term (“*Vermögenswerte*”) in Article 1 of the BIT to refer to assets that qualify as protected “investments” in general.
167. Apart from that, Claimants point out, any question as to the precise scope of protection of shareholders under the BIT concerned the merits of the dispute, not jurisdiction.¹⁸²

(iv) The dispute arises directly out of the investment

168. Finally, Claimants argue that the dispute arises directly out of their investment in Argentina. Article 25 ICSID Convention required a relation between the dispute and the investment; not a direct ownership of the investment.¹⁸³ The relationship between dispute and investment was met, as Claimants point out: the revocation of the License effectively

¹⁷⁹ Claimants’ Post-Hearing Brief, para. 52. *See extensively also* Rejoinder on Jurisdiction, paras. 46-60.

¹⁸⁰ Claimants’ Post-Hearing Brief, para. 53.

¹⁸¹ Claimants’ Post-Hearing Brief, para. 54.

¹⁸² Rejoinder on Jurisdiction, paras. 27 and 29; Claimants’ Post-Hearing Brief, para. 57.

¹⁸³ Counter-Memorial on Jurisdiction, para. 57.

destroyed Claimants’ entire investment in the gaming and lottery sector in the Province of Salta.

VI. THE TRIBUNAL’S ANALYSIS

169. As provided for in Article 41(1) of the ICSID Convention, “[t]he Tribunal shall be the judge of its own competence.” It therefore falls upon it to assess whether the present dispute is within the jurisdiction of the Centre as laid down in Article 25(1) of the ICSID Convention and whether the jurisdictional requirements under the Argentina-Austria BIT are met. In addition, the Tribunal will consider whether admissibility-related considerations suggest rejecting Claimants’ claims, in whole or in part, at the present stage of the proceedings.
170. The Tribunal will first address whether Claimants’ involvement in the gaming and lottery sector in Salta qualifies as an “investment” in the sense of both Article 1 of the BIT and Article 25(1) of the ICSID Convention (i.e., part of Respondent’s third objection that the Tribunal lacks jurisdiction *ratione materiae*). It will then assess, as a matter of the admissibility of the proceedings, whether Claimants have been able to show the existence of a *prima facie* claim (i.e., Respondent’s first objection and remaining issues of her third objection). Finally, the Tribunal will determine whether the Parties’ have validly consented to the present proceedings under Article 8 of the Argentina-Austria BIT (i.e., Respondent’s second objection).
171. As should be almost unnecessary to state, in interpreting the ICSID Convention and the Argentina-Austria BIT, the Tribunal applies the rules on treaty interpretation laid down in the Vienna Convention on the Law of Treaties, which is binding upon both the Argentine Republic and the Republic of Austria.¹⁸⁴ These rules – and the interpretive canons flowing from them – are well-known and do not need to be further expounded in the abstract. They imply that the content of treaty rights and obligations are objectively ascertained by all members of an international tribunal in full judicial independence and neutrality. Specifically for investment treaties, this means that interpretation is not to be guided by

¹⁸⁴ Vienna Convention on the Law of Treaties (1969) (CL-001).

interpretive presumptions in favor of either investors and their home States or of host States, nor by teleological preferences about investor-State relations that are extrinsic to the treaty commitments made in the present case.¹⁸⁵

172. Furthermore, the Tribunal notes that, in its analysis of the governing law, it is not limited to the arguments or sources invoked by the Parties, but is required, under the maxim *iura novit curia* or, better, *iura novit arbiter*, to apply the law on its own motion. This approach corresponds to the Tribunal's public function as an adjudicatory body that is part of the administration of international justice. It justifies reliance on arguments and authorities on the governing law not submitted by the Parties, provided the latter are given an opportunity to comment on arguments and legal theories that were either not addressed or could not reasonably be anticipated.¹⁸⁶ It also justifies that the Tribunal treats Respondent's

¹⁸⁵ Although the Vienna Convention ties the interpretation of international treaties to objective criteria, namely the principle of good faith and recourse to the text, context, and object and purpose of the treaty and, under certain circumstances, its *travaux préparatoires*, its rules on treaty interpretation are far from always leading the interpreter to only one possible and cogent solution. Instead, the Vienna Convention's rules on treaty interpretation often enough have the effect that reasonable arbitrators may reasonably disagree on the construction of treaty provisions. These disagreements result from the vagaries and indeterminacies inherent to using language to lay down rights and obligations in international treaties; they may relate to differences in pre-understanding or in weighing the respective interpretive canons. Consequently, the majority of the Tribunal respects that the dissenting arbitrator has come to different conclusions on the construction of the Argentina-Austria BIT based on his understanding of the hermeneutic exercise at stake. However, to ascribe differences in construction to "manifest reckless misinterpretations and erroneous application of the relevant provisions," to criticize that "the motives of the Decision look like the plea of a party," or to denote reasons given as "gossip" or "rigmarole", as the Dissent does (*see* Dissent, paras. 191, 151, 163 and 143 respectively), in the majority's view, fails to appreciate the nuances and difficulties an hermeneutic enterprise, such as the interpretation of international treaties, entails.

¹⁸⁶ *See Lighthouse Corporation Pty Ltd And Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award (22 December 2017), para. 109 ("When applying the governing law, the Tribunal is not bound by the arguments or sources invoked by the Parties. Under the *maxim iura novit curia* – or, better, *iura novit arbiter* – the Tribunal is required to apply the law of its own motion, provided always that it gives the Parties' an opportunity to comment if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.") (citing to *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment (7 January 2015), para. 295 ("[...] an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, sua sponte, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it"); *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Merits, Judgment (25 July 1974), para. 18 ("[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court"); *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Award (23 April 2012), para. 141; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013), para. 287); similarly *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, Mrs. Gisela Wirtgen, JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic*, PCA Case No. 2014-03, Final Award (11 October 2017), para. 179.

objections in a different order than they were raised and that the Tribunal requalifies objections relating to the scope of protection of shareholder-investors under the BIT, in accordance with its assessment of the requirements for jurisdiction and admissibility under Article 25(1) of the ICSID Convention and the Argentina-Austria BIT.

1. Existence of a Protected Investment

173. One aspect of Respondent’s objection that the Tribunal lacks jurisdiction *ratione materiae* concerns the question whether Claimants have made an investment in Argentina that is protected under both the ICSID Convention and the Argentina-Austria BIT.¹⁸⁷ This aspect of Respondent’s objection has shifted over the course of the written and oral arguments, posing certain difficulties in grasping which aspects of this objections are still upheld – or have been dropped – during the Hearing on jurisdiction and/or in Respondent’s Post-Hearing Brief. In light of these difficulties, and given that the Tribunal has to determine, objectively and independently of a Party’s objection, its own jurisdiction, all possible aspects of Respondent’s objections relating to the lack of a protected investment are hereafter addressed.
174. Respondent’s objection that Claimants have not made a protected investment can be understood: first, as an objection that Claimants have not made an “investment” in Argentina in the sense of Article 1 of the Argentina-Austria BIT; second, that Claimants have not made an “investment” in the sense of Article 25(1) of the ICSID Convention;¹⁸⁸

¹⁸⁷ The other aspect of Respondent’s third objection that the Tribunal lacks jurisdiction *ratione materiae* because of limits the BIT imposes for the protection of shareholder-investors, in the Tribunal’s view, does not, properly understood, concern a question of jurisdiction *ratione materiae*, but concerns the scope of the substantive protections the BIT grants to shareholder-investors. This is a question pertaining to the merits of the claim. At the present stage of the proceedings, any limitation on the substantive scope of protection is only relevant to the extent it results in the lack of a *prima facie* claim. See *infra* Section VI.2.

¹⁸⁸ Whether Claimants have made an “investment” in the sense of Article 25(1) of the ICSID Convention and whether their involvement in Argentina qualifies as an “investment” under Article 1 of the Argentina-Austria BIT, are conceptually separate, even though in substance the notions of “investment” in both instruments will overlap to a large extent. In addition, both concepts relate to two separate jurisdictional issues. The concept of “investment” in Article 25(1) of the ICSID Convention constitutes one of the express jurisdictional elements under Article 25(1) of the ICSID Convention. The concept of “investment” in the sense of Article 1 of the Argentina-Austria BIT is relevant for determining the scope of Respondent’s consent under Article 8 of the Argentina-Austria BIT *ratione materiae*. See *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), para. 108 (stating that “the Tribunal considers that the notion of investment, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply through a reference to the parties’ consent,

and third, as questioning whether the dispute before the Tribunal directly arises out of an investment as required by Article 25(1) of the ICSID Convention.

175. Claimants, in turn, have identified a number of different assets that, in their view, suggest they have made an investment in Argentina that qualifies as such under both Article 1 of the Argentina-Austria BIT and Article 25(1) of the ICSID Convention. These assets encompass:

- i. Claimants' 60% shareholding in L&E and (through L&E) its shareholding in ENJASA;¹⁸⁹
- ii. the assets held and operations conducted by ENJASA with the help of approx. 750 employees, which included 4 casinos, 15 slot machine halls, and 14 lottery operations; and
- iii. the exclusive operating license of ENJASA.

176. Against this background, the Tribunal will first address to which extent Claimants have made an "investment" in the sense of Article 1 of the Argentina-Austria BIT. It will then analyze to which extent Claimants have made an "investment" in the sense of Article 25(1) of the ICSID Convention and, finally, turn to whether the present dispute "arises directly out of that investment."

A. Existence of an "investment" under Article 1 of the Argentina-Austria BIT

177. In the Tribunal's view, Claimants' (direct) 60% shareholding in L&E and its (indirect) shareholding in ENJASA (via L&E) qualify as an investment in the sense of Article 1(1)(b)

which is a distinct condition for the Centre's jurisdiction. The Tribunal believes that an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning."). These differences notwithstanding, both aspects of the Tribunal's jurisdiction are dealt with together in the Tribunal's analysis for purpose of efficiency, because the Parties did not always distinguish between both concepts of "investment" with the necessary conceptual clarity.

¹⁸⁹ Claimants do not, by contrast, claim protection for the 40% share in L&E that they purchased on 18 November 2013, that is, subsequently to the revocation of ENJASA's license through Resolution No. 240/13. No claim for damages or other breach of Respondent's obligations relating to this 40% share has been submitted to this Tribunal. *See* Reply on Jurisdiction, para. 189; Hearing Transcript of 23 March 2017, pp. 110, 112, 113; Claimants' Post-Hearing Brief, paras. 25-39. Consequently, there is also no need to address Respondent's argument that Claimants' claim in this respect is abusive (*see supra* para. 106).

of the Argentina-Austria BIT. This provision states, again indicating differences between the Parties concerning translation, as follows:

The term “investment” means any kind of asset invested or reinvested in any sector of the economic activity, provided the investment has been made in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made, and, in particular, though not exclusively: [...] shares [Respondent]/any shareholding [Claimants] and any other form of participation in companies [...].

178. As the wording of this provision makes clear, Claimants’ (direct) shareholding in L&E qualifies as an “investment” under the Argentina-Austria BIT.
179. Similarly, Claimants’ indirect shareholding in ENJASA via L&E qualifies as an “investment” under the Argentina-Austria BIT. This becomes clear from how the structure of Claimants’ shareholding in ENJASA developed historically.
180. To recall: Claimants’ involvement in the gaming and lottery sector in Salta and in the two Argentine companies, L&E and ENJASA, was triggered by the privatization of the gaming and lottery sector in the Province of Salta. At the start of that process, Claimants’ predecessor in right (the joint venture between CAIH, Boldt S.A., and Iberlux Int. S.A.) received, in 1999, a controlling share in ENJASA, a company that was fully owned by the Province of Salta, but whose only (significant) asset at that time was the exclusive 30-year operating license for gaming and lottery activities in Salta. This controlling share was received against the commitment to pay an annual license fee, to invest in a five-star hotel in Salta, to sponsor schools for hotel trade and gastronomy, and to establish a foundation for the promotion of cultural activities and the tourism industry in the Province Salta. In the implementation of their investment in the gaming and lottery sector in Salta, the participants in the joint venture then decided to establish L&E as a holding company to hold the shares in ENJASA. The shareholder structure in L&E corresponded to the respective participation of the members of the joint venture. Without the interposition of L&E, the participants in the joint venture, and later Claimants as their successor, would have been direct shareholders in ENJASA.
181. Against this background, the shareholding in ENJASA was not principally one of L&E’s assets; rather L&E was a vehicle to hold the shares in ENJASA, which were themselves

the principal investment in Argentina. Consequently, it is clear that the indirect shareholding in ENJASA was an investment of Claimants in Argentina, which their predecessors in right first held through the structure of a joint venture and thereafter via the Argentina-incorporated holding company L&E. For this reason, there is no reason not to consider Claimants' indirect shareholding in ENJASA as falling under the notion of "shares [...] in a company" that qualify as a protected investment in Argentina in the sense of Article 1(1)(b) of the BIT.

182. Consequently, as also Respondent accepts,¹⁹⁰ both Claimants' direct shareholding in L&E and their indirect shareholding in ENJASA qualify as "investments" under Article 1(1)(b) of the Argentina-Austria BIT.
183. What is debated between the Parties, by contrast, is to which extent assets of ENJASA, in particular its operating license, qualify as Claimants' "investment" under the Argentina-Austria BIT independently of Claimants' shareholding in L&E and ENJASA. The issue here is not whether an operating license in the abstract could qualify as an asset, and hence as an investment, in the sense of Article 1(1) of the BIT, as it is not sufficient, for the purpose of determining the Tribunal's jurisdiction, that the License may be characterized as an asset and fall under the definition of investment in the BIT. Instead, as rightly pointed out by Respondent, in order for the Tribunal to have jurisdiction, the License must qualify as an "investment" that is owned by an Austrian "investor", as only investments of investors of the other Contracting Party are protected under the Argentina-Austria BIT, whereas investments of nationals of the host State, or of nationals of a third State, are not. The question therefore is whether ENJASA's operating license can be considered as Claimants' "investment" in the sense of Article 1(1) of the BIT.
184. In the Tribunal's view, this is not the case. Even though ENJASA's operating license was the only significant asset ENJASA held at the time of the privatization in 1999/2000, and although it was, from an economic perspective, the reason why the bidders in the public tender were willing to make economically significant promises in return for becoming shareholders in ENJASA, the operating license as such was an asset that belonged, already

¹⁹⁰ See Respondent's Post-Hearing Brief, para. 123 (stating that "the Argentine Republic does not deny that a shareholding may constitute an investment under the terms of the BIT").

at the time of the public tender, to ENJASA. Different from the role of L&E, which was created subsequently as a vehicle to hold the shares in ENJASA, the participants in the privatization process did not bid for the 30-year operating license and later created ENJASA to hold that license. They participated in the bid in order to become shareholders of ENJASA. Unlike Claimants' shareholding in ENJASA, which is held indirectly through L&E, ENJASA's license, therefore cannot be considered as an "investment" that is held indirectly by Claimants through their (indirect) participation in ENJASA. The same holds true for other assets owned by ENJASA; these as well do not qualify as "investments" that are indirectly held by Claimants through their participation in ENJASA. Consequently, for the Tribunal, ENJASA's operating license and its other assets do not qualify as protected "investments" themselves in the sense of Article 1(1) of the Argentina-Austria BIT.

185. This does not mean, however, that interferences with ENJASA's assets are irrelevant for Claimants' rights as shareholder-investors protected under the BIT. Yet, the question to which extent Claimants enjoy protection as (indirect) shareholders against interferences with ENJASA's assets, such as the revocation of its operating license and subsequent events, is, in principle, an issue for the merits of the case. At the present jurisdictional stage, and despite Respondent's formulation as part of its objection that the Tribunal lacks jurisdiction *ratione materiae*, the issue (i.e., the scope of protection of Claimants as shareholder-investors) is only relevant in order to assess whether Claimants have successfully presented a *prima facie* claim. This issue is discussed in connection with Respondent's objection that Claimants have failed to present a *prima facie* claim.¹⁹¹

B. Existence of an "investment" under Article 25(1) ICSID Convention

186. In the Tribunal's view, Claimants' involvement in the operation of gaming and lottery activities in Salta through their participation in L&E and, indirectly, in ENJASA also qualifies as an "investment" in the sense of Article 25(1) of the ICSID Convention. In the absence of a definition of this notion in the ICSID Convention, the precise contours of this notion are debated, both in the jurisprudence of investment tribunals and in scholarly writing. Debate exists in particular as to the precise elements or criteria that should be used

¹⁹¹ See *infra* Section VI.2.

to delineate economic activities undertaken, or assets held, by foreign nationals that qualify as an “investment” in the sense of Article 25(1) of the ICSID Convention from those that do not.¹⁹²

187. The starting point of the analysis is regularly the so-called *Salini* test.¹⁹³ According to this test, an “investment” in the sense of Article 25(1) of the ICSID Convention is characterized by the following elements: (1) the existence of a substantial contribution by the foreign national, (2) a certain duration of the economic activity in question, (3) the assumption of risk by the foreign national, and (4) the contribution of the activity to the host State’s development.¹⁹⁴
188. The first three *Salini* criteria are broadly accepted in ICSID practice and doctrine. They help to circumscribe the type of economic activity or asset protected as an “investment” and delineate it from non-protected activities or assets in relation to the risk certain forms of economic involvement abroad entail. The specific risk in question arises out of the fact that certain long-term forms of economic involvement in a host State (which are termed “foreign investment”) require foreign nationals to place their economic activities and assets upfront under the sovereign authority of the host State in order to recoup economic returns over time. It is the investment-specific risk stemming from the non-synallagmatic nature of investor-State relations that the ICSID Convention aims, if not to minimize, at least to make more manageable by providing a mechanism for settling disputes between investors and host States.
189. In this context, the first three *Salini* criteria help to circumscribe the activities and assets of foreign nationals in host States that the ICSID Convention considers not only in need of protection against political risk, but also worthy of access to its specific dispute settlement mechanism. These three *Salini* criteria thus exclude non-economic activity and the non-commercial use of assets of foreign nationals from the concept of “investment”. They also

¹⁹² See Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn., Cambridge University Press 2009), Article 25, paras. 113-174.

¹⁹³ The test is named after *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), paras. 50-58 (CL-075).

¹⁹⁴ Sometimes, the regularity of profits and returns is listed as an additional element. See *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997), para. 43 (CL-076).

exclude short-term economic activity, or assets used in that context, such as one-time sales transactions that do not face investment-specific risk, from access to dispute settlement under the ICSID Convention. And finally, these three *Salini* criteria may exclude wholly insignificant activities and assets that, while having a commercial value, do not amount to a significant contribution to the host State's economic life.

190. Quite controversial, however, is whether the activity undertaken, or the asset held, by a foreign national also must fulfil the fourth criterion, that is, to contribute positively to the development of the host State. This criterion is put forward by some ICSID tribunals and annulment committees as a necessary component in light of the ICSID Convention's object and purpose to contribute to economic development, as expressed in its Preamble.¹⁹⁵ Other ICSID tribunals and annulment committees object to the inclusion of this criterion, *inter alia*, because they consider it either as superfluous, as conferring too much discretion on arbitral tribunals and thus creating legal uncertainty, or as limiting access of foreign nationals to ICSID arbitration in light of aspects that should be assessed as part of the merits, rather than jurisdiction, such as whether investments that are harmful to the host State's development receive substantive protection.¹⁹⁶ Again other ICSID tribunals consider that the contribution to the host State's development, while a necessary element of the definition of "investment", should generally be presumed.¹⁹⁷
191. For purposes of establishing jurisdiction in the present case, the Tribunal does not need to address this controversy, as it has no impact on the outcome of the present case. Instead, in the present case, all of the *Salini* criteria are fulfilled, including that of contribution to the host State's development. Thus, Claimants' shareholdings in L&E and, indirectly, in

¹⁹⁵ See, for example, *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006), paras. 27-41 (AL RA 151); *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (17 May 2007), paras. 123 *et seq.*

¹⁹⁶ *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009), paras. 56 *et seq.* (CL-072); *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), para. 111); *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 February 2012), paras. 106-108; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), para. 295; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para. 5.43 (CL-020).

¹⁹⁷ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), paras. 84-85 (AL RA 152).

ENJASA, coupled with the undertakings made as part of the privatization process to invest in the gaming, lottery, and tourism sector in Salta, constitute a substantial commitment of resources by Claimants; this commitment has been made to achieve profits and returns for a substantial duration; and it also entails the assumption of risk.

192. Furthermore, the operation of gaming and lottery activities in Salta also contributed to development in the Province of Salta. Not only did ENJASA employ, at the time its operating license was revoked, approx. 750 employees; the privatization of the operating and gaming industry in the Province also included the commitment to build two schools, one for hoteling, one for gastronomy, as well as a five-star hotel, and to establish a foundation for the purpose of enhancing and promoting education and research in the tourism and gastronomy sectors in Salta. In light of these aspects, Claimants' involvement in the gaming and lottery sector in Salta through their shareholding in L&E and, indirectly, ENJASA also contributed positively to the development in the Province of Salta and, by extension, the Republic of Argentina.
193. Consequently, Claimants' shareholding in L&E and ENJASA also qualifies as an "investment" in the sense of Article 25(1) of the ICSID Convention.

C. Existence of a "dispute arising directly out of an investment" under Article 25(1) ICSID Convention

194. Finally, there is no doubt, in the Tribunal's view, that the present dispute, as required by Article 25(1) of the ICSID Convention, arises directly out of Claimants' investment in Argentina. The directness requirement in Article 25(1) of the ICSID Convention relates to the connection the dispute has to have to the investment; it does not restrict jurisdiction to claims arising out of direct investments.¹⁹⁸ The requirement is met, in the present case, because Claimants' claim that the revocation of ENJASA's license, coupled with the subsequent transfer of ENJASA's operation and employees to new operators, is the cause

¹⁹⁸ See *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997), para. 24 (CL-076) ("It is apparent that the term 'directly' relates in this Article to the 'dispute' and not to the 'investment.' It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction."); see also *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003), paras. 26-27 (AL RA 13); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (22 February 2006), para. 73 (AL RA 32).

of the alleged destruction of Claimants' investment in the gaming and lottery sector in Salta, that is, its (direct) shareholding in L&E and (its indirect shareholding) in ENJASA.

D. Conclusion

195. In light of the above, the Tribunal finds that Claimants have made, in the form of their shareholding in L&E and, indirectly, in ENJASA, an investment in Argentina in the sense of both Article 1(1) of the Argentina-Austria BIT and Article 25(1) of the ICSID Convention. Furthermore, the present dispute arises directly out of Claimants' investment in Argentina, as required by Article 25(1) of the ICSID Convention. By contrast, ENJASA assets, including, but not limited to, its operating license, do not qualify as Claimants' investment for purposes of determining the Tribunal's jurisdiction.
196. Consequently, Respondent's third objection that the Tribunal lacks jurisdiction *ratione materiae* is hereby rejected insofar as it relates to the argument that Claimants have not made an investment in Argentina that is protected under Article 25(1) of the ICSID Convention and Article 1 of the Argentina-Austria BIT. The other aspect of Respondent's third objection related to limitations in the protection of shareholder-investors under the Argentina-Austria BIT, is dealt with together with Respondent's first objection in the following section.

2. Existence of a *Prima Facie* Claim

197. The Tribunal now turns to Respondent's objection that Claimants have not presented a *prima facie* claim for breach of the BIT based on the facts they allege. This encompasses both Respondent's first objection, as well as the part of Respondent's third objection concerning the scope of protection of shareholder-investors under the BIT. In the Tribunal's view, both sets of issues raise questions that concern the scope of substantive protections offered under the Argentina-Austria BIT to foreign investors and their investment.¹⁹⁹

¹⁹⁹ See also footnote 187.

198. As presented by Respondent, the underlying objection does not strictly relate to the jurisdiction of the Tribunal,²⁰⁰ but rather concerns the admissibility of the claim(s) brought. This notwithstanding, such an objection is a valid reason for an investment tribunal to dismiss a case, in whole or in part, at the jurisdictional stage. Such dismissal would be justified both by the principle of judicial economy and by the need to respect the rights and interests of both parties, which is inherent in the idea of fair administration of international justice. After all, it would be both inefficient (for the Tribunal and the Parties) and prejudicial in law and in costs (to Respondent as well as Claimants) to proceed with a claim to the merits, that clearly has no foundation in law, even though the Tribunal otherwise may have jurisdiction over such claim.
199. Respondent's first objection for lack of a *prima facie* claim has two prongs: first, that Claimants' claims arising in connection with the revocation of ENJASA's license have to be qualified as "contract claims" rather than "treaty claims"; and second, that the forum selection clauses in favor of the First Instance Court of Salta in both the Bidding Terms and Conditions and in the Transfer Agreement bar recourse to the present Tribunal for such claims. As already stated, the remaining part of Respondent's third objection equally raises the question to which extent Claimants have presented a *prima facie* claim that the revocation of ENJASA's license and subsequent events have resulted in a breach of Claimants rights as shareholder-investors in L&E and ENJASA under the Argentina-Austria BIT.
200. After addressing the applicable test for determining the existence of a *prima facie* claim, the Tribunal turns to the characterization of the claims brought by Claimants as treaty claims. It then assesses to which extent Claimants have met the threshold to present *prima facie* claims for breach of the Argentina-Austria BIT given the pleaded facts and Claimants' status as shareholder-investors. Finally, the effect of the forum selection clauses on the jurisdiction of the Tribunal is addressed.

²⁰⁰ Respondent's objection could be read as relating to the subject-matter limitations of Respondent's consent in Article 8(1) of the BIT to "dispute[s] [...] concerning any subject matter governed by this Agreement," a question that is relevant as a jurisdictional criterion under Article 25(1) of the ICSID Convention. Yet, Respondent's objection is broader. Respondent is not merely arguing that the Tribunal is limited to assessing the legality of Respondent's action under the BIT, as provided for in Article 8(1) of the BIT. Respondent's argument is that the case presented by Claimants does not *prima facie* give rise to a successful claim for breach of the BIT.

A. The applicable test for determining the existence of a prima facie claim

201. The test for determining the existence of a *prima facie* claim at the jurisdictional stage is well-established in the practice of investment treaty tribunals. It follows the test applied by international courts and tribunals more generally, in particular the ICJ. Based on this jurisprudence, the Tribunal must be satisfied that the facts alleged by Claimants are plausibly capable of constituting a breach of the law applicable to the dispute, that is, in the present case, the Argentina-Austria BIT.

202. The ICJ elaborated the test to determine the existence of a *prima facie* claim in *Ambatielos* as follows:

[...] it is not necessary for that Government [i.e., the Hellenic Government as claimant] to show, for present purposes, that an alleged treaty violation has an unassailable legal basis. [...] If the interpretation given by the Hellenic Government to any of the provisions relied upon appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one, then the *Ambatielos* claim must be considered, for the purposes of the present proceedings, to be a claim based on the Treaty of 1886.

In other words, if it is made to appear that the Hellenic Government is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails, then there are reasonable grounds for concluding that its claim is based on the Treaty.²⁰¹

203. Similarly, in *Oil Platforms*, the ICJ held that, in order to meet the *prima facie* claim, it must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant [to that Treaty].²⁰²

²⁰¹ *Ambatielos (Greece v. United Kingdom)*, Judgment (19 May 1953), ICJ Reports 1953, p. 18 (AL RA 235).

²⁰² *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment (12 December 1996), ICJ Reports 1996, pp. 803, 810, para. 16 (AL RA 6).

204. Rosalyn Higgins, in her Separate Opinion in *Oil Platforms*, famously formulated the *prima facie* test even more plastically as requiring that “[t]he Court should thus see if, on the facts as alleged by [the Applicant], the [Respondent’s] actions complained of might violate the Treaty articles.”²⁰³
205. The same test has been applied consistently in investment treaty jurisprudence. As one of the first cases to address it, the Tribunal in *SGS v. Philippines* held:
- It is not enough that the Claimant raises an issue under one or more provisions of the BIT which the Respondent disputes. To adapt the words of the International Court in the *Oil Platforms* case, the Tribunal “must ascertain whether the violations of the [BIT] pleaded by [SGS] do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain” pursuant to Article VIII(2) of the BIT.²⁰⁴
206. Similar statements can be found in a host of other decisions by investment treaty tribunals.²⁰⁵

²⁰³ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment (12 December 1996), Separate Opinion of Judge Higgins, ICJ Reports 1996, pp. 847, 856, para. 33 (AL RA 8).

²⁰⁴ *SGS Société Générale de Surveillance SA v. The Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction (29 January 2004), para. 26 (AL RA 25). (quoting *Case concerning Oil Platforms (Iran v. USA)*, ICJ, Judgment on Preliminary Objections (12 December 1996), para. 16 (AL RA 6)).

²⁰⁵ *See Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 November 2004), para. 151 (AL RA 9); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005), paras. 118-119 (AL RA 36); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006), paras. 69-71 (AL RA 10); *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction (11 April 2007), paras. 139-141 (AL RA 11); *Saipem v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), paras. 85-86 (AL RA 12); *Encana Corporation v. Republic of Ecuador*, UNCITRAL Case, Partial Award on Jurisdiction (27 February 2004), para. 36 (AL RA 33); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction (17 July 2003), para. 69 (AL RA 13); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003), para. 76 (AL RA 14); *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction (30 July 2004), para. 30 (AL RA 26); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005), para. 254 (AL RA 15); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 185 (AL RA 16); *Mytilineos Holdings SA v. The State Union of Serbia and Montenegro and the Republic of Serbia*, UNCITRAL Case, Partial Award on Jurisdiction (8 September 2006), para. 184 (AL RA 17); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (22 February 2006), para. 63 (AL RA 32); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Jurisdiction (25 August 2006), para. 55 (AL RA

207. The task of the Tribunal under this test is therefore to determine whether the facts pleaded by Claimants, if established to be true, could possibly result in a breach of the Argentina-Austria BIT. This test has implications both for the treatment of questions of fact as well as for questions of interpretation and application of the applicable law at the jurisdictional stage.
208. As for the treatment of facts, the Tribunal must not, as part of its analysis under the *prima facie* test at the jurisdictional stage, determine the veracity of the facts alleged by Claimants or question them in light of factual allegations made by Respondent that would, if found to be true, invalidate Claimants' version of what indeed happened. This exercise of fact-finding is a matter for the merits of the proceedings and requires not only full briefing by both parties, but possibly also the taking of evidence by the Tribunal. What the Tribunal must do instead at the jurisdictional stage under the *prima facie* test is to determine whether the facts as pleaded by Claimants can plausibly result in a finding of breach of the Argentina-Austria BIT, namely of its prohibition of expropriations without compensation, of its obligations to extend fair and equitable treatment, and of its obligation to grant national treatment, as invoked by Claimants.
209. This raises the question as to what the *prima facie* test implies for the Tribunal's task in dealing with competing propositions of the Parties as to the proper interpretation of the applicable law and its application to the alleged facts. This issue is particularly salient in

18); *Telenor Mobile Communications v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006), para. 34 (AL RA 43); *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case, Decision on Jurisdiction (30 April 2010), para. 185 (AL RA 19); *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013), para. 91 (AL RA 20); *Achmea v. The Slovak Republic (II)*, PCA Case No. 2013/12, Award on Jurisdiction and Admissibility (20 May 2014), paras. 206-218 (AL RA 21); *Urbaser S.A. y Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 December 2012), para. 56 (AL RA 41); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003), paras. 144-145 (CL-009); *Wena Hotels Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, in ICSID Reports, Volume 6, p. 86 (CL-109); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004), para. 180 (CL-081); *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006), para. 53 (CL-098); *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), para. 54 (CL-074); *Chevron Corporation and Texaco Petroleum Co. v. The Republic of Ecuador*, PCA Case No. 2009-23, UNCITRAL, Third Interim Award on Jurisdiction and Admissibility (27 February 2012), paras. 4.7-4.8 (CL-052); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), para. 141 (CL-050).

the face of legal indeterminacies and competing legal theories or lines of jurisprudence relating to the applicable law, a phenomenon regularly occurring in investment arbitration. In such a situation, an investment tribunal must steer a careful course. On the one hand, it should take into account the right of both parties to fully present their case and their legal arguments to the Tribunal, including arguments that are novel or go against the predominant views and would hence contribute to the further development of the law. On the other hand, the Tribunal should prevent frivolous, spurious, and legally clearly unfounded cases, which would impose an illegitimate burden on the time and resources of both Respondent and the Tribunal, from going forward to the merits.

210. In finding the right balance, an investment tribunal should not simply rubberstamp Claimants' legal qualification of their case on the merits, but make an independent determination on the interpretation of the applicable law, here the Argentina-Austria BIT.²⁰⁶ At the same time, the Tribunal's independent determination should not, as suggested in *SGS v. Philippines* "require the definitive interpretation of the treaty provision which is relied on,"²⁰⁷ as this may cut short the Parties' possibility of making a full presentation of their case. Instead, the Tribunal's determination of whether a *prima facie* claim exists should be limited to ascertaining whether Claimants' case relies on a plausible interpretation of the applicable law.
211. In determining the plausibility of Claimants' case, the Tribunal should take into account existing legal indeterminacies and ambiguities, as well as competing legal theories or competing lines of prior arbitral jurisprudence. Similarly, as part of establishing the plausibility of Claimants' case in law, room must be made for arguments that are novel or that go against the predominant view on the applicable law. This is necessary in light of the absence of a possibility for an appeal in investment arbitration, which could review findings of law, resolve indeterminacies in the law authoritatively, and allow for the law's further development.

²⁰⁶ Similarly, *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2014), para. 30.

²⁰⁷ *SGS Société Générale de Surveillance SA v. The Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction (29 January 2004), para. 157 (AL RA 25).

212. The Tribunal should therefore limit its assessment of the applicable law in respect of the merits, in the words of the *Ambatielos* case, to determining whether Claimants' case "rel[ies] upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails."²⁰⁸ Only if, as stated in *Mytilineos v. Serbia*, "the facts as pleaded are plainly incapable of supporting a finding of breach of treaty, all or part [of] the claim might fall outside of the jurisdiction of the tribunal."²⁰⁹ In such a case, there is no interest, neither for Claimants nor for the international community, in proceeding with a case to the merits. By contrast, as long as the case fairly raises issues relating to the interpretation and application of the substantive law in question, the claims should proceed to the merits and allow the Parties to plead fully their respective arguments on the interpretation and application of the applicable law.
213. Consequently, the Tribunal's exercise at the present stage of the proceedings does not entail a conclusive determination on the interpretation of the treaty provisions breach which is invoked, nor does it require a conclusive legal qualification of the facts pleaded. Instead, it is sufficient that a plausible argument can be made that a breach of the Argentina-Austria BIT occurred in light of the alleged facts, even if the Tribunal ultimately were to adopt, in its decision on the merits, a different legal interpretation of the applicable law, or apply the law differently to the then determined facts of the case. In other words, under the *prima facie* test, the ultimate legal qualification of the case at hand remains a question reserved to the merits and will be determined conclusively only following a full briefing by both Parties on the factual and legal issues at stake.

B. Characterization of the claims brought by Claimants as treaty claims

214. The Parties in the present case do not differ substantially on the abstract legal test to be applied to determine the existence of a *prima facie* claim; rather their differences lie in the concrete characterization of the claims brought. For Respondent, Claimants merely label their claims as treaty claims, whereas the "essential basis" of those claims, namely the

²⁰⁸ *Ambatielos (Greece v. United Kingdom)*, Judgment (19 May 1953), ICJ Reports 1953, p. 18 (AL RA 235).

²⁰⁹ *Mytilineos Holdings SA v. The State Union of Serbia and Montenegro and the Republic of Serbia*, UNCITRAL Case, Partial Award on Jurisdiction (8 September 2006), para. 184 (AL RA 17).

revocation of ENJASA's license, in Respondent's view, relates to a breach of contract.²¹⁰ To this end, Respondent argues that the License conferred to ENJASA had to be seen as a contractual arrangement²¹¹ and that, in turn, the revocation of the License was equally a contractual matter that fell outside the Tribunal's jurisdiction for treaty claims.²¹² Claimants, by contrast, stress that their claims had to be qualified as treaty claims.

215. In the Tribunal's view, Respondent's first objection relating to the lack of a *prima facie* claim mischaracterizes the nature of Claimants' claim before this Tribunal. In the present proceedings, Claimants do not bring claims for breach of an agreement they are party to with the Province of Salta, such as the Transfer Agreement or the contractual or quasi-contractual arrangements to implement the privatization of the gaming and lottery sector in Salta. Claimants also do not bring claims for the breach of ENJASA's license under the domestic law applicable to that License as such.
216. Rather, for Claimants, the revocation of ENJASA's license, and its consequences on Claimants' investment in Argentina, is the trigger that results in the alleged breach of their rights as foreign investors under the Argentina-Austria BIT. It is Claimants' argument that the revocation of the License did not take place in the normal exercise of ENREJA's regulatory powers, but formed part of a larger plan, an "orchestrated action" aimed at ousting ENJASA, and by prolongation L&E and its shareholders, from their 30-year monopoly in Salta's gaming and lottery sector and redistributing its operations to other operators. Claimants' claim, in other words, is not limited to the question of whether the revocation of ENJASA's license was lawful, under domestic law or otherwise. Claimants are also not bringing a claim on behalf of ENJASA. Instead, they claim that the revocation of ENJASA's license and subsequent events violated their own rights as (indirect) investors in ENJASA under the Argentina-Austria BIT. Claimants thus frame their case as a treaty claim, not as a contract claim.²¹³

²¹⁰ See Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras. 28-39.

²¹¹ Respondent's Post-Hearing Brief, paras. 5-19.

²¹² Respondent's Post-Hearing Brief, paras. 20-26.

²¹³ For the majority of the Tribunal, neither the need for an "investment" to have been made "in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made" (Article 1(1) of the BIT), nor the requirement that "[t]he contents and scope of the rights for the different categories of assets shall be

217. In light of how Claimants frame their claim, it is irrelevant for present purposes whether ENJASA’s license is to be qualified under Argentine law as a contractual or quasi-contractual arrangement. After all, even if it were correct that the License had to be qualified as a contractual or quasi-contractual arrangement, Claimants’ claim is not framed as a breach of that License, but as part of the broader factual matrix just outlined.
218. Furthermore, even if Claimants’ claim was limited to the question whether the revocation of ENJASA’s license – looked at in isolation – resulted in a breach of the Argentina-Austria BIT, there would be a plausible claim that this revocation did not constitute the exercise of a contractual right. Instead, there would be a plausible claim that by the very terms of Resolution No. 240/13, the revocation was based on the authority conferred to ENREJA under Law No. 7020. It concerned, as stated in Resolution No. 240/13,
- a police activity of the government, understood as an “administrative” function which is intended to protect the security, morality or public health [...], which, in the case under analysis, seeks to secure the proper provision of a licensed activity.*²¹⁴
219. In addition, Claimants present a plausible argument that the revocation of ENJASA’s license was not based upon the operation of the contractual termination clause in Article 6 of the Transfer Agreement. As stated in Resolution No. 240/13:
- [T]he revocation of the license as a penalty shall not be confused with the right to *declare, automatically and by operation of law*, the extinction and/or cancellation of the license, provided for in Article 6 of Decree No. 3616/99, which power is vested in the Executive Branch in six events: expiration of the license, breach of the payment of the royalty, violation of the obligations imposed by Article 5 of Law No. 7020, exploitation of any game of chance without ENREJA’s prior authorization and the total

determined by the laws and regulations of the Contracting Party in whose territory the investment is made” (Article 1(1) *in fine* of the BIT), nor the provision that “[t]he arbitral tribunal shall decide the dispute with reference to the laws of the Contracting Party involved in the dispute” (Article 8(6) of the BIT) excludes the assessment of whether the acts of a regulatory authority, such as ENREJA, that affect a foreign investor or its investment and are taken to implement domestic law and regulations, are in line with the substantive standards of treatment in the Argentina-Austria BIT (*contra* Dissent, para. 218).

²¹⁴ Exhibit C-031 p. 21 (emphases in the original).

or partial assignment and transfer of the powers granted in the license without prior authorization of the Executive Branch.²¹⁵

220. Against this background, there is a plausible claim that ENREJA qualified the revocation of ENJASA's license as a sanction in the sense of Article 13 of Law No. 7020 for alleged breaches of ENJASA's legal obligations under Article 5 of Law No. 7020 concerning anti-money laundering provisions and the hiring of operators without ENREJA's authorization. This sanction, in ENREJA's own words, could plausibly be said to be imposed in the exercise of public authority, not as a matter of any contractual authorization.
221. Consequently, even if the present case was limited to the question of whether the revocation of ENJASA's license in and of itself constituted a breach of the Argentina-Austria BIT, and even if the License was to be qualified under Argentine law as a contractual or quasi-contractual instrument, there would still be a plausible claim that the revocation of that License was an act of public power or *puissance publique*. This, in turn, would plausibly allow to qualify a claim concerning the legality of the revocation of ENJASA's license under the BIT as a treaty claim, rather than a contract claim given that a well-established line of jurisprudence of investment treaty tribunals distinguishes between contract claims and treaty claims in cases relating to the termination of investor-State contracts based on whether the termination constituted a commercial act any party to a contract, including a private actor, could engage in, or whether the act in question constituted the exercise of public authority that is to be measured against the standards of treatment in the BIT.²¹⁶

²¹⁵ *Id.*, at p. 31.

²¹⁶ See, for example, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 299 (AL RA 101 / CL-014); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005), para. 281 (AL RA 15); *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Sentence Arbitrale (22 December 2003), para. 65; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 183 (AL RA 16 / CL-013); *Salini Costruttori S.p.A and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 November 2004), para. 155 (AL RA 9); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 443 (AL RA 237 / CL-080); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), para. 315 (AL RA 141); cf. also *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004), para. 161 (AL RA 25); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 174 (AL RA 119).

222. Against this background, the Tribunal therefore concludes in respect of the first prong of Respondent's first objection, that the claims triggered by the revocation of ENJASA's license, as presented by Claimants in the present proceedings, do not constitute contract claims, but relate to the breach of substantive standards granted under the Argentina-Austria BIT and constitute treaty claims.

C. Prima facie breaches of the BIT

223. The Tribunal now turns to determining whether the factual matrix presented by Claimants is *prima facie* able to result in a breach of the substantive rights under the Argentina-Austria BIT, in particular its provisions on expropriation in Article 4 of the BIT, fair and equitable treatment in Article 2(1) of the BIT, and national treatment in Article 3(1) of the BIT. It is in this context that Respondent's third objection insofar as it relates to the scope of protection of shareholder-investors becomes relevant whereby the Tribunal must determine to which extent Claimants as direct shareholders in L&E and indirect shareholders in ENJASA enjoy protection under the substantive treaty standards contained in the Argentina-Austria BIT and have a *prima facie* claim that their rights as shareholder-investors under the treaty have been breached by the revocation of ENJASA's license through Resolution No. 240/13 and subsequent events.

224. In making this determination, the Tribunal therefore addresses not only aspects that are part of Respondent's first objection that Claimants have failed to show the existence of a *prima facie* claim proper, but also those aspects of Respondent's third objection that the Tribunal lacks jurisdiction *ratione materiae* which concern Respondent's claim that, in light of Respondent's construction of Article 4(3) of the BIT, Claimants, as indirect shareholders in ENJASA, are unable to bring claims relating to assets held by ENJASA, in particular claims arising out of the revocation of ENJASA's operating license unless the revocation of the license resulted in an expropriation of "assets"/"financial assets" of ENJASA.

225. The Tribunal will first turn to the question whether Claimants have been able to show a *prima facie* breach of Article 4 of the BIT. In this context, the Tribunal will also address Respondent's argument on the impact of Article 4(3) of the BIT on claims by shareholder-investors, both in respect of expropriation and other causes of action under the Argentina-

Austria BIT. The Tribunal will then analyze whether Claimants have presented a *prima facie* claim for breach of Article 2(1) of the BIT (fair and equitable treatment). Finally, it will assess whether Claimants have presented a *prima facie* claim for breach of Article 3(1) of the BIT (national treatment).

(i) *Prima facie breach of Article 4 of the BIT*

226. Article 4 of the BIT protects investments against uncompensated expropriations and “measures having an equivalent effect;” Article 4(1) and (2) of the BIT provides, as per the translation agreed by the Parties, as follows:

ARTICLE 4

(1) The term “expropriation” includes both nationalization as well as any other measure having an equivalent effect.

(2) The investments of investors of a Contracting Party shall not be expropriated in the territory of the other Contracting Party except for a public purpose, in accordance with due process of law and against compensation. Such compensation shall amount to the value of the investment expropriated immediately before the expropriation or the impending expropriation became public knowledge. Compensation shall be paid without undue delay and shall bear interest until the date of payment, at the customary bank rate of the State in whose territory the investment has been made; shall be effectively realizable and freely transferable. Assessment and payment of compensation shall be adequately provided for no later than at the time of expropriation.

227. The question in the present context therefore is whether the revocation of ENJASA’s license and subsequent events can be understood, in a *prima facie* plausible manner, to result in an expropriation in the sense of Article 4(1) of the BIT of Claimants’ investment, that is, their direct shareholding in L&E as well as their indirect shareholding in ENJASA.

228. Clearly, the revocation of ENJASA’s license and subsequent events do not constitute a direct expropriation, which requires the taking and transfer of title, of Claimants’ investment. Claimants, as is undisputed between the Parties, continue to own title to their shares in L&E and ENJASA. Yet, the notion of expropriation in Article 4(1) of the BIT

also encompasses “measures having an equivalent effect,” that is, so-called indirect or *de facto* expropriations. In the jurisprudence of investment treaty tribunals, it has been held that such indirect expropriations can occur, inter alia, when host State measures, which directly affect assets of the company, substantially and permanently deprive the shareholder-investor of her investment in the shareholding in the company and effectively destroy the value of those shares. In such cases, shareholders can bring claims based on (indirect) expropriation of their shareholding in the host State.²¹⁷

229. Against this background, in the Tribunal’s view, Claimants have presented a *prima facie* claim that the revocation of ENJASA’s operating license and subsequent events qualify as an indirect expropriation – a “measure having an equivalent effect” – with respect to their shareholding in L&E and ENJASA. After all, Claimants claim that without ENJASA’s exclusive operating license, and taking into account the transfer of ENJASA operations to new operators, their investment in Salta’s gaming and lottery sector, as well as the value

²¹⁷ For examples, see only the cases invoked by Claimants to support their *prima facie* claim that an indirect expropriation of their investment as shareholders has occurred through interference with assets of the company in Rejoinder on Jurisdiction, paras. 32-36: *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003), paras. 59, 66-69 (AL RA 13); *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003), paras. 69, 73 (AL RA 14); *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (1 September 2009), paras. 57-62, 76-80, 86-130 (CL-095); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), paras. 35, 43-49, 58-60 (CL-051); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (2 August 2004), paras. 17, 34-35 (CL-096); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004), paras. 125, 136-150 (CL-081); *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004), paras. 26-33 (CL-099); *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005), paras. 54-67 (CL-082); *Sempre Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction (11 May 2005), paras. 73-79 (CL-097); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (22 February 2006), para. 79 (AL RA 32); *Iurii Bogdanov et al. v. Republic of Moldova*, SCC, Award (22 September 2005), para. 5.1 (CL-102); *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006), paras. 68-83 (CL-098); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction (25 August 2006), para. 74 (AL RA 18); *RosInvestCo UK Ltd v. The Russian Federation*, SCC Arbitration No. V (079/2005), Final Award (12 September 2010), paras. 605-609, 625 (CL-103); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), paras. 82-93 (AL RA 96); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013), para. 380 (CL-100); *Yuri Bogdanov & Yulia Bogdanova v. The Republic of Moldova*, SCC Arbitration No. V (091/2012), Final Award (16 April 2013), paras. 167-168 (CL-101); *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, UNCITRAL, Award on Jurisdiction (18 July 2013), paras. 278-285 (CL-104); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (29 December 2014), paras. 150-181, 302-307 (AL RA 145).

of their shares in L&E and ENJASA, have been effectively destroyed.²¹⁸ This satisfies, in the Tribunal's view, the threshold for presenting a *prima facie* claim that Claimants have suffered an indirect expropriation of their investment in Argentina contrary to Article 4(1) and (2) of the BIT.

230. Without prejudging the test ultimately applicable on the merits, it would seem, however, that certain factors will play a role during the merits phase in determining whether a breach of Article 4(1) and (2) of the BIT has occurred. First, it would seem relevant to consider whether the revocation of the License and subsequent acts have substantially and permanently deprived Claimants of the economic benefits attached to their shareholding in L&E and ENJASA. In this context, one issue would seem to be the influence of the circumstance that the Sheraton Hotel Salta remained operative and under ENJASA's control after the revocation of ENJASA's license on the determination of whether an indirect expropriation of Claimants' shareholding in L&E and ENJASA has occurred. Similarly, the fact that Claimants were allegedly offered to continue operating certain parts of their hitherto exclusive gaming and lottery operations would seem to be a factor for consideration in determining the existence of an indirect expropriation, namely whether Claimants' investment has been effectively destroyed.
231. Second, it would seem relevant to consider to which extent the revocation of ENJASA's license constituted a regular exercise of the host State's regulatory power. During the merits phase, it would thus seem to be an issue whether the revocation of ENJASA's license constituted a regular exercise of ENREJA's supervisory powers under Law No. 7020, as argued by Respondent, or whether the revocation constituted an abuse of ENREJA's regulatory powers.

²¹⁸ See Memorial on the Merits, para. 397 ("The revocation of ENJASA's licence without the payment of any compensation in itself destroyed the entirety of Claimants' investment in Argentina. The subsequent transfer of lease agreements and employment contracts to ENJASA's competitors confirmed the definitive taking of the investment, leaving Claimants without any economic basis to continue their investment."). Similarly, Counter-Memorial on Jurisdiction, para. 80 ("[...] by revoking ENJASA's licence, the Argentine Republic prevented Claimants from operating 46 gaming tables in four casinos, 1376 slot machines in 15 slot machine halls and from operating and/or commercializing 14 lottery games. Thus, the revocation enacted in Resolution No. 240/13, destroyed the commercial value of Claimants' investment. There was thus an indirect expropriation of Claimants' investment." – (footnote omitted)).

232. Apart from a *prima facie* breach of Articles 4(1) and (2) of the BIT, the Parties have also debated the role and interpretation of Article 4(3) of the treaty. This article reads, in its authentic German and Spanish versions, as follows:

ARTIKEL 4

[...]

(3) Enteignet eine Vertragspartei die Vermögenswerte einer Gesellschaft, die in Anwendung von Artikel 1 Absatz 2 dieses Abkommens als ihre eigene Gesellschaft anzusehen ist, und an welcher der Investor der anderen Vertragspartei Anteilsrechte besitzt, so wendet sie die Bestimmungen des Absatzes 2 dieses Artikels dergestalt an, daß die angemessene Entschädigung dieses Investors sichergestellt wird.

[...]

ARTICULO 4

[...]

(3) Cuando una Parte Contratante expropie los activos financieros de una sociedad que, conforme con las disposiciones del Artículo 1, apartado 2 del presente Convenio, sea considerada como sociedad perteneciente a esa Parte Contratante y en la cual el inversor de la otra Parte Contratante tuviera derechos de participación, aquella aplicará las disposiciones del apartado 2 de este Artículo de manera tal que la indemnización apropiada del inversor resulte asegurada.

[...]

233. As detailed above, the Parties debated the application of this provision to ENJASA’s operating license in light of the potentially differing meanings of the German term “*Vermögenswerte*” and the Spanish term “*activos financieros*” in the two authentic versions of the BIT. While the German term “*Vermögenswerte*” would seem to cover ENJASA’s license as an asset, as argued by Claimants,²¹⁹ the Spanish term “*activos financieros*” might not, as argued by Respondent.²²⁰ Moreover, for Respondent, Article 4(3) of the BIT limits shareholder-investors, such as Claimants, to claims for expropriation and excludes claims by shareholder-investors for breach of other treaty commitments, such as fair and equitable treatment or national treatment.²²¹

234. As a result of the differences in the authentic German and Spanish versions of Article 4(3) of the BIT, the Parties have provided diverging translations of this provision into English. Indicating the differences in the Parties’ translations, the English text of Article 4(3) of the BIT is as follows:

Where a Contracting Party expropriates the financial [Respondent] assets of a company that, in accordance with the provisions of Article 1, paragraph 2 hereof, is deemed to be a company belonging to that Contracting Party, and in which the investor of the

²¹⁹ Rejoinder on Jurisdiction, paras. 46-60.

²²⁰ Reply on Jurisdiction, paras. 199-211.

²²¹ Reply on Jurisdiction, paras. 212-213.

other Contracting Party owns [Respondent]/has [Claimants] shares, the provisions set forth in paragraph 2 of this Article shall be applied by the former so as to guarantee the appropriate compensation of the investor.

235. It is not necessary that the Tribunal comes to an ultimate conclusion on the interpretation of Article 4(3) of the BIT at the present stage of the proceedings. Instead, it is sufficient that Claimants have presented a *prima facie* plausible construction of Article 4(3) of the BIT. Paraphrasing *Ambatielos*, “[i]f the interpretation [...] relied upon appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one, then the [...] claim must” proceed to the merits.²²²
236. In the Tribunal’s view, Claimants have made out a *prima facie* claim that the revocation of ENJASA’s license resulted in an expropriation of one of ENJASA’s assets, entitling Claimants as indirect shareholders in ENJASA under Article 4(3) of the BIT to compensation. To start with, ENJASA qualifies, as required by Article 4(3), as an Argentine company, as defined in Article 1(2) of the BIT.
237. In addition, Claimants have presented a plausible construction of Article 4(3) of the BIT under which ENJASA’s operating license is protected as an “asset”. In this context, the Tribunal is of the view, that it does not yet have to resolve the Parties’ controversy about the proper interpretation of the notion of “asset” in Article 4(3) of the BIT in light of the differing language used by the German and Spanish versions of the BIT (“*Vermögenswerte*” versus “*activos financieros*”) under the applicable *prima facie* test. What is sufficient, at the present stage of the proceedings, is that Claimants’ construction plausibly covers ENJASA’s operating license as a protected “asset” in the sense of Article 4(3) of the BIT and that the revocation of that License and subsequent events can be plausibly understood as having resulted in an expropriation of ENJASA. Claimants have forwarded such a plausible construction of Article 4(3) of the BIT by arguing that, according to Article 33(4) of the Vienna Convention on the Law of Treaties, the meaning of the German version of Article 4(3) of the BIT should be adopted as it best reconciles the diverging texts.

²²² *Ambatielos (Greece v. United Kingdom)*, Judgment (19 May 1953), ICJ Reports 1953, p. 18 (AL RA 235).

238. Furthermore, Claimants have alleged that the revocation of ENJASA's operating license, and the subsequent transfer of operations to new operators, destroyed ENJASA's business operation in the gaming and lottery sector in the Province of Salta. As pleaded, it is *prima facie* plausible to consider the revocation of the License, and the subsequent transfer of operations to new operators, as an act that results in an expropriation in the sense of Article 4(1) of the BIT of certain of ENJASA's assets or ENJASA as a whole. Also in this context, as the Tribunal has pointed out above, it would seem relevant to consider during the merits stage of the proceedings to which extent the revocation of the License and subsequent events have indeed resulted in a substantial and permanent deprivation of ENJASA's assets under the circumstances and whether the revocation of the License was, or was not, a regular exercise of ENREJA's regulatory powers pursuant to Law No. 7020. For purposes of the present stage of the proceedings, however, Claimants have presented a *prima facie* claim that ENJASA was faced with an expropriation, which in turn could entitle Claimants as ENJASA's indirect shareholder to compensation pursuant to Article 4(3) of the BIT.
239. All in all, with respect to Article 4 of the BIT, in the Tribunal's view, Claimants have made a *prima facie* claim that the revocation of ENJASA's license and subsequent events constituted an indirect expropriation of Claimants' shareholding in L&E and ENJASA contrary to Article 4(1) and (2) of the BIT. Furthermore, Claimants have presented a *prima facie* claim that the revocation of ENJASA's license and subsequent events constituted an expropriation of certain of ENJASA's assets or of ENJASA as a whole which could entitle Claimants to compensation pursuant to Article 4(3) of the BIT.
240. As a final issue, the Tribunal must address Respondent's argument that Article 4(3) of the BIT limits the protection of shareholder-investors under the BIT in cases where the assets of the company have been expropriated, to the exclusion of other standards of protection, such as fair and equitable treatment under Article 2(1) of the BIT, or national treatment under Article 3(1) of the BIT. In this respect, it bears noting that nothing in the text of Article 4(3) of the BIT supports such argument, on a *prima facie* reading of that provision. Instead, the formulation of Article 4(3) of the BIT *prima facie* suggests that that provision was intended to grant shareholder-investors an additional cause of action when a local company, in which a covered investor holds shares, is expropriated.

241. This additional cause of action differs from a claim of shareholder-investors under Article 4(2) of the BIT for an (indirect) expropriation of their shareholding. Under Article 4(3) of the BIT, a claimant would only have to show that assets/financial assets of the company were subject to an expropriation, without the need to demonstrate any detrimental effect on the value of the shareholding. By contrast, for a claim under Article 4(2) of the BIT, the shareholder-investor would need to show that the interference of the host State with assets of the company had an effect on the shareholding that was so severe that it qualifies as a “measure having an equivalent effect” on that shareholding.

(ii) *Prima facie breach of Article 2(1) of the BIT*

242. The Tribunal now turns to determining whether Claimants have presented a *prima facie* claim for breach of Article 2(1) of the BIT. Given the circumstances of the revocation of ENJASA’s license, a breach of Article 2(1) of the BIT, which, as per the English translation agreed between the Parties, requires the Contracting States to “accor[d] at all times fair and equitable treatment” appears *prima facie* plausible. Fair and equitable treatment has been interpreted, *inter alia*, to protect covered investors and their investments against the arbitrary exercise of public powers, as well as against harassment by public authorities, to require public authorities to administer the applicable law in good faith, to entitle foreign investors and their investments to due process, and to protect an investor’s legitimate expectations.²²³

²²³ For examples, see only the cases invoked by Claimants to support their *prima facie* claim that they were not accorded fair and equitable treatment in Counter-Memorial on Jurisdiction, paras. 84-85: *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 348 (CL-016); *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) part VII, para. 7.75 (CL-020); *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 611 (CL-021); *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 309 (CL-018); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), paras. 175, 176 (CL-118); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 99 (CL-011); *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), para. 153 (CL-008); *Waguhi Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009), para. 450 (CL-024); *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 November 2010), para. 300 (CL-025); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), para. 308 (CL-034); *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98 (AL RA 119); *Eureko B.V. v. Republic of Poland*, Partial Award (19 August 2005), paras. 231-233 (AL RA 30); *Biwater Gauff (Tanzania) Ltd. v. United Republic of*

243. These rule of law-elements flowing from fair and equitable treatment have been found to apply not only to action taken directly vis-à-vis the claimant-investor, but also to action the host State has taken in relation to a company in which the investor is a shareholder. In such situations, the shareholder-investor has been considered to have a right, and consequently standing, under the fair and equitable treatment standard that the company in which she has invested is treated in accordance with the above mentioned rule of law-elements.²²⁴
244. In light of the factual circumstances pleaded by Claimants, including that ENREJA's Resolution No. 240/13 was passed in breach of ENJASA's right to be heard, was insufficiently motivated, disproportionate, and based on the retroactive application of

Tanzania, ICSID Case No. ARB/05/22, Award (24 July 2008), paras. 597-599 (CL-031); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011), paras. 158, 159 (CL-090).

²²⁴ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003), paras. 59, 66-69 (AL RA 13); *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003), paras. 69, 73 (AL RA 14); *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006), para. 81 (CL-098); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (22 February 2006), para. 79 (AL RA 32); *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (1 September 2009), paras. 57-62, 76-80, 86-130 (CL-095); *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), paras. 35, 43-49, 58-60 (CL-051); *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (2 August 2004), paras. 17, 34-35 (CL-096); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004), paras. 125, 136-150 (CL-081); *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004), paras. 26-33 (CL-099); *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005), paras. 54-67 (CL-082); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction (11 May 2005), paras. 73-79 (CL-097); *Iurii Bogdanov et al. v. Republic of Moldova*, SCC, Award (22 September 2005), para. 5.1 (CL-102); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction (25 August 2006), para. 74 (AL RA 18); *RosInvestCo UK Ltd v. The Russian Federation*, SCC Arbitration No. V (079/2005), Final Award (12 September 2010), paras. 605-609, 625 (CL-103); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), paras. 82-93 (AL RA 96); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013), para. 380 (CL-100); *Yuri Bogdanov & Yulia Bogdanova v. The Republic of Moldova*, SCC Arbitration No. V (091/2012), Final Award (16 April 2013), paras. 167-168 (CL-101); *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, UNCITRAL, Award on Jurisdiction (18 July 2013), paras. 278-285 (CL-104); *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (29 December 2014), paras. 150-181, 302-307 (AL RA 145); *Bernhard von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), paras. 326 (CL-146); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), paras. 152 ff (CL-008); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), paras. 74 ff (CL-011); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), paras. 100-139 (CL-003); *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007), paras. 289-310 (AL RA-75).

certain regulatory rules, and constituted a sham proceeding that was motivated not by legitimate policies but by local favouritism,²²⁵ there is *prima facie* a plausible claim that any or all of the above mentioned rule of law-elements of the fair and equitable treatment standard were breached in relation to Claimants’ investment in the gaming and lottery sector in Salta through the revocation of ENJASA’s operating license and subsequent acts. Yet, without prejudging the test ultimately applicable on the merits, it would seem relevant to consider, and for Claimants to show, to which extent deficiencies existed in ENREJA’s revocation of ENJASA’s license as alleged by Claimants, or whether instead ENREJA’s action was the regular exercise of its regulatory authority under Law No. 7020 that conformed to the requirements of fair and equitable treatment.

(iii) *Prima facie* breach of Article 3(1) of the BIT

245. While claims for (direct and indirect) expropriation and breach of fair and equitable treatment under the BIT have *prima facie* been demonstrated to be plausible, the Tribunal considers that the invocation by Claimants of a breach of the national treatment provision in Article 3(1) of the BIT has not been substantiated in a plausible manner, therefore failing the *prima facie* test.

246. Article 3(1) of the BIT provides as follows in its authentic German and Spanish versions:

ARTIKEL 3

Behandlung von Investitionen

(1) Jede Vertragspartei behandelt Investoren der anderen Vertragspartei und deren Investitionen nicht weniger günstig als ihre eigenen Investoren und deren Investitionen oder Investoren dritter Staaten und deren Investitionen.

[...]

ARTICULO 3

Tratamiento de las inversiones

(1) Cada Parte Contratante otorgará a los inversores de la otra Parte Contratante y a sus inversiones, un tratamiento no menos favorable que el otorgado a sus propios inversores y a sus inversiones o a los inversores de terceros Estados y a sus inversiones.

[...]

247. The Parties have provided slightly diverging translations into English of this provision. In the Tribunal’s view, these differences, however, are irrelevant for interpreting Article 3(1) of the BIT. This notwithstanding, the Parties’ respective translations are reproduced here as follows:

Translation by Claimants

Translation by Respondent

²²⁵ See Memorial on the Merits, paras. 423-432; Counter-Memorial on Jurisdiction, para. 84.

ARTICLE 3

Treatment of Investments

(1) Each Contracting Party shall treat investors of the respective other Contracting Party and their investments no less favourable than its own investors and their investments or investors from third countries and their investments.

[...]

ARTICLE 3

Treatment of Investments

(1) Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords to its own investors and to their investments or to the investors of any third State and to their investments.

[...]

248. Claimants allege that, after the revocation of its License, ENJASA's operations have been transferred to local operators without the same stringent requirements that ENJASA had to meet at the time the gaming and lottery industry in Salta was privatized in 1999/2000.²²⁶ Moreover, Claimants point out that operating licenses for gaming activities were granted, at least in part, to those operators whose alleged hiring by ENJASA ENREJA had used as a ground to revoke ENJASA's license.²²⁷ Claimants consider both of these factors to result in a breach of Article 3(1) of the BIT.
249. The Tribunal, however, is unable to see how either one of these aspects, or both aspects together, could plausibly result in a breach of Article 3(1) of the BIT. Article 3(1) prohibits nationality-based discriminations between foreign investors and their investments, on the one hand, and national investors and their investments, on the other. Such discrimination, however, presupposes that foreign and national investors and their investments are affected differently, *de iure* or *de facto*, either by the same government measure or by measures that are sufficiently closely connected so as to result in a discriminatory treatment.²²⁸
250. Yet, in the scenario pleaded by Claimants, the Tribunal is unable to detect any *prima facie* discrimination of the type targeted by Article 3(1) of the BIT. First, in light of the above, Article 3(1) of the BIT does not plausibly allow, for purposes of establishing discrimination or differentiated treatment, a comparison of the conditions between the tender process in 1999/2000 and the award of new operating licenses in 2013/2014. Instead, governments remain free to change the conditions for tendering public concessions or licenses for the

²²⁶ See Memorial on the Merits, para. 208; Counter-Memorial on Jurisdiction, paras. 87-88.

²²⁷ See Memorial on the Merits, para. 349.

²²⁸ See Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Protection* (WoltersKluwer 2009) 182-83 (CL-027).

operation of economic activities at different points in time as part of their regulatory powers and their right to regulate. The purpose of non-discrimination provisions is to ensure equal treatment as a precondition for fair competition at any given moment in time, not to freeze market regulation over time. The latter, however, would be the case if operating licenses in 2013/2014 in completely different economic, social, and political circumstances would have to be awarded under the same conditions as in 1999/2000. For the same reason, that is, the need to ensure flexibility in government regulation over time, the Tribunal does not find that Article 3(1) of the BIT can plausibly be interpreted to be violated because the Province of Salta decided to switch from a one-firm monopoly in the gaming and lottery sector in 1999/2000 to a system with multiple operators in 2013/2014.

251. Second, for purposes of the analysis of Article 3(1) of the BIT it is irrelevant that the new operators who were awarded a license in 2013/2014 had been in business relations with ENJASA found to be illegal by ENREJA – which was one of the grounds ENREJA invoked to justify the revocation of ENJASA’s exclusive license. Here again, the revocation of ENJASA’s exclusive license and the award of new non-exclusive licenses to new operators are separate scenarios. The revocation of ENJASA’s exclusive license itself cannot plausibly be considered to have been discriminatory as Claimants do not allege that a license benefitting an investor of another nationality was, in similar circumstances, not revoked. Likewise, the award of the new licences to other operators cannot be plausibly considered to have been discriminatory for Claimants as Claimants had not tendered for these licenses.
252. In respect of the latter, it could have been a *prima facie* plausible claim that Respondent breached Article 3(1) of the BIT if ENJASA had been allegedly prevented from participating, at equal terms with the new operators, in the award of new licenses, or if, because of foreign ownership, it had been treated differently in that process. Yet, this is not Claimants’ claim. They do not argue that they could not have participated in 2013/2014 in the award of new licenses at equal terms with national operators; instead, they claim that the award of licenses to the new operators in 2013/2014 as such resulted in a nationality-based discrimination of Claimants in contravention of Article 3(1) of the BIT. Such a claim, however, cannot be made to be plausible in law. Consequently, the Tribunal finds that

Claimants have been unable to make a *prima facie* claim for breach of Article 3(1) of the BIT.

253. In summary, the Tribunal has now determined that Claimants have presented plausible claims that their rights as foreign shareholder-investors under Articles 4 and 2(1) of the Argentina-Austria BIT *prima facie* have been breached. By contrast, the Tribunal has found that Claimants have not presented a *prima facie* claim for breach of Article 3(1) of the BIT. This finding responds both to aspects of Respondent's first objection and to Respondent's third objection insofar as it relates to the scope of protection of shareholder-investors.

D. The effect of the forum selection clauses

254. Finally, the Tribunal turns to Respondent's argument – the second prong of Respondent's first objection – that the forum selection clauses in both the Bidding Terms and Conditions and the Transfer Agreement affect the Tribunal's jurisdiction. However, in the Tribunal's view, the forum selection clauses in these two instruments do not exclude the Tribunal's jurisdiction.
255. First of all, both clauses do not extend *ratione personae* to the present dispute with Respondent who is not herself party to the Transfer Agreement, nor was involved in the privatization of ENJASA through the public tender in 1999/2000. More importantly, however, both forum selection clauses do not encompass *ratione materiae* Claimants' claims for breach of the BIT. This holds true with respect to both Article 8.3 of the Bidding Terms and Conditions and Article 13.1 of the Transfer Agreement.

(i) Article 8.3 of the Bidding Terms and Conditions

256. Article 8.3 of the Bidding Terms and Conditions, the wording of which, including the Parties diverging translations, is reproduced above,²²⁹ provides that all participants in the public tender process for the sale of Class A-shares of ENJASA by the Province of Salta submit to the exclusive jurisdiction of the ordinary courts of the Province of Salta. It applies to all documents and instruments related to the public tender and the Transfer Agreement.

²²⁹ See *supra* para. 39.

257. However, the wording and context of Article 8.3 also make clear that the forum selection clause only applies to disputes arising out of the public tender and its implementation, that is, disputes of successful as well as unsuccessful bidders who participated in the tender proceeding and who wish to complain, for example, about the conduct of those proceedings. It concerns the submission of participants in the tender process to the jurisdiction of the courts of the Province of Salta in respect of the public tender. By contrast, Article 8.3 of the Bidding Terms and Condition cannot be read so as to cover disputes for breach of the BIT arising in connection with the revocation of ENJASA's license in 2013 and subsequent events, which is entirely unconnected to the privatization of ENJASA in 1999/2000. Such treaty disputes are beyond the remit *ratione materiae* of Article 8.3 of the Bidding Terms and Condition.

(ii) *Article 13.1 of the Transfer Agreement*

258. Article 13.1 of the Agreement, the wording of which is reproduced above,²³⁰ contains a forum selection clause that provides for the exclusive jurisdiction of the courts of the Province of Salta. Yet, this provision does not apply *ratione materiae* to disputes under the BIT in connection with the revocation of ENJASA's operating license and subsequent events.

259. Instead, as becomes clear from its wording, Article 13.1 is limited to disputes arising out of, and relating to the rights and obligations under, the Transfer Agreement. Sentence 2 of Article 13.1 of the Transfer Agreement stipulates that the exclusive jurisdiction of the courts of the Province of Salta applies to all effects derived from the present agreement (“[...] todos los efectos derivados del mismo [ie este contrato]”). From the wording of this forum selection clause, it is therefore clear that disputes under the BIT are not covered *ratione materiae*.

260. What is more, neither the revocation of ENJASA's license in 2013, nor subsequent events, are effects derived from the Transfer Agreement. This is confirmed by Article 7.1.2 of the Transfer Agreement, which deals with consequences arising out of a breach of the buyer's duties under the Agreement after the transfer has been effected. It stipulates that contractual

²³⁰ See *supra* para. 42.

consequences that may attach to the breach of the buyer's obligations, are "without prejudice to those [sections] determined by Law No. 7020, the Regulatory Decree or the License."²³¹ This provision therefore makes clear that the consequences of a breach of the Transfer Agreement, and by prolongation disputes arising therefrom, are independent from sanctions both under the regulatory regime governing gaming in Salta and under the License, and by prolongation disputes arising in that context. Consequently, disputes arising in connection with public law sanctions cannot be regarded as disputes derived from the Transfer Agreement and are thus not subject to the exclusive jurisdiction clause of Article 13.1 of the Transfer Agreement.

261. Given the limited scope *ratione materiae* of both Article 8.3 of the Bidding Terms and Conditions and Article 13.1 of the Transfer Agreement, it is also not necessary to address the question to which extent contractual forum selection clauses are able to waive treaty claims or recourse under the Argentina-Austria BIT. Neither forum selection clause applies *ratione materiae* to the present dispute and, already for this reason, can have no effect on the jurisdiction of the present Tribunal.

E. Conclusion

262. In light of the above, the Tribunal finds that Claimants have met the threshold of presenting *prima facie* claims for breach of Article 4 of the BIT relating to expropriation, and for breach of Article 2(1) of the BIT relating to fair and equitable treatment. Their claims as presented qualify as treaty claims, not contract claims. They have also presented *prima facie* claims that these treaty provisions were breached in relation to Claimants as shareholder-investors in L&E and ENJASA. In particular, the Tribunal found that Article 4(3) of the Argentina-Austria BIT cannot be interpreted *prima facie* as limiting claims by shareholder-investors to breaches of Article 4 of the BIT for expropriation. Moreover, as

²³¹ Exhibit A RA 11: "Si realizada la transferencia de las acciones el Comprador incumpliere con alguna de las obligaciones impuestas por este Contrato y/o el Pliego y/o demás documentación integrante de la licitación, se aplicarán las siguientes sanciones sin perjuicio de las determinadas en la ley 7020, su Decreto Reglamentario y la Licencia." The Parties agreed on the following translation of this clause: "7.1.2. If once the transfer of shares has been performed, the Purchaser failed to comply with any of the obligations arising from this Agreement and/or from the Bidding Terms and Conditions and/or any other documents that form part of the Bidding Process, the following penalties shall apply, notwithstanding those penalties set forth in Law No. 7020, its Regulatory Decree and the License."

indicated above, the forum selection clauses in the Bidding Terms and Conditions as well as the Transfer Agreement have a limited scope, which does not cover claims for breach of the Argentina-Austria BIT arising out of the revocation of ENJASA's license and subsequent events. By contrast, Claimants have, in the Tribunal's view, not been able to present a *prima facie* claim for breach of Article 3(1) of the BIT relating to national treatment. The Tribunal therefore rejects Respondent's objection relating to a lack of a *prima facie* claim insofar as it relates to claims for breach of Articles 2(1) and 4 of the BIT, but upholds it with respect to Claimants' claim for breach of Article 3(1) of the treaty.

3. Respondent's Consent to Arbitrate

263. Finally, Respondent objects that she has not validly consented to arbitrate the present dispute under Article 8 of the BIT. Her objection rests, at its core, on the view that Claimants have not complied with the various and sequential requirements Article 8 of the BIT sets out for Austrian investors to follow prior to submitting their claim to ICSID arbitration. In Respondent's view, Claimants have not, contrary to Article 8(2) of the BIT, submitted the dispute now pending before this Tribunal to domestic courts after the amicable consultations they initiated on 30 April 2014 (for CAI), respectively 7 August 2014 (for CASAG), and have not, contrary to Article 8(3) of the BIT, waited for the lapse of 18 months while that dispute was pending in domestic courts, nor for a decision on the merits of that dispute.
264. Furthermore, Respondent argues that any dispute submitted by ENJASA before domestic courts in order to review the legality of the revocation of its operating license could not fulfill the requirements under Article 8(2) and (3) of the BIT as that dispute was not identical, in terms of the parties and the causes of action, to the dispute pending before this Tribunal. Moreover, Respondent argues that these claims, even if they qualified as domestic recourses under Article 8(2) and (3) of the BIT, were not preceded by amicable consultations for six months, as required by Article 8(1) and (2) of the BIT.
265. Instead, what Claimants should have done, according to Respondent, in order for this Tribunal to have jurisdiction, is to bring a claim for breach of the BIT in Argentine courts after initiating amicable consultations and waiting for six months, and only proceed to international arbitration once that claim had been pending domestically for 18 months or

had not been granted on the merits. Respondent also contends that the necessary recourses for breach of the BIT exist under Argentine law and that they are capable of leading to a resolution of such a dispute within 18 months.

266. Furthermore, for Respondent the alleged breach of the BIT – and thus also the dispute to which it led – arose only with the issuance by ENREJA of Resolution No. 315/13, not with the issuance of Resolution No. 240/13. The latter, Respondent argues, was not a final decision and therefore no dispute under the BIT could have existed yet. Consequently, ENJASA’s Recourse for Reconsideration against Resolution No. 240/13 could not be considered as a submission of the dispute to “the competent administrative or judicial jurisdiction” in the sense of Article 8(2) of the BIT. For Respondent, Resolution No. 315/13 was also not a “decision rendered” in the sense of Article 8(3)(b) of the BIT.
267. As a subsidiary argument, Respondent further points out that, even if ENJASA’s recourses against Resolutions Nos. 240/13 and 315/13, in particular its Action for Annulment brought in the First Instance Court of Salta on 5 February 2014, were considered to fulfill the domestic remedy requirement under Article 8(2) of the BIT, Claimants’ initiation of the present arbitration on 4 December 2014 would have been premature, as ENJASA’s domestic recourse had not been pending for 18 months yet, nor had it resulted in a decision on the merits. Finally, Respondent considers that, in all events, Article 8(4) of the BIT bars this Tribunal’s jurisdiction as ENJASA’s claims against the revocation of its operating license in domestic courts have not been withdrawn.
268. Claimants view the application of Article 8 of the BIT differently, as regards both that provision’s abstract interpretation and its concrete application to the facts of the case. In Claimants’ view, Article 8 of the BIT only provides, with its duty to engage in amicable consultations and to submit the dispute to domestic courts or an administrative jurisdiction, requirements that affect the admissibility of claims; it does not, by contrast, establish jurisdictional conditions, or conditions precedent, of Respondent’s consent, which must be fulfilled prior to the initiation of its claims before the Tribunal.
269. Furthermore, Claimants consider that ENJASA’s Recourse for Reconsideration against Resolution No. 240/13, which resulted in Resolution No. 315/13, fulfilled the requirement in Article 8(2) of the BIT to have recourse to a domestic administrative jurisdiction. The

issuance of Resolution No. 315/13, in turn, constituted, in Claimants' view, a decision on the merits in the sense of Article 8(3)(b) of the BIT, which allowed it to submit the dispute to international arbitration. These procedural steps, Claimants further point out, were accompanied by various meetings with representatives of the Province of Salta in order to discuss how ENJASA's license could be reinstated. In Claimants' view, the domestic recourses ENJASA had submitted in the present case were the only available and pertinent remedies within Argentina's domestic legal order to address the grievance Claimants allege to have suffered. Bringing claims for violation of the BIT against Respondent in her domestic courts, as suggested by Respondent, in Claimants' view, was not possible and in any event futile within the 18 months-framework Article 8(3)(a) of the BIT establishes.

270. In addressing the present objection, the Tribunal will, first, address the source and existence of Respondent's consent and the nature of the pre-arbitral requirements contained in Article 8 of the BIT. It will then turn to the question of Claimants' compliance with the requirement to conduct amicable consultations for a certain duration in Article 8(1) and (2) of the BIT, address Claimants' compliance with Article 8(2) and (3) of the BIT, and finally turn to the arguments concerning Article 8(4) of the BIT.

A. Source and existence of Respondent's consent and nature of the pre-arbitral requirements in Article 8 of the BIT

271. In dispute settlement proceedings under public international law, consent is the cornerstone of, and *conditio sine qua non* for, the jurisdiction of an international court or tribunal. This has been held consistently in the jurisprudence of the ICJ.²³² Similarly, as a key element for the jurisdiction of ICSID tribunals under Article 25(1) of the ICSID Convention, the consent of both parties to submit the dispute to the Centre is needed.²³³ Whether, in the

²³² See *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Objections, Judgment (15 June 1954), ICJ Reports 1954, pp. 19, 32 (AL RA 199); *East Timor (Portugal v. Australia)*, Judgment (30 June 1995), ICJ Reports 1995, pp. 90, 104-105, para. 34 (AL RA 200); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment (3 February 2006), ICJ Reports 2006, pp. 6, 39-40, para. 88 (AL RA 39).

²³³ *Daimler Chrysler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), para. 168 (AL RA 96); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 116 (AL RA 38). See also Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between

present instance, consent has been given by Respondent and whether, together with Claimants' consent, it can be relied on by the Tribunal as a basis of jurisdiction, is a question of interpreting Article 8 of the BIT pursuant to the rules on treaty interpretation in the Vienna Convention on the Law of Treaties.

272. In this context, it is important to note that Article 25(1) of the ICSID Convention does not require that the Parties' consent is cast in the form of a contractual or contract-like "arbitration agreement" or "agreement to arbitrate."²³⁴ It is equally possible that parties express their consent in the absence of privity, for example when the host State consents in advance and in relation to a generally defined class of potential claimants in an international investment treaty, and the claimant investor consents by bringing a concrete claim for breach of that treaty.
273. In the latter scenario, analogies with contract-based arbitration and inter-State arbitration on the basis of compromissory clauses in international treaties should be treated with caution. Investment treaty arbitration is very different from contract-based arbitration, even if both take place under the ICSID framework. It does not involve the assessment of whether breach of an agreement concluded between the disputing parties has occurred, but whether the respondent State abided by commitments made in an international treaty concluded with the claimant investor's home State. But investment treaty arbitration is also different from inter-State arbitration because its disputes, while governed by public international law, are resolved between investors and host States. Investment treaty arbitration involves the review of legality under public international law of the host State's conduct initiated by an affected foreign investor. In terms of its function, it has therefore been likened to mechanisms of judicial review found domestically in administrative or constitutional courts or internationally in human rights courts.
274. These specificities of investment treaty arbitration also affect how investment treaty tribunals should analyze pre-arbitration requirements contained in the investor-State dispute settlement provisions of BITs. First, because its jurisdictional basis is not a

States and Nationals of Other States, 18 March 1965, para. 23 (AL RA 154) (providing that consent "is the cornerstone of the jurisdiction of the Centre").

²³⁴ *Contra* Dissent, paras. 4, 10, 19, 39, 43-56, 61, 65, 80, 188, 189, 191, 202-205.

contract, an investment treaty tribunal should not ask whether Respondent's offer to arbitrate in the BIT was matched by Claimants' acceptance, including compliance with any strict pre-arbitration requirement, so as to result in a contractual "arbitration agreement." Instead, like in the context of dispute settlement under public international law, compliance with pre-arbitration requirements in a BIT should be analyzed as a question concerning the validity of the seisin of the Tribunal.²³⁵

275. Yet, unlike in inter-State dispute settlement, where the ICJ has insisted, in certain cases,²³⁶ on the strict compliance with conditions of seisin under compromissory clauses, the Tribunal considers that, unless pre-arbitration requirements are formulated clearly and unmistakably as strict conditions to the validity of seisin, in investment treaty arbitration a more flexible and less formalistic approach is warranted. Such less formalistic approach is more in line with the object and purpose of investment treaties to promote and protect foreign investment for the development of economic cooperation between States. Moreover, investors – who are, unlike States, not subjects of public international law – cannot be expected to be accustomed to the formalities of inter-State communication and inter-State dispute settlement. Consequently, absent a clear and unmistakable formulation to the contrary, investors should not be held to the formalities of public international law dispute settlement with the same strictness as States.
276. These considerations also affect the interpretation of Article 8 of the Argentina-Austria BIT. Article 8 of the BIT is the dispute settlement provision of a treaty, whose object and purpose is to promote and protect foreign investment. It cannot be seen in a pure inter-State context but is in fact addressed to investors, entitled to protection, and consequently has to be interpreted in that light.²³⁷ This does not mean that pre-arbitration requirements are

²³⁵ For this conceptual approach see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment (1 April 2011), ICJ Reports 2011, pp. 70, 121 *et seq.*, paras. 122 *et seq.*

²³⁶ See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment (3 February 2006), ICJ Reports 2006, pp. 6, 39-40, para. 88 (AL RA 39); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment (1 April 2011), ICJ Reports 2011, pp. 70, 125 *et seq.*, paras. 132 *et seq.* For the alleged relevance of these cases, see Dissent, paras. 6, 33-37, 92-93, 186.

²³⁷ Similarly, Article 36(2) of the Vienna Convention on the Law of Treaties, which provides that a non-party

optional. On the contrary, they remain, in principle, mandatory requirements. But – again, unless the pre-arbitration requirements are formulated clearly and unmistakably to require the same formalistic approach in assessing compliance with them – an investment treaty tribunal should accord greater flexibility to the disputing parties than the ICJ accords to conditions of seisin under compromissory clauses. It is against this background that the Tribunal proceeds to analyzing Article 8 of the Argentina-Austria BIT.

277. In the Tribunal’s view, Respondent’s consent to arbitrate disputes under the BIT is contained in the first sentence of Article 8(4) of the BIT, which provides, as per the English translation agreed to by the Parties, that “under the terms of this Agreement, each Contracting Party irrevocably consents in advance to the submission of any dispute to arbitration.” This provision is a clear, certain and unequivocal manifestation of the consent of both Argentina and Austria to arbitrations initiated by investors of the other Contracting State. As stated in Article 8(4) of the BIT, this consent has been given “irrevocably” and “in advance” at the time the treaty entered into force.
278. As per the wording of Article 8(4) of the BIT, the consent of the two Contracting Parties to the BIT, therefore, does not only come into existence after any pre-arbitral requirements contained in Article 8 of the BIT have been fulfilled by the investor prior to her submission of the dispute to ICSID arbitration; instead, the two States’ consent to arbitrate has existed all along since the time the Argentina-Austria BIT has entered into force. In light of the clear wording of Article 8(4) of the BIT, there is no room here for the conclusion other tribunals have reached on the basis of differently worded Argentine BITs, notably in *ICS v. Argentina*, that prior to the fulfillment of pre-arbitral requirements contained in a BIT’s investor-State dispute settlement clause, “[c]onsent is nonetheless not yet present.”²³⁸
279. The fact that consent to arbitrate disputes with an investor has been given in advance and irrevocably in the relationship between the two Contracting States to the Argentina-Austria

beneficiary third State “shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty,” can play no role in the current context. As investors are not States, the rules for beneficiary third States under Article 36(2) of the Vienna Convention are not applicable to the relations between host States and investors covered under the BIT.

²³⁸ *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award in Jurisdiction (10 February 2012), para. 262 (AL RA 40).

BIT at the time the BIT entered into force also affects the legal nature of the requirements contained in Article 8 of the BIT. Since Respondent's consent clearly already existed since the time the BIT has entered into force, the pre-arbitral requirements laid down in Article 8 of the BIT, such as the need for amicable consultations in Article 8(1), or the need for prior recourse to domestic remedies in Article 8(3), cannot be viewed as constituting conditions precedent to the Respondent's consent, non-compliance with which prior to initiating the present arbitration would automatically and necessarily exclude the Tribunal's jurisdiction, as held by other tribunals on the basis of differently worded Argentine BITs.²³⁹ Instead, rather than affecting the existence of Respondent's consent to arbitrate, the pre-arbitral requirements in Article 8 of the BIT establish a procedure Claimants have to follow before the Tribunal can exercise jurisdiction over the merits. This procedure concerns the "how" and "when" of the Tribunal's exercise of jurisdiction, not its "whether."

280. In that sense, the pre-arbitral requirements in Article 8 of the BIT concern the validity of Claimants' seisin and do not go, as conditions precedent to Respondent's consent, to the question of jurisdiction. This does not mean, as stated above, that the pre-arbitral requirements in Article 8 of the BIT are optional; they cannot be modified and their sequence cannot be altered. On the contrary, they have to be complied with before the Tribunal is able to proceed to analyzing the case on the merits. Yet, unless pre-arbitral requirements are formulated clearly as conditions precedent for the respondent State's consent, they do not all necessarily need to be complied with prior to initiating the present arbitration, but can also be fulfilled, as further detailed below, subsequent to that point in time and until a decision on jurisdiction is taken. This is one way how excessive formalism, which is inapposite in investment treaty arbitration, should be avoided.
281. That the pre-arbitral requirements set out in Articles 8(1)-(3) of the BIT do not constitute conditions precedent to Respondent's consent, also becomes clear from the wording of Article 8(4) itself. While the Spanish version of that provision uses the term "*condiciones*",

²³⁹ See *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), para. 183 (AL RA 96); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011), para. 94 (AL RA 46); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 160(2) (AL RA 38).

a term that could lend itself to the view that the requirements in Article 8 conditioned Respondent's consent, the German version simply speaks of "*Bestimmungen*" (i.e., provisions), not "*Bedingungen*" (i.e., conditions), under which Respondent has given its consent. As the more differentiated use of words in the German version thus makes clear, the Contracting States to the BIT did not establish the pre-arbitral requirements in Article 8 of the BIT as conditions precedent to the existence of the host State's consent to investor-State arbitration, but rather as mandatory procedural steps investors have to take before a claim can be decided by an international arbitral tribunal on the merits.

282. Against this general background, the Tribunal now turns to addressing what the pre-arbitral requirements contained in Article 8(1), (2) and (3) of the Argentina-Austria BIT require of Claimants and whether they have complied with them.

B. Amicable consultations pursuant to Article 8(1) of the BIT

283. Article 8(1) of the BIT provides, as per the agreed English translation of the Parties, as follows:

Any dispute with regard to investments between an investor of one of the Contracting Parties and the other Contracting Party concerning any subject matter governed by this Agreement shall, as far as possible, be settled through amicable consultations between the parties to the dispute.

284. This provision establishes an obligation that investor-State disputes under the Argentina-Austria BIT be settled amicably. Yet, Article 8(1) of the BIT contains no more than a soft or "best efforts" obligation incumbent on both parties to try to settle the dispute through amicable consultations. As the wording of Article 8(1) of the BIT makes clear, this obligation only exists, per the agreed translation of the Parties into English, "as far as possible." Consequently, if there are reasons why consultations are not possible at all (for example because there is no willingness to find a negotiated settlement between the Parties, or because the time-limits under domestic law for initiating the domestic recourses provided for under Article 8(2) of the BIT do not permit for negotiations to be pursued) or there are reasons why consultations cannot be pursued for full six months as envisaged by Article 8(2) of the BIT (for example because the time-limits under domestic law for initiating the domestic recourses provided for under Article 8(2) are shorter than six

months), Article 8(1) of the BIT does not mandate the Parties to pursue negotiations, depending on the circumstance, either at all or beyond the point in time when the domestic remedies mentioned in Article 8(2) of the BIT have to be initiated.

285. Against this background, the Tribunal is of the view that Claimants have complied with the requirement to conduct amicable consultations to settle the dispute pending before the Tribunal. Already on 27 August 2013, and therefore before any formal steps were taken by ENJASA to contest the validity of ENREJA's Resolution No. 240/13, Mr. Tucek, the CEO of CASAG, met with representatives of the Province of Salta and of ENREJA to discuss what steps needed to be undertaken in order to reinstate ENJASA's exclusive license. Further meetings between representatives of Claimants and the Province of Salta addressing the consequences of the revocation of ENJASA's license took place after ENJASA had submitted its Recourse for Reconsideration against Resolution No. 240/13.
286. Although the principal point at issue during these meetings was the reinstatement of ENJASA's license, agreement on this issue would have settled any dispute between Claimants and Respondent under the BIT and avoided that the present proceedings be brought. In addition, representatives of Claimants were already involved in these negotiations, indicating that the issues at stake were not limited to the relationship between ENJASA and ENREJA, or the Province of Salta, but already concerned the rights and interests of the foreign shareholders in ENJASA. Finally, ENJASA's Recourse for Reconsideration against Resolution No. 240/13, even if only in the form of a reservation of rights, expressly alluded to the breach of the Argentina-Austria BIT resulting from the revocation of the License. All of this shows that the "dispute", at the time, was not limited to claims for breach of domestic law between ENJASA and ENREJA, or the Province of Salta, but already concerned the rights of Claimants as foreign investors under the Argentina-Austria BIT.
287. In that context, the Tribunal accepts that Article 8(1) of the BIT contains a broad understanding of the "dispute" that must form the object of amicable consultations. Differently from what is provided for under the inter-State dispute settlement provisions in

Article 9 of the BIT,²⁴⁰ Article 8(1) does not require that the dispute needs to relate specifically to the interpretation and application of the BIT to the case at hand. Instead, under Article 8(1) of the BIT, it is sufficient that the “dispute” be “with regard to investments [...] concerning any subject matter governed by this Agreement.” This way of framing the notion of “dispute”, in the Tribunal’s view, encompasses not only treaty claims between the parties to the present proceedings, but any dispute that relates to how investments protected under the treaty are treated by authorities of the host State. In the present circumstances, the notion of “dispute” also covers negotiations concerning the reinstatement of ENJASA’s license, even if at the time the breach of the BIT was not raised as the principal argument. Such a controversy qualifies as a dispute “with regard to” a covered investment and “concer[ns] any subject matter governed by this Agreement.”

288. Furthermore, while the meetings and consultations took place between representatives of Claimants and of the Province of Salta, they fulfill, in the Tribunal’s view, the need for Claimants to attempt the settlement of the dispute with Respondent, as the acts of the Province of Salta are attributable under international law to the Argentine Republic pursuant to Article 4(1) of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.
289. The Tribunal also has no indication of fact to conclude that Claimants engaged in these negotiations, which they initiated, without the genuine intention of trying to settle the dispute arising out of the revocation of ENJASA’s license amicably. In the Tribunal’s view, it cannot be required that Claimants furnish positive evidence of the existence of such genuine intentions in the absence of clear indications suggesting their absence.
290. Finally, it needs to be noted that what is relevant in this context is not that, at the time, Claimants deliberately and intentionally qualified or denominated their actions as “amicable consultations” in the sense of Article 8(1) of the BIT; relevant is only that, objectively an attempt at settling the dispute has been made prior to initiating the domestic recourses mentioned in Article 8(2) and (3) of the BIT. As the Tribunal has laid out

²⁴⁰ Article 9(1) of the BIT provides that “[a]ny dispute concerning the interpretation or application of this Agreement shall, whenever possible, be settled through diplomatic channels.”

above,²⁴¹ substance, in this context, should be preferred over form. Amicable consultations under Article 8(1) of the BIT do not require the same formalities as the use of “diplomatic channels” by the BIT’s contracting States parties under Article 9(1) of the BIT as the first step in their inter-State dispute settlement under the BIT.

291. Consequently, that Claimants have again initiated, what in their view at the time were “amicable consultations” with the Argentine Republic through their letters of 30 April 2014 (in the name of CAI) and of 7 August 2014 (in the name of CASAG) is immaterial for purposes of determining whether Claimants have complied with the pre-arbitration requirements in Article 8 of the BIT before. The renewed initiation of consultations from 30 April 2014 onwards would not override or invalidate the fact that earlier amicable consultations had taken place that fulfilled Article 8(1) of the BIT.
292. Against this background, the Tribunal is satisfied that Claimants have fulfilled the prior consultation requirement provided for in Article 8(1) of the BIT with the meeting between Mr. Tucek and representatives of the Province of Salta of 27 August 2013 and its follow-ups before ENJASA initiated its Action for Annulment against Resolutions Nos. 240/13 and 315/13.

C. Compliance with Article 8(2) and (3) of the BIT

293. Article 8(2) and (3) of the BIT provides, indicating slight, but immaterial differences in the translations of the Parties, as follows:
- (2) If the dispute cannot be settled through consultations within a term of six months, the dispute may be submitted to the competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment was made.
 - (3) The dispute may be submitted to an arbitral tribunal in the following cases:
 - a) where, after a period of eighteen months has elapsed from the date of notification of the initiation of the proceeding before the afore-mentioned jurisdiction [Respondent]/authorities [Claimants], no decision was rendered on the merits;

²⁴¹ See *supra* paras. 275-276.

b) where such decision has been rendered, but the parties are still in dispute [Respondent]/the dispute persists [Claimants]. In such case, recourse to the arbitral tribunal shall render ineffective any decision previously adopted at the national level;

c) where the parties to the dispute have so agreed.

294. Thus, in addition to the need to engage in amicable consultations pursuant to Article 8(1) of the BIT, Article 8(3) provides for conditions under which the dispute can be submitted to an arbitral tribunal. Apart from the – presently not relevant – case of the parties’ agreement (Article 8(3)(c)), this can occur if the dispute has been submitted, either for 18 months without a decision on the merits (Article 8(3)(a)) or until such a decision is rendered without resolving the dispute (Article 8(3)(b)), to one of the domestic jurisdictions or authorities referred to in Article 8(2) of the BIT. Thus, before Claimants are able to proceed to ICSID arbitration, they need to have obtained either a decision on the merits by a domestic judicial or administrative jurisdiction or waited for such a decision for 18 months. Furthermore, Article 8(2) of the BIT provides that the submission to the domestic jurisdictions or authorities should be preceded by unsuccessful amicable consultations for six months.

295. To determine whether these requirements have been fulfilled in the present case, the Tribunal will first address the nature of the dispute that must have been submitted to a domestic judicial or administrative jurisdiction. It then addresses whether any of the domestic recourses initiated by ENJASA fulfills the requirement in Article 8(2) of the BIT to have recourse to the “competent administrative or judicial jurisdiction.” Subsequently, the Tribunal addresses whether Claimants have complied with the requirement in Article 8(3)(a) of the BIT that the dispute must have been pending for 18 months in a domestic jurisdiction.

(i) *The notion of dispute in Article 8 of the BIT*

296. A first issue that must be addressed in this context by the Tribunal is whether the recourse to a domestic jurisdiction required under Article 8(3) of the BIT must involve, as argued by Respondent, a dispute identical to that submitted to ICSID arbitration, that is, a dispute between identical parties and relating to an identical cause of action, namely a breach of the BIT, or whether it is sufficient, as argued by Claimants, that the dispute in the domestic

context involves substantially similar facts, without the need for identity between the parties and causes of action. Only if Respondent's position was the correct one, would it be necessary for the Tribunal to determine the issue, which was highly contested between the Parties and their experts, whether recourses of shareholder-investors for liability of the federal State for breach of a BIT in case the complained of conduct originated from conduct of one of the federated provinces are possible within Argentina's domestic legal order or not and whether they can result in a decision on the merits within 18 months.

297. In the Tribunal's view, the notion of "dispute" for which recourse to domestic remedies must be had pursuant to Article 8(3) of the BIT cannot be understood in the narrow terms presented by Respondent. Instead, the notion of "dispute" under Article 8(3) of the BIT must be understood, as already pointed out above in the context of Article 8(1) of the BIT,²⁴² in a broad manner. What is relevant, in the Tribunal's view, is not that the specific cause of action, i.e., liability for damages for breach of the BIT, has been examined domestically in proceedings between identical parties to the present arbitration, but that a domestic jurisdiction had the opportunity to correct the complained about measure, thus avoiding the need for formal international dispute settlement through investor-State arbitration. This is all that is required in order to meet the object and purpose of a domestic-remedies-first provision, such as Article 8(3) of the BIT, namely to provide domestic institutions with an opportunity of self-correction.²⁴³
298. In the present case, exactly such an opportunity, which would have avoided the need for formal recourse to investor-State arbitration was afforded in Argentina's domestic legal order when ENJASA challenged the legality of the revocation of its operating license, first through its Recourse for Reconsideration against Resolution No. 240/13, and later through its Action for Annulment against Resolution No. 315/13. Incidentally, also in this respect, it bears noting that ENJASA's Action for Annulment made the argument that the revocation of the License constituted a breach of the Argentina-Austria BIT.²⁴⁴ ENJASA

²⁴² See *supra* para. 287.

²⁴³ Cf. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012), para. 135 (CL-137); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), para. 148 (CL-134).

²⁴⁴ See Exhibit C-221, pp. 130.-131.

Action for Annulment thus already vindicated the treaty claims pending before the Tribunal, even though the domestic recourse was between different parties and involved a different remedy.

299. That this reading of the notion of “dispute” in Article 8 of the BIT is the correct one also follows from a look at the text of Article 8 of the BIT *in toto*. Thus, Article 8(2) of the BIT provides that the “dispute” in question “may be submitted to the competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment was made.” In particular the fact that Article 8(2) of the BIT speaks of the possibility that the “dispute” may be submitted to the competent “administrative jurisdiction” is a clear indication that the contracting parties to the Argentina-Austria BIT did not understand the notion of “dispute” in Article 8(2) and (3) of the BIT to be limited to treaty claims between the parties to the later international arbitration.
300. Indeed, it is uncommon that claims for breach of an international treaty are assigned to an “administrative jurisdiction,” that is, administration-internal adjudicatory recourses entertained by bodies or entities that are part of the executive, rather than the judiciary.²⁴⁵ In fact, the Tribunal has not been pointed to the existence of such a mechanism in either the Republic of Austria or the Republic of Argentina where claims for the breach of a BIT between foreign investors and the host State could be resolved by an “administrative jurisdiction.”
301. Article 8(4), second sentence of the BIT, in turn, confirms this broad understanding of “dispute.” It requires that “[f]rom the commencement of an arbitration proceeding, each party to the dispute shall take all the required measures to withdraw the pending judicial proceedings.” As detailed further below, this obligation of the parties is not limited to

²⁴⁵ That this is the interpretation to be given to the notion of “administrative jurisdiction” becomes particularly clear from the German version of Article 8(2) of the BIT, which speaks of “*Verwaltungsverfahren*” (i.e., proceedings before administrative agencies or bodies) not “*Verwaltungsgerichtsverfahren*” (i.e., proceedings before administrative courts). To the same effect, the German version of Article 8(3)(a) of the BIT speaks of “*Behörden*” as the superordinate concept covering “the competent administrative or judicial jurisdiction,” not of “*Gerichte*”. “*Gerichte*”, however, would have been the correct technical term, if what was intended by the use of the contracting parties of the term “the competent administrative jurisdiction/authorities,” was a reference to proceedings before an administrative court, rather than before an administrative entity or body that is part of the executive, not the judiciary. The Spanish version of the BIT, in turn, uses the generic term “*jurisdicción*”, which can equally be used to refer to proceedings before administrative courts and administration-internal recourses.

withdrawing from domestic courts a pending treaty claim between the identical parties to the present proceedings, but covers the broader set of proceedings that relates to the same factual matrix as the present proceedings, whether between identical parties or between the local subsidiary of foreign shareholder-investors and domestic authorities with separate legal personality under domestic law from the respondent State.

302. Finally, the narrow reading of the notion of “dispute” supported by Respondent would have the effect that shareholder-investors who wish to vindicate their rights as protected investors under the BIT could only do so in an investor-State arbitration after two types of domestic proceedings have been pursued: first, a recourse by the locally incorporated company against the government’s conduct itself (as otherwise the effects of that act would also become binding and un-appealable for the shareholder under domestic law); and secondly, a recourse by the shareholder-investor before domestic courts for damages based on an alleged breach of its rights under the BIT. Recourse to treaty-based arbitration, in turn, would then only be open after the second type of proceedings had been pursued for at least 18 months, or until a decision on the merits in those proceedings has been issued. Such inefficiencies in the system of recourses under a BIT would not merely provide domestic institutions with an opportunity of self-correction; they would unnecessarily increase the length and costs of dispute settlement proceedings between foreign investors and host States. That this is what the contracting parties to the BIT intended to do by agreeing on a domestic-courts-first requirement in Article 8(2) and (3) of the BIT is hard to imagine and does not result in a good faith reading of Article 8(2) and (3) of the BIT under the rules on treaty interpretation of the Vienna Convention.
303. Against this background, it is not surprising that investment treaty tribunals have often adopted a broader notion of dispute to determining whether domestic-remedies-first requirements in investment treaties have been complied with in cases involving investor-State dispute settlement provisions similar to Article 8 of the Argentina-Austria BIT. Thus, the tribunal in *Teinver v. The Argentine Republic* ruled that

international legal remedies may apply “different law to different parties” than local law remedies do, and this should not be a barrier to the fulfillment of any local court remedy requirements.²⁴⁶

304. Similarly, the tribunal in *Philip Morris v. Uruguay* concluded that the term “disputes”, as used in Article 10(2), is to be interpreted broadly as concerning the subject matter and facts at issue and not as limited to particular legal claims, including specifically BIT claims. The dispute before domestic courts under Article 10(2) does not need to have the same legal basis or cause of action as the dispute brought in the subsequent arbitration, provided that both disputes involve substantially similar facts and relate to investments as this term is defined by the BIT.²⁴⁷
305. Agreeing with these considerations, in the Tribunal’s view, the domestic recourses by ENJASA against the revocation of its operating license fulfill the domestic-remedies-first requirement contained in Article 8(3) of the BIT, even if the dispute pending before this Tribunal is between different parties, namely a foreign shareholder of ENJASA and the Republic of Argentina, and relates to the breach of the Argentina-Austria BIT, rather than to the breach of domestic law. No other recourse between Claimants and Respondent for breach of the BIT before a domestic jurisdiction was necessary to fulfill the requirement in Article 8(3) to have recourse to domestic remedies first because Article 8(2) and (3) of the BIT, in the Tribunal’s view, does not require that the domestic recourse be between the same parties and concerning the identical cause of action and requested remedy.

(ii) *Relevant domestic recourse in the sense of Article 8(2) of the BIT*

306. The next question the Tribunal needs to address is which of the various domestic remedies ENJASA made use of, if any, is the relevant one for determining whether Claimants can have recourse to international arbitration pursuant to Article 8(3) of the BIT. In this context, Article 8(3) of the BIT refers back to “the competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment was made” mentioned in Article

²⁴⁶ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012), para. 133 (CL-137).

²⁴⁷ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), para. 113 (CL-134).

8(2). Two amongst ENJASA's domestic recourses have been the main focus of the Parties' discussions: (i) ENJASA's Recourse for Reconsideration against Resolution No. 240/13 with ENREJA of 28 August 2013, which resulted in Resolution No. 315/13; and (ii) ENJASA's Action for Annulment against Resolutions Nos. 240/13 and 315/13 of 5 February 2014 before the First Instance Court of Salta.

307. Both of these recourses aimed at squashing ENREJA's decision to revoke ENJASA's operating license. In case of success, they would have put ENJASA and Claimants back into the *status quo ante* of operating in Salta's gaming and lottery sector on the basis of an exclusive license. Both of these recourses concerned, in the words of the tribunal in *Philip Morris v. Uruguay*, "substantially similar facts"²⁴⁸ as the dispute pending before the Tribunal under the BIT and, for this reason, in principle fulfill the domestic-remedies-first requirement established in Article 8(3) of the BIT.
308. Yet, the Tribunal does not consider that ENJASA's Recourse for Reconsideration against Resolution No. 240/13 to ENREJA of 28 August 2013 was sufficient to fulfill the need to submit the dispute to a domestic jurisdiction in the sense of Article 8(2) of the BIT. Notably, Article 8(2) of the BIT does not require recourse to a domestic court before the present Tribunal can exercise jurisdiction – submission to a "competent administrative jurisdiction" is sufficient. Yet, the notion of "administrative jurisdiction" does not refer to just any type of involvement of an administrative institution or agency in the resolution of an investment dispute. Instead, the use of the idea of "jurisdiction" in Article 8(2) of the BIT clarifies that the administrative agency in question has to make an independent analysis of the legality of the host State's conduct and decide in a binding manner on a recourse by the person aggrieved in a way that is comparable to a court. Even if the result is binding, without an independent analysis of the legality of government action, it is not meaningful to speak of the existence of an administrative "jurisdiction" comparable to that of a court.

²⁴⁸ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), para. 113 (CL-134).

309. While the Tribunal is satisfied from the expert testimony given during the Hearing by Professors García Pulles, Bianchi and Mata²⁴⁹ that ENJASA's Recourse for Reconsideration was a proper remedy under domestic law in order to contest the legality of the revocation of the License, the decision on that Recourse was taken by the same agency that issued the measure in question, namely ENREJA. Although it may be possible that an administrative jurisdiction in the sense of Article 8(2) of the BIT is organized as an independent unit within the same executive agency whose acts are under review, the expert testimony on the law in place in the Province of Salta did not establish positively that ENREJA's decision on ENJASA's Recourse for Reconsideration involved such an independent analysis of the legality of ENREJA's Resolution No. 240/13. On the contrary, there were doubts as to the independence of ENREJA's review of the legality of Resolution No. 240/13 in response to ENJASA's Recourse for Reconsideration.²⁵⁰ For this reason, the Tribunal considers that ENJASA's Recourse for Reconsideration does not meet the requirement that the dispute has been submitted to an "administrative jurisdiction" in the sense of Article 8(2) of the BIT.
310. While ENJASA's Recourse for Reconsideration against Resolution No. 240/13 therefore does not qualify as the submission of the dispute to a competent administrative jurisdiction, ENJASA has also initiated, on 5 February 2014, an Action for Annulment of Resolutions No. 240/13 and 315/13 with the First Instance Court of Salta. Unlike ENJASA's Recourse for Reconsideration, this action qualifies, in the Tribunal's view, as a recourse to domestic courts in the sense of Article 8(2) of the BIT. ENJASA's Action for Annulment, which involves the review of legality of the revocation of the License, involves, as termed by the tribunal in *Philip Morris v. Uruguay*, "substantially similar facts" as the present dispute, and, in case of success, would have done away, in principle, with the need to have recourse to international arbitration before this Tribunal.

²⁴⁹ Exhibit C-273, para. 50, Exhibit C-274, para. 28, *see also* Hearing Transcript of 25 March 2017, pp. 496-500, (Professor Mata), p. 564 (Professor García Pulles).

²⁵⁰ On the contrary, there was doubt as to the independence of the review of ENJASA's Recourse for Reconsideration within ENREJA. Professor García Pulles stated in response to a question by one of the arbitrators whether in the internal organization of ENREJA a decision on a Recourse for Reconsideration was taken by a different person than the original decision, the following: "No. From the point of view of the body it is the same body. I cannot say if the same people were involved when the two decisions were taken. It could have been the same people because it is the same body." *See* Hearing Transcript of 24 March 2017, p. 409.

311. Last, but not least, there is a question of timing, as Article 8(2) of the BIT stipulates that the domestic remedies in question may be initiated in case the dispute cannot be settled through amicable consultations within six months. However, ENJASA submitted its Action for Annulment already on 5 February 2014 and therefore less than six months after it had its first consultations with ENREJA and the Province of Salta on 27 August 2013.
312. In the Tribunal's view, the term of six months mentioned in Article 8(2) of the BIT cannot be read as a waiting period that has to be fully exhausted. Rather the term during which negotiations should be pursued as provided for in Article 8(2) of the BIT cannot be read in isolation. Instead, it has to be read and applied in connection with the requirement to make use of domestic remedies before recourse to international arbitration, as provided for in Article 8(3) of the BIT, and in light of any deadlines domestic law stipulates for the domestic recourses in question. In this context, foreign investors, or their local subsidiaries, as the case may be, can only be expected and required to engage in amicable consultations as long as this is possible in light of existing deadlines under domestic law to initiate the domestic recourses required under Article 8(3) of the BIT. Any other construction would create a contradiction between the six-months consultation period laid down in Article 8(2) of the BIT and the need to have recourse to domestic remedies in Article 8(3) of the BIT, which need to respect requirements under domestic law in respect of form and timing in order to be validly interposed.²⁵¹
313. Given that the Recourse for Reconsideration against Resolution No. 240/13 had to be submitted to ENREJA by 28 August 2013, that is, 15 days after Resolution No. 240/13 was issued, and that subsequent to the issuance of Resolution No. 315/13 an Action for Annulment had to be brought within a further delay provided for under domestic law in order to challenge the revocation in the courts of Salta as required under Article 8(3) of the BIT, the Tribunal finds that no breach of the period for amicable consultations laid down in Article 8(2) of the BIT has occurred. Likewise, the sequence of the interposition of the

²⁵¹ For this reason, the majority of the Tribunal also considers any parallel to the reasoning in *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Decision on Jurisdiction (15 December 2010), paras. 140 *et seq.* (AL RA 204), which related to a "waiting period" under Article VI(3)(a) of the Ecuador-United States BIT, inapposite. *But see* Dissent, paras. 29, 188.

various pre-arbitral requirements, that is, amicable consultation and recourse to domestic remedies, has been respected and not side-stepped by Claimants.

(iii) Compliance with the 18-months requirement in Article 8(3)(a) of the BIT

314. Having determined that ENJASA's Action for Annulment before the First Instance Court of Salta was the relevant domestic remedy in the sense of Article 8(2) of the BIT, and considering that no decision on the merits of that Action has been rendered, the Tribunal must now address whether Claimants have complied with the requirement that their domestic recourse is pending domestically for 18 months pursuant to Article 8(3)(a) of the BIT.
315. Although by now 18 months have passed since 5 February 2014, when ENJASA submitted its Action for Annulment of Resolutions Nos. 240/13 and 315/13 to the First Instance Court of Salta, Claimants initiated the present arbitration on 4 December 2014, i.e., less than 18 months after ENJASA had recourse to the court in Salta. The question therefore arises whether non-compliance with this 18-months requirement at the time of initiating the ICSID arbitration make Claimants' claims inadmissible under Article 8(3) of the BIT or whether it is sufficient that the 18 months have passed when the Tribunal decides on its jurisdiction and the admissibility of the claim. The wording of Article 8(3)(a) of the BIT certainly does not mandate that the 18 months necessarily must have passed prior to Claimants' recourse to international arbitration, given that the Tribunal has decided that this pre-arbitral requirement is not a condition precedent to Respondent's consent. Article 8(3) of the BIT merely states that the dispute may be "submitted to an arbitral tribunal" under the three circumstances mentioned. "Submission", however, does not necessarily have to refer to the time of the actual seisin of the arbitral tribunal. It can equally be understood to refer to the time when the tribunal can actually exercise jurisdiction over the claim and proceed to the merits.
316. That this is the understanding of Article 8(3) of the BIT is confirmed by the fact that, under Article 8(3)(c) of the BIT, the dispute can be submitted to an international arbitration "whenever the parties to the dispute have so agreed." Given the consent-based nature of jurisdiction of an investment-treaty tribunal, it would be sufficient for the tribunal to base its jurisdiction on the parties' agreement under Article 8(3)(c) of the BIT,

independently of whether that agreement was reached before or after the seisin of the arbitral tribunal. Considering that questions of timing of the seisin are irrelevant for purposes of Article 8(3)(c) of the BIT, they must also, *mutatis mutandi*, be irrelevant for purposes of timing of the seisin under Article 8(3)(a) of the BIT.

317. A strict reading of comparable domestic litigation requirements under different Argentine BITs may indeed be suggested based on the decisions by the tribunals in *Wintershall v. Argentina*, *Daimler v. Argentina*, *Impregilo v. Argentina*, and *ICS v. Argentina*.²⁵² However, in none of these cases was the respective tribunal faced with the situation that the respective claimant, or its local subsidiary, had actually initiated domestic proceedings, but started investor-State arbitration under the BIT before 18 months had passed in the domestic forum. Instead, in all of these cases, no domestic recourse at all had ever been initiated.²⁵³ Consequently, the issue about subsequent compliance with the domestic-remedies-first requirement was never considered in these cases. This notwithstanding, the tribunal in *Daimler Financial Services v. Argentina* suggested that the subsequent fulfilment of the 18-months requirement may have been sufficient when it answered the question in the negative “whether the dispute has, at least in the interim, been litigated for 18 months before the Argentine domestic courts.”²⁵⁴
318. Be that as it may, in the Tribunal’s view, requiring that 18 months must have passed before international arbitration is initiated is overly formalistic and not in line with the object and purpose of a domestic-remedies-first requirement, such as that contained in Article 8(3) of the BIT. After all, the purpose of such a requirement is to give the courts of the host State an opportunity, for a certain time, to remedy the alleged grievance before an international

²⁵² *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), para. 183 (AL RA 96); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011), para. 94 (AL RA 46); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 160(2) (AL RA 38); *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA Case No. 2010-9, Award in Jurisdiction (10 February 2012), para. 262 (AL RA 40).

²⁵³ *Wintershall AG v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), paras. 7-11 (AL RA 38); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011), para. 90 (AL RA 46); *ICS Inspection and Control Services v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012), para. 246 (AL RA 40); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012), para. 191 (AL RA 96).

²⁵⁴ See *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012), para. 190.

tribunal assumes jurisdiction, thus coordinating dispute settlement between national and international jurisdictions. Nothing different is suggested by the wording of Article 8 of the BIT.

319. Consequently, if it is clear, at the time the international arbitral tribunal decides on its jurisdiction and on the admissibility of the claims, that the period the BIT required domestic recourses to be pursued has passed without the dispute having been settled, the purpose of the domestic-remedies-first requirement cannot be achieved anymore. To still insist on strict compliance with it by dismissing the dispute in the present proceedings as inadmissible, would be an exaggerated procedural formalism that is incompatible with the fair administration of international justice in investment treaty disputes and the principle of good faith, which govern the settlement of international disputes. After all, strict insistence on the 18-months term before the present arbitration had been initiated by this Tribunal, would not prevent Claimants to reinitiate an identical international arbitration without facing obstacles to jurisdiction and admissibility in light of their non-compliance with the 18-months requirement in Article 8(3)(a) of the BIT.
320. Moreover, the view that it is sufficient that domestic-remedies-first requirements, such as that contained in Article 8(3) of the BIT, be fulfilled subsequently to the initiation of ICSID arbitration, but before a decision on jurisdiction is taken, has even been accepted by a number of investment treaty tribunals that qualified the domestic-remedies-first requirement in the applicable treaty as going to the jurisdiction of the tribunal. If, however, domestic-courts-first requirements that are found to be of a jurisdictional nature can be complied with subsequently to the initiation of arbitration, but before a decision on jurisdiction is taken, this must hold true *a fortiori* for domestic-courts-first requirements such as those in Article 8(3) of the Argentina-Austria BIT.
321. Thus, the tribunal in *TSA Spectrum v. Argentina* concluded in a case where the claimant had initiated ICSID arbitration before 18 months in domestic courts had passed without a final decision, as required under the Argentina-Netherlands BIT, that

[...] despite the fact that ICSID proceedings were initiated prematurely, the Arbitral Tribunal considers that it would be highly formalistic now to reject the case on the ground of failure to observe the formalities in Article 10(3) of the BIT, since a rejection

on such ground would in no way prevent TSA from immediately instituting new ICSID proceedings on the same matter.²⁵⁵

322. Similarly, in *Teinver v. Argentina*, the tribunal decided in respect of the claimant's non-compliance with a comparable domestic-courts-first clause in Article X(3) of the Argentina-Spain BIT:

[...] while Claimants concede that the 18-month local court period had not lapsed at the time they filed their Request for Arbitration, they are correct to note that 18 months have subsequently passed, and the local suit remains pending. As such, the core objective of this requirement, to give local courts the opportunity to consider the disputed measures, has been met. To require Claimants to start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources.²⁵⁶

323. Likewise, the tribunal in *Philip Morris v. Uruguay* addressed a similar issue under Article X(2) of the Switzerland-Uruguay BIT. The tribunal decided, basing itself on an analysis of cases decided by the Permanent Court of International Justice and the ICJ, that it was satisfied to proceed with the case, even though certain procedural preconditions to jurisdiction had been met only after the initiation of the arbitration:²⁵⁷

The Tribunal notes that the ICJ's decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes has not prevented that Court from accepting jurisdiction where requirements for jurisdiction that were not met at the time of instituting the proceedings were met subsequently (at least where they occurred before the date on which a decision on jurisdiction is to be taken).²⁵⁸

²⁵⁵ *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (19 December 2008), para. 112 (AL RA 158).

²⁵⁶ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012), para. 135 (CL-137) (footnote omitted).

²⁵⁷ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), paras. 144-149 (CL-134).

²⁵⁸ *Id.*, at para. 144 (footnote omitted).

324. The tribunal in *Philip Morris v. Uruguay* therefore concluded that
- it would be perfectly possible for the Claimants to commence these same proceedings on the day after a decision by this Tribunal is handed down, a situation where dismissal of the Claimants' claims would merely multiply costs and procedures to no use.²⁵⁹
325. This jurisprudence also conforms to the approach both the Permanent Court of International Justice and the ICJ have taken in a number of cases in respect of conditions to the Court's jurisdiction that were only fulfilled after the court had been seized. Thus, in the *Mavrommatis* case, the Permanent Court held:
- Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.²⁶⁰
326. Similarly, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the ICJ found repeatedly that the fact that Serbia had only become a party to the Court's Statute after the proceedings had been instituted did not affect the Court's jurisdiction for reasons related to judicial economy and the sound administration of justice:
- What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings

²⁵⁹ *Id.*, at para. 147.

²⁶⁰ *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Objection to the Jurisdiction of the Court, Judgment No. 2 (30 August 1924) PCIJ Series A, No. 2, p. 34 (AL RA 162).

anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.²⁶¹

327. Only the case of Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*)²⁶² departs from this consistent line of jurisprudence.²⁶³ In that case, the Court reasoned that the reference in Article 22 of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) to negotiations between the parties²⁶⁴ established a condition precedent to the Court's jurisdiction.²⁶⁵ Given that qualification, there was no need for the Court to consider whether the negotiation requirement could have been fulfilled in parallel or subsequently to seizing the Court. At the same time, there is also no indication that the claimant in that case had made an attempt to fulfil the negotiation requirement subsequently to initiating the case in question.²⁶⁶ This distinguishes the Racial Discrimination case from both the Court's earlier jurisprudence and the situation in the present case, where domestic proceedings have now been pending for more than 18 months without a decision on the

²⁶¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment (18 November 2008) ICJ Reports 2008, pp. 412, 441, para. 85. Similarly *id.*, at pp. 442-443, paras. 87 and 89. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment (11 July 1996), ICJ Reports 1996, pp. 595, 613-614, para. 26.

²⁶² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment (1 April 2011), ICJ Reports 2011, p. 70.

²⁶³ Pointing out that departure and criticizing the Court for it: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment (1 April 2011), Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports 2011, pp. 142, 153-154, para. 35.

²⁶⁴ That Article provides:

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

²⁶⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment (1 April 2011), ICJ Reports 2011, pp. 70, 126, para. 136.

²⁶⁶ Similarly, in the *Armed Activities* case, there was neither an indication nor argument that the conditions under Article 29 of the Convention on Discrimination against Women, including the attempt to initiate international arbitration, had been met subsequent to the seisin of the Court. See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment (3 February 2006), ICJ Reports 2006, pp. 6, 39-41, paras. 88-93 (AL RA 39).

merits and where the Tribunal has found that the pre-arbitral requirements contained in Article 8 of the BIT did not constitute conditions precedent to the Respondent's consent.

328. In light of the above, the Tribunal concludes that ENJASA's Action for Annulment of Resolutions Nos. 240/13 and 315/13 complied with the need to have recourse to domestic remedies under Article 8(3) of the BIT. This recourse has also been submitted after amicable consultations had been initiated with the meeting of Mr. Tucek with representatives of the Province of Salta of 27 August 2013 and pursued in subsequent meetings. Since this recourse has now been pending for more than 18 months without a decision on the merits, the Tribunal finds that it can exercise its jurisdiction in the present case and proceed to the merits.

D. Effect of Article 8(4) of the BIT

329. Finally, the Tribunal must address Respondent's argument that the fact that ENJASA has not withdrawn its Action for Annulment of Resolutions Nos. 240/13 and 315/13, which is pending before the First Instance Court of Salta, constitutes a bar to the Tribunal exercising jurisdiction over the case under Article 8(4), second sentence of the BIT. This provision stipulates, as per the English translation agreed between the Parties, that "[f]rom the commencement of an arbitration proceeding, each party to the dispute shall take all the required measures to withdraw the pending judicial proceedings."
330. As becomes clear from its wording, Article 8(4) of the BIT establishes a duty for both parties to take all required measures that the present "dispute" is not pending before the Tribunal and in a domestic jurisdiction. The "dispute" in this context, as explained before,²⁶⁷ is a broad one and encompasses both the treaty claim pending before the Tribunal as well as ENJASA's recourses in domestic court, which already encompassed the claim that ENREJA's action breached the Argentina-Austria BIT. Under Article 8(4) of the BIT, both of these proceedings cannot go forward in parallel, even if the parties to the respective proceedings are different and the causes of action and requested remedies differ.
331. However, in the Tribunal's view, Article 8(4) of the BIT cannot be read as requiring Claimants to withdraw domestic proceedings already before initiating ICSID arbitration or

²⁶⁷ See *supra* para. 304.

prior to receiving a decision on jurisdiction. This is clear from the wording and context of Article 8(4) of the BIT. As per its wording, Article 8(4) of the BIT imposes an obligation on both parties to take all required measures to withdraw the pending judicial proceedings; but it does not formulate this obligation as affecting Respondent's consent to international arbitration nor as some other condition on the Tribunal's jurisdiction.

332. Although having to defend against two related claims, one in a domestic court, one in international arbitration, is a burden for the host State, requiring Claimants to withdraw all pending domestic proceedings prior to a decision on jurisdiction of this Tribunal would impose an even greater burden on Claimants and risks bringing about a denial of justice. After all, if Claimants were required to withdraw domestic proceedings prior to having received a decision by the arbitral tribunal on jurisdiction, they would risk being left without any remedy, both at the domestic and the international level, if the arbitral tribunal decided to decline jurisdiction. Given that the domestic proceedings, once withdrawn, could not be revived in order to address Claimants' claims, this could result in a situation where justice would in effect be denied. Consequently, the Tribunal finds that the obligation in Article 8(4) of the BIT to withdraw any pending domestic proceeding only arises once the present decision comes into effect.
333. In this context, the Tribunal takes note of Claimants' undertaking that once a positive decision on jurisdiction is rendered in the present arbitration, they will take all required measures to withdraw any proceedings relating to the dispute pending in Argentine courts. Yet, Article 8(4), second sentence of the BIT does not only impose an obligation on Claimants. It imposes obligations on both Parties. The Tribunal accordingly finds that both Parties have to take all required measures to withdraw the pending domestic proceedings in order to comply with their obligation under Article 8(4), second sentence of the BIT.
334. Article 26, first sentence of the ICSID Convention, which provides that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy," does not suggest a different conclusion or a different construction of Article 8(4) of the BIT. While Article 26 of the ICSID Convention provides for the exclusivity of ICSID arbitration to resolve the dispute in question, the provision only has an effect on the proceedings pending in parallel

to the ICSID arbitration; Article 26 of the ICSID Convention does not stipulate that parallel pendency in another forum has an effect on the jurisdiction or admissibility of the ICSID arbitration. Instead, the parties' consent to ICSID arbitration, and by prolongation the jurisdiction of the Tribunal, remain unaffected by the existence of parallel proceedings in another forum.²⁶⁸ Article 26 of the ICSID Convention does therefore not suggest a different construction of Article 8(4) of the BIT from the one adopted by the Tribunal above. On the contrary, the exclusivity rule of Article 26 of the ICSID Convention supports the Tribunal's conclusion that the exclusivity of the ICSID arbitration should be achieved by withdrawing the proceedings pending in parallel before Argentine courts as stipulated in Article 8(4) of the BIT.

335. Article 8(4), second sentence of the BIT imposes an obligations of conduct, not result. Consequently, both Parties have to take the measures that are in their power to bring about the withdrawal of the proceedings concerning the present dispute that are pending in Argentine courts. In the Tribunal's view, they have to do so within two months from the time the present Decision is issued, a timeframe the Tribunal considers reasonable in the present circumstances. In order to monitor the Parties' compliance with this obligation, the Parties have to inform the Tribunal of the steps taken once the two-months timeframe expires.

E. Conclusion

336. As a result of the above, the Tribunal comes to the conclusion that Respondent has validly consented to the jurisdiction of the Centre and the present arbitration under Article 8 of the BIT at the time the BIT entered into force. It is at this time that both Contracting States to the BIT, that is, the Republic of Austria and the Argentine Republic have declared their consent to ICSID arbitration. This consent thus has existed since the entry into force of the

²⁶⁸ See Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn., Cambridge University Press 2009), Article 26, para. 2 (explaining that "once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID. This principle operates from the moment of valid consent. This exclusive remedy rule of Art. 26 is subject to modification by the parties. The phrase 'unless otherwise stated' in the first sentence gives the parties the option to deviate from it by agreement.").

BIT. Claimants, in turn, have consented to the jurisdiction of the Centre and the present arbitration when they initiated the present claim against Respondent.

337. The pre-arbitral requirements equally laid down in Article 8 of the BIT, that is, the need to attempt to settle the dispute through amicable consultations and to have recourse to domestic remedies, do not constitute conditions precedent to Respondent's consent, which would need to be fulfilled at the time of initiating ICSID arbitration. They merely concern criteria for the validity of the seisin of the Tribunal. The Tribunal found that it suffices that these criteria are fulfilled at the time a decision on jurisdiction is taken. A contrary view would be overly formalistic and would have the effect that, while the present Tribunal would need to dismiss the present case, Claimants could immediately reinstate the same dispute in another ICSID arbitration proceeding. Such a situation would go against the principle of fair administration of international justice.
338. Against this background, the Tribunal has found that Claimants have complied with the requirement to first engage in amicable consultations pursuant to Article 8(1) of the BIT and subsequently to submit the dispute to a domestic jurisdiction pursuant to Article 8(2) and (3) of the BIT. Meanwhile, domestic recourses have been pending for more than 18 months without a decision, thus permitting the Tribunal to assume jurisdiction and assess the pending claims on the merits pursuant to Article 8(3)(a) of the BIT.
339. Finally, the Tribunal finds that the pendency of the domestic court proceedings concerning the review of the revocation of ENJASA's license does not affect the Tribunal's jurisdiction. This notwithstanding, once the present Decision has been issued, both Parties are under an obligation to take all required measures that domestic proceedings relating to the present dispute are withdrawn within two months and inform the Tribunal about the steps taken.

VII. COSTS

340. All Parties have requested the Tribunal to order costs and fees against the opposing Party. The Tribunal reserves its decision on this question for subsequent determination.

VIII. DECISION

341. On the basis of the reasoning above, the Tribunal decides:

- 1) that it has jurisdiction over the present dispute insofar as Claimants' claims for breach of Articles 2(1) and 4(1)-(3) of the Argentina-Austria BIT are concerned;
- 2) that it has no jurisdiction over the present dispute insofar as claims for breach of Article 3(1) of the Argentina-Austria BIT are concerned;
- 3) that both Parties will within two months as from the issuance of this Decision take all required measures to withdraw the domestic proceedings relating to the present dispute and inform the Tribunal of their actions;
- 4) that a decision on costs is reserved for subsequent determination.

[*Signed*]

Prof. Dr. Stephan W. Schill
Arbitrator

Date: 18 June 2018

[*Signed*]

Dr. Santiago Torres Bernárdez
Arbitrator
(Subject to the attached Dissenting Opinion
and Declaration of Dissent)

Date: 20 June 2018

[*Signed*]

Prof. Dr. Hans van Houtte
President of the Tribunal

Date: 22 June 2018