

**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**

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**DISSENTING OPINION**

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Dr. Santiago Torres Bernárdez, Arbitrator

*Date of dispatch to the Parties: 5 November 2021*

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## **Dissenting Opinion of Santiago Torres Bernárdez**

### **INTRODUCTION**

#### **A. The Subject-Matter and Nature of the Dispute, and the Tribunal’s Competence and Function**

1. The first question of principle for which I feel compelled to dissent from the Award rendered by the majority is the determination of the subject-matter of the present dispute defined by Claimants in their Request for Arbitration filed before ICSID. The *petitum* and *causa petendi* of such Request are perfectly clear, and thus, so is the subject-matter of the dispute submitted to arbitration. That is what the Arbitral Tribunal understood, unanimously, when adopting the Decision on Jurisdiction.
2. This Decision by the Tribunal corrected the scope of Claimants’ original *petitum*, limiting it to the obligations assumed by the Argentine Republic under Articles 2(1) (fair and equitable treatment) and 4 (expropriation) of the Argentina/Austria BIT, but maintained the original *causa petendi*. Consequently, such correction entailed no modification of the original subject-matter of the dispute defined in the Request for Arbitration, or the legal nature of the dispute inherent therein, which remained a “treaty claim” only, as evidenced by both Parties’ written and oral arguments in this merits phase, as well as the final conclusions of their respective Post-Hearing Briefs (PHB).
3. There is no reason, therefore, for the present Award to deem “this dispute” as if it were a contract claim existing within the framework of Salta’s domestic legal system between Argentine company ENJASA under Claimants’ control and the Province of Salta concerning the revocation by the Provincial Regulatory Agency (ENREJA) of ENJASA’s exclusive License (for the exploitation of games of chance under provincial jurisdiction) as a sanction on account of violations or breaches by the company of its obligations as Licensee as regards the prevention of money laundering in accordance with Article 5 of Law No. 7020 of the Province. This contract claim ceased to exist when ENJASA withdrew from the proceedings instituted before the competent court in contentious-administrative matters for such Province for the annulment of

ENREJA's Resolutions Nos. 240/13 and 315/13, in compliance with the order issued by this Arbitral Tribunal in its Decision on Jurisdiction pursuant to the second sentence of Article 8 (4) of the Argentina-Austria BIT.

4. As a result of such withdrawal, the decision whereby ENJASA's License was revoked has become final in Respondent's legal system. So, not only has the original contract claim ceased to exist, but the revocation itself has become a legal *event* under Respondent's domestic law. This Arbitral Tribunal has a duty to treat it as such when applying such law as "proper law" applicable to the resolution of this treaty claim, as prescribed by Article 8 (6) of the Argentina-Austria BIT. However, the majority resurrects in this Award Salta's extinct contract claim, or certain aspects thereof, and rises as *appellate court* of the actions undertaken by ENREJA and the Provincial Executive Branch, as though such dispute was part of the subject-matter of this treaty claim and as if this Arbitral Tribunal had the power and jurisdiction to act as such. To me, there is no room in this ICSID arbitration either to reconsider the evidence on which the sanction imposed by ENREJA upon company ENJASA was based, or to decide *de novo* on that sanction, which, as stated *supra*, has become final under Respondent's domestic law, which this Arbitral Tribunal has a duty to observe and apply in the resolution of the present dispute as per the provisions of the Argentina-Austria BIT so mandate.
5. As frequently highlighted in ICSID awards, the arbitral tribunals constituted by application of the ICSID Convention are not appellate courts for domestic decisions, and this Arbitral Tribunal is no exception. Hence, this Arbitral Tribunal must abide by Salta's decision on the extinct contract claim, despite taking into consideration, of course, the actions undertaken, and the final decisions adopted in the Province of Salta insofar as necessary to resolve the subject-matter of this treaty claim at the time of settling the present dispute by means of the "proper law" applicable thereto as determined by Argentina and Austria in their BIT. In such regard, I fully share the assertion made by the tribunal in *Lemire v. Ukraine* whereby "... arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws" (Decision on Jurisdiction and Liability of 14 January 2010, para. 283); that by the tribunal in *Glamis Gold v. United States* whereby "It is not the role of this Tribunal, or any other international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency"

(Award of 8 June 2009, para. 779); that by the tribunal in *SD Myers v. Canada* whereby “(A) tribunal does not have an open-ended mandate to second-guess government decision-making” (Partial Award of 13 November 2000, para. 261); that by the tribunal in *Crystallex v. Venezuela* whereby “It is not for an investment-state tribunal to second-guess the substantive correctness of the reasons which an administration were to put forward in its decisions, or to question the importance assigned by the administration to certain policy objectives over others” (Award of 4 April 2016, para. 583); and so on and so forth.

6. The decision adopted by the majority Award in the instant case has manifestly exceeded the duty and jurisdiction of the Arbitral Tribunal, as well as the very subject-matter of the present treaty claim between Claimants and the Argentine Republic. It is unacceptable to assume the functions of an *appellate court* that are not inherent in an ICSID arbitral tribunal, without a specific mandate under the Argentina-Austria BIT. It is also unacceptable to act without the slightest deference to the domestic actions undertaken by the competent authorities and to manifestly rule out or ignore key allegations, arguments and evidence submitted by Respondent, along with its reliance upon the customary rule of international law concerning the regular exercise in its territory by competent bodies of the regulatory and police powers of the Argentine Republic that are inherent in its State sovereignty.

## **B. The Applicable Law**

7. Article 42(1) of the ICSID Convention provides that: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.” Since Claimants and Respondent have agreed on no rules of law, it is the rule contained in the second sentence of Article 42 (1) that applies to this arbitration as far as the ICSID Convention is concerned. In turn, Article 8 (6) of the Argentina-Austria BIT establishes the following on the “proper law” applicable to the settlement of investment disputes:

“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—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.”

8. It is thus perfectly clear that the Contracting States to the relevant BIT, i.e., Argentina and Austria, have agreed therein that the law applicable to “*the settlement of investment disputes*” under Article 8 of the BIT is composed of rules from the four sources expressly mentioned in paragraph (6) thereof. The express reference in such paragraph to “the laws of the Contracting Party involved in the dispute” is in line with relevant provision of Article 42 (1) of the ICSID Convention and undoubtedly, entails *renvoi* to the domestic law of Respondent, i.e., the Argentine Republic. Claimants have denied it, but the majority Award has no alternative but to recognize it, even though it immediately tries to exclude its application by means of groundless considerations. It is not for arbitrators to rewrite or ignore the decision on “applicable law” adopted by the Contracting States to a BIT which has been invoked by Claimants in order to institute this arbitration, but to apply it as and when necessary, as in the case of the present dispute. Many BITs fail to mention “the laws of the Contracting Party involved in the dispute” in their respective provisions on “applicable law,” but the Argentina-Austria expressly does so, and this intention shared by both States must be observed, and the provision in which it is enshrined, applied by this Arbitral Tribunal in good faith or otherwise the Tribunal risks to manifestly exceeds its powers.
9. Accordingly, what has been stated in awards or decisions issued by investment arbitral tribunals on either the application of the domestic law of the host State of the investment or on the scope of application, in relation to BITs that make no express reference to the domestic law of the host State involved in the dispute as “applicable law,” is completely irrelevant in this arbitration. In the case at issue, except for the “specific agreements concluded in relation to such an investment,” which do not exist, the other three legal systems listed in Article 8 (6) of the Argentina-Austria BIT (the laws of the host State of the investment; the provisions of the BIT; and the principles of international law on the matter) include rules, provisions or legal principles that this Arbitral Tribunal must apply where relevant to the settlement of this treaty claim raised by Claimants in reliance upon such BIT. There is no contradiction between the fact that the dispute before the Arbitral Tribunal is a treaty dispute and the fact that the “domestic law of the Argentine Republic” is involved in the settlement thereof, as the Tribunal has the authority and duty to apply it by virtue of two rules of international

treaty law: Article 8 (6) of the Argentina-Austria BIT and Article 42 (1) of the ICSID Convention. These two rules of international treaty law are also the ones that authorize and compel this Arbitral Tribunal to apply the relevant principles and rules of international law which have not been expressly excluded by the BIT to the settlement of this dispute, as per the case-law of the ICJ in *ELSI*. Lastly, the type of claim filed does authorize neither an investor nor an arbitrator to alter the definition of “applicable law” stated in the BIT or multilateral treaty in question at whim. The notion of “applicable law” does not refer to the “investor’s claim,” but to the broadest notion of “dispute or controversy,” which, apart from such claim (*petitum*), encompasses the cause of or reason for the claim (*causa petendi*) and the *parties* to the dispute. The term “applicable law” refers to all those components of the notion of “dispute or controversy,” not just to the type of claim or the investor’s *petitum*.

10. It is thus striking that Claimants have proposed as an *a priori* allegation that Argentine law be excluded from the settlement of this dispute in spite of the provisions of the Argentina-Austria BIT, and that they have attempted to limit rules or principles of applicable international law, or replace them with the practices of some international investment tribunals which are not always consistent with the principles and rules laid down by international law on the matter or the circumstances of this arbitration. This attempt to mutilate or alter the “applicable law” determined by Argentina and Austria in Article 8 (6) of the BIT is not a proposition acceptable to me. No foreign investor relying upon a given BIT in order to institute an international arbitration before ICSID against the host State of its investment can unilaterally rule out such provisions of the BIT as it may deem inconvenient to its claims, since BITs are international treaties concluded between States to which the investor is a third party who receives an offer that is conditional upon what the Contracting States provide in the BIT in question. Claimants have sought to do that with “applicable law” now as they did in the jurisdictional phase with the provisions conditioning the international arbitration offer made by the Contracting States to the Argentina-Austria BIT. But BITs are not an *a la carte* menu that allows investors to rely upon some of their provisions while ruling out or ignoring other provisions of the same BIT.
11. Therefore, I have no choice other than to readily dismiss such allegation made by Claimants on “applicable law” whereby they purport to self-define such law thus impairing the provisions of Article 8 (6) of the Argentina-Austria BIT. This allegation

made by Claimants on “applicable law” is even more striking in view of the fact that it is materially contrary to their claims on direct and indirect “expropriation,” because, as highlighted by the tribunal in *EnCana v. Ecuador* presided over in 2006 by today’s ICJ Judge Professor James Crawford: “However, for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador” (Award, para. 184).

12. Such material contradiction is coupled by another one regarding the content and scope of the rights pertaining to the various categories of assets listed in Article 1 of the Argentina-Austria BIT, an issue on which both Claimants and the majority Award remain inexplicably silent. In the jurisdictional phase, Claimants invoked Article 1 (b) (shares and any other form of participation in companies) to assert their condition as Austrian investors protected by the said BIT. Accordingly, they may not be presumed to ignore the content and scope of such category of asset, which the final paragraph of Article 1 of the BIT defines as follows: “The contents and scope of the rights for the different categories of assets shall be determined by the laws and regulations of the Contracting Party in whose territory the investment is made.” That is to say, in this case, by the laws and regulations of the Argentine Republic and/or its Province of Salta. This provision supplements the express reference in Article 8 (6) of the BIT, explained *supra*, whereby the arbitral tribunal shall decide the dispute in accordance with, *inter alia*, the laws of the Contracting Party involved in the dispute, i.e., the domestic law of the Argentine Republic in this arbitration. Consequently, I agree with Respondent’s view that Argentine law also determines the scope of Claimants’ rights as investors “under the BIT” and reject the contrary opinion adopted by the majority Award. The citation of the judgment issued in *ELSI* by the majority Award in this context is inapposite.
13. The majority Award formally rejects Claimants’ request to exclude the law of the Argentine Republic and avoids applying the relevant customary international law on the matter despite the importance of both systems to the resolution of the present dispute in accordance with the applicable law determined by Article 8 (6) of the BIT, such as the customary rule of international law invoked by Respondent as a defense on the merits. It also fails to apply other relevant provisions of the BIT, such as the final paragraph of Article 1 mentioned *supra*, or misapplies others, such as Article 4 (2) on

expropriation. The same happened at the jurisdictional phase. Therefore, the majority disregarded Claimants' failure to meet the conditions precedent to the international arbitration offer by Contracting States under Article 8 of the BIT, and now, at the merits phase, affords similar treatment to the provision of Article 8 (6), which determines the law to be applied by the Arbitral Tribunal to the settlement of the present dispute.

14. This Dissenting Opinion applies legal rules and principles relevant to the settlement of the present dispute from the three "applicable law" systems listed in Article 8 (6) of the BIT that exist in this arbitration. The relevant rules and principles stemming from those three systems are a perfect supplement to each other in the circumstances of the case. Nor is there any legal impediment to applying such rules or principles, as far as their relevance to the settlement of the present dispute is concerned, since, by virtue of Article 8 (6) of the Argentina-Austria BIT, the rule stated in such paragraph on "applicable law" is clearly a "provision of this Agreement."

### **C. The Burden of Proof**

15. The principle *actori incumbit probatio*, generally applied by international tribunals, also governs the imposition of the burden of proof in ICSID investment arbitrations, *where the international responsibility of the host State of the investment is not presumed*. It shall be established. In the instant case, it is thus for Claimants to prove their assertion that Respondent violated Articles 2(1), 4(1) and (2), and 4(3) of the Argentina-Austria BIT. This means, in the words of the tribunal in *Les Laboratoires v. Poland*, that:

"the burden then falls onto the Claimants to show that Poland's regulatory actions were inconsistent with the legitimate exercise of Poland's powers," and that "(it) would be unreasonable to demand that Poland 'prove the negative' in the sense of demonstrating an absence of bad faith and discrimination, or the lack of disproportionateness in the measures taken" (Award of 14 February 2012, paras. 583-584).

16. However, this general principle of administration of evidence applied by international tribunals does not relieve Respondent of the burden of proving, where appropriate, the facts invoked in its own defense. In fact, a respondent can merely deny claimant's assertions, but it may also defend itself by making its own assertions against claimant, which can lead to the allegation of elements of fact. When this occurs, as in the case at issue, respondent has the burden of proving the facts alleged in its defense. So, in this

arbitration, each Party has the burden of proving the facts alleged thereby. In contrast, neither Party has to prove what has been admitted by the other Party, or the facts which are known to the public at large.

17. Generally speaking, Claimants have had difficulties with the administration of evidence of their allegations. For instance, Claimants maintain that ENJASA neither violated nor breached the obligation to request ENREJA's authorization to hire third-party operators (first paragraph of Article 5 of Provincial Law No. 7020), although they have been unable to submit to the Arbitral Tribunal an original or a copy of such request for any of the 11 third-parties recognized (by ENREJA's Resolution No. 324 of 20 November 2013) as operators prior to 13 August 2013 (C-219), the date on which ENJASA's License was revoked under ENREJA's Resolution No. 240.
18. Another example: concerning the interpretation of the obligation stated in the second paragraph of Article 5 of Law No. 7020, ENJASA informed ENREJA, by means of a letter of 30 August 2005 signed by the company's attorney-in-fact, Mr. Petersen, that it agreed that the Anti-Money Laundering Law and Law No. 7020 actually provide that prizes of over ten thousand Argentine pesos shall be paid by check prior identification of the person to collect the prize. ENJASA has always met this requirement (Exhibit RA 193), while, in these arbitral proceedings, Claimants object to the interpretation of the provision then accepted by the company and confirmed by subsequent letters from Mr. Petersen in like capacity of March 2008 (Exhibit RA-173) and May 2010 (Exhibit RA-165).
19. It is also perplexing that Claimants argue that the revocation of ENJASA's License was a measure having effects tantamount to an expropriation absent any showing that the requirements of the international standard applicable on the matter, which has been formulated by the ICSID tribunal in *Venezuela Holdings B.V. and others v. Venezuela* (Guillaume, Kaufmann-Kohler and El-Kosheri) as follows, are met:

“The Tribunal considers that, under international law, a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to *an effective deprivation of the investment as a whole. Such deprivation requires either a total loss of the investment's value or a total loss of control by the investor of its investment, both of a permanent nature*” (Award of 9 October 2014, para. 286) (emphasis added).

#### **D. Claimants' Claim and the Rule of Previous Exhaustion of the Local Remedies of the Respondent State**

20. Another hindrance to be circumvented by Claimants in connection with the establishment of international responsibility of the Argentine Republic in the instant case is the rule of previous exhaustion of the local remedies of the respondent State, described by the Chamber of the ICJ in *ELSI* as an “important principle of customary international law” (*ICJ Reports 1989*, p. 42, para. 50). The Parties have not discussed this principle, but the issue is objectively raised before the Arbitral Tribunal which knows the law (*jura novit curia*), in view of the definition of “applicable law” under Article 8 (6) of the Argentina-Austria BIT.
21. Indeed, Article 44 (b) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts contained in Part III entitled “*The Implementation of the International Responsibility of a State*” establishes that “The responsibility of a State may not be invoked if: ...the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.” Paragraph (3) of the commentary to such article specifies that:
- “The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.”
22. In light of the terms of paragraph (b) of Article 44 and its commentary, as well as the fact that the Argentina-Austria BIT does not contain “any words making clear an intention to dispense with (the) rule” of previous exhaustion of local remedies (*ELSI, dixit.*), this Arbitral Tribunal may not presume that the provision included in such Article 44 is *prima facie* alien to this case. Nevertheless, both Claimants’ allegations and some considerations and conclusions of the majority Award encompass cases which undoubtedly fall within the scope of application of the rule of previous exhaustion of local remedies under customary international law. The provisions of Article 26 of the ICSID Convention on such rule does not settle the issue arising in this context, because the reference made by such article of the ICSID Convention to the previous exhaustion of local remedies concerns the “consent to arbitration” of the Contracting States to the ICSID Convention, not the claims on the merits filed by third-party investors in order to establish the international responsibility of an ICSID

Contracting State. The issue arises in this phase of these ICSID proceedings, since Claimants have not exhausted, prior to this arbitration, Respondent's local judicial remedies, and without that exhaustion, Respondent cannot be found to have incurred, for example, a "denial of justice" or "manifest arbitrariness" or anything similar as alleged by Claimants and admitted by the majority Award.

23. Paragraph (1) of the ILC commentary to Article 44 explains the distinction to be made between certain admissibilities and others. According to such paragraph, the ILC Articles on international responsibility of States are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals, but define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility, thus concluding as follows on such distinction:

"Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another. By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two of such matters are dealt with in article 44; the requirements of nationality of claims and exhaustion of local remedies."

24. It is evident that, in this case, Claimants have exhausted Respondent's local administrative remedies before submitting their claim to ICSID, but not Respondent's local judicial remedies, as a consequence of which local remedies have not been exhausted. On the other hand, the exhaustion of local remedies is a *primary rule* of customary international law that is generally treated like something other than what is called the "merits of the case," as it is sufficient to comply with such primary rule if the "essence of the claim" has been previously submitted to local remedies until their exhaustion before bringing it before the relevant international tribunal (*ELSI, ICJ Reports 1989*, p.46, para. 59 (*in fine*)). But this was not the case here either. It is thus confirmed that Claimants resorted to ICSID without having previously exhausted Respondent's local remedies, which exerts a negative impact thereon, because it prevents them from invoking the responsibility of Respondent, i.e., the secondary rules of international law on international responsibility of States, in all such cases where their claims on the merits are based on primary rules of international law subject to the

primary rule of customary international law of previous exhaustion of local remedies. In those cases, the Responsibility of the State may not be invoked and, therefore, the claim will not be admissible (Article 44 of ILC Articles on Responsibility of States for Internationally Wrongful Acts).

#### **E. The Duty to Make Reparation**

25. Any internationally wrongful act gives rise to international responsibility the main content of which is the obligation to make reparation for the injury caused by means of one of the forms of reparation admitted under international law, *inter alia*, in practice, compensation for the injury caused, unless there is a circumstance precluding wrongfulness in any given case. Without an internationally wrongful act, there is no international responsibility of a State under the relevant Articles codified by the International Law Commission (ILC). In the specific case of this arbitration, Claimants allege that the Argentine Republic has an obligation to compensate them for the injury caused to their investment in ENJASA, as a consequence of the revocation by the Province of Salta (Argentine Republic) of the License held by the company for the exploitation and management of games of chance subject to provincial jurisdiction, since, in their view, such measure had purportedly violated Articles 2 (1), 4(1), 4(2) and 4 (3) of the Argentina-Austria BIT. In their final conclusions, Claimants request on those grounds reparation by Respondent in the form of compensation for an amount of at least USD 51,919,998 (PHB, para. 584)
26. Nonetheless, I believe that, in the case at issue, there is no room for compensating Claimants for the amount mentioned *supra*, or any other, based on two decisive legal considerations. First, because the adverse effect alleged by Claimants does not stem from an internationally wrongful act by Respondent towards them, but from the regular exercise by the competent authority of the Argentine Republic of its regulatory and police powers as a sovereign State, which is why the adverse effect in question gives rise neither to international responsibility nor to an obligation to make reparation on the part of Respondent. And, secondly, because Claimants have failed to prove that Respondent violated the obligations stated in the articles of the Argentina-Austria BIT on which they rely in any of the three claims brought, and, absent evidence of violation - of, at least, one of those international treaty obligations - Respondent was unable to incur international responsibility giving rise to an obligation to make reparation for the

adverse effect that Claimants allege to have suffered, neither in the form or compensation nor in any other form of reparation admitted by the ILC Articles on Responsibility of States for Internationally Wrongful Acts. Consequently, in my opinion, adjudication of the present dispute does not raise any question on the assessment of injuries or adverse effects, as Respondent has incurred no international responsibility *vis-à-vis* Claimants that may give rise to an obligation to make reparation.

27. The majority, however, has erroneously concluded in the Award that Respondent has incurred international responsibility *vis-à-vis* Claimants and the latter must be compensated. This unfounded conclusion in the Award calls on certain legal questions usually raised by the “obligation to make reparation” before international arbitral tribunals. First, such tribunals need to determine whether the injury or adverse effect that the investor-claimant alleges to have suffered is compensable as provided by the “proper law” applicable to the relevant dispute. Secondly, if that is not the case, tribunals must then determine whether the injury or adverse effect alleged by the investor-claimant is a direct consequence of the commission by the host State of an internationally wrongful act giving rise to the international responsibility of the State *vis-à-vis* the investor-claimant in question. Lastly, if reparation for an injury or adverse effect is due because the host State has incurred international responsibility *vis-à-vis* the investor-claimant, the arbitral tribunal is to determine the most suitable form of reparation in light of the nature of the injury or adverse effect found and, in the event of “compensation,” assess the *quantum* thereof.
28. Any and all stages of the decision process mentioned *supra* are governed by international law; none of them is a question that the international system has left to arbitrators’ utmost discretion. The determination of the existence of an obligation to make reparation, its forms, and the assessment of the *quantum* of a potential compensation entail an exercise regulated by international law, as well as the fundamental previous determination of the existence of international responsibility on the part of the host State for having committed an internationally wrongful act. The rules codified in the ILC Articles referred to *supra* leave no room for doubt. In other words, there is no room to invoke the case-law of *Factory at Chorzów* on the obligation to make full reparation for the injury caused by the internationally wrongful act if the rules of international law governing the different aspects of such obligation are

subsequently ignored or excluded, starting with the very existence of the internationally wrongful act giving rise to the international responsibility alleged, as it occurs in the instant case within the framework of each of Claimants' three claims, as such existence requires both the subjective element (attribution) and the objective element (violation of an international obligation) of the internationally wrongful act alleged to concur.

29. In paragraphs 480 and 481 of their PHB, Claimants seem to argue that the *quantum* of the compensation claimed would be the same or very similar whether Respondent had violated Article 4 (expropriation) or Article 2 (1) (fair and equitable treatment) of the Argentina-Austria BIT, or both. I do not agree that, under international law, the identity and nature of the internationally wrongful act giving rise to the international responsibility in question are not important to the determination of the amount of compensation as a form of reparation. In any case, as confirmed by the relevant commentaries of the ILC in its Articles on Responsibility of States for Internationally Wrongful Acts, the scope of the "principle of full reparation" is strictly limited to the "reparation of the injury actually caused" by the specific wrongful act in question, and any claim in excess of the value of such injury in relation to the capital invested by the relevant investor, or, where applicable, a potential loss of profits is dismissed as abusive. On the other hand, with regard to loss of profits, it may also be the case that, as it occurs in the case at issue, international law prevents claiming a given loss of profits due to the fact that it arises from a risk that, like "business risk," is attributed to the investor-entrepreneur under international investment law.
30. Paragraph 5 of the commentary of the ILC to Article 34 (Forms of reparation) of its Articles on Responsibility of States for Internationally Wrongful Acts specifies that "[c]ompensation is limited to damage actually suffered as a result of the internationally wrongful act and excludes damage which is indirect or remote". Legal scholars fully supports this commentary, as shown by the fact that Article 13 of the Resolution of the International Law Institute (ILI) on "Legal Aspects of Recourse to Arbitration by an Investor against the Authorities of the Host State under Inter-state Treaties" provides that: "Compensation due to an investor for violation of the FET standard shall be assessed without regard for compensation that could be allocated in case of an expropriation, in accordance with the damage suffered by the investor" (*Annuaire de l'IDI*, Tokyo Session, vol. 75, 2013, p. 431).

31. Another rule of international law governing the obligation to make reparation concerns the “contribution to the injury” of the victim of the wrongful act, a topic on which Claimants and the majority Award remain in such utter as inexcusable silence, although the relevant rule is codified in Article 39 of Chapter II (Reparation for injury) of Part two (Content of the international responsibility of a State) of such ILC Articles. It is worth recalling that such rule establishes that: “In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State *or any person or entity in relation to whom reparation is sought.*” (Emphasis added)
32. As pointed out by the decision on annulment issued by the *ad hoc* committee in *MTD Equity v. Chile*, “[t]here is no reason not to apply the same principle of contribution to claims for breach of treaty brought by individuals” (paragraph 99 of the Decision). In the instant case, Respondent has submitted documentary evidence that Claimants were invited to participate in the “transition plan” for the granting of new licenses, applied after the recourse for reconsideration of the sanction revoking ENJASA’s License was dismissed (ENREJA’s Resolution No. 315), an invitation which stood for some time (ENREJA’s Resolution No. 324 of 20 November 2013 (C-219)). Nevertheless, Claimants declined the invitation to participate in such plan, which undoubtedly contributed to the injury that they now allege to have suffered. Anyway, it is evident that, had Claimants agreed to participate in the “transition plan,” they would have obtained at least one of the new licenses, which would have reduced the amount of the loss of profits they now allege to have suffered as a consequence of the revocation of ENJASA’s License and the fact that, when the violations or breaches by the company that gave rise to such revocation occurred, it was Claimants themselves who controlled, managed, ran and administered ENJASA as a businessperson.
33. Claimants have referred to or invoked in connection with their “indirect expropriation” claim the requirement that compensation be “prompt, adequate and effective” (formula proposed by Cordell Hull, Secretary of State of the United States, in the 1920’s and rejected by Mexico.) But the Argentina-Austria BIT concluded in 1992 - which is the treaty governing this arbitration - does not use such formula at all, but the following: “Compensation shall be paid without *undue delay*” and “[a]ssessment and payment of compensation *shall be adequately provided for* no later than at the time of expropriation” (Article 4 (2) of the Argentina-Austria BIT.) (Emphasis added.) These

formulations of the applicable BIT are more consistent with contemporaneous sensitivities and the language used in relevant documents and resolutions of the United Nations. In any case, they are the formulas to be taken into consideration by this Arbitral Tribunal if compensation was due, as they pertain to the applicable BIT. The formula proposed by Cordell Hull is not included in any of the 59 ILC Articles on Responsibility of States for Internationally Wrongful Acts. This means that it is not a secondary rule of responsibility of States for internationally wrongful acts, but a primary treaty rule, which may be incorporated into BITs or other treaties when agreed by the Contracting States thereof, which is not the case here with the BIT applicable in this arbitration.

34. It is clear today that the temporary absence of compensation does not render an expropriation unlawful, as it makes no sense to advance the payment of compensation while the parties discuss whether there has been an expropriation or not (or whether the issue is *sub judice*.) The most recent awards so confirm. For instance, the award rendered by the tribunal in *Venezuela Holdings B.V. and others v. Venezuela* states: (i) that “the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful;” and (ii) that “in the absence of payment of compensation, a tribunal must consider the facts of the case” (paragraph 301 of the Award). There are other arbitral decisions to such effect, for example, that of *Tidewater v. Venezuela*. In his *Principles of Public International Law*, Professor Brownlie already noted that compensation is not a condition precedent to the lawfulness of an expropriation, nor is the absence of compensation a condition precedent to the unlawfulness thereof (7<sup>th</sup> ed., 1973, p 523).
35. Despite the foregoing considerations, the majority Award imposes upon Respondent, absent any legal ground, a compensation based on the loss of profits of ENJASA, which was a going concern when ENREJA sanctioned it by revoking the License held by the company. Hence, it is worth pointing out in such regard that, in accordance with Article 36 (2) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts: “The compensation shall cover any financially assessable damage including loss of profits *insofar as it is established*.” There are criteria which take into account in that establishment no value above the market value, although more complex valuation techniques given their consideration of probability factors, such as the “discounted cash flow (DCF)” method, have also been devised. This may lead to double recovery as a

consequence of the interrelation between the value of the capital of the company as well as that of its return, which should be avoided, which is why other tribunals have preferred more stable asset-based methods.

36. The commentary of the ILC to such Article 36 of its Articles on Responsibility of States for Internationally Wrongful Acts distinguishes three categories of “loss of profits”, i.e., lost profits. The third category concerns, as in the case at issue, claims for loss of profits in the context of concessions and other contractually protected interests (such as those of ENJASA’s License), in which what is compensated is “the future income stream [...], up to the time when the legal recognition of entitlement ends” (paragraph (33) of the ILC commentary to Article 36). Such commentary concludes the following thereon: “(that) [i]f loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.” (paragraph 33 of the ILC commentary to Article 36).
37. Lastly, in relation to the award of interest, Article 38 (1) of the ILC Articles provides, *inter alia*, interest shall be payable on “any principal sum due,” but only “when necessary in order to ensure full reparation,” because, as specified by the ILC commentary to that article:
- “Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term ‘principal sum’ is used in article 38 rather than ‘compensation’. Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.” (paragraph (1) of the commentary).
38. The majority Award has failed to explain why it awards “compound interest” to be borne by Respondent when the general rule of international law establishes that such interest is inadmissible. As Arbitrator Huber stated in 1924 in the *British Claims in the Spanish Zone of Morocco* case: “the arbitral case law ... is unanimous ... In disallowing compound interest” (cited by the ILC in paragraph (8) of its commentary to Article 38 of its Articles on Responsibility of States for Internationally Wrongful Acts). In 2001, the ILC so confirmed when also pointing out that: “The general view of courts and tribunals has been against the award of compound interest, and this is true even of those

tribunals which hold claimants to be normally entitled to compensatory interest.” This Arbitral Tribunal has a duty to apply in the matter of interest as well as in any such other issue as may arise in this arbitration the “applicable law” as defined in Article 8 (6) of the Argentina-Austria BIT, which, as stated *supra*, includes the international law on the matter, not the statements made by other investment arbitral tribunals, absent a justification or otherwise. The majority Award fails to do so in a further manifest excess of powers.

39. Neither the PCIJ nor the ICJ the function of which was and is, respectively, to resolve disputes under international law have awarded “compound interest.” In *Wimbledon (PCIJ, Series A, No. 1, 1923, p. 32)* and *Diallo case (ICJ, Reports 2012(II), p. 343, para. 56)*, both Courts awarded simple interest at 6 per cent as from the date of judgment. The Iran-United States Claims Tribunal has also consistently denied claims for compound interest. For instance, in *R.J. Reynolds Tobacco v. Iran (1984)*, the tribunal failed to find “any special reasons for departing from international precedents which normally do not allow the awarding of compound interest” (cited by the ILC in paragraph (5) of its commentary to Article 38 mentioned *supra*.)
40. In ICSID arbitration practice, tribunals have sometimes been inclined to award “simple interest” (for example, in *CMS Gas Transmission v. Argentina, 2005*), while, in other cases, they have opted to award “compound interest” (for example, in *MTD Equity v. Chile, 2004*). However, the award of “compound interest” by ICSID tribunals, in most cases, has not been duly grounded, as is to be expected since they depart from general international law, which disproves their frequent rhetorical assertions that they apply international law. On the whole, the decisions awarding “compound interest” merely indicate that claimants have so requested which is contrary to the provisions of Rule 47 (1) (i) of ICSID Arbitration Rules. This is not acceptable either, especially, because the payment of interest is governed by secondary rules of international law which constitute the right to make reparation for the injury caused by an internationally wrongful act, which is manifestly evidenced by the fact that Article 38 of the ILC is included in Chapter II of Part two of such ILC Articles entitled “*Content of the international responsibility of a State.*”

**PART I: ON THE CUSTOMARY RULE OF INTERNATIONAL LAW INVOKED BY RESPONDENT WHICH SETS FORTH THAT A STATE IS NOT BOUND TO COMPENSATE AN ALIEN FOR POTENTIAL ADVERSE EFFECTS ARISING FROM THE EXERCISE BY ITS COMPETENT AGENCIES OF THE STATE'S REGULATORY AND POLICE POWERS**

**A. The Customary Nature of the Rule and Applicability thereof to the Instant Case**

41. In its final conclusions, Respondent asserts it did not violate Articles 2(1), 4(1) and (2) and 4 (3) of the Argentina-Austria BIT and that, therefore, there is no room for compensation given that the revocation of ENJASA's license constituted a regular exercise by ENREJA, the provincial Regulatory Agency of games of chance in Salta, of the State's regulatory and oversight or police powers international law recognizes and protects insofar as it is one of the corollaries of the sovereignty thereof. It is a long-standing rule of customary international law that in recent years has regained prominence given the excesses which have accompanied the invocation of indirect expropriation in international cases on foreign investments. The majority Award fails to respond to the invocation by Respondent of the aforementioned customary rule of international law despite having been presented as defense on the merits against Claimants' conclusions, incurring, thus, in that regard, *infra petita*.
42. I have already had the chance to refer to this rule of international law in my Dissenting Declaration attached to the Decision on Jurisdiction of the Arbitral Tribunal in which I cited the formulation of any such rule made by the *Saluka v. Czech Republic* Tribunal in its partial award of 17 March 2006 (para. 255), as well as some other instruments, compilations, and studies on the international responsibility of States for the treatment afforded to the person or property of aliens, which is where the customary rule invoked by Respondent is enshrined in the general international body of law, as Professor Brownlie already asserted:
- “State measures, *prima facie* a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subject to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.” (*Principles of Public International Law*, 2nded., Clarendon-Oxford University Press, 19, 1973 p. 517-518
43. International law has traditionally granted States broad discretion to define, organize and manage their economies. The admission in the international body of law of rules

on expropriation and other standards of foreign investment protection has neither substituted nor diminished in any way whatsoever the sovereign States' regulatory and police powers that are an essential instrument to make the exercise and development of public functions that contemporaneous societies claim from the State feasible. As stated by the *Harvard Draft Convention on the International Responsibility of States*:

“An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful” ( 55 American Journal of International Law, 545, 1961, p. 554))

44. These non-compensable deprivations are accompanied in the Harvard draft by the following conditions: (i) it is not a clear and discriminatory violation of the law of the State concerned; (ii) it is not the result of a violation of any provision of Articles 6 to 8 (of the draft Convention); (iii) it is not an unreasonable departure from the principles recognized by the principal legal systems of the world; and (iv) it is not an abuse of the powers specified in the paragraph for the purpose of depriving an alien of his property.
45. In turn, the United States of America *Restatement (Third) of Foreign Relations Law* sets forth that: “A State is not responsible for the loss of property of an alien or for other economic disadvantages resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of State, if it is not discriminatory,...and is not designed to cause the alien to abandon the property to the state or sell it at a distress price” (American Law Institute, 1987, Vol. 2, section 712, comment)
46. Successive reports by García Amador, Special Rapporteur of the International Law Commission (ILC) on the subject of the international responsibility of the State for the treatment afforded to the person or property of aliens also reflect the existence, effectiveness and operativity of the customary rule of international law under consideration. In his sixth and last 1961 report where he makes a general review of his draft articles, García Amador distinguishes “expropriation” from “other measures” and reasserts the need to distinguish measures which “are intrinsically contrary to international law and hence, directly and immediately, capable of involving the responsibility of the State, and measures which, on the contrary, constitute the exercise

of a right by the State, whose responsibility is therefore only involved if the measures are attended by other factors or circumstances which represent in themselves an act or omission contrary to international law.” As regards the “duty to make reparation”, García Amador holds that “If in taking the measure which gives rise to the claim the State exercised one of its many powers in respect of patrimonial rights, whatever their nature or the nationality of the owner, one cannot and should not speak of ‘reparation’, although this term is ordinarily used both in practice and in the writings of learned authors,” (*Yearbook of the ILC*, 1961, vol. II, pp. 39-40, paras. 154 and 156).

47. In more recent times, the State’s regulatory and police powers have known a considerable development since the State had to undertake new tasks in order to promote the nations’ welfare and international cooperation in different areas and sectors in an increasingly globalized international society. These developments have required, for instance, the State’s intervention in areas such as fostering of a fair international trade, nations’ economic development, environmental degradation prevention, renewable energy development, citizens’ health and security protection, fight against poverty, terrorism and drug trafficking, tax evasion prevention and a long etc., among which we find money laundering prevention as an essential element in the fight against drug trafficking and terrorism which, in the instant case, triggered the revocation of the License the company ENJASA had for the exclusive exploitation of games of chance of provincial jurisdiction in the Province of Salta of the Argentine Republic.
48. This new dimension of the States’ regulatory and police activity has concurred with the development, following the 1965 ICSID Convention, of international rules and proceedings on foreign private investment, which might have misled some people with respect to the full and continuous effect of the customary rule of international law which sets forth *ex origen* that no State is bound to compensate an alien for the potential adverse effects arising from the regular or ordinary exercise by its agencies of their regulatory and police powers, except to the extent the State has consented thereto.
49. Therefore, it makes no sense, to assert that the distinction between “regulatory measures” and “indirect expropriation measures” began around 2004 or other recent date since that would mean disregarding that while the international protection of the so called “indirect expropriation” has developed in recent decades, the acknowledgement and protection by customary international law of the States’

regulatory and police powers comes from yesteryears as an element inherent in their sovereignty and it is so reflected by contemporaneous public international law both before and after the conclusion of the ICSID Convention.

50. What happened during the last years of the XX century and the early XXI century was that the legitimate concern of some arbitral tribunals and some publicists to protect foreign property against potential expropriations or deprivations by the investment host State was accompanied more often than desirable either by a silence or a baffling marginalization as regards the State's regulatory and police powers or by the accompaniment of limitations of said powers through an unusual extension of the scope of application of the so called "indirect expropriation." See, e.g., awards in *SPP v. Egypt* (1992), *Santa Elena v. Costa Rica* (2000), *Metaclad v. Mexico* (2000) and *Tecmed v. Mexico* (2003).
51. This last case is a good example of the trend to admit, because of events that are inevitable, any such State's powers albeit curtailing them. In fact, the award in *Tecmed* holds, on the one hand, that "The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable" (Award of 29 May 2003, para. 119) whereas, on the other, it extrapolates to international law on foreign investment elements of the European Court of Human Rights case law which are alien thereto and it considers as protected investments the investors' mere subjective expectations which, to a large extent, voids of content the asserted "undisputable principle" facing the continuously expanding "indirect expropriation" claims. The criticisms raised by some aspects of said award are thus understandable.
52. Decisions within the overall trend of *Tecmed* still fail to overcome the congenital regulatory gap any such trend undergoes, and which ultimately leads the dispute resolution between foreign investors and host States to depend on a subjective construction by the tribunal, instead of its being based upon application of the objective rules of the "applicable law" defined by the relevant BIT.
53. In any event, today, like yesterday, customary international law continues to recognize that the potential adverse effects for a foreign investor resulting from the regular exercise of the host State's regulatory and police powers do not create as such said State's international responsibility due to the fact that those effects are not the

consequence or the result of an international wrongful act by the host State. In this respect, it is particularly enlightening that in 1999 - within the framework of the negotiations on the Draft Multilateral Agreement on Investment backed by the OECD (MAI) the member States Ministers stated as follows:

“Ministers confirm that the MAI must be consistent with the sovereign responsibility of governments to conduct domestic policies. The MAI would establish mutually beneficial international rules which would not inhibit, the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation” (OECD, *Ministerial Statement of 28 April 1999*).

54. In turn, the Convention establishing the Multilateral Investment Guarantee Agency excludes non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activity in their territories. Another conventional example is the 1996 Energy Charter, Article 18 of which provides that each State “continuous to hold the rights to ... regulate the environmental and safety aspects of the (energy resources) exploration and developments.” Besides, in the XXI century, an increasing number of States have included in their free trade, commercial or investment agreements, specific provisions on the so called “indirect expropriation” for the purpose of preventing interpretations by arbitral tribunals that disregard, diminish or affect States’ regulatory and police authorities or powers. Thus, for instance, the free trade agreement between Peru and Canada provides as follows: “The sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred.” A like trend is also observed in multilateral treaties on foreign investment such as the Dominican Republic-CAFTA Convention.
55. The concern to protect the customary rule of international law discussed is also reflected in recent Model BITs of countries such as USA, Canada, Norway, etc... For instance, in Annex B to the “2004 US Model BIT” the following final commentary is made with reference to Article 6 thereof concerning expropriations: “Except in rare circumstances, non-discriminatory action by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations”. In turn, the “2012 US Model BIT” provides that: “The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial

matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities”.

56. These new developments and the detailed and accurate language thereof, undoubtedly, respond to the alarm created by some arbitral decisions on foreign investment matters that have disregarded or hastily addressed the customary rule of international law discussed, notwithstanding the fact that any such developments and explanations also constitute an important additional acknowledgment of the aging and full effect of the aforementioned customary rule. For the avoidance of misunderstandings, it is worth recalling at the same time that a customary rule of general international law is always applicable or likely to be applied, except when it has been expressly excluded by the parties to the relevant agreement or treaty. The ICJ case law is absolutely clear in this respect: “(an) important principle of customary international law should (not) be held to have been tacitly dispense with, in the absence of any words making clear an intention to do so” (*ELSI, Judgment, ICJ Reports 1989*, p. 15, para. 50). In the instant case, not only has the Argentina-Austria BIT not expressly excluded the customary rule under consideration but it has also listed among the applicable law, in Article 8 (6), “the applicable principles of international law”, as also does Article 42 (1) of the ICSID Convention.
57. In conclusion, the customary rule of international law under consideration is applicable to this dispute given that: (i) it formulates a relevant and important principle of customary international law not expressly excluded by the Argentina-Austria BIT; (ii) the provisions set forth under Article 8 (6) of the BIT and under Article 42 (1) of the ICSID Convention; and (iii) it has been expressly invoked by Respondent, a Contracting State of the applicable BIT, against Claimants’ claims in the arbitration at issue.

#### **B. General Acknowledgement of the Rule Applicability to International Arbitrations on Foreign Investments**

58. As frequently quoted, including citation by both Parties to this arbitration, the *Saluka v. Czech Republic* tribunal in its partial award of 17 March 2006 stated as follows: “It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt

in a non-discriminatory manner *bona fide* regulations that are aimed at general welfare” (para. 255 of the Award). And, in addition, that in the opinion of the tribunal:

“the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in *Methanex Corp. v. USA* said recently in its final award, “[i]t is a principle of customary international law that, where economic injury results from a bona fide regulation within the police powers of a State, compensation is not required” (para. 262 of the Award).

59. Express acknowledgment in international arbitration on foreign investments of this customary rule of international law applicability, although relatively belated was, nevertheless prior to *Saluka*. For instance, back in 2000 already it was applied by the tribunal of the *SD Myers v. Canada* case (Partial Award of 13 November 2000, para. 263), in 2001 by the *Genin v. Estonia* and *CME v. Czech Republic* tribunals, in 2002 by the *Feldman v. Mexico* tribunal and in 2005 by the *Methanex v. United States* tribunal, which stated in this respect as follows:

“... as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.” (para. 7, p. 4, Chapter D, Part IV) (the Spanish version is the one that appears in the *El Paso v. Argentina* award, para. 243).

60. Applicability to the instant case of this aforementioned rule of customary international law is, thus, undisputable given that it is a rule in force, its relevance to this dispute resolution, the reference to “the applicable principles of international law” in the definition of the “applicable law” formulated in Article 8 (6) of the Argentina-Austria BIT and the invocation of the rule by Respondent. Besides, both Parties have so acknowledged in their briefs. For its part, Respondent has also drawn the Arbitral Tribunal’s attention to several recent examples of the aforementioned customary rule application by international investment arbitral tribunals in relation to alleged violations by the host State of the protection standards formulated in the BITs with reference to both direct and indirect expropriations as well as fair and equitable treatment. This is shown by a simple *prima facie* reading of awards such as *Crystallex*

*v. Venezuela* (2016) and *Koch Minerals S.á r.l. v. Venezuela* (2017) as regards indirect expropriation, *Burlington v. Ecuador* (2012) and *Quiborax v. Bolivia* (2015) with regard to direct expropriation, and *Philip Morris v. Uruguay* (2016) regarding fair and equitable treatment.

61. The aforementioned rule of customary international law is, thus, likely to be invoked, as Respondent does, against each and every one of the three foreign investment protection standards which Claimants allege have been breached by Respondent in the instant case. The *Philip Morris v. Uruguay* tribunal's award also specifies that the rule has an overall reach in the sense that its scope of application is not limited to executive authorities or regulatory entities' administrative decisions, but it also encompasses decisions of legislative nature provided that the new rules are grounded on rational bases and are not discriminatory (para. 430 of the Award).

#### **C. International Arbitral Tribunals' Deference toward Decisions Adopted in the Domestic Forum by the State's Competent Body**

62. Respondent has underscored all the deference international arbitral tribunals reveal for decisions adopted in the domestic forum by the host State's regulatory agencies and other competent supervision and enforcement authorities in matters related to the treatment afforded to foreign investors and/or their investments. In fact, the references in international tribunals' awards and decisions to the deference or the high level of deference owed to domestic decisions are very frequent, *inter alia*, because of the experience and higher competence the competent national authorities are supposed to have.
63. This is, in the first place, due to the fact that derogations or limitations of States' national sovereignty are not presumed in public international law, but also, and particularly, because the aforementioned deference is an integral part of the rule of customary international law which provides for that the adverse effects the ordinary or regular exercise by the State's agencies of their regulatory or police powers potentially cause to the person or property of aliens do not constitute an international wrongful act and, therefore, they do not entail the duty to make reparation for the injury potentially caused, neither through compensation nor through any other form of repair admitted in the rules of international law codified in the International Law Commission Articles on

“Responsibility of States for Internationally Wrongful Acts” mentioned hereinabove (United Nations General Assembly Resolution of 12 December 2001).

64. International investment arbitral tribunals have also recognized the *normativity* of the deference element as part of the aforementioned rule. For instance, the *SD Myers v. Canada* (2000) tribunal’s award states that “The determination (of whether the investor has been treated unfairly or arbitrarily) must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” (para. 263 of the partial award) and, in turn, the *Koch Minerals S.á r.l. v. Venezuela* (2017) tribunal states that “...the standard of review of a State’s conduct to be undertaken by an international tribunal includes a significant measure of deference toward the State making the impugned measure. Such a tribunal cannot simply put itself in the position of the State and weigh the measure anew, particularly with hindsight” (para.7.20 of the Award). The majority Award fails to respect the “deference” element the aforementioned rule entails.

#### **D. The High Level of Demand of the Exceptions to the Rule**

65. International arbitral tribunals frequently underscore that a domestic regulatory decision or a decision adopted in the exercise of the regulatory role by the host State’s regulatory agency or other competent authority shall not be arbitrary or discriminatory or unreasonable, but that asserting or stating so does not suffice to dismiss it. Who so invokes it shall duly prove it and the customary international law standards in this regard are particularly demanding.
66. For instance, the *Glamis Gold v. United States* (2009) tribunal stated with reference to the interpretation of Article 1105 of the NAFTA that the measure “must be sufficiently egregious and shocking” so that the arbitral tribunal’s only task would be to decide whether Claimant “has adequately proven that the agency’s review and conclusions exhibit a **gross** denial of justice, **manifest** arbitrariness, **blatant** unfairness, a **complete** lack of due process, **evident** discrimination, or **manifest** lack of reasons so as to rise to the level of the breach of the customary international standard embedded in Article 1105” (Award of 8 June 2009, para. 779.)
67. In other words, it does not suffice for Claimants to allege or even prove that the measure adopted is, for instance, merely unfair or arbitrary. What they shall prove is that, in this context, the measure challenged has caused, or resulted in causing such an unfairness

or arbitrariness that it may be defined, for example, as a “gross denial of justice” or a “manifest arbitrariness” so as to conclude there is *in casu* a breach of the relevant standard of international law that prevails over the customary rule invoked by Respondent or dismisses the application thereof. That is to say, Claimants shall prove that in the case at issue there is a concurrence of circumstances or elements of such a degree of unfairness or arbitrariness that international law rejects flatly. The following paragraphs of the *Tza Yap Shum v. Peru* tribunal’s award of 19 June 2009 clearly present an example of what Claimants shall prove *mutatis mutandis* in this context:

“180. Even when the Tribunal acknowledges the State’s regulatory power deserves a deferent treatment, it is essential to do so without losing sight of the reasons that so warrant.

181. Scrutiny of a number of arbitral awards which have considered arguments on indirect expropriation arising from the Tax authorities’ conduct, evinces that they have frequently been dismissed. However, these awards also reveal a considerable consensus regarding the fact that the imposition and application of tax measures *may acquire an expropriatory nature* if the measure is confiscatory, arbitrary, abusive or discriminatory.” (Emphasis added)

68. Therefore, in the present case it is for Claimants to prove that the revocation of ENJASA’s License by ENREJA, Regulatory Agency and Enforcement Authority of Law No. 7020, was such gross a measure that it displaces the application of the customary rule invoked by Respondent concerning the regular exercise by the competent body of the Province of Salta of the sanctioning role thereof in response to serious and repeated violations or breaches by ENJASA of its Licensee’s obligations. But this evidence has not been produced by Claimants among other things because their “political conspiracy” theory gradually vanished as the proceedings developed until it lost all aspects of credibility during the oral stage.
69. The ICJ case law in the *ELSI* case (1989) has defined the notion of “arbitrariness” in international law as follows: “(arbitrariness is) not so much something opposed to a rule of law, as something opposed to the rule of law” (*Reports ICJ, 1989*, para. 128). This definition confirms the high level or degree of demand that the “arbitrariness” shall have when being invoked to dismiss application of the aforementioned customary rule of international law. Nevertheless, when Claimants assert in their allegations that the revocation of ENJASA’s License was “arbitrary”, they do not use such term in the special sense the notion of “arbitrariness” has in international law as defined by the

ICJ. This means that even if Claimants had proved, which they have not done either, an arbitrariness in the ordinary meaning of the term, that would not have sufficed to dismiss in the instant case application of the customary rule of international law invoked by Respondent which internationally protects the revocation by ENREJA of the License ENJASA had as it constitutes a particular representation of the exercise of the Argentine State's regulatory and police powers. Revocation of a license or concession by way of sanction for the breach by licensee or concessionaire, as the case may be, of the obligations thereof, is in no way whatsoever a measure against but for assertion of the "*rule of law*", provided that, as it occurs in the case at issue, both due process and the right of defense be respected.

70. In addition, this majority Award incurs in *infra petita* in view of the little consideration given to the customary rule of international law invoked by Respondent as affirmative defense facing Claimants' claims, despite the fact that the disputed measure - the revocation of the ENJASA license - is the result of a sanction imposed to the company by the competent authorities of the Argentine Province of Salta due to prior violations or breaches by the company of the applicable provincial framework law and of the provisions set forth in the license agreement itself. In other words, the sanction imposed to ENJASA is the result of the normal exercise by ENREJA of its obligations as the Regulatory Agency and Enforcement Authority at the provincial jurisdiction and as such, it participates in the Argentine State's regulatory and police powers regarding games of chance management and exploitation by the company, which in Salta constitutes a public ownership activity exercised by the Provincial Authorities through the grant of licenses to private parties.
71. As a disputed measure, it shall be highlighted that the revocatory decision actually complies with each and every constitutive element of the standard that—as Claimants themselves admit (PHB, para. 299)—would determine in international law the lawfulness of a license revocation which, for instance, the *Quiborax v. Bolivia* tribunal's award defines in the following terms:

“The Tribunal must thus consider whether, in light of all the circumstances, the Revocation Decree was a legitimate cancellation of the Claimants' concessions in the exercise of Bolivia's sovereign power to sanction violations of Bolivian law and is therefore not a compensable taking or whether it is a veritable taking disguised as the exercise of the State's police powers. This will depend on whether (i) the Revocation Decree is based on actual violations of Bolivian law

by the Claimants; (ii) whether those violations of Bolivian law are sanctioned with the termination of the concessions (whether by revocation, cancellation, annulment or otherwise), and (iii) whether the revocation was carried out in accordance with due process.” (Award of 16 September 2015, para. 207)

72. The revocation of ENJASA’s license by ENREJA actually complies with the three conditions of the text quoted hereinabove: (i) it is based upon repeated and proven prior violations by the company of the Province of Salta pertinent legislation (Law No. 7020) and of the license agreement itself; (ii) the violations at issue could eventually be sanctioned with the revocation of the license pursuant to the provisions set forth at Law No. 7020; and (iii) the revocation was conducted by ENREJA, the Regulatory Agency and Enforcement Authority of Law No. 7020, in accordance with the effective legislation in the matter and respecting due process before, during and following the revocation. Ratification of the Regulatory Agency’s decision by decree of the Province of Salta Executive Branch was carried out without prejudice of the administrative recourse for reconsideration before ENREJA exercised by Claimants and the contentious-administrative proceedings subsequently brought thereby before the competent provincial court requesting annulment of ENREJA Resolutions No. 240/13 and No. 315/13.
73. The public purpose of the measure warrants no debate whatsoever since the reasons that determined the sanction of revocation were violations or breaches by ENJASA of their legal and contractual obligations related to money laundry control and hiring of third party operators without ENREJA’s authorization in a historical context of repeated violations or breaches during the 2005- 2013 period which had already given rise, prior to revocation, to more than twenty formal administrative proceedings against ENJASA concluded with many others sanctions imposed by ENREJA and on the occasion of which the company had already been warned time and again of the possibility of the License being revoked should violations or breaches thereof not cease.

**E. Claimants’ Admission of the Existence of a Customary Rule of International Law Concerning the State’s Exercise of its Regulatory and Police Powers, and Challenge to the Application of the Rule in the Instant Case**

74. Claimants acknowledge the existence in customary international law of the rule concerning the State’s regulatory and police powers invoked by Respondent but challenge its application to the instant case (PHB, para. 280 *et seq*). In such regard, Claimants highlight what they describe as conditions for application of the rule, which,

in their opinion, would be reflected in Article 4 (2) of the Argentina-Austria BIT. In support of this contention, Claimants take as a starting point of their position certain passages of the awards rendered in *El Paso v. Argentina* (Award of 31 October 2014, para. 240) and *Methanex v. United States* (Award of 3 August 2005, Part IV, Chapter D, p. 4, para. 7).

75. Claimants rely upon the *El Paso* award so as to identify the constituent elements of the alleged conditions stated in Article 4 (2) of the BIT, which, in their view, would be useful to distinguish between the exercise of a legitimate general regulation and an expropriation. Nevertheless, Claimants' citation to such award in paragraph 281 of their PHB is misleading, as it mistakes the award's conclusion that, in principle, general regulations do not amount to indirect expropriation with the issue of potential exceptions to such principle when such general regulations are "unreasonable". As to the general principle, *El Paso*'s finding cannot be more precise:

"In sum, a general regulation is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process. In other words, *in principle, general non-discriminatory regulatory measures, adopted in accordance with the rules of good faith and due process, do not entail a duty of compensation*" (para. 240 of the Award) (emphasis in the original).

Accordingly, administrative measures or decisions adopted by the competent authority in accordance with the reasonable general regulation in question do not entail a duty of compensation. Moreover, in the words of the *El Paso* tribunal, "as a matter of principle, a general regulation – whose object is not the taking of property as in the case of direct expropriation – does not amount to an indirect expropriation" (para. 236 of the Award).

76. That being said, the *El Paso* tribunal - which shares the sociological argument of the *Pope & Talbot* tribunal whereby "a blanket exception for regulatory measures" would readily create a gaping loophole in the international protection of investments against expropriations – goes on to admit that there are exceptions to the principle that general regulations do not amount to expropriation although they: "do not, in any way, weaken the principle that certain takings or deprivations are non-compensable. They merely remind the legislator, or, indeed, the adjudicator, (*sic!*) that the so-called 'police power exception' is not absolute" (para. 235 of the Award). Then, the *El Paso* tribunal

wonders if, “[b]y exception, *unreasonable* general regulations can amount to indirect expropriation,” concluding in that regard that:

“If general regulations are unreasonable, i.e. arbitrary, discriminatory, disproportionate or otherwise unfair, they can, however, be considered as amounting to indirect expropriation if they result in a neutralization of the foreign investor’s property rights” (para. 241 of the Award).

77. These “unreasonable general regulations” of *El Paso* are described by the award as “exceptions,” and are, thus, subject to a restrictive interpretation and, in any case, as far as the present dispute is concerned, irrelevant, since Claimants have alleged neither that Law No. 7020 is an unreasonable general regulation, nor that it is intentionally or objectively discriminatory, or that the rights revoked were property rights. With regard to the term “unreasonable”, it would seem to be inspired by the expression “unreasonable interference” under Article 10 (3) (a) of the Harvard Draft Convention on Responsibility of States mentioned *supra*. The *El Paso* award also points to the requirement that the measures adopted by the State be reasonable and proportionate, as stated by other tribunals, such as those in *LG&E v. Argentina* and *Tecmed v. Mexico*.
78. In relation to proportionality, a protean notion that is prone to abuse, it should be borne in mind that, within the particular framework of the current international law on protection of foreign investments, such notion neither is nor operates as a self-contained principle or standard (such as good faith or fair and equitable treatment), even though, in given contexts or situations, it may be applied as a supplement, either as a general principle of law or because the notion is incorporated in a rule of domestic law and/or a rule of international law that is part of the “proper law” applicable in order to settle the dispute by virtue of the applicable BIT. This occurs in this case where Law No. 7020 of the Province of Salta applied to the revocation of ENJASA’s license includes, *inter alia*, in weighing the sanction, the proportionality criterion, Claimants not having shown, on the other hand, the existence of defects in the application of such criterion by ENREJA in the context of the administrative proceedings pursued. It should also be noted that the universe of domestic administrative sanctions of State legal systems is not to be confused with the “countermeasures” institute of public international law applicable to the relations between States, where proportionality between the countermeasure and the injury suffered indeed plays a critical role (see Article 51 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts).

79. In view of the general considerations mentioned *supra*, I cannot agree that the scope and role of “proportionality” in the international law on protection of foreign investments, corresponds to the operation of “proportionality” in the case-law of the European Court of Human Rights. Anyway, proportionality is a notion alien to the definition of the material scope of application of the customary rule of international law whereby any potential adverse effects on the foreign investor resulting from the ordinary exercise by States of their regulatory and police powers are not subject to reparation. Nor does it seem admissible that a subjective conception of the notion of the “investor’s expectations” can somehow alter the application of such customary rule or curtail its material scope of application. On this matter, I am in full agreement with the following passage of the decision of annulment issued by the *ad hoc* committee in *MTD Equity v. Chile*:

“... For example the TECMED Tribunal’s apparent reliance on the foreign investor’s expectations as the source of the host State’s obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly” (paragraph 67 of the Decision on Annulment).

80. Doctrine also confirms that an investment is certainly protected by the applicable BIT, but the BIT should not be used as a means to rewrite license agreements such as that of the case at issue or such other arrangements as may be concluded with the foreign investor (see, for example, James Crawford, “*Treaty and Contract in Investment Arbitration*”, Kluwer Law International 2008, vol. 24. Issue 3, p. 374). In this case, for instance, it would be unacceptable to invoke Claimants’ subjective “legitimate expectations” in this arbitration in order to rewrite ENJASA’s exclusive license agreement within the regulatory framework of games of chance under Law No. 7020 of the Province of Salta whereby the license revoked by ENREJA had been granted.

81. As to the citation to *Methanex v. United States* in paragraph 282 of Claimants’ PHB, we should first wonder its *raison d’être* in this context. I understand that the purpose would be to support Claimants’ contention that the provisions of Article 4 (2) of the Argentina-Austria BIT would be tantamount to a kind of specific promise by the Argentine Republic to putative Austrian investors, i.e., Claimants CAI and CASAG in

this case, to refrain from exercising its regulatory and police powers in whole or in part when they invested in ENJASA on the occasion of the privatization of the company. In other words, the provisions of Article 4 (2) of the BIT would be tantamount to a particular commitment assumed by the Argentine Republic towards CAI and CASAG that their investment in ENJASA would be protected from all or some of the potential adverse effects of the exercise by ENREJA, in its capacity as Regulatory Agency and Enforcement Authority, of its duties and functions.

82. If that were the *raison d'être* of the citation to *Methanex*, we would be in the face of a downright fallacy, since Article 8 (6) of the Argentina-Austria BIT makes a clear distinction between “the provisions of this Agreement,” on the one hand, and “the terms of any specific agreements concluded in relation to such an investment,” on the other, and, concerning the latter, there is no evidence on record that any specific agreements were concluded with Claimants when ENJASA was privatized, exempting them from the potential adverse effects of ENREJA’s exercise of its obligations as Regulatory Agency and Enforcement Authority of Law No. 7020 of the Province of Salta. None of the relevant documents on record submitted to the Arbitral Tribunal mentions or refers to any agreement, promise or exemption in favor of Claimants with respect to such potential effects. For example, the Transfer Agreement for ENJASA’s Class A Shares, Article 2.1 of which defines and lists “the specific rules applicable to, and the documents that form part of, the AGREEMENT,” mentions no promise, exemption or favorable treatment to Claimants or BOLDT and/or IBERLUX. Nor is there evidence of any specific agreement on the matter after the date of the investment. The Memorandum of Understanding (UNIREN) does not exempt ENJASA or its shareholders from the potential adverse effects of the sanctions that ENREJA might impose on the company in the event of violations or breaches of its legal and/or contractual obligations.
83. As regards the potential exceptions to the customary rule of international law whereby the deprivation suffered by the foreign investor does not warrant compensation when it arises from the State’s regular exercise of regulatory and police powers, Claimants have alleged that the sanction entailing the revocation of ENJASA’s license had been expropriatory in nature as it failed to meet the following four liberally self-defined conditions: “public purpose and good faith,” “adequacy and proportionality,” “due process,” and “not arbitrary”. As to each of these categories, Claimants have cited

purportedly relevant references from awards rendered by investment arbitral tribunals but have failed to submit evidence of a single aspect of any of those broad categories of conditions, i.e., evidence that the revocation sanction was not for a public purpose; was adopted in bad faith; was inadequate, disproportionate or arbitrary; or was in violation of due process.

84. Nor have Claimants shown that, due to a particular environment or event outside the revocation of ENREJA's license as such, that sanction has become expropriatory in nature in international law for being "confiscatory, arbitrary, abusive or discriminatory" in the words of the arbitral tribunal in *Mr. Tza Yap Shum v. Republic of Peru* (para. 181 of the Decision on Jurisdiction and Competence of 19 June 2009). Moreover, for a given sanction measure to be described as "unreasonable" in international law when it was adopted by the competent body of the State in question in exercise of its authority and functions, the "unreasonable" of the measure must be of such a superlative degree or level as to be able to prevail over the customary rule governing sovereign States' regulatory and police powers.
85. In fact, as highlighted by arbitral tribunals and doctrine, a conclusion that is consistent with international law on the matter requires a showing, by means of a thorough analysis of the specific factual and legal elements of the case, such superlative degree or level of the sanction measure in question, since the admitted exceptions to the application of the customary rule under study are not intended to weaken such rule, but, as rightly stated by the *El Paso* tribunal, to remind the legislator or adjudicator that its regulatory and police powers are not absolute. However, nor have Claimants shown that ENREJA's revocation of the license was, in the circumstances of the case, such an "unreasonable" measure as to allow an international arbitral tribunal to conclude that the application of the customary rule governing the State's regulatory and police powers has been ruled out in the case.
86. The foregoing considerations confirm that Claimants have failed to prove the *in casu* existence of an exception to the customary rule invoked by Respondent, and, therefore, I reject Claimants' argument that such customary rule of general international law would not apply in the context of this dispute. In contrast, I believe that it is not only fully applicable, but also critical to the adjudication of the dispute.

**F. The Treatment Given to the Customary Rule of International Law Invoked by Respondent and Admitted by Claimants in the Majority Award**

87. The majority Award tries to ignore the impact of the customary rule of international law invoked by Respondent and admitted by Claimants on the resolution of this dispute, in spite of the recognition, scope, effect and currency of such rule in contemporaneous foreign investment international arbitration. The position of the majority is one of the main reasons why, in my view, the decision adopted in the Award is manifestly wrong for failing to duly apply the “proper law” in accordance with Article 8 (6) of the Argentina-Austria BIT, which, in turn, explains this lengthy and detailed Dissenting Opinion.
88. It is unacceptable that the application of a rule of customary international law of general importance to States’ everyday activities such as that invoked by Respondent, which is in full force and effect and critical to the resolution of this dispute under applicable law is ignored or ruled out as the majority does, which leads me to cite once again the case-law of the ICJ in *ELSI*: “(an) important principle of customary international law should (not) be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so” (ICJ Reports, 1989, Judgment, p. 15, para. 50).
89. In addition, failing to consider the customary rule of international law invoked by Respondent, in the circumstances of this case, is particularly wrong. There are systemic and procedural reasons for the rule under analysis to be addressed as a preliminary question before pondering Claimants’ claims, because, if it is confirmed that the disputed measure actually stems from the host State’s regular exercise of its regulatory and police powers, such claims should not be considered for decisive purposes, although they may be for confirmation reasons or *ex abundante cautela*.
90. This opinion is independent from the nature of each of the three claims made by Claimants, namely, “indirect expropriation,” “direct expropriation,” and “fair and equitable treatment.” For instance, the tribunal in *Burlington v. Ecuador* rightly begins its analysis of the “direct expropriation” standard with the following consideration:

“Burlington argues that the takeover of the Blocks constituted a direct expropriation of its investment. Ecuador does not object to reviewing the takeover under the standard applicable to direct expropriation and the Tribunal agrees. Accordingly, a State measure constitutes expropriation under the Treaty if (i) the measure deprives the investor of his investment; (ii) the deprivation is permanent; and (iii) *the deprivation finds no justification under the police*

*powers doctrine. The Tribunal will examine these elements in reverse order*" (Decision on Liability of 14 December 2012, para. 506) (emphasis added).

In a case related to the analysis of a purported "indirect expropriation," the tribunal in *Quiborax v. Bolivia* (Award of 26 September 2015, para. 200) adopted a similar approach. This is also the exposition model followed in this Dissenting Opinion, given that, in the circumstances of this case, it is also consistent with procedural logic to examine, first of all, if the application of the customary rule of international law invoked by Respondent in its defense is warranted.

91. In search of exceptions to the customary rule of international law invoked by Respondent, the majority Award rules out some of those alleged by Claimants, for example, violation of due process, but artificially admits others, such as arbitrariness and proportionality, for me, on insufficient grounds, in light of the facts proved or acknowledged by each of the Parties and the applicable law set forth in Article 8 (6) of the Argentina-Austria BIT. The majority Award pretends to ignore:

(i) that none of the citations to awards invoked by Claimants concerning proportionality and due process dealt with sanction measures adopted by a State's competent provincial authority in response to previous violations or breaches by licensee of applicable laws and the license agreement. Claimants have mentioned awards concerning licenses or concessions, such as *Tecmed v. Mexico*, but not awards in which the purported adverse effect of the measure disputed by claimant resulted from a legitimate sanction imposed by the competent regulatory authority upon licensee for having violated or breached its legal and/or contractual obligations;

(ii) that applicable provincial laws expressly provide that the revocation of the license is one of the sanctions to be imposed in the event of such violations or breaches, and that, consequently, both ENJASA and Claimant shareholders upon privatization of the company unconditionally assumed such risk prior to revocation of the license. In such regard, it should be borne in mind that "risk" is one of the key elements of the generally accepted notion of the term "investment";

(iii) that Claimants chose to resort to ICSID whereupon they had to withdraw from the contentious-administrative proceedings instituted thereby before the courts of Salta for

the annulment of ENREJA's Resolutions Nos. 240 and 315 on the revocation of ENJASA's license, pursuant to Article 8 (4) of the Argentina-Austria BIT, and that, as a consequence of such withdrawal, ENREJA's decisions on the revocation of ENJASA's license have become final in Respondent's domestic law;

(iv) that nor is there any room to conclude that Respondent breached "due process", since Claimants opted not to have the injury that they claim to have suffered remedied by means of a judgment of the competent court for Salta in contentious-administrative matters to which they had resorted. That is so not because Claimants were compelled under the Argentina-Austria BIT or the ICSID Convention to exhaust local remedies prior to instituting this arbitration, but due to the fact that such failure makes it impossible to verify within the international framework the potential existence of an expropriation of the investment or an unfair or inequitable treatment thereof by Salta authorities. As rightly pointed out in *EnCana v. Ecuador* (2006): "The question is not whether the claim is admissible but whether the relevant rights have been expropriated as a matter of substance" (footnote 138 of such Award). Undoubtedly, in international law, a claim for breach within the domestic framework of "due process" by a respondent State cannot succeed if the claimant investor resorts to an international tribunal when it still has at its disposal domestic means of settlement that it fails to use (see, for example, the Award in *Parkerings v. Lithuania* (2007)). The claimant investor may eventually institute an international arbitration, but not prove that respondent in those arbitral proceedings breached the "due process" standard within the domestic framework;

(v) that nor is there any room to conclude that the regular administrative proceedings whereupon ENREJA revoked ENJASA's license breached a proportionality criterion established by customary international law, since, even for Claimants themselves, references to such purported criterion in this context are merely a "dominant position" (PHB, para. 286), rather than a well-known legal criterion that is an integral part of the customary rule of international law invoked by Respondent, without prejudice of the provisions or mandates of a given treaty in such regard, or the proportionality criteria laid down in applicable domestic laws, as prescribed by both Article 13 of Provincial Law No. 7020 and ENJASA's License Agreement in this case;

(vi) that the findings in the Award are not well-founded. They do not show that, at the time of revocation of ENJASA's license, events occurred that could give rise to an exception admitted by international law to the customary rule invoked by Respondent and admitted by Claimants. For instance, the Award shows nothing remotely similar to the occurrence of "egregious and shocking" events like those mentioned in *Glamis* (paragraph 66 *supra*) or circumstances leading to exceptions such as those stated by Harvard Draft Convention in *Saluka* (para. 257 of the Award). Lastly, the majority Award refrains from taking into consideration the normality of the situation in the Province of Salta when ENJASA's license was revoked within the framework of a democratic rule of law like that of the Argentine Republic. Hence, there is no reason to extrapolate into this case, presumptions of abnormality as it occurs in other past and present international arbitrations;

(vii) that the majority Award also presents several inconsistencies by failing to give effect to the twofold circumstance that, first, Claimants did not own the license revoked (as nor did ENJASA), and, secondly, that the decision to revoke ENJASA's license as a sanction imposed on account of the previous violations or breaches of its obligations did not permanently and completely neutralize Claimants' investment in the company. A mere reduction of the value of an investment, even if significant, is not an "indirect expropriation." Furthermore, the condition of permanent and complete disappearance of all the critical elements of a property right (or a like contractual right) of licensee is not met in this case, as ENJASA did not have such right when its License was revoked and the License was revocable in nature (see Charles Leben, « *La liberté normative de l'Etat et la question de l'expropriation indirecte* » in « *Le contentieux arbitral international relatif à l'investissement* », Arthemis, 2006, pp. 173-174, cited in *El Paso Award*, para. 233).

92. I understand that Claimants' reference to the "dominant position" mentioned *supra* is appropriate only for those who subscribe to the so-called "sole effects" doctrine, which is in decline for being excessive and incomplete, as stressed in 2006, *inter alia*, by the tribunal in *LG&E v. Argentina* (para. 194 of the Award). In addition, this doctrine is especially and wholly inappropriate in this case, since ENREJA's revocation of the license was not an ordinary measure, but a **sanction** expressly provided for in Provincial Law No. 7020 (and the License Agreement) imposed upon ENJASA for

having repeatedly violated or breached its legal obligations as Licensee (as well as the provisions of the License Agreement.) On the other hand, ENREJA imposed the revocation sanction - as evinced by the documents in possession of the Arbitral Tribunal – upon conclusion of duly administrative proceedings, in exercise of the ordinary powers and authority conferred thereupon in its capacity as Regulatory Agency and Enforcement Authority by Law No. 7020 of the Province of Salta on games of chance, which is a public activity subject to provincial jurisdiction in such Province, and without prejudice of the administrative remedies available and/or the judicial control of ENREJA’s decision by the courts of Salta.

93. Like any sanction, the revocation of ENJASA’s license was a measure which, by definition, had adverse effects on the company (the License Agreement uses the term “penalties” with reference to such effects.) Those adverse effects may also apply indirectly to investors in such company. But it is a measure which does not, by its nature and its object and purpose, give rise *ex origen* to Respondent’s international responsibility before ENJASA or Claimants, or, for that matter, to compensation to ENJASA or Claimants. The “sole effects” doctrine mentioned *supra* was applied a few years ago by some investment arbitral tribunals which failed, at the outset, to pay due attention to the States’ regulatory and police powers as recognized and safeguarded by international law. In any case, such doctrine lacks the normativity necessary to prevail over such a relevant customary rule of international law inherent in States’ sovereignty as that invoked by Respondent in its defense. On the other hand, such doctrine is, nowadays, going out in practice, and international investment arbitral tribunals, in general, make the impending distinction between “the State’s regulatory and police measures” and “indirect expropriation measures.” Both kinds of measures cannot be mistaken or assimilated anymore.

#### **G. Conclusion on the Customary Rule Invoked by Respondent**

94. The revocation of the License was a legitimate measure adopted by ENREJA in exercise of its functions of Regulatory Agency and Enforcement Authority of Law No. 7020 as a sanction upon ENJASA for its serious and repeated violations or breaches of its legal and contractual obligations as Licensee. By its nature and given its object and purpose, such measure was an act undertaken by ENREJA in exercise of its ordinary legal powers and authority, which are recognized and safeguarded both by the domestic

legal system of the Argentine Republic in the Province of Salta, as well as the rule of customary international law invoked by Respondent.

95. The adverse effects or deprivations suffered by Claimants as a result of the exercise by the competent provincial authorities of the Province of Salta of the Argentine State's regulatory and police powers do not violate in the instant case the standards alleged by Claimants on direct or indirect expropriation, or fair and equitable treatment, enshrined in the Argentina-Austria BIT. Even though the conduct of such provincial authorities may indeed be attributed to Respondent, if such attribution is not accompanied by a violation by Respondent of an international obligation towards Claimants, there is no internationally wrongful act, as is actually the case here. In other words, since, in this case, the objective element of international responsibility is absent, there is no internationally wrongful act, and, without an internationally wrongful act, Respondent bears no international responsibility, and, if Respondent bears no international responsibility, it has no obligation to make reparation for the injury allegedly suffered by Claimants due to the revocation of ENJASA's license by means of compensation (Articles 1, 2, 28 and 31 of the Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts.)
96. The majority Award makes findings opposed to those mentioned *supra*, which, I deem groundless in light of the information on record and the evidence submitted by the Parties. The majority Award fails to take into consideration facts that are highly relevant and duly proved or admitted in the resolution of this dispute. The Award also mutilates part of the "proper law" applicable to the dispute pursuant to Article 8 (6) of the BIT. The *adverse effects* of the revocation of the License on ENJASA are specific to the very notion of sanction, and that possibility was known to and accepted by Claimants when they invested in the company. In addition, those effects in no way exhaust the elements to be weighed by this Arbitral Tribunal in order to adjudicate this case.
97. Moreover, apart from the *effects*, we should bear in mind the *causes* of those effects; the *nature* of the measure, which, in the case at issue, is a sanction on account of violations or breaches of obligations by the sanctioned party; and the *kind* of rights affected by the sanction. Without giving due consideration to all these elements, neither this Tribunal nor any other can reach conclusions in accordance with the law applicable to this dispute. The equation cannot miss or disregard the following: (i) the causes of

the revocation of the License (ENJASA's previous violations or breaches of Article 5 of Law No. 7020 and the License); (ii) the nature of the measure adopted by ENREJA (a legitimate sanction expressly prescribed under Article 13 of Law No. 7020); (iii) the number, seriousness and repetition of violations or breaches by ENJASA despite ENREJA's prior warnings of which there is abundant documentary evidence on record; and (iv) the kind of rights revoked by the sanction (Licensee's administrative exploitation and management rights), which may not be expropriated under Respondent's Argentine domestic law. The majority has failed to pay due attention to all these issues, or others that are just as relevant, as a consequence of which their Award regrettably decides *infra petita* on the customary rule of international law invoked by Respondent in its defense.

98. The sanction measure disputed did not go beyond the revocation of ENJASA's License. It affected, for example, no property rights or other rights *in rem* of the company. ENJASA was certainly a "licensee", but not the "owner" of the License, and the administrative rights to manage a State activity, such as the exploitation of games of chance in Salta under its provincial jurisdiction, cannot, by definition, have been subjected to direct or indirect expropriations by the Provincial Executive Branch, which is the license-granting authority. No-one expropriates itself. Now, if, under domestic law, there is no possibility of expropriating the rights or assets in question, it cannot be asserted in this international arbitration that an expropriation did occur, because that assertion would be, *inter alia*, contrary to the provisions of Article 1 (*in fine*) of the Argentina-Austria BIT on the contents and scope of the rights for the different categories of assets listed therein. Nor can it be ignored that, in the present case, the Provincial Executive Branch might well, in accordance with the License Agreement, not only ratify the revocation of a license determined by the Regulatory Agency, as was the case, but also declare the license null and void by operation of law, on account of ENJASA's breach of the obligations imposed by Article 5 of Provincial Law No. 7020 (Article 6 of the License Agreement).
99. Nor did the revocation of the license infringe upon the rule of law, as Claimants have purported, since both Articles 5 and 13 of Law No. 7020, and those which therein define ENREJA's powers and authority, are perfectly clear and were not questioned but accepted by ENJASA while it was the Licensee, as well as by Claimants when they invested in the company both on the occasion of its privatization and, later, when they

became majority shareholders by acquiring around 60% of the company equity or when they acquired virtually all the rest of the company's shares after ENREJA issued Resolution No. 240. Neither ENJASA nor Claimants challenged at any of those times before the courts of the Province of Salta the Regulatory Agency's powers, authority or ability to impose sanctions, or the sanctions imposed on ENJASA throughout the years prior to Resolution No. 240. They resorted to the court in contentious-administrative matters for the Province of Salta only after ENREJA's Resolution No. 315 rejected the recourse for reconsideration of the decision to revoke the License under Resolution No. 240. Nor did ENJASA resort to the Provincial Executive Branch on appeal against any of the sanctions that ENREJA imposed thereon (*recurso de alzada*)

100. Lastly, the contentious-administrative proceedings instituted in Salta by Claimants, requesting the annulment of ENREJA's Resolutions Nos. 240 and 315 concluded by means of an early withdrawal, as Claimants (majority investors in ENJASA and managers exercising control over the company for years) chose to resort to ICSID arbitration, arguing that, as a consequence of the revocation of ENJASA's license, Respondent had allegedly violated certain provisions of the Argentina-Austria BIT. They did not wait for the provincial court in contentious-administrative matters to decide in the domestic forum on the annulment of Resolutions Nos. 240 and 315, which thus became final in the Argentine domestic system, which is one of the sources of the law applicable to the resolution of the dispute for being, pursuant to Article 8 (6) of the Argentina-Austria BIT, "the laws of the Contracting Party party in the dispute."

## **PART II: ON RESPONDENT'S POTENTIAL INTERNATIONAL RESPONSIBILITY FOR THE INTERNATIONALLY WRONGFUL ACTS ALLEGED BY CLAIMANTS**

101. Having concluded that the alleged adverse effects for Claimants of the revocation of ENJASA's license do not constitute an internationally wrongful act, but rather a mere consequence of measures issued by Respondent's competent body in response to violations or breaches by the company and, as such, supported by the customary rule of international law on the exercise of State regulatory and police power, Respondent has not incurred any international responsibility to Claimants for said alleged adverse effects. Therefore, all three claims by Claimants are rejected. However, I have *ex abundante cautela* decided to examine in detail the merits of each claim, further concluding also that Respondent has not violated any international obligation *vis-à-vis*

Claimants and, in the absence of this objective element of international responsibility, Respondent could have not performed the internationally wrongful acts attributed to him by Claimants. The findings from the analysis of Claimants' claims are therefore similar to those from the analysis of the customary rule of international law invoked by Respondent in its defense.

**A. Claimants' First Claim: Alleged Violation of Article 4(1) and (2) of the TBI by Respondent (Indirect Expropriation)**

**(a) Relevant Texts**

**(i) Agreement between the Republic of Argentina and the Republic of Austria for the Promotion and Protection of Investments, 7 August 1992, effective since 1 January 1995**

102. As regards this first claim, Claimants rely on Article 4(1) and (2) of the Argentina-Austria BIT, which provides:

“(1) The term "expropriation" includes both nationalization or any other measures having an equivalent effect.

(2) Investments of investors of one Contracting Party shall not be expropriated in the territory of the other Contracting Party for more than a public purpose and under due process and compensation. The amount of compensation shall correspond to the value of the investment immediately before the expropriation or impending tender was issued. The compensation shall be paid without undue delay and shall produce interest until the time of payment, in accordance with the usual banking rate of the State in whose territory the investment has been made; effectively realizable and shall be freely transferable. The determination and the payment of compensation shall be set out in an appropriate manner at the latest at the moment of the expropriation.”

103. Claimants CAI and CASAG, both Austrian, are indirect shareholders of the Argentine company *Entretenimientos y Juegos de Azar S.A* (ENJASA), which, prior to the revocation of ENREJA by means of Resolution No. 240 (dated 13 August 2013) owned around 60% of the shares and, since November 2013, 99.94% of the shares of Leisure and Entertainment S.A. (L&E). As shareholders, Claimants state in this arbitration that the aforementioned revocation of ENJASA's license by the Regulatory Agency resulting in an interference with their investment tantamount to an “indirect expropriation”, which would be in breach of Article 4(1) and (2) of Argentina-Austria BIT cited above.

104. The text of these paragraphs of Article 4 of Argentina-Austria BIT is slightly different from what could be deemed as the usual wording of BITs. First, the title of the Article is “Compensation” instead of “Expropriation”. Second, paragraph (1) defines “expropriation” in a narrower sense than other BITs, as it merely mentions “nationalization”, on the one hand, and “any other measures having an equivalent effect”, on the other hand, the latter in reference to the term “nationalization” alone which is not the only possible form of expropriation. In turn, as I have already explained in the Introduction of this Opinion, paragraph (2) of Article 4 does not require that compensation be “prompt, adequate and effective,” but rather provides that “compensation shall be paid *without undue delay*” and that “the determination and the payment of compensation shall *be set out in an appropriate manner* at the latest at the moment of the expropriation.” (Emphasis added)
105. Every interpretation undertaken in accordance with the provisions of Articles 31 to 33 of the Vienna Convention should take into consideration *inter alia* the “context” represented by the other provisions of the treaty being interpreted. As regards the Argentina-Austria BIT, the interpreter must take into account the Definitions under Article 1, the relevant paragraphs of which read as follows:
- “For the purposes of this Agreement:
1. The term “investment” means every asset invested or reinvested in any sector of the economy, provided that the investment has been made in accordance with the laws and regulations of the Contracting Party in whose territory has been made and, in particular, though not exclusively:
- b) The rights of participation and other forms of participation in companies;
- The content and scope of rights for the various categories of assets shall be determined by the laws and regulations of the Contracting Party in whose territory the investment is located.”
106. Lastly, for the purposes of application of paragraphs (1) and (2) of Article 4 of the BIT, it should also be noted that the law of the Argentine Republic, and as a consequence, the law of its Province of Salta is “applicable law” to this dispute by virtue of Article 8(6) of Argentina-Austria BIT, as we also stated in the Introduction.

**(ii) The Applicable Law of the Argentine Republic**

107. In this case, the relevant instruments of applicable Argentine law are legal instruments of the Province of Salta, which is the entity constitutionally competent to operate

“Games of Chance” in said provincial jurisdiction. The underlying instruments of this arbitration are:

1. Law No. 7020 of the Province of Salta published on 12 January 1999 (as amended by Law No. 7133 of 2001);
  2. Decree No. 3616 of the Executive of the Province of Salta, dated 1 September 1999, creating ENJASA and conferring a License thereto (the terms of the license agreement are included as Annex 1 thereof);
  3. Decree No. 419 of the Executive of the Province of Salta, dated 15 February 2002, approving the Transfer Agreement of ENJASA, executed on 14 February 2000 between the Ministry of Production and Employment and the UTE (Casinos de Austria Internacional Holding, Boldt and Iberlux Internacional), attached to said Decree.
  4. Text of the 2008 Memorandum of Understanding (Agreement Review and Renegotiation Unit - UNIREN).
  5. Decree No. 5313 of 25 November 2008, approving the Memorandum of Understanding between UNIREN and ENJASA.
108. All these instruments have been provided to the Tribunal by the Parties, which have frequently invoked or cited them in their pleadings and oral arguments. Hence, their texts are an integral part of the record of these proceedings. For the sake of economy, they shall not be reproduced in this Opinion. All of them are in the public domain.

#### **(b) Consideration of the Claim**

##### **(i) The Revocation of ENJASA’s License Was Not an “Indirect Expropriation”**

109. Evidently, the revocation of ENJASA’s License by ENREJA as a sanction for violation or breach of Article 5 of Law No. 7020 and the License itself was not an expropriation of the shares of L&E and/or ENJASA, unless the legal language is no longer a means of communication among jurists. As stated by the tribunal in *S.D. Myers v. Canada*: “In general, the term expropriation carries with it the connotation of a ‘taking’ by a government-type authority of a person’s property with a view to transferring ownership of that property to another person, usually the authority that exercised *de jure* or *de facto* power to do the taking” (partial award of 13 November 2000, para. 280).
110. Here, the disputed measure, *i.e.*, the revocation of ENJASA’s License, may not qualify as a “*taking*” because ENJASA was not the owner but the holder of the License, that is, a “licensee” rather than “owner”; hence, there could not be a transfer of non-existent

property whatsoever. Instead, there was a sanction applied to ENJASA by the Regulatory Agency and Enforcement Authority under Law No. 7020, for serious and repeated violations and breaches of the company's obligations as Licensee to prevent money laundering as set forth under Article 5 of Law No. 7020, almost all of which occurred when Claimants to these arbitration proceedings were already majority shareholders and not only controlled but also directly managed the company that incurred the violations and breaches that led to the revocation. That is, Claimants initiated these proceedings before the ICSID against the Argentine Republic (in order to seek economic compensation for the alleged adverse impact on their actions as a result of the loss of ENJASA's old license for violations or breaches of its legal and contractual obligations) when they controlled, managed and ran the company.

111. Being aware of the non-existence of the "*taking*" and, at the same time, determined to resort to Article 4(1) and (2) of the Argentina-Austria BIT, Claimants have brought a main claim in the terms of the so-called "indirect expropriation", relying on international arbitral decisions on foreign investments rendered to deal with factual and legal situations arising from the adoption of measures that bear little or no relevance to the revocation in this case.
112. Thus, Claimants are seeking to use "indirect expropriation" or "*de facto* expropriation", justified in other situations for basic reasons of justice, in order to obtain economic compensation for the adverse effects they suffered as a result of a legal sanction applied to ENJASA for failure to comply with its obligations as Licensee as regards money laundering prevention (part of States' fight against drug trafficking and terrorism), when by the time the revocation was mandated the company had been controlled, managed and ran by the very Claimants for ten years. This has nothing to do with "indirect expropriation". In the language of international arbitral tribunals, the concept of "indirect expropriation" has been described in different ways but its original meaning is clear. It refers to measures typically with smaller negative effects than those of direct expropriation but which, given their magnitude, ownership rights are so affected by the interference that the owner is deprived of the exercise or economic benefit of its right or control over its property, without any actual transfer of title. As stated, for instance, by the tribunal in *Metalclad v. Mexico*:

"expropriation ... includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in

favor of the host State, but also cover or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State” (Award of 30 August 2000, para.103).

113. Normally, these are measures of a permanent nature whose interference causes a loss of complete or near complete value of the investment or a loss of control over the company which prevents the investor from obtaining the economic return on its investment. Numerous claims of expropriation have been dismissed precisely because the investor remained in control of the company, as is this case (*Feldman v. Mexico*, *Methanex v. United States*, *Sempra v. Argentina*, *CMS v. Argentina*, *Azurix v. Argentina*, *LG&E v. Argentina*). It also appears that, in the first investment arbitral proceedings, “indirect expropriation” was alleged by claimants and considered by tribunals mainly or exclusively in light of the effects of state measures on an investor’s investment, a unilateral view of the concept that inevitably came into conflict with State regulatory and police powers. However, in practice, that stage has been left behind by investment arbitral tribunals.
114. In any case, the central issue of this dispute is by no means, as Claimants suggest, the adoption by the authorities of the Province of Salta of a measure likely to qualify as “indirect expropriation” for the following considerations: (i) it is a measure aimed at sanctioning prior violations or breaches by ENJASA of Licensee’s obligations under Article 5 of Law No. 7020; (ii) the sanction was applied by the relevant Regulatory Agency in the regular performance of its duties as Enforcement Authority under said law; (iii) the ordinary administrative procedure applied to every licensee was followed by the Regulatory Agency and Enforcement Authority; (iv) said procedure was conducted in accordance with due process and ENJASA’s right of defense was guaranteed; and (v) Claimants were fully aware of and accepted both such procedure and Law No. 7020 when, upon privatization, they decided to invest in ENJASA through their shareholding in a *Unión Transitoria de Empresas (UTE* - a joint venture under Argentinian law) as well as when, subsequently, after becoming majority shareholders of L&E, they managed the company and controlled its business activities.
115. Unlike other disputes between investors and host States, this dispute has not been caused by significant modifications of the legal framework and/or the license agreement between the date when Claimants decided to start investing in ENJASA and

the date when the Regulatory Agency and Enforcement Authority decided to revoke ENJASA's License for its serious and repeated violations and breaches of its obligations under Article 5 of Law No. 7020, which also infringed the provisions on Article 5 of the License' contrat. Moreover, it does not concern issues related to, for example, a revision or renewal of a license or concession. Therefore, many awards on investments and concessions have little or nothing to do with the subject-matter of this dispute, such as, by way of example, the award in *Tecmed v. Mexico* often cited by Claimants in these proceedings.

**(ii) The So-Called "Sole Effects" Doctrine is not Applicable to This Case**

116. Claimants have not only alleged "indirect expropriation" but also, in doing so, they have relied on a unidimensional version of the concept, namely, the so-called "sole effects" doctrine which excludes from consideration all elements, aspects or factors other than the adverse effects of the disputed measure. This doctrine, currently disproved, is at all events not applicable to a dispute like this. Hence, Claimants' reliance on arbitral decisions on "indirect expropriation" based on the "sole effects" doctrine is of no use to adjudicate this case. Arguing that the only factor to be considered in determining the existence of "indirect expropriation" should be the degree of interference of the effects of the adopted measure, that is, the revocation of ENJASA's license, with the company's or Claimants' property rights, does not make any sense. It is like requesting that the decision of this Arbitral Tribunal be based on absurd and unreasonable grounds.
117. The "sole effects" doctrine, especially developed in the particular context of the Iran-United States Claims Tribunal, has had certain prestige among some commentators who have disregarded or tried to disregard said context. It is therefore appropriate to recall the origins of this doctrine, as in this passage of another doctrinal sector: "Seemingly, the (Mixed) Tribunal has effectively assumed that, in light of the prevailing circumstances in Iran between 1978 and 1981, a loss of property was attributable to Iran as a result of irregular measures contrary to international law" [Translated by me] (Alejandro Faya Rodríguez, *¿Cómo se determina una expropiación indirecta bajo tratados internacionales en materia de inversión? Un análisis contemporáneo*", Universidad Autónoma de México, Instituto de Investigaciones Jurídicas 2013, p. 230).

118. In the Province of Salta, both before and after the measure whereby ENJASA's License was revoked, the circumstances were and continue to be peaceful and completely normal, from a constitutional and democratic perspective. Furthermore, the Argentina-Austria BIT is not precisely the "Algiers Declaration", which accords jurisdiction on the aforementioned Claims Tribunal beyond expropriation, as it extends to "other measures affecting property rights". So, it is inappropriate that this ICSID Arbitral Tribunal assumes or presumes that said sanction against ENJASA was the result of measures inconsistent with Argentina laws, the provisions of the BIT, or international law, although Claimants have repeatedly attempted so by referring to a so-called "political conspiracy", which they have been incapable of establishing.
119. The "political conspiracy" argument has lost weight during the hearings at the present phase, but Claimants have still alleged it in their Post-Hearing Brief (PHB). In turn, the majority Award contains some ambiguity in that regard since, on the one hand, it affirms that such I plea is not taking into account in the decision but, on the other hand, it fails to state that Claimants have produced no evidence of the alleged "political conspiracy used to lend some credibility to their claims, in particular, to the claim of "indirect expropriation".)

**(iii) The Arbitral Practice and Contemporaneous Authors Reject the "Sole Effects" Doctrine**

120. In recent practice, even in relation to proper "indirect expropriation", there is a clear rejection of the "sole effects" doctrine. It makes little sense to state that just because a measure has a negative impact on a foreign investment, there is inexorably and conclusively unlawful "indirect expropriation". The seriousness of the impact of the measure is not the only element that should be weighed because, in international law, it cannot be assumed that States, having admitted the legal concept of "indirect expropriation", have implicitly and simultaneously admitted the limitation of the regulatory and police powers inherent in their sovereignty. That would be contrary to systemic principles of international law, such as the principle that both the limitations of State sovereignty and State responsibility for internationally wrongful acts are not presumed.
121. In general, the exercise of such regulatory and police powers does not produce any serious economic adverse impact on investments, though there might be cases where such an impact could take place without the investor being entitled to compensation by

virtue of the customary rule of international law examined *supra* in this Opinion. One of those cases is precisely the revocation of a license or concession by the Regulatory Agency on account of violations or breaches of licensee's or concessionaire's obligations, as is the present case..

122. In order to determine when a specific legitimate sanction or regulation with adverse effects does not entitle the investor to compensation, as in this case, or when there has been “indirect expropriation” subject to compensation, investment arbitral tribunals consider, in light of the particular circumstances of the case, the powers of the host State to regulate and sanction in the public interest all the activities conducted in their territories (even by foreign investors) and the rights of foreign investors for the benefit of their investment. As described in the following scholarly commentary: “There is a prevailing tendency towards recognizing, explicitly or implicitly, that the nature of the measure, together with its effects, are the elements required to determine the existence (or non-existence) of indirect expropriation. Therefore, tribunals usually move away from extreme versions and consider both the nature and the practical impact of the measure” [Translated by me] (Alejandro Faya Rodríguez, *op. cit.*, p. 232). For the sake of accuracy, I would add to this comment the causes and context of the measure, as expressly stated by the tribunal in *LG&E v. Argentina* in 2006 as follows:

“It is this Tribunal’s opinion that there must be a balance in the analysis both of the causes and the effects of a measure in order that one may qualify a measure as being of an expropriatory nature. It is important not to confound the State’s right to adopt policies with its power to take an expropriatory measure. This determination is important because it is one of the main elements to distinguish, from the perspective of an international tribunal between a regulatory measure, which is an ordinary expression of the exercise of the state’s police power that entails a decrease in assets or rights, and a *de facto* expropriation that deprives those assets and rights of any real substance” (Award of 3 October 2006, para.194) (emphasis added).

123. In this case, the revocation of ENJASA’s license was not an extraordinary, irregular, discriminatory or arbitrary act. Neither was it a deprivation which, by its nature, could qualify as direct or indirect expropriation, as deprivation in this case was caused by a measure adopted in the ordinary exercise of the regulatory and police powers of the State—through the Regulatory Agency and the relevant Enforcement Authority under Law No. 7020, in the national and international general public interest, in order to prevent money laundering— by means of a sanction under that Law for prior serious

and repeated violations or breaches of legal and contractual obligations assumed by ENJASA as Licensee, as well as after ENREJA had warned it that the License could be revoked in pursuance of Article 13 of the said Law if the said violations or breaches were not remedied, as finally happened in the present case.

124. This is certainly the conclusion of every analysis that properly takes into consideration the factors that should be weighed (effects; causes; context; nature of the measure). In any case, I have come to my conclusions on Claimants “indirect expropriation” claim in view not only of the effects of the measure (revocation of ENJASA’s License) but also its causes (prior violations and breaches of ENJASA’s legal and contractual obligations as Licensee), the nature of the measure adopted (sanction for violation or breach of the obligations listed in Article 5 of Law No. 7020), and the class or type of asset affected by the disputed measure (ENJASA’s contractual rights as Licensee to operate games of chance within the relevant provincial jurisdiction).

**(iv) Were Licensee’s Rights Subject to Expropriation?**

125. Seemingly, Claimants’ first claim assumes that the Licensee’s rights could be expropriated, since otherwise they could not have been subject to the indirect expropriation that they allege having suffered as a result of the revocation of the license. I acknowledge that, while in national legal systems as a general rule, only rights *in rem* such as property are subject to expropriation, that is not the case at the international level. Under international law, according to circumstances, the term “expropriation” may have a broader scope and encompass contractual rights or even some type of intangible rights, though without going so far like some tribunals which have ruled, as regards investments, that any interest with economic value may be subject to expropriation, as if such a proposition was a generally accepted rule. Again, this excess extrapolates ICSID and PCA arbitration proceedings relating to investments–tendencies applied by the Iran-United States Claims Tribunal which, as stated *supra*, operates within the specific framework of the Algiers Declaration. Present proceedings are conducted under the Argentina-Austria BIT of 7 August 1992 (effective since 1 January 1995), and the ICSID Convention, not under the Algiers Declaration.
126. In investment arbitration proceedings based on treaties, the scope of property subject to expropriation may be somewhat broad according to the provisions of the BIT or treaty concerned, either directly when regulating expropriation or indirectly, for

example, when defining the term “investment” in the BIT or treaty concerned. In this case, since Article 1 (*in fine*) of the Argentina-Austria BIT provides that the content of rights for the various categories of assets protected by the BIT—including the one invoked by Claimants (the rights of participation and other forms of participation in companies)—shall be determined “by the laws and regulations of the Contracting Party in whose territory the investment is located,” the scope of what may be expropriated under the Argentina-Austria BIT defined by the laws and regulations of the Argentine Republic. Therefore, in this regard, the decisions of other international investment arbitration tribunals or relevant legal opinions should not be extrapolated.

127. In addition, under Article 8(6) of the BIT as well, Argentine law is undoubtedly applied as one of the three main legal sources that form the “applicable law” to the settlement of this dispute since Argentina and Austria so decided in their BIT. Thus, there is no reason to challenge the statement of the tribunal in *Encana c. Ecuador* that “...for there to have been an expropriation of an investment or return (...) the rights affected must exist under the law which creates them” (Award of 3 February 2006, para. 184). In this case, it is under the laws of the Argentine Republic and/or the Province of Salta, but Claimants have failed to establish that such laws provide for the expropriation of the administrative rights or benefits enjoyed by ENJASA in its capacity as licensee.
128. Therefore, all those submissions by Claimants or the majority Award affirming or inferring that ENJASA was the owner of the revoked License, referred to as “*contrato de licencia*” under Law No. 7020, are completely inapposite. Under such License, ENJASA was permitted or authorized to operate games of chance in the Province of Salta, on an exclusive basis, for thirty years within the regulatory framework of Law No. 7020 and the terms of the License contract itself, but under no circumstances and at no point was ENJASA the owner of the License. The definition of the purpose of the License in Article 1 excludes any idea of ownership by Licensee over the license in the following terms:

“1.1. The object of the license is to authorize the operation of games of chance in the provincial territory *with the scope and limitations set forth herein...*

1.2. The authorization entails *the management, marketing and operation* of games of chance belonging to the jurisdiction of the province...

1.3. The Licensee may *market* the games of chance belonging to the jurisdiction of the province, and which are subject matter of this licence, not only within the provincial territory but also in the national territory...

1.4. The Licensee shall subject its activity, in everything related to the development of the license, to the provisions set forth in Law No. 7020, the regulatory decree and the rules issued by the Games of Chance Regulatory Agency in use of the powers conferred to it. (Emphasis added)

129. To sum up, in Salta, the power to regulate games of chance is vested in the Province, and Article 4 of provincial Law No. 7020 conferred the power to grant licenses for exploitation of such games upon the Provincial Executive. Therefore, it was said Executive that, by Decree No. 3616 of 1 September 1999, granted the License to ENJASA, a company created by the same decree and later privatized. It is thus evident that ENJASA's contractual rights as Licensee were not property *in rem* or contractual rights subject to direct or indirect expropriation by the Province of Salta, unless it is absurdly admitted that one may expropriate oneself. In short, ENJASA' contractual rights as licensee were not an asset subject to expropriation when the License was revoked *since, by their very legal nature, they were not an asset subject to expropriation within the Province of Salta*. The License could be revoked, terminated, or declared no longer valid, but could not be expropriated, either directly or indirectly. Hence, it cannot be stated, at the international level, that the revocation of ENJASA's license was an "indirect expropriation".

**(v) Has There Been Complete or Near Complete Deprivation of Value or Control of Claimants' Investment?**

130. As stated by legal authors, an "expropriation" affects an asset in its entirety on a permanent basis. There is no partial expropriation as the notion would make no sense. However, in the case of investments comprising a variety of rights and assets, the expropriation of one specific item could be admitted in certain circumstances, provided such item is not an integral part of the same legal transaction and, by its nature, may be expropriated. This is not the case here.
131. In the present case, a potential violation of the expropriation standard under the BIT would first require determining whether Claimants have been deprived, both substantially and permanently, of the economic return on their investment. This would also entail deciding, in the first place, if the revocation of ENJASA's License was in the regular exercise of ENREJA's regulatory powers. But if it was not, *quad non*, the

tribunal should determine *inter alia* the interference of the revoking sanction with Claimants' investment in ENJASA on account of all the assets of the latter, that is, both the profits earned as the exclusive licensee for the operation of the gaming and lottery business in the Province of Salta and the ownership and operation of Hotel Sheraton Salta and other potential assets of the company. As stated by the tribunal in *Vivendi v. Argentina*, the weight of authority appears to draw a distinction between "a partial deprivation of value" of the investment (not an expropriation) and a complete or near complete deprivation of value of the investment (expropriation). (Award of 20 August 2007, para.7.5.11). Another form of interference that could qualify as expropriation is a loss of control by the company or subsidiary concerned, regardless of the degree of loss of value of the investment. However, in this case, Claimants did not lose control of ENJASA or their shares in the company.

132. Having concluded *supra* that the revocation of ENJASA's License by Resolution No. 240 issued by ENREJA—the Regulatory Agency and Enforcement Authority under Law No. 7020—was the result from the regular exercise by said body of the regulatory and police powers of the Argentine Republic as a sovereign State, I am under no duty to determine whether such revocation substantially and permanently deprived Claimants of the benefits of their investment in ENJASA. However, since this last issue has been long discussed between the Parties, I shall also provide my opinion *ex abundante cautela* on that matter. In its Post-Hearing Brief, Respondent states:

"With respect to the ownership and operation of Hotel Sheraton Salta, the revocation of the License did not affect its ownership and operation. In effect, ENJASA continued to be the owner of this hotel and obtained considerable economic benefits derived from it. Furthermore, it has been established that the hotel was built with tax allowances and benefits and subsequently sold at market price. For this sale transaction, ENJASA yielded a considerable accounting profit." (ENJASA's Financial Statements as of 31/12/2017, Notes 3.15, 19 and 20 (Exhibit-299). In Note 3.15, it is confirmed that the profit obtained through the sale was ARS 20,590,902) (PHB, para. 266)

133. The factual elements mentioned by Respondent in that citation are duly documented and have not been essentially disproved by Claimants. So, ENJASA was not only the exclusive Licensee for the operation of games of chance in the provincial jurisdiction of Salta, but also the owner and manager of a five-star hotel, *i.e.*, the aforementioned Hotel Sheraton Salta. Indeed, ENJASA operated those two economic elements subject to the same legal business, as evidenced *inter alia* by the "Transfer Agreement" of

ENJASA, attached to Decree No. 419 of 15 February 2000, executed between the UTE (Casinos, Boldt and Iberlux) and the Province of Salta upon privatization of the company, whereby the parties not only agreed on the sale and transfer of ENJASA's stock to the UTE but also defined the obligations of the purchaser (*i.e.*, such *UTE*), which essentially consisted of (i) payment of an annual fee for ENJASA's License to operate games of chance, and (ii) the construction of the aforementioned Hotel Sheraton as part of the so-called "Tourism Development Plan." Both obligations are therefore an integral part of a single legal business, the transaction consisting in the privatization of ENJASA, concluded between the aforementioned *UTE* and the Province of Salta.

134. The tenders presented by the *UTE* (Casinos, Boldt and Iberlux) covered both proposals on the annual fee in consideration for the exclusive thirty-year License for the operation of games of chance in the provincial jurisdiction by ENJASA, and the financing of the Tourism Development Plan, including the construction of the Hotel. The improved economic bid submitted by the *UTE*—successful bidder in the public tender—proposed an annual fee of USD 2,500,000 for the first three years, an annual fee of USD 4,100,000 for the remaining twenty-seven years, and a total investment in the Tourism Development Plan of USD 20,700,000, based on information included in the Preamble of Decree No. 419 mentioned in the preceding paragraph.
135. The Transfer Agreement of ENJASA clearly confirms the unity of business under the agreement between said *UTE* and the Province of Salta, as it first sets forth in Articles 3, 4 and 5 the stock sold, the price, the method of payment and the manner of transfer of the stock, and then includes in Article 6 as *obligations of purchaser under this contract* not only those related to payment of the annual fee but also those undertaken by the *UTE* as regards construction of the Hotel as per the Tourism Development Plan.
136. There is no doubt in that regard, as such "obligations of purchaser under this contract" provide *inter alia* for: (i) payment of the fee and execution of the Tourism Development Investment Plan; (ii) that the purchaser shall comply with the Development Plan in due time and form; (iii) that the purchaser shall submit to the Regulatory Agency a certificate of the investments undertaken in the tender for each year; (iv) that the Regulatory Agency shall monitor and certify compliance with the Investment Plan; (v) that the purchaser shall prepare and submit to the Regulatory Agency on a two-monthly

basis a progress report on the works carried out during the period; (vi) that the tasks requiring the execution of works included in the Investment Plan shall be performed at purchaser's risk and expense, which shall assume all necessary expenses until total completion thereof; and (vii) that in no event shall the seller be liable for the consequences arising from those tasks or contracts executed by the purchaser for their performance.

137. In light of the above, I undoubtedly conclude that: (i) the two economic aspects of Claimants' investment pertained to the same transaction, a single and indivisible legal business between the UTE concerned and the Province of Salta; and (ii) hence, the revocation of ENJASA's License did not deprive Claimants of the complete value of their investment since it did not affect ownership and operation of Hotel Sheraton Salta or any other assets of the company, or their control over the company and/or stock. Consequently, Claimants' allegation that they suffered "indirect expropriation" as a result of the revocation of ENJASA's License is untenable.

**(vi) The Power of the Regulatory Agency as the Enforcement Authority to Take Action for Violation or Breach of Article 5 of Law No. 7020, as Amended by Law No. 7133**

138. Title I of Law No. 7020, "Regulatory Framework Applicable to Games of Chance", provides in Chapter I (General Provisions) that the operation and management of Games of Chance in the entire territory of the Province of Salta shall be comply with the guidelines, procedures and conditions established by this law and its regulations (Article 1), defines the term "Games of Chance" (Article 2), states that the Enforcement Authority of the law shall be the Games of Chance Regulatory Agency created under Title II thereof (ENREJA) and that such Agency shall have sufficient authority to issue operative rules to enforce the Law (Article 3), specifies that such games in the Province of Salta shall be operated through licenses granted by the Provincial Executive under the terms and for the periods to be determined by the latter (Article 4), and that licensee shall act in compliance with Law No. 7020, shall be liable for the selection and use of operation and maintenance methods to ensure compliance with the provisions of said Law, may not hire operators without the prior authorization of the Enforcement Authority, and shall designate a person responsible for anti-money laundering who shall be entrusted with obligations earmarked to prevent said money laundering (Article 5).

139. The following articles of Chapter I of Title I of Law No. 7030 deal with the preparation of financial statements by licensee (Articles 6 to 9), audits by the Regulatory Agency (Articles 10 to 12), and sanctions applied by the Regulatory Agency (Article 13). Article 13, entitled “Breaches”, together with Article 5, is especially relevant in this arbitration, and provides that:

“Any violations or breaches of this law, its regulatory provisions, the License Agreement, and the rules and regulations issued by the Agency shall be punishable by the Enforcement Authority by:

- a) Warning
- b) Fine
- c) Disqualification
- d) Suspension of the License
- e) Revocation of the License

Such sanctions shall be applied taking into account the seriousness of the violation or breach, notwithstanding any criminal liability or liability for contraventions.”

140. These sanctions under Title I of Law No. 7020 relating to the “obligations of Licensees” should not be confounded with the administrative sanctions of Article 41, Chapter IV, Title II of said Law, entitled “Administrative Infractions,” which ENREJA may also apply to “natural or legal persons” who, with or without its authorization, carry out any of the activities defined as “games of chance” under Article 2 of Law No. 7020 and, in doing so, violate one or more of the provisions of Law No. 7020, the regulatory decree thereof and the resolutions issued by the Regulatory Agency, notwithstanding any sanctions for contraventions, or criminal and civil liability imposed upon the infractor (Article 40). While the sanctions set out under Article 41 of Law No. 7020 differ from those under Article 13, there is no conflict because the provisions of both articles punish different scenarios and pursue different goals. The sanctions under Article 41 are irrelevant to these proceedings as they relate to scenarios and purposes different from those under Article 13, which relate to violations or breaches of “*licensee’s obligation*”, such as those under Article 5 of Law No. 7020.

141. The situation described above is clear. A simple reading of Articles 13 and 41 in the context of Law No. 7020 will suffice. But Claimants in this arbitration have made

allegations expressly or impliedly based on the argument that both articles are applicable to a licensee in breach of its “obligations as licensee”. This statement – actually a fallacy– repeats what ENJASA alleged in that regard in Salta, which Resolution No. 240/13 issued by the Regulatory Agency and Enforcement Authority under Law No. 7020 expressly rejects in the following terms:

“Whereas, in relation to infringements and consequences thereof, two situations are distinguished by the provisions of Law No. 7020, as amended Law 7133: a) Breaches, the penalties of which are contemplated in Article 13 and applicable to breaches or violations of the law, its regulations, license contract and other regulations enacted by the Entity: *which shall be* punished with a Warning, Inability to operate, Suspension of the License and Revocation of the License; of b) Administrative Infringements, the penalty of which are provided for in Article 41: *which shall be subject*, indistinctly or jointly, to a Fine, Inability to operate, Seizure or Closure (Article 41).

Whereas, both rules intend to punish, not only the negative disobediences (abstentions or omissions) but also the behaviors generally committed with the intention to be inconsistent with a rule. However, there is an imperceptible distinction in the list of penalties, since, for instance, Article 13 authorizes the suspension and revocation of the license while Article 41 has, in addition, to provide for the inability to operate and the fine, the seizure and the closure. It should be also observed that the breaches are infringements to the laws, to the contract and to general regulations; the violations –leave aside the contract and the general regulations referred to the violations of the law, decree and the resolutions of the Entity when they are not of regulatory nature” (pages 30/31 of Resolution 240) (emphasis in original).

142. ENREJA decided to revoke ENJASA’s license for violations or breaches of legal and contractual obligations assumed by the company as Licensee for the operation of games of chance within the provincial jurisdiction of Salta, and it obviously did so as it should by means of a sanction applied in compliance with Article 13 of said Law. It appears that if Article 41 had been applicable, ENREJA would not have been able to revoke the license, given that Article 41 does not provide for revocation as a sanction. The irrefutable evidence that Article 41 was not applicable *in casu* is the proven fact that, in the Notice of Resolution No. 240/13, ENREJA informed ENJASA that it could submit a request for clarification, reconsideration or appeal, against said Resolution, whereas Article 50 of Law No. 7020 provides that, in the case of administrative infractions, the resolutions to apply sanctions pursuant to Article 41 may only be challenged by clarification and/or revocation. Accordingly, the provisions on “administrative infractions” of Chapter IV of Title II of Law No. 7020 (including the

one-year time-bar of actions and sanctions under Article 49) were alien both to the dispute between ENJASA and the Province of Salta, as the company could submit a request for reconsideration of Resolution No. 240/13, and to the subject-matter of these ICSID proceedings between Claimants (CAI and CASAG) and Respondent (Argentine Republic).

143. Further evidence that confirms that the provisions on “administrative infractions” of Chapter IV of Title II of Law No. 7020 are alien to the central issue of these proceedings is the fact that the “legal obligations” of a Licensee under Article 5 of Law No. 7020 concerning the prior authorizations from ENREJA (first paragraph of the Article), along with the prevention of money laundering (second paragraph) are also “contractual obligations” of Licensee under the “License Agreement” executed by ENJASA. Indeed, Articles 4 (Obligations of the Licensee), 5 (Sanctions) and 6 (Events of Extinction and/or Cancellation) of the “license agreement” of Annex I to Decree No. 3616, issued by the Provincial Executive, provide, *inter alia*, as follows:

Article 4

“4.1 The licensee shall have the following obligations:

4.1.2. To comply in its exercise of the license with all the provisions set forth in Law No. 7020 and the regulatory decree.

4.1.3. To comply in its exercise of the license with all the rules issued by ENREJA within the framework of its competence.

Article 5

5.1. Each of the violations or breaches on the part of the licensee to Law No. 7020, its regulation provisions and the regulations issued by ENREJA *shall be punished* with the sanctions and graduation established in Law No. 7020 and its implementing regulation. (Emphasis added)

5.2 Consideration, application and grading of the sanction shall be analyzed by ENREJA and sanctions should be proportional to the seriousness of the committed infraction.

5.3. For the sake of grading the sanction, ENREJA shall take into account: the seriousness of the infraction, the extent to which the rule of law, morality and good customs are impaired, the damages it causes to the provincial State and/or private persons, the social commotion it may produce and the licensee’s record of recidivism.

Article 6

6.1. Notwithstanding the grounds set forth in the share transfer agreement... the following shall be grounds for extinction and/or automatic cancellation of the license by operation of law:

....

...

\* Failure to comply with the obligations set forth in article 5 of Law N° 7020.\*  
Operation of any games of chance without the previous authorization of ENREJA.

\* Total or partial assignment or transfer of the powers granted under this license without previous authorization of the Provincial Executive Branch.”

144. These provisions of the “license agreement” of Annex I to Decree No. 3616 dated 1 September 1999–Article 6 of which expressly mentions Article 5 of Law No. 7020–could not make reference to the provisions on “Administrative Infractions” under Articles 40 to 51 of said Law for three reasons. First, in 1999, those provisions did not form part of Law No. 7020 as they were added thereto by Law No. 7133 in 2001 (Law 7133/2001). Second, as stated by the passage of ENREJA Resolution No. 240 cited above, the “infractions” of Law No. 7020 incorporated in 2001 “*put aside*” the agreement and regulations, including resolutions issued by the Regulatory Agency, and “Licensee’s obligations” of ENJASA were subject to a double condition of being “legal obligations” and “contractual obligations”. Lastly, the sanctions under Article 5 of the “license agreement” concern only the sanctions of Article 13 of Law No. 7020 for violations or breaches of “obligations of a Licensee” both because the text says so and because in 1999 said Article 13 was the only article on sanctions under Law No. 7020, since the current Article 41 had not yet been incorporated into the Law.
145. Article 31 of Title II of Law No. 7020 creates the Games of Chance Regulatory Agency (ENREJA) of the Province of Salta—as an “Autarchic Entity” of the Government—which is “vested under the terms of this law with the necessary and sufficient powers to regulate Games of Chance in all their forms.” The categories of powers of the Agency are listed in Article 32, the most relevant of which in these proceedings is the one mentioned in paragraph (d) of said Article, namely:

“(d) Exercise police powers in all matters related to the management and operation of games of chance, in order to ensure strict compliance with the law,

issuing any and all regulations required to this end and imposing any applicable sanctions.”

Lastly, in furtherance of achieving its goals, the Agency is vested with the following powers pursuant to Article 33 of Law No. 7020: (a) regulatory; (b) administrative-jurisdictional; and (c) disciplinary.

146. These powers of ENREJA granted thereupon by Law No. 7020 are unquestionable and have not been challenged by Claimants. Claimants do allege—as previously done by ENJASA in Salta—that the exercise by ENREJA of these powers in August 2013 in connexion with the revocation of the thirty-year exclusive license granted to ENJASA in 1999 by the Provincial Executive when it created the company as an Argentine company that was shortly thereafter privatized.
147. Later on, additional powers to those under Law No. 7020 were granted to ENREJA, as confirmed by the documentation submitted by the Parties to the Tribunal. For example, Decree No. 5313 of 25 November 2008 whereby the Governor of the Province of Salta, after recalling *inter alia* that the ENREJA is an autarchic entity, mandates that the Regulatory Agency “shall be responsible for controlling, supervising and auditing, and shall take all necessary action to follow up and collect the (new) fee payable by ENJASA to the Provincial State for the license to operate games of chance on an exclusive basis” [Translated by me]. This decision was because the Memorandum of Understanding executed on 7 May 2008 between UNIREN and ENJASA changed the method for calculating the annual fee payable by the company to the Province for such license. In effect, the Memorandum of Understanding replaced the initial fee with a new one based on a percentage of ENJASA’s income for the immediately preceding period, wherefore a strict control of the basis of calculation of those percentages was required, since then the amount of fee to be paid by the company depended as from that time on ENJASA’s income.
148. In accordance with Articles 34 to 36 of Law No. 7020, ENREJA is ran and managed by a Board of Directors consisting of three members appointed by the Provincial Executive for a term of three years, with a possibility of being reappointed. The Directors of such Board act on an exclusive basis and are subject to the same disqualifications and incompatibilities as the judges for the Province. The Board is therefore a collegiate body that elects a President and a Vice-President. It meets whenever called upon by the President (at least, once a month), and takes decisions with

a majority vote of the members present. Resolutions Nos. 240/13 and No. 7315/13 were unanimously adopted and are not accompanied with the individual opinion of any of its three members.

149. Article 38 of Law No. 7020 stipulates that the Board of Directors of ENREJA shall “[e]xercise all the powers and competences vested in the Agency in the Regulatory Framework applicable to Games of Chance” and provides a detailed list of its roles, the most relevant of which to these proceedings are: (i) to apply the legal and regulatory provisions on games of chance in the Province and enforce them through the respective Police Power; (ii) to issue any regulations required to achieve its goals and exercise its powers; (iii) to perform audits and further control techniques in order to determine compliance with contractual obligations of licensees; and (iv) to prepare an Annual Report and Balance Sheet and report the results to the Provincial Executive on an annual basis.
150. ENREJA Resolution No. 240/13 confirms that “sections 34 and subsequent provisions of Law No. 7020 set the plural nature of the Regulatory Entity and how its decisions must be validly adopted” and, on this basis, rejects the argument alleged by ENJASA on the existence of an oral authorization in relation to the obligation not to hire operators absent the Enforcement Authority’s authorization under the first paragraph of Article 5 of Law No. 7020, in the following terms:

“Whereas, the argument made with respect to an alleged verbal authorization is neither justified. Ignoring its inexistence and the absence of any evidence in this regard, it is not possible to understand it as a tacit authorization to the behaviors performed by the officers of the Controlling Authority, since such behaviors are carried out under the general tasks assigned to lower ranking officers for the performance of acts preliminary to the analysis of the petition and the rendering of the resolution, even less to consider this alleged ‘verbal’ authorization as an administrative act. This is so because such assertion is contrary to the manner expressly set out in Article 37 and, especially, Article 39, by the Administrative Procedural Law of Salta, which provides that the acts shall be documented in writing and, at the collegiate bodies, through the record of minutes of each meeting. In this regard, sections 34 and subsequent provisions of Law No. 7020 set the plural nature of the Regulatory Entity and how its decisions must be validly adopted.” (Page 5 of Resolution 240/13)

151. In this arbitration, Claimants have also often implied the argument on ENJASA’s oral authorization in Salta for the same purpose, which I reject on account of Resolution No. 240. Besides, under Article 38(L) of Law No. 7020, the ENREJA’s Board of

Directors is the collegiate body vested with all powers and competencies granted to the Agency within the Regulatory Framework of Games of Chance in the Province of Salta and, moreover, the text of the first paragraph of Article 5 of Law No. 7020 (“... *shall not hire operators without the authorization of the Enforcement Authority*”) admits no exception to the requirement of prior authorization thereunder.

152. It should also be recalled that ENREJA, as the Regulatory Agency and Enforcement Authority, is unquestionably empowered to sanction any violation or breach of Article 5 of Law No. 7020 by a licensee through, *inter alia*, revocation of the license in pursuance of Article 13 of said Law, but it has no authority to grant new licenses since, under Article 4 of said Law, the power to grant licenses and to determine their terms and duration is vested in the Provincial Executive. Therefore, understandably, once ENJASA’s license was revoked by Resolution No. 240/13, ENREJA’s Board of Directors reported the revocation to the Provincial Executive. Claimants’ argument in that regard is thus inapposite in light of applicable texts.
153. To conclude, the revocation of ENJASA’s license was adopted by ENREJA’s Board of Directors in the exercise of its powers and functions—within the Regulatory Framework of Games of Chance in the Province of Salta—as a sanction against ENJASA for serious and repeated violations of its obligations to prevent money laundering, listed in Article 5 of said Law, perfectly known to and accepted by Claimants when they freely decided to invest as shareholders in ENJASA through a UTA upon privatization. As stated by ENREJA Resolution No. 315/13:

“... the gaming regulatory framework existed before the privatization of shares of EN.JA.S.A, and before the creation thereof, so investors knew in advance the exploitation rules.” (Page 12 of the Resolution)

Moreover, it should be noted that Claimants were majority shareholders and directly ran and managed the company when most violations and breaches of Article 5 of the Law were committed by said company, which led to revocation of the ENJASA’s License.

154. Describing such sanction, as Claimants do, as “indirect expropriation” and, on that basis, seeking compensation for a repeated business behavior sanctioned by the Enforcement Authority under Law No. 7020 for violating said Law and also the provisions of the License agreement at issue, finds no support in any of the three sources that constitute the “applicable law” to this dispute, as defined in Article 8(6) of

Argentina-Austria BIT. Accordingly, such description is inappropriate and against the legal certainty on which the relationship between a host State and a foreign private investor, always bound by the principle of good faith, rests.

**(vii) The Final Nature of ENREJA's Revocation Sanction and Considerations and Conclusions of Resolution No. 240 on the Violations or Breaches by ENJASA of Article 5 of Law No. 7020**

155. The Notice of ENREJA's Resolution No. 315 of 19 November 2013 which rejects the recourse for reconsideration of Resolution No. 240 informed ENJASA, pursuant to provincial procedural Law No. 5348, that the decision was final and conclusive, but that the contentious-administrative proceedings could be instituted within thirty days of the notice. ENJASA resorted to any such means, instituting contentious-administrative proceedings before the Province of Salta competent court requesting the annulment of ENREJA's Resolutions No. 240 and No. 315.
156. Subsequently and without waiting for the conclusion of any such contentious-administrative proceedings in Salta, CAI and CASAG, in their capacity as Austrian investors filed before the ICSID a Request for Arbitration against the Argentine Republic invoking in such regard the Argentina-Austria BIT and asserting that the proceedings in the Province of Salta with reference to the revocation of ENJASA's license by ENREJA was tantamount to a violation by the Argentine Republic of certain standards of the aforementioned BIT and requesting a reparation by means of an economic compensation for the injury arising from the alleged violation.
157. Thus, over a certain period of time there were two simultaneous proceedings regarding the same event but with different *parties, cause of action and petitum*; therefore, there were, as a result, two disputes, one in Salta on the annulment of ENREJA's Resolutions Nos. 240 and 315 for the revocation of ENJASA's license and another one before the ICSID on the alleged violation by the Argentine Republic of certain provisions of the aforementioned BIT; in Salta with ENJASA in its capacity as claimant and before the ICSID with CAI and CASAG (ENJASA's shareholders) as Claimants. This situation could not be sustained for long as it was contrary to the provisions set forth at the second sentence of Article 8 (4) (paragraph 4, second sentence) of the BIT, and, in addition, it defied any logic since, on the one hand, the annulment of the revocation of ENJASA's license was being pursued and, on the other, an economic compensation for the effects of any such revocation was being requested.

158. This Tribunal's Decision on Jurisdiction put an end to the situation described hereinabove when mandating Claimants to withdraw from the contentious-administrative proceedings instituted in Salta. Claimants did so through a request for withdrawal which, once consented by Respondent, was granted by the competent court in contentious-administrative matters for the Province of Salta.
159. As a consequence of any such withdrawal, the dispute between ENJASA and the Province of Salta has extinguished and the ENREJA's administrative act revoking the license ENJASA had become final in domestic system of the Argentine Republic. This supervening fact cannot be disregarded or set aside since - as already mentioned hereinabove—Argentine law is one of the components of the "law applicable" to this ICSID arbitration proceedings pursuant to the provisions set forth under Article 8 (6) of Argentina-Austria BIT. Since the aforementioned withdrawal, the revocation of ENJASA's license is a final administrative act and, certainly, not subject to appeal before this Arbitral Tribunal which is without jurisdiction to intervene in a contract claim dispute like the one that took place in Salta between ENJASA and the Province of Salta.
160. Claimants' implausible proposition that this Tribunal exclude from the "law applicable" to this dispute the law of the Argentine Republic, Respondent to this arbitration, is an utterly unacceptable proposition as it is contrary to the provisions agreed upon by Argentina and Austria in their BIT. And, in addition, because ICSID arbitrators' duty is applying to the dispute resolution the "applicable law" as defined by the relevant BIT and not substituting the Contracting States' common intention articulated in the text of the BIT at issue. The ICSID Convention does not know the arbitrator-legislator figure. Besides, Claimants cannot invoke a BIT to institute ICSID arbitration proceedings and immediately thereafter ignore the BIT provisions that make them uncomfortable. BITs are not an *a la carte* menu.
161. Article 5 of Law No. 7020 is one of the five General Provisions of the Chapter I of Title I (Regulatory Framework Applicable to Games of Chance) thereof. This preponderant place in the Law provisions it formulates, relating, *inter alia*, to prevention of money of the laundering—an aspect underscored by ENREJA's Resolution No. 240 - shows the importance ascribed by the Provincial Legislator to any such provisions within the framework of an activity favorable to the commission of this kind of crimes, an activity that in Salta, it is worth recalling, is a public function of

provincial jurisdiction the exploitation of which is carried out through licenses granted by the Provincial Executive which is the one that *determines the terms and the periods of time of the licenses* (Article 4 of Law No. 7020). And this happened with the exclusive license granted to ENJASA for a thirty-year term. Among the terms of the license - to which ENJASA was subject in its capacity as Licensee - there appeared, accordingly, the obligations formulated in Article 5 of the Law the text of which reads as follows:

“The licensee shall act in accordance with the provisions of this law and shall be responsible for selecting and using the operation and maintenance methods necessary to ensure compliance with the provisions of this law, and shall not hire operators without the authorization of the Enforcement Authority, which shall establish the requirements and conditions to be met by each operator.

The licensee shall appoint an individual responsible for anti-money laundering issues, who shall be in charge of:

- a) Centralizing all the information about clients, any transactions that may be known to, or suspected by, him or her, or which give him or her reason to suspect;
- b) Reporting all transactions made by the same person that are not consistent with that person’s reported activities; and
- c) Demanding presentation of a valid ID card or passport by any client in whose favor a check is drawn or a wire transfer is made to a foreign account in an amount exceeding ten thousand Argentine Pesos (ARS 10,000.00).”

ENJASA was sanctioned by the ENREJA for violations or breaches of the obligations formulated both in the first and second paragraph of Article 5 of Law No. 7020.

162. As regards the obligation not to hire operators without the authorization of the Enforcement Authority contained at the first paragraph of Article 5 of Law No. 7020, namely, file (282-040/08), ENREJA’s Resolution No. 240 analyzes the relationship and/or existing contracts with Emsenor, Navarrete, Colloricchio, New Star, Norberto Herrera, Video Dome and Prodec and Dek with ENJASA pointing out, *inter alia*, that the latter had not denied or questioned the validity of the instruments underlying the charges attributed thereto, that it had barely produced exculpatory evidence, that submissions thereof on the situation had been rather unclear, when not contradictory, and that the alleged oral or tacit authorizations for the junior staff’s behaviors did not constitute ENREJA’s Board of Directors’ authorizations.

163. In this regard, the Resolution reasserts that being gaming, an administrative activity carried out within the ambit of the State, “can only be exploited by private parties in the manners prescribed by law, which does not provide for ENREJA—not to mention its personnel—granting licenses, let alone in an oral manner.” (page 6 of the Resolution.) Granting of licenses in Salta belongs exclusively to the Provincial Executive.
164. For Resolution No. 240, the issue to be decided regarding the obligation set forth at the first paragraph of Article 5 of Law No. 7020 was limited to determining whether ENJASA requested and had the Enforcement Authority’s authorization to hire game Operators as requested by Article 5 of Law No. 7020, in the course of the handling of certain files by the Regulatory Agency “certain documents—unknown to ENREJA until then—came up and reports were issued which showed that certain persons alien to ENJASA had an active participation in the gaming activity in the Province of Salta” (page 6 of the Resolution.) (In the references of quotations of Resolutions 240 and 315 of this Section the number of the pages correspond to the number of pages in the original Spanish text of the said Resolutions).
165. Resolution No. 240 states that far from having conducted a “*reorganization*” as alleged by Licensee, the Enforcement Authority had no doubt whatsoever that “ENJASA incorporated Game Operators—mainly with respect to slot machines and live games—which were hired by it without ENREJA’s authorization” and that “regardless of the definition to be ascribed to the term “game operator,” there can be no doubt that EMSENOR S.R.L., Enzo Colloicchio, Video Drome S.A., Sixto Rafael Navarrete, Prodec S.A., Dek S.A., and Newstar S.R. L. acted in such condition, given their direct participation in gaming houses and activities in the Province of Salta. However, they are presented to ENREJA under the guise of ENJASA’s license” (page 9 y 10 of the Resolution.)
166. Resolution No. 240 also dismisses the fact that these operators had anything to do with the “*preexisting*” permits granted at the time by the extinct *Banco de Préstamos y Asistencia Social* (page 10) and it considers irrelevant whether or not there was a ‘delegation of powers’ on the part of ENJASA in favor of such third parties given that the crux of the question was the irregular hiring of an Operator “in blatant violation of anti-money laundering regulations”, concluding as follows:

“Taking into account the foregoing considerations, it has been shown that ENJASA did not commence the formalities for obtaining the permit—let alone for obtaining the relevant authorization —whereby the Games of Chance Regulatory Agency would have allowed ENJASA to hire the above-mentioned operators—upon a prior review of their background and the establishment of certain conditions—as mandated by Article 5 of Law No. 7020, as amended. Quite on the contrary, ENJASA only sought to justify the execution of such contracts. Nor did ENJASA explain the reason why it excluded from its annual and monthly sworn statements the revenues obtained from some of such gaming houses... The seriousness of such breach will be assessed below in light of the particular significance attributed by the lawmaker to the compliance with the requirements set forth in Article 5 of Law No. 7020.”

(page 11 of Resolution No. 240.)

167. With respect to the violations or breaches by ENJASA of the obligations set forth at the second paragraph of Article 5 of Law No.7020, Resolution No. 240 substantiated the charges brought in two files: File (282-215/11) and File (282-302/12). The purpose of the first of those files were charges brought against ENJASA regarding payments exceeding ARS 10,000 with no record or compliance with anti-money laundering rules which had been detected in live or table games at the Golden Dreams and Salta casinos. In turn, the second file sought to elucidate, on the one hand, the expired payment made to a certain customer and, on the other, the failure to record two payments exceeding ARS 10,000 corresponding to evening Tómbola raffles.
168. As regards File (282-215/11), Resolution No. 240 rejects ENJASA’s statute of limitations defense, and it explains that unlike the case of slot machines (online system,) in live games there is no control system of the financial transactions, and it is, thus, necessary to collect evidence that accounts for payments made to gamblers on account of prizes obtained in the above-mentioned gaming houses and live-games tables operating therein (poker, roulette, etc.) “Thus, the controls of the revenues and expenses for the purposes of the calculation of the license fee and the audit fee are conducted on the basis of monthly and annual sworn statements submitted by ENJASA and on-site and manual audit processes carried out by the different areas of ENREJA” (page 15 of the Resolution.)
169. The Resolution also explains that it was necessary to cross the information of the payments to gamblers of ENJASA’s sheets and internal records *Daily Reports, Relevant Payments or Rating Cards Forms*) with the data of the audit area of the Regulatory Agency, and the financial transactions detected were consistent with the

monthly sworn statements submitted by ENJASA. The reports prepared on the basis of the above-mentioned documents show that, “only in the period audited (August 2008), at least 52 payments of more than ARS 10,000 were made to customers (involving an aggregate movement in that month of ARS 943,780.00) on account of prizes won at the live-game tables, for which the registration duties provided for by Law No. 7020 as amended, and Resolution No. 026/00 were not complied with” (Resolution No. 240, pages 13 and 14.)

170. Resolution No. 240 also mentions witness statements by the staff in charge of the gaming tables which stated the following: (i) that amounts exceeding ARS 10,000 were clearly paid; (ii) that the beneficiaries’ identifications were inaccurate; (iii) that cash movements involved in this type of game of chance confirmed those witness statements; and (iv) that in some months, monthly prizes were paid in an aggregate amount for January/September of ARS 57,837.542 (as per ENJASA’s monthly sworn statement for Golden Dreams Casino.) There was also, according to the Resolution, conclusive evidence (images obtained from ENJASA’s recording system acknowledged by witnesses) of prizes above ARS 10,000 paid in cash that were not identified as required by anti-money laundering regulations.
171. With respect to the cases of File (282/215/11), Resolution No. 240 concludes that ENJASA did not show it made the relevant payments by check or that it recorded them in either of the two anti-money laundering books kept for such purposes. Given that the data examined revealed that the last entry of a relevant payment, *i.e.*, above ARS 10,000, was made on 10 December 2009 in the case of Salta casino and on 9 October 2011 in the case of Golden Dreams casino, and that:

“Consequently, ENJASA has been unable to rebut the fact that Article 5 of Law No. 7020 and Articles 1 and 2 of Resolution No. 026/00 were infringed. Proof of this is the fact that ENJASA failed to show in its defense brief that such payments were recorded in the anti-money laundering book or that it made the relevant payments by check as mandated by Article 5 of Law No. 7020 and its implementing regulation, contained in Resolution No. 026/00.” (page 16 of Resolution No. 240.)

172. As regards File (282-302/12), the charges were three: (i) the case of payment of an expired prize of an amount above ARS 10,000; (ii) the failure to register payment corresponding to evening Tómbola raffle for an amount of ARS 12,000; and (iii) the failure to register a second payment corresponding to another evening Tómbola raffle

for an amount of ARS 15,000.00. In general, Resolution No. 240 mentions (i) that ENJASA had acknowledged the facts; (ii) that ENJASA's defense arguments in such respect are confusing and contradictory (pages 16, 17 and 18 of the Resolution.)

173. With respect to the first charge, the Resolution underlines that ENJASA had admitted the facts in their entirety "*i.e.*, that the above payment was made after it had expired and that it was belatedly recorded one month later, that the failure to record the payment was caused by the fact that the branch did not have an anti-money laundering book, and that the system operated by it failed" and the Resolution considers that the explanations provided with respect to the system failures are unacceptable, as they are unclear and based on internal procedures unrelated to ENJASA's relationship with the ENREJA (Resolution, pages 18/19.) Having rejected the grounds for justifications provided by ENJASA, the Resolution considers that the entry of the payment at issue, one month and five days following the prize expiry date, resulted suspicious not only because it related to an improper (expired) payment—this being an unprecedented course of conduct on the part of ENJASA, but also because:

“...such belated registration leads to a presumption that the entry is bogus. This is so given that Tómbola tickets are bearer instruments... therefore, it is not possible to identify the holder unless the payment is registered when it is made. If the payment is registered one month later, it is impossible to verify such entry” (pages 19/20 of the Resolution.)

174. As regards the two payments of Tómbola raffle prizes, Resolution No. 240 explains that they were detected by means of the software used for real-time online gambling capture and the determination of the winners of the Tómbola lottery game (a system approved by ENREJA's Resolution No. 078/98). Payment of the ARS 12,000 prize was not recorded in the Book kept for such purposes and as concerns the payment of ARS 15,000 the manual corrections that ENJASA might have made could not be invoked because they were never reported to the Regulatory Agency (page 19 of the Resolution).
175. At the end of its consideration of File (282-302/12) as a whole, the Resolution concludes that there were three payments made to winners for prizes above ARS 10,000, which were not recorded or paid as mandated by law and that, consequently, ENJASA's explanation had been fruitless once again. ENJASA had failed to reasonably justify:

“the reasons why it breached the provisions contained in Article 5(2) of Law No. 7020, pursuant to which ENJASA was to register payments above ARS 10,000 in the manner provided for in Resolution No. 026/00, in force at the time. Similarly, ENJASA’s references to mistakes are also unavailing, as their seriousness exceeds what might logically be tolerated as a mistake, as such mistakes appeared repeatedly and adversely affect essential aspects of gaming” (page 21 of the Resolution.)

176. ENREJA’s Resolution No. 240/13 explicitly states in sections XII and XIII thereof (pages 30-33 of the Resolution) that revocation of the license was adopted by the Enforcement Authority as sanction pursuant to the provisions set forth in Article 13 (e) *in fine* of Law No. 7020, as amended by Law No. 7133. Article 13, entitled “Breaches,” enumerates from lesser to more serious the sanctions applied by any such Authority to violations or breaches of Law No. 7020, *inter alia*, its Article 5, its regulatory provisions, the License Agreement and the rules and regulations issued by the Regulatory Agency. Resolution No. 240 also distinguishes, as already explained *supra* herein, those sanctions from those explicitly stated in Article 41 *et seq.* of Law No. 7020 in the event of “Administrative Infractions.” Nevertheless, in its recourse for reconsideration, ENJASA alleged that the breaches attributed thereto “were mere infractions which were not relevant and did not have significant practical impact on the business operated by the company.” Resolution No. 315/13 responds to this allegation by the company pointing out as follows:

“This argument confirms the little regard paid by ENJASA to provincial money laundering laws throughout these years. Additionally, the successive administrative enquiries are clear evidence that the facts occurred and that licensee received gradual warnings and sanctions. By means of Resolutions Nos. 031/08, 032/08, 232/08, 106/10, once a warning that no further infringing behaviour was to be tolerated, and in Resolution No. 104/10, the State informed the licensee of the fact that compliance with the obligations rigorously described in Law No. 7020, Article 5 and implementing regulations, was a matter of the utmost importance” (pages 20 of Resolution No. 315/13.)

177. In these arbitral proceedings, Claimants, with the assistance of some of their experts, have attempted, as ENJASA did in Salta, to create certain interpretative uncertainty about the respective scope of application of the aforementioned Articles 13 and 41 of Law No. 7020 to which neither the terminology nor the text of certain excerpts of the majority Award which, in my opinion, are inapposite and with which, in any event, I absolutely disagree because of their erratic nature. Anyways, what it is worth recalling is that there is no possible doubt whatsoever that for ENREJA’s Resolution No. 240

ENJASA's conducts constituted serious and repeated violations or breaches of Article 5 of Law No. 7020 and, accordingly, the Enforcement Authority sanctioned them with the most serious sanction listed in Article 13 of Law No. 7020, *i.e.*, with the revocation of the License ENJASA had at the time.

178. Sanctions for the “administrative infractions” contained in Article 41 of Law No. 7020 are alien to the violations or breaches of the obligations formulated in Article 5 of the Law for which ENJASA was sanctioned. As are also, for similar reasons, the provisions on the statute of limitations of Article 49 of Law No. 7020 regarding which Resolution No. 240 comments as follows:

“However, taking into account the chapter where Article 49 is included, it is evident that it is not applicable to the cases at hand, and it only applies to the infractions contained in Article 40 (this interpretation being in line with its restrictive nature), rather than to the breaches contemplated in Article 5 of the above-mentioned law” (page 22 of Resolution No. 240.)

And, the Resolution adds that the limitations period applicable to any such breaches is governed by Article 59 *et seq.* of the Criminal Code, thus, the applicable term would be of five years as long as such infractions are not tolled by recurrences or by the filing of an administrative enquiry (*ibid.*)

179. As any sanction measure, the revocation of the license given its very nature sought to inflict sanctions (the term used in Article 5.1 of the License agreement) to ENJASA for having breached or violated obligations concerning the company under Law No. 7020; as well as those of the license agreement. A sanction measure cannot by definition be neutral in its effects given that what is being sought is punishing the perpetrator for the breach or violation of a legal obligation or obligations under the responsibility thereof for the purpose of reestablishing the integrity of the rule or rules breached or violated.
180. This is one of the reasons why the so called “*sole effects*” theory is, as already stated, not applicable in the instant case, since any sanction has by definition an adverse effect for the party being sanctioned and, eventually, for anyone that has invested in the party being sanctioned or has somehow partnered therewith, notwithstanding the fact that any such theory can conform to law in other contexts or in different circumstances. Accordingly, the invocation in the case at issue of decisions by arbitral tribunals that have applied the so called “*sole effects*” theory, to scopes alien to those of sanctions, are irrelevant as a guide for this dispute resolution.

181. Therefore, when the measures adopted are sanctions imposed by the competent Enforcement Authority to a Licensee for the violation or breach of one or more of the obligations the latter is subject to, the “*sole effects*” theory is unacceptable for being absurd, since it would imply admitting the existence in the relevant legal system of a duty to reward social actors for the breach of their obligations. There is no domestic or international legal system in which an oxymoron of such magnitude can have a place. In any event, there is no such duty in any of the sources of law applicable hereto under Article 8 (6) of the Argentina-Austria BIT.
182. The introduction of the above-mentioned theory in the scope of sanctions would be tantamount to denying the power any State has to sanction violations or breaches of the laws thereof with the resulting legal uncertainty, since the exercise of any such power responds to evident social and administrative needs as recalled by Resolution No. 240 in the following excerpt in which ENREJA’s conviction is expressed:
- “... that the logical consequence of the public administration’s right to “control” is its right to “sanction”—as it is not sufficient to vest in the administration the authority to prove the breaches committed by a contractor—such disciplinary power finds its foundation in the need for the administration to be vested with the authority to demand that the concessionaire provide the service as required by law” (page 32 of the Resolution.)
183. It is understandable that Claimants in this arbitration have attempted, as ENJASA did in Salta, to hide, deny, diminish, conceal, or sidestep the power reserved to the Executive Branch of the Government of Salta by the License’s agreement to declare the extinction or caducity of the License Agreement, *grounds* that determined the revocation of the license ENJASA had. For instance, the already mentioned “political conspiracy” theory (described as “fallacious” at Resolution No. 315, page 3) or that of the “xenophobia against Austrians” also alleged with no evidence production whatsoever, and others such as “ENJASA’s defenselessness” or that of “disproportion of the sanction” [Translated by me.] Against this background, it is worth recalling the so called “UNIREN’s *oblivion or pardon* theory” with which Claimants have attempted to undermine the consequences which, in determining the degree of the sanction imposed by the ENREJA, ENJASA’s recidivism or repetition in the commission of proven violations or breaches of Article 5 of Law No. 7020 has had, despite ENJASA’s having been priorly warned in such regard by the ENREJA duly in advance.

184. The “UNIREN’s *oblivion* or *pardon* theory” has been expressly rejected by both ENREJA’s Resolution No. 240 (page 31) and Resolution No. 315 (page 3.) Nevertheless, it has been alleged once again by Claimants in these arbitral proceedings. It is thus worth quoting the excerpt of Resolution No. 315 in which ENREJA rejects the argument that the State would have accepted or acknowledged in the Memorandum of Understanding the nonexistence of any “legal breach” by ENJASA:

“As explained in Resolution No. 240/13, it is inaccurate that Article Two of the Agreement entered into by licensee and UNIREN, approved by Decree No. 3428/08, has included a generalized ‘oblivion’ or ‘pardon.’ Clearly and with no hesitation, the article at stake refers to the duties undertaken by licensee on a contractual basis (more specifically, to the duty to make tourism-related investments undertaken together with the proposal to acquire shares that were subsequently awarded to licensee). Such article did not apply and would never apply to any legal breach” (page 3 of Resolution No. 315.)

185. It is worth underscoring that the decree approving the Memorandum of Understanding of 7 May 2008 is subsequent to several ENREJA’s Resolutions sanctioning ENJASA for violations or breaches of anti-laundering rules following such date.

186. Lastly, it shall also be borne in mind, that the revocation of ENJASA’s License by ENREJA’s sanction shall not be confused with the power - reserved to the Executive Branch of the Province of Salta by the license agreement - to declare the termination and/or expiration of the license *automatically and by operation of law*, on one or any of the six grounds set forth in Article 6 of the License Agreement annexed to Decree No. 3616/99. This is also expressly recognized by Resolution No. 240 when stating that the above-mentioned power could only be exercised by that which granted the license, *i.e.* the Executive Branch of the Province of Salta (page 31 of the Resolution,) even though it admits that an unscrupulous conduct with respect to anti-money laundering rules could have resulted in a request by ENREJA to the Executive Branch to declare the expiration of the license pursuant to the provisions set forth in Article 5 of the license agreement (page 29 of the Resolution).

187. It is, thus, worth recalling that three out of the six grounds for termination or expiration of the License Agreement ENJASA had, listed in Article 6 are the following: (i) failure to comply with the obligations imposed by Article 5 of Law No. 7020; (ii) operation of any games of chance without the previous consent of ENREJA; and (iii) total or partial assignment or transfer of the powers granted under this license without previous

consent of the Provincial Executive Branch. In light of these grounds, it is evident that the violations or breaches by ENJASA of the “legal obligations” imposed thereon by Article 5 of Law No. 7020 confirmed by ENREJA’s Resolution No. 240 also constituted many other violations or breaches of the relevant “contractual obligations” of ENJASA’s license agreement, which, as such, undoubtedly enabled the Provincial Executive Branch to declare the termination of such license agreement by operation of law.

188. The above-mentioned grounds are undoubtedly part of the context in which some other allegations and arguments by Claimants, such as that of “political conspiracy” or ENJASA’s alleged “defenselessness” in the administrative proceedings pursued in the three administrative enquiries resolved by Resolution No. 240, despite the fact that the company could and did exercise at each stage of such proceedings its right of defense, of submitting an administrative request for reconsideration of Resolution No. 240 and of instituting before the courts of Salta contentious-administrative proceedings requesting the annulment of Resolutions No. 240 and 315, shall be weighed. And all this happened when, according to the terms of the License Agreement, the Provincial Executive Branch of Salta could have declared the termination or expiration of the license automatically and by operation of law through a decision or decree. The “political conspiracy” and/or “defenselessness” allegations lack all credibility in face of this evident possibility of Salta authorities.
189. The existence of the above-mentioned grounds for termination or expiration of the license agreement underscores the legal relevance that strict compliance by Licensee with each and every obligation listed in Article 5 of Law No. 7020 had for the conservation of the License, relevance expressly confirmed at the License Agreement and at Resolution No. 240 itself. Furthermore - as this Resolution declares - “if the violation of Article 5 of Law No. 7020 constitutes express grounds for the automatic expiration... (of the license agreement), this is all the more so grounds for revocation of the license, as a sanction to be imposed by the Regulatory Agency...” ( page 32 of Resolution No. 240.)

**(viii) Claimants Have Failed to Establish their Allegations Exempting ENJASA from Liability for its Violations or Breaches of the Obligations to Prevent Money Laundering under Article 5 of Law No. 7020**

190. Claimants to these ICSID proceedings have attempted to mitigate or even disregard the effects of the repeated violations or breaches of the provisions on money laundering prevention under Article 5 of Law No. 7020 by ENJASA, as confirmed by ENREJA Resolutions Nos. 240 and 315 which, as stated before, have become final under Argentine law, one of the three sources of applicable law in these proceedings pursuant to Article 8(6) of Argentina-Austria BIT. Moreover, they have frequently done so by means of arguments like those of ENJASA (already rejected by Resolutions Nos. 240 and 315), as if this ICSID Arbitral Tribunal was an appellate court in the proceedings initiated in Salta by the Regulatory Agency and the Enforcement Authority under Law No. 7020. They have also ignored the finality of the decision to revoke ENJASA's License, as well as the scope of jurisdiction of this Arbitral Tribunal.
191. However, Claimants have barely produced documentary evidence in support of their allegations and arguments in this dispute in order to mitigate or justify the violations or breaches of the obligations listed in Article 5 of Law No. 7020 by ENJASA, which led to the revocation of the company's exclusive license by ENREJA. As regards the obligation stated in the *first paragraph of Article 5 of Law No. 7020*, Claimants have attempted, like ENJASA in Salta, to ascribe an especially narrow sense to the term "operators", subjectively defined by them, rather than adopting its ordinary meaning of "any person or mechanism that performs specific actions", as translated from the definition of the *Diccionario de la Real Academia Española*. They have also sought to limit the scope of the expression "hire operators" to contracts for a specific purpose, whereas the provision's scope of application encompasses any contract with a third party. As explained at the hearing by Mr. Marcer, Respondent's legal expert, "[a]n operator is the one [...] who has some kind of function according to license: license-holder" and "it's something that has to do with the definition by the administration [the Regulatory Agency]." (Day 5, 196: 3-5, 8-9)
192. Certainly, ENJASA had constantly failed to request authorization to the Regulatory Agency, not only in relation to the recruitment of third parties but also in relation to many other matters subject to authorization, as established in Resolutions Nos. 15/05, 244/08, 286/09, 39/10, 210/10, and 161/13. Resolution No. 240 specifies that said

authorizations should be issued by the Regulatory Agency by means of an “administrative act”, including oral or implied authorizations, and that “silence per se is just an administrative inexpressive behavior” (pages 5/6 of the Resolution.) In any case, most of the sanctions imposed by ENREJA upon ENJASA were for the latter’s failure to request proper authorization it was bound to request. This is baffling since paragraphs (1) and (2) of Article 1 of the ENJASA’s License were perfectly clear in that regard:

“1.1. The object of the license is to authorize the operation of games of chance in the provincial territory *with the scope and limitations set forth herein* and to authorize the operation of games of chance in such other jurisdictions that have subscribed the pertaining multilateral conventions from time to time.

1.2. The authorization entails the management, marketing and operation of games of chance belonging to the jurisdiction of the province on an exclusive basis, except for bingos and raffles operated by public and not-for-profit entities at their own risk *performed with prior authorization by the Games of Chance Regulatory Agency.*” (Emphasis added)

193. Claimants have also alleged that the third parties hired by ENJASA were, in whole or in part, individuals with permits granted by the old *Banco de Préstamos y Asistencia Social (BPAS)*, when such permits—always precarious—expired upon transfer of their shares to ENJASA, in its new corporate structure following privatization, as clearly indicated in the “Notes to the Financial Statements” for 2001 and 2007 (CEMA-26) by Mr. Anselmi, general manager of ENJASA. These Notes were timely submitted by the company to ENREJA, and their contents were validated by Mr. Anselmi himself on Day 2 of the hearing. Both Notes are identical, and their contents read as follows:

“The transfer contract of shares class A mentioned above was approved by Decree 419/00 of the Executive Branch of the Province of Salta, dated 15th February 2000. From then on, ENJASA, in this new model of company, starts to operate games of chance in the jurisdiction of the province. Up until then, this was under the responsibility of the ex-BPAS. According to Article 12 of Decree 2126/98 of the Executive Branch of the Province of Salta, at the time of the transfer of the share covenant, any kind of relation and obligation is extinguished, whichever the state of execution, and also any kind of debt and credit and labor obligations.”

194. In view of the above, there is no doubt that ENJASA, as a privatized company and *exclusive* Licensee should have requested authorization to ENREJA to hire third parties, according to Article 5 (first paragraph) of Law No. 7020. However, Claimants

have been unable to submit to the Arbitral Tribunal any single copy of a letter from ENJASA requesting proper authorization to ENREJA in relation to the third parties hired, as they should have done if ENJASA had complied with said obligation under Article 5 of the Law, which enshrines the general principle of Argentine law that a licensee or concessionaire under a public contract may not subcontract unless previously authorized by the relevant authorities, as explained by Expert Marcer on Day 5 of the hearing. ENJASA failed to do so either before the 2008 Memorandum of Understanding (UNIREN) in relation to the company's UTEs with Cachi Valle Aventuras and Video Drome, or afterwards, as there is no single piece of evidence to the contrary on the record. In other words, ENJASA failed to comply with the obligation under Article 5 (first paragraph) of Law No. 7020 and hence Claimants now are in no position to submit to this Arbitral Tribunal a single copy of a request for authorization by ENJASA, which in turn evinces that the company was in breach of said obligation during the period from privatization of the company in 2000 to revocation of the License in 2013.

195. However, there is evidence on the record of the fact that during the negotiations of UNIREN one of the most controversial issues was precisely the situation of ENJASA's unauthorized UTEs with Cachi Valle Venturas and Video Drome, which contracts were seemingly already subject to administrative enquiry. In any case, following such negotiations, the Memorandum of Understanding stipulates: (i) to change the method for calculating the annual fee, (ii) to formally take note of the existence of the aforementioned unauthorized *UTEs* of ENJASA without imposing the relevant sanction on the company, while (iii) Licensee's obligation under Article 5 (first paragraph) of Law No. 7020 remains unchanged. However, ENJASA in Salta and Claimants to these proceedings seem to suggest that the Memorandum of Understanding evidences that the Administration had agreed that, *in most cases*, contracts executed with third parties without ENREJA's prior authorization would not violate anti-money laundering laws. This suggestion is legally impractical since the parties for both UNIREN and ENREJA involved in the negotiations of the Memorandum of Understanding had no power to modify or amend the regulatory framework of Law No. 7020 and, as a consequence, the obligation under Article 5 (first paragraph) thereof. In any case, Claimants have produced no evidence in support of such suggestion.

196. The *bona fide* consideration of the facts related to negotiations and the provisions of the Memorandum of Understanding also confirm that there was no acquiescence from Salta's competent authorities, which Claimants now purport or suggest. The references in the 2008 Memorandum of Understanding to the two *UTEs* mentioned above concern ENJASA's *UTEs* with Video Drome and Cachi Valle Aventuras *only* (as declared on Day 3 of the hearing by witness Gómez Naar in his examination by Mrs. Etchegorry). However, ENJASA continued executing contracts with third parties without ENREJA's authorization—as described in detail in the recitals of Resolution No. 240/13—despite having been involved in the negotiations of the Memorandum of Understanding and further written warnings received from ENREJA. These contracts with third parties following the Memorandum of Understanding were one of the reasons why ENREJA sanctioned ENJASA with revocation of the license. Subcontracting by ENJASA had not been occasional but rather an actual pattern of behavior by then that disregarded a Licensee's legal and contractual obligations, which threatened the integrity of the powers and roles conferred by the legislator upon ENREJA in its dual capacity as both Regulatory Agency and Enforcement Authority under Law No. 7020.
197. As regards the obligations to record and the methods for payment of prizes exceeding ARS 10,000—a provision stipulated in the second paragraph of Article 5 of Law No. 7020 (and regulated by ENREJA Resolution No. 26/00 dated 10 April 2000)—the Regulatory Agency has construed and applied said provision on a uniform, consistent and repeated basis, considering that the object and purpose of the provision is to prevent money laundering. Both Resolution No. 26/00 and subsequent ENREJA resolutions related to this law, such as Resolutions Nos. 31/08 (C- ADD), 32/08 (C-151), 232/08 (C-155), 104/10 (C-152), 106/10 (C-156) and 161/10 (C-157), interpret the law in a similar way as Resolutions Nos. 240/13 and 315/13.
198. Claimants to these proceedings cannot purport to have had their legitimate expectations about the interpretation and application of the aforementioned provision of Article 5 (second paragraph) of Law No. 7020 frustrated by ENREJA's decisions, on account of the following proven facts: (i) ENJASA expressly acknowledged in writing in 2005 and beyond the scope of the obligation set forth in Article 5 (second paragraph) of Law No. 7020, as interpreted and applied by ENREJA; (ii) ENJASA paid, prior to Resolution No. 240/13, the fines imposed by ENREJA as a sanction for violations or

breaches of said obligation without objecting by means of any of the administrative remedies available; and (iii) it appears that ENJASA filed no contentious-administrative proceedings, prior to Resolution No. 240/13, with the courts for the Province of Salta against ENREJA's interpretation and application of the obligation under Article 5 (second paragraph) of Law No. 7020, either globally or in respect of any of the specific sanctions successively imposed by the Regulatory Agency and Enforcement Authority upon ENJASA for the violations and breaches of said obligation by Licensee

199. For ENREJA, as explained in its resolutions, the provision of Article 5 (second paragraph) of Law No. 7020 creates a *money laundering prevention system* which, for instance, Resolution No. 32/08 describes in the following terms:

“[T]hrough Law No. 7020, as amended, the legislator has introduced an antimoney laundering prevention system and, in this regard, the second part of Article 5 thereof provides for a number of obligations to be complied with by the licensee. The scheme adopted by the law for the purposes of antimoney laundering prevention contains two criteria for the registration of transactions, a quantitative one: payment of prizes in excess of ARS 10,000 (by means of the identification of the beneficiary and payment by check, or in the case of foreigners, by wire transfer) and a qualitative one: suspicious transactions and those bearing no reasonable relationship between the individual and the performance of the activities declared” (C-151) [Translated by me].

200. To facilitate the application of such system, ENREJA's resolutions have also provided that Licensee should designate a person responsible to accomplish the purpose of the system, as well as to keep an “anti-money-laundering book” in which the company should record the prize winner, the amount to be paid, and the methods of payment (check; wire transfer) of prizes exceeding ARS 10,000 (Resolution No. 26/00). Thus, the purpose of the book is not to record the prize as such, but rather the identification of the winner that receives the prize above ARS 10,000, as it is this record that allows following up the transaction and verifying whether there has been money laundering or not (Resolution No. 32/08). Keeping such “anti-money laundering book” is not therefore, within the scope of the system, a mere formality and its loss could entail a sanction, as was the case of ENJASA, based on the documentation before the Arbitral Tribunal.
201. Licensee's specific obligations within the scope of the system established under Article 5 (second paragraph) of Law No. 7020 have been stated on the basis of its object and

purpose by ENREJA in exercise of its powers to issue regulatory operating rules “in order to ensure strict compliance with the law, issuing any and all regulations required to this end and imposing any applicable sanctions” (Articles 32 and 33 of Law No. 7020). These specific obligations were expressly admitted by ENJASA at least since 2005, as confirmed by the following citations of documents forwarded by the company’s attorney-in-fact to ENREJA:

(i) “1. Anti-Money Laundering Law No. 7020 effectively provides that prizes in excess of ten thousand Argentine pesos must be paid by cheque once the person collecting the prize has been duly identified; ENJASA has always complied with this provision” (Letter from ENJASA, 30 August 2005, signed by Mr. Petersen in his capacity as attorney-in-fact for the company) (RA-193);

(ii) “... the staff working in that sector did not inform ENJASA’s authorities of [the] prizes paid in connection with the machines in question. We were thus prevented from acting as we do in similar situations with respect to the identification of the beneficiary and the method of payment pursuant to the anti-money laundering legislation and, while the party responsible before the Agency is ENJASA, for reasons beyond our control, we were not able to comply with the Agency's requirements.” (Defense filed by ENJASA, signed by Mr. Petersen in his capacity as attorney-in-fact for the company, against ENREJA Resolution No. 70/10, March 2008) (RA-173)

(iii) “... the events occurred as clearly stated in our defence: the persons that paid the prizes were unaware of the requirements to be complied with for the payment of prizes in excess of ARS 10,000...”

(Administrative recourse for reconsideration against ENREJA Resolution No. 104/10, filed by ENJASA and signed by Mr. Petersen in his capacity as attorney-in-fact for the company, 20 May 2010) (RA-165). Confirmed by Mr. Anselmi, general manager of ENJASA, on Day 2 of the hearing. This recourse for reconsideration is one of the very few recourses filed by ENJASA against resolutions issued by the Regulatory Agency to sanction its behavior before Resolution No. 240/20.

202. Evidently, in light of these citations, ENJASA not only knew but also agreed to – and this is what matters here - the interpretation and application by the Regulatory Agency

of the contents, scope and purpose of the master obligation under Article 5 (second paragraph) of Law No. 7020. Therefore, some references or objections by Claimants to the principle of legality, statute of limitations or the difficulties in applying the qualitative criterion of the system in practice (treatment of the so-called “suspicious transactions”) are not so significant for the administration of the evidence of the facts discussed in the context of this Opinion. As regards the principle of legality, in addition to Articles 32 and 33 of Law No. 7020 mentioned above, consideration should be given to the license agreement, in particular, Articles 4 (Obligations of the Licensee), 5 (Sanctions) and 6 (Events of Extinction and/or Cancellation), as well as the fact that all these provisions stem, in their interpretation and application, from “administrative law”, which should not be confounded with “criminal law” for the purposes of the principle of legality.

203. As regards the reference to the statute of limitations, it is evident that the provision of Article 49 of Title II, Chapter IV (Administrative Infractions) of Law No. 7020 is not applicable to Article 5 of Title I, Chapter I (General Provisions) of such Law, as confirmed by ENREJA Resolution No. 240/13. Finally, with respect to the so-called “suspicious transactions”, the *Diccionario de la Real Academia Española* defines “suspicious customer” as an “individual whose behavior or background raises suspicion or mistrust” [Translated by me]. Undoubtedly, transactions with suspicious customers require a considerable level of competence, professionalism and tact by the company’s personnel in charge of handling them, but they do not seem to have been an excessive burden at all for a company with the dimensions, means and experience of ENJASA, in view of the explanations provided by Mr. Tucek, CAI CEO and member of ENJASA’s Board of Directors, during his examination on those transactions, on Day 2 of the hearing, as well as the testimony of some former officers of the company that prizes in excess of ARS 10,000 were very rare. In any event, as explained by Mr. Kusa, Claimants’ expert, at the hearing in 2018, the Supreme Court of the Argentine Republic ruled on the concept of “suspicious transaction” in a case filed against the UIF as follows: “... that the principle was ambiguous but they [sic] didn't go against legality, and this subject must take all measures to examine when a transaction qualifies as suspicious.” (Day 6, 37:19-38:3).
204. Moreover, ENJASA was perfectly aware that the violations or breaches of the provisions of the first and second paragraphs of Article 5 of Law No. 7020—that is,

either provision on money laundering prevention—were grounds for sanction by ENREJA pursuant to both such Law and the License Agreement. It is also undisputed that the applicable sanctions for violations or breaches of the provisions of both paragraphs of Article 5 of Law No. 7020 are those listed in Article 13 of said Law, which states as follows: “Any violations or breaches of this law, its regulatory provisions, the License Agreement and the rules and regulations issued by the Agency shall be punishable by the Enforcement Authority.” This introduction to Article 13 is enough to dismiss as reckless Claimants’ attempt to turn the violations or breaches by ENJASA of the provisions of Article 5 on money laundering prevention into mere “administrative infractions” in order to challenge ENREJA’s decision to revoke the license.

205. This Resolution aimed at revoking the License, issued by ENREJA, was adopted upon compliance with “due process”, without any incident and in full observance of the right of defense of the party sanctioned for the company’s violations or breaches of its obligations to prevent money laundering (first and second paragraphs of Article 5 of Law No. 7020). As regards violation of the obligation in the first paragraph (hiring operators without ENREJA’s prior authorization), an administrative enquiry was filed by decision of the Regulatory Agency through Resolution No. 384/12, whereas with respect to the obligation in the second paragraph of said Article, it was through Resolutions Nos. 380/12 (failure to record lottery prizes in excess of ARS 10,000) and 381/12 (failure to record live game prizes in excess of ARS 10,000). Those were failures to record the identity of the winner of the prize, the prize itself or the method to pay the prize by check. Moreover, the activities of an individual who unlawfully lent money to customers inside the casinos’ game halls were also called into question.
206. In its defense, ENJASA attempted to justify its behavior by means of several allegations and arguments, though without questioning, as a general rule, the facts attributed to it and thus accepting them as such. It was those generally accepted facts that ENREJA, in its conclusions, qualifies as violations or breaches by ENJASA of the provisions of the first or second paragraph, as appropriate, of Article 5 of the Law in the three administrative enquiries settled. Now, Claimants to this arbitration are not in a position to dispute those facts accepted by ENJASA or their qualification by ENREJA, as they withdrew the annulment proceedings filed with the courts for the Province of Salta against Resolutions Nos. 240/13 and 315/13, and since then both

Resolutions are final under Argentine law, which is an integral part of the “applicable law” in these proceedings pursuant to Article 8(6) of Argentina-Austria BIT.

207. The revocation of the License by ENREJA through Resolution No. 240, confirmed by Resolution No. 315/13, cannot be deemed baffling, as purported by Claimants, for two equally decisive reasons. First, after increasing the amount of the fines on account of the seriousness of the ENJASA’s breaches and recidivism, ENREJA warned, expressly and formally, to the company—i.e., by Resolutions Nos. 39/10 and 128/10, that the license could be revoked if the violations of Law No. 7020 continued, as was eventually the case in 2013. Second, the sanction that revoked the License was preceded by twenty-one sanctions applied to the company by Resolution of ENREJA for violations or breaches of the company’s obligations as Licensee, six of which were violations of its obligations to prevent money laundering under Article 5. Both Article 13 Law No. 7020 and Article 5(2) of the License Agreement provide that sanctions shall be applied taking into account “the seriousness of the violation or breach” and, as in every system of sanctions, recidivism aggravates the “seriousness of the breach.” ENJASA’s management should have taken this into account in order to avoid being sanctioned with revocation of its License, as the warnings were timely provided for it to conform its behavior with its obligations as Licensee.
208. ENJASA’s management had enough time to take internal action to avoid sanctions for violations or breaches of core obligations, as those related to the prevention of money laundering under Article 5 of Law No. 7020, since by nature such category of violations or breaches increased the seriousness of the sanction, just like recidivism. But ENJASA failed to do so despite ENREJA’s warnings. At the time of the events, measures against money laundering were adopted, both at the national and international level, and an online system was created which made it easier for the Regulatory Agency to immediately take knowledge of any unlawful acts committed in slot machines. The company’s contribution to aggravate incidental sanctions is evident since prevention of money laundering fell in full within the scope of application of both Article 5 of Law No. 7020 and Article 5(3) of the License Agreement (cited *supra*) which provides that “[f]or the sake of grading the sanction”, the following factors shall be taken into account:

1. the seriousness of the infraction;
2. the extent to which the rule of law, morality and good customs are impaired;
3. the damages it causes to the provincial State and/or private persons;
4. the social commotion it may produce; and
5. the licensee's record of recidivism.

209. There is no evidence on the record whether ENJASA's Board of Directors was aware of this provision in its written exchanges with ENREJA. Rather, the testimony of Mr. Tucek, CAI CEO and member of ENJASA's Board of Directors, on Day 2 of the hearing in this phase of the proceedings, shed some light on the reasons why ENJASA paid all the fines imposed thereon by ENREJA, without filing any administrative recourse or any action with contentious-administrative courts, even where it alleged in its defense that the sanction applied by ENREJA was unfounded. According to Mr. Tucek:

“... if there's a fine of ARS 10,000 or 15,000 or 20,000, and if you consider the cost of a court case, and by going into court against the regulator for the fine of ARS

10,000/15,000/20,000 would basically jeopardize the relationship with the authorities and would cost more money than paying ARS 10,000 or 15,000.”

One can understand the simplicity approach taken by the company with regard to the fines, as stated by Mr. Tucek, but then it would not be surprising, as he also asserts, that ENJASA's license was revoked because paying the fines amounts to acknowledging the breach or violation at issue which, in turns, amounts to creating a record of recidivism.

210. It is true, as explained by Mr. Tucek at the hearing, that he is not a lawyer and had not read all the legal provisions of the regulatory framework of games of chance in the Province of Salta. Therefore, he could be unaware of Article 13 of Law No. 7020 which provides for revocation of the license by ENREJA, though the License Agreement also states so, but the company had its own lawyers that should have timely advised him of the existence of said Article 13 and that the number of fines paid without filing any administrative recourse and/or legal action would have serious legal consequences for Licensee. First, having a record of recidivism increases the level of recidivism with the resulting aggravation of the nature of subsequent offenses and their applicable

sanctions, as was the case of ENJASA. And second, as recognized by Mr. Bianchi himself, Claimants' legal expert, in the absence of a legal action brought before the courts by Claimants, the acknowledgment of the violation or breach that led to the sanction becomes final and cannot then be alleged as illegitimate in another subsequent legal action (statute of limitations of the action to challenge a decision) (Day 5, 32:10-19). ENJASA's officers were negligent in failing to foresee that the seriousness of the violation of the provisions on money laundering prevention, along with recidivism, could well lead to revocation of the License as a sanction. This was what happened eventually, but Respondent may not be held liable for the negligence or casual deficiencies of ENJASA's Board of Directors particularly where, as in this case, Claimants were not shareholders alien to the daily operations of the company, but rather controlled, ran and managed ENJASA's business and administered the company.

211. Licensee's obligations to record payments under Article 5 (second paragraph) of Law No. 7020 apply only to "payment of prizes in an amount exceeding ARS 10,000." This standard matches the international standard under EU Law which, as informed to the Arbitral Tribunal, provides for "payment of prizes exceeding EUR 2,000." In any case, it should be noted in this context that all prize payments authorized by ENREJA Resolution No. 240 exceeded the standard ARS 10,000. Specifically, the amounts paid were ARS 11,080, ARS 12,000, ARS 15,000, and ARS 11,480, respectively. These amounts have not been disputed by Claimants. Additionally, payment of prizes exceeding ARS 10,000 was by no means frequent, which indicates that the obligation to record such payments was not an excessive burden for a company like ENJASA. As testified at the hearing by Mr. Fade, auditor of the company, in reply to the question about how frequently these payments occurred:

"... in terms of frequency, with lottery it was probably two or three times a week we would make such payments; and in the bigger halls, probably once a week. In the smaller halls, probably not so frequently: maybe only once a month in the interior. In some halls, the machines were really good, so there might be prizes more often, but it usually wasn't more often than once, twice a week at the most" (Day 4, 83: 2-9.)

212. Contrary to Claimants' allegations, this discussion allows concluding that the adverse effects of the revocation of ENJASA's License by ENREJA Resolution No. 240/13 on their investment are not at all the result of the adverse effects of an "indirect expropriation" of Claimants' investment by Respondent. Certainly, there was an

adverse effect for the investor, not as a result of “indirect expropriation by Respondent” but rather of serious and repeated violations or breaches by ENJASA—controlled, ran and managed by Claimants—of its legal and contractual obligations as Licensee to prevent money laundering. It was these violations or breaches that led the Respondent’s competent authority in the Province of Salta to be compelled to revoke the License by applying a statutory sanction to the company in exercise of its regulatory and police power of the Provincial State, in compliance with the laws, rules, the license agreement and regulations issued by the Regulatory Agency and Enforcement Authority under Law No. 7020.

213. Claimants have been unable to establish in these proceedings that the revocation of ENJASA’s License was “indirect expropriation” of their investment in the company by the authorities of Salta, which as such would amount to an internationally wrongful act on the part of Respondent by virtue of the provisions of Article 4(1) and (2) of Argentina-Austria BIT. They have failed to do so because said allegation is not consistent with what actually happened in light of the proven or admitted facts and the applicable law in this dispute as defined in Article 8 (6) of such BIT. The artificial nature of the allegation is evident and can only be explained by the desire to turn a domestic contractual dispute into an early ICSID arbitration against Respondent, that is, without waiting for the decision of the courts of Salta on the proceedings filed to annul ENREJA Resolutions Nos. 240 and 315.
214. As a consequence of ENJASA’s withdrawal of such proceedings, the revocation of the license has, as stated *supra*, become final under the laws of the Argentine Republic which, for the purposes of this arbitration, amounts to a new adverse effect *vis-à-vis* Claimants. As mentioned in the preceding paragraph, by the time of ENJASA’s violations or breaches (grounds for revocation of the License), the company’s business was run and controlled by Claimants, as evidenced by Mr. Tucek’s dual capacity as CAI CEO and member of ENJASA’s Board of Directors, who confirmed at the hearing that ENJASA regularly reported from Salta to CAI in Vienna and Vienna supposedly gave instructions to Salta. Claimants were not at all unfamiliar with ENJASA’s activities in Salta and therefore are also liable for the company’s violations or breaches of the obligations listed in Article 5 of Law No. 7020. Thus, Claimants contradict themselves in this arbitration as ENJASA has never alleged in Salta, as regards revocation of its License, that it had been subject to any sort of “expropriation”. This

contradiction makes Claimants' allegation on "indirect expropriation" and its previous behavior in SALTA in relation to the same facts, unacceptable (*allegans contraria non audiendus est*) to the extent that the contradiction benefits Claimants at the expense of Respondent for being against the principles of good faith and estoppel.

215. Finally, again, it should be noted that the gaming regulatory framework in the Province of Salta of Law No. 7020 existed before the creation of ENJASA and privatization of its shares, so Claimants were aware of such framework before investing in the company, as recalled by ENREJA in ENREJA Resolution No. 315 (page 12 of the Resolution) and, therefore, the company's duty to comply with its obligations as Licensee, as those listed in Article 5 of Law No. 7020, also undertaken by ENJASA under its License Agreement.

**(ix) Due Process and ENJASA's Right of Defense Were Observed at All Times**

216. Claimants also contend, once again without supporting evidence, that the Regulatory Agency and Enforcement Authority observed neither due process nor ENJASA's right of defense in the administrative proceedings concerning the revocation of the License. However, the facts proved or admitted and applicable law lead to the opposite conclusion, i.e., that both due process and the right of defense were scrupulously observed by the Province of Salta.
217. The procedural and substantive law of such Province, applied in the proceedings mentioned *supra*, corresponds exactly to that of an advanced rule of law, such as that of Respondent and its Provinces. ENREJA revoked the License on account of ENJASA's violations or breaches of its obligations as Licensee set out in Article 5 of Law No. 7020, a conduct also in violation or breach of the provisions of the company's License Agreement itself. The revocation of the License was in no way an arbitrary or capricious administrative act as purportedly characterized by Claimants and the majority Award, but a regulated and orderly administrative act, which developed as usual and in accordance with the guarantees offered by Salta's provincial legal/administrative system and the Respondent.
218. ENJASA was served timely notice of the commencement of the preliminary investigation of each of ENREJA's administrative enquiries with its respective charges by means of a formal act issued by the Regulatory Agency, so that the company was

able to prepare its defense. Those administrative enquiries were the case concerning the hiring of operators without prior authorization under Resolution No. 384/12, the case concerning omissions in the record of payments of lottery prizes under Resolution No. 380/12, and the case concerning omissions in the record of payments of live or board game prizes under Resolution No. 381/12. ENREJA learned about the events giving rise to the institution of such enquiries through third-party complaints or inspections of the relevant casinos or gaming houses carried out by its own officials.

219. With regard to ENJASA's right of defense, I am puzzled by Claimants' assertion that such right was not duly observed, since all the information on record in this arbitration disproves it, even the statements made at the hearing by their expert, Mr. García Pullés, in relation to the observance of the four allegedly constituent elements of the right to be heard. According to that information, in exercise of its right of defense, ENJASA filed its answers to the charges; had access to and was able to take copies of the files; requested that terms be extended; submitted evidence in its defense; obtained Resolution No. 240 with a detailed recital explaining the facts and the law in support of the revocation of the License; had the opportunity to file an administrative recourse for clarification, reconsideration or appeal against the resolution, and chose a recourse for reconsideration; pending such recourse, requested and was granted interim relief in order to safeguard its rights; obtained a decision on such recourse by means of Resolution No. 315, which also contains a detailed recital explaining the grounds for its dismissal; and, lastly, instituted contentious-administrative proceedings before the competent court for Salta, requesting the annulment of Resolutions Nos. 240 and 315.
220. The few complaints by ENJASA's counsel that are entered on record concern issues such as the tightness of certain time limits and the inability to introduce new evidence into the proceedings for reconsideration of Resolution No. 240, both of which are regulated by the Law of Administrative Procedure of Salta (LPAS, for its Spanish acronym), to which ENREJA's proceedings were, of course, subject. The first paragraphs of Resolution No. 315 address such issues. Resolution No. 315 states, on the one hand, that the "challenge filed is admissible as appellant has duly complied with the legal time limits prescribed" by the LPAS, and, on the other, that such procedural system does not allow evidence to be received "in proceedings under which the subject damaged by an action has actually been a party to the case. This is especially true in the case of the above-mentioned enquiry proceedings, as appellant has had an

active and wide participation in connection with its right of defense” (page 1 of Resolution No. 315).

221. That being said, I consider that the allegation that the Salta proceedings failed to observe ENJASA’s right of defense when Claimants have not exhausted local court remedies is an indefensible contradiction, especially within the framework of their claim for indirect expropriation. Moreover, it weakens what they are supposed to prove for such claim to prevail over Respondent’s defense on the merits, as the “non-exhaustion” of such remedies does not correspond to the meaning under general international law of notions such as “serious denial of justice,” “manifest arbitrariness,” “complete lack of due process,” or “evidently unfair decision.” None of these situations can arise in international law without the previous exhaustion of Respondent’s local remedies, and international law is one of the sources of the “proper law” applicable to the resolution of the present dispute, as provided for by Article 8 (6) of the Argentina-Austria BIT.

222. Furthermore, in my opinion, as pointed out by the arbitral tribunal in *Metalclad v. Mexico* (2000), a “denial of justice” can also refer to domestic administrative proceedings such as those pursued by ENJASA before ENREJA, although Claimants in their first claim in this arbitration allege that they have been victims of an “indirect expropriation” due to the violation of Article 4 (1) and (2) of the Argentina-Austria BIT, rather than a “denial of justice” on account of the violation of customary international law concerning one or more of the four types of “denial of justice” identified in arbitration practice by investment tribunals, such as the ICSID tribunal in *Azinian v. Mexico*, presided over by Jan Paulsson, which did so in the following paragraphs of the award:

“102. A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way...

103. There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law...” (Award of 1 November 1999).

223. In any case, Claimants have failed to demonstrate in this arbitration that ENREJA incurred any of these four types of “denial of justice” under customary international law in the course of the administrative proceedings pursued in connection with the revocation of ENJASA’s License in the Province of Salta.

**(x) The Proportionality of the Sanction Imposed by ENREJA**

224. The fact that the sanction imposed by ENREJA, i.e., the revocation of ENJASA's License, was the most severe of all those provided for in Article 13 of Law No. 7020 has been alleged by Claimants as an example of an undue bias against them, if not an abuse of rights by the Regulatory Agency and Enforcement Authority. The majority Award partly accepts this allegation in search for some crack which allows it to find the Argentine Republic liable for having violated Article 4 (1) y (2) of the Argentina-Austria BIT and, thus, reach the goal of a compensation, which, in my view, is inappropriate.
225. Indeed, Article 13 of Law No. 7020 provides *in fine* that the "sanctions shall be applied taking into account the seriousness of the violation or breach," and Article 5.2 of the License Agreement lays down a similar criterion regarding the "sanctions and graduation established in Law No. 7020 and its implementing regulation." In addition, this proportionality criterion applies to the violations and breaches of Law No. 7020 and its regulations, as well as to the provisions of the License Agreement and the regulations issued by the Regulatory Agency. Lastly, Article 5.3 of the License Agreement adds "[f]or the sake of grading the sanction" the criteria listed *supra* in this Opinion.
226. In order to examine this issue, it is worth remembering the provisions of ENREJA's Resolution No. 240 itself on the elements taken into account by its Board of Directors so as to impose the sanction concerning the revocation of ENJASA's License. In accordance with such Resolution, those elements were the following:
1. ENJASA's background;
  2. The importance of the breaches proved;
  3. The effect of those breaches on the public activity entrusted to ENJASA; and
  4. The sanctions authorized by law.

As to the first of these elements, i.e., the company's background, Resolution No. 240 is particularly specific. It states, on the one hand, that the Board of Directors took into consideration "the countless occasions on which it had to issue decisions concerning ENJASA's repeated and manifest refusals to comply with the law" and, on the other, that "[n]otwithstanding all the corrective measures adopted in this regard, ENJASA has

exceeded the bounds of legal tolerance in acting in disregard of the rules that regulate the gaming industry” (page 27 of the Resolution).

227. As evidence of those assertions, Resolution No. 240 goes on to list twenty-one Resolutions issued by ENREJA - from February 2005 to May 2013 – imposing sanctions on ENJASA for breaches of laws and/or regulations governing its activity as exclusive Licensee of games of chance in the provincial jurisdiction of Salta (pages 27 to 29 of the Resolution). Six of those twenty sanctioning Resolutions prior to Resolution No. 240 impose fines on ENJASA precisely for the violation of the provisions of paragraphs 1 and 2 of Article 5 of Law No. 7020 and its regulation then in force and effect (ENJASA’s Resolution No. 026/00) on the prevention of money laundering, as Resolution No. 240 itself also did in August 2013 when imposing a sanction on ENJASA, as stated *supra*, for hiring operators without ENREJA’s prior authorization and/or making payments of prizes for over ARS 10,000 without recording in the “anti-money laundering book” the identity of the customer who had won the prize and/or the payment of the prize itself and/or the payment of the prize through the methods of payment authorized, i.e., check or wire transfer, as the case may be.
228. Neither ENJASA at the relevant time nor Claimants in this arbitration have questioned the authenticity of any of those resolutions sanctioning ENJASA’s conduct and listed in Resolution No. 240 as examples of the company’s repeated unlawful conduct. Those sanctions should be considered together with the following concurrent factors, which are relevant in order to appreciate the proportionality of the revocation of ENJASA’s License determined by such Resolution adopted by ENREJA: (i) the prior penalties or warnings by the Enforcement Authority concerning the possibility that the License be revoked if the violations or breaches persisted; (ii) the importance and identity of the laws and regulations violated in the legal system of the Province of Salta where the exploitation and administration of games of chance is subject to provincial jurisdiction; (iii) the social, economic and political sensitivity existing over the crime of money laundering in the fight against drug trafficking and terrorism; (iv) the development of international cooperation in the fight against tax evasion, drug trafficking and international terrorism during the period in question in which the Argentine Republic actively participates; (v) the fact that the public function entrusted to ENJASA’s management as Licensee (the exclusive administration of casinos and games of chance) is objectively an activity prone to be used by criminals for their felonies; and (vi) the

adverse effects of failing to duly record the transactions relevant so as to determine the amount of the yearly license fee to be paid by ENJASA.

229. Due to the fact that the events admitted or proved in connection with Licensee's violations or breaches of its legal and contractual obligations on the prevention of money-laundering were serious and repeated, it is clear to me that the sanction of revoking ENJASA's License, adopted by Resolution No. 240 of 13 August 2013, was as proportionate as prescribed by the relevant provisions of both Law No. 7020 and the License Agreement, which is the proportionality that ENREJA had to weigh and did weigh in determining the graduation of the sanction imposed on ENJASA pursuant to Article 13 of Law No. 7020. In the words of ENREJA's Board of Directors in Resolution No. 240, such violations or breaches revealed, given their repeated and serious nature, a model of conduct adopted by Licensee that was inconsistent with the obligations stated in Article 5 of Law No. 7020, since, in accordance with the Resolution:

“...Law No. 7020 clearly sets forth that certain controls must be conducted as a condition for the operation of games of chance, in order to prevent the laundering of money of illegal origin. For such purposes, the most comprehensive legal protection is afforded, an anti-money laundering provision—Article 5—is included in a chapter in the Law where it cannot go unnoticed, and all of the actors involved—the Regulatory Agency, operators and gamblers—are included” ( page 26 of the Resolution).

230. ENJASA failed to conduct such necessary legal controls, as a result of which it was sanctioned with the forfeiture of the License after a long period of tolerance and warnings by ENREJA, which latter eventually proceeded to impose the sanction of revoking ENJASA's License in strict compliance with its duties as Regulatory Agency and Enforcement Authority of Law No. 7020.

**(c) Conclusion on Claimants' First Claim**

231. In light of all the foregoing considerations, I reject Claimants' "indirect expropriation" claim, which was allegedly based on the treaty provisions of Article 4 (1) and (2) of the Argentina-Austria BIT for lacking the objective element of Respondent's violation of an international obligation owed to Claimants, in the absence of which the existence of an internationally wrongful act by Respondent to the detriment of Claimants may not be inferred under international law.

232. Not only has Respondent not engaged in any conduct in violation of such provisions of the BIT when the Regulatory Agency and Enforcement Authority of Law No. 7020 of the Province of Salta adopted the sanction of revoking ENJASA's License, but it has acted in accordance with the Argentine law of the Province of Salta, as well as the customary rule of general international law protecting the regular exercise by States' competent bodies of their sovereign regulatory and police powers, both of which, together with the relevant BIT, form the "proper law" applicable to the resolution of this dispute under Article 8 (6) of the BIT itself.
233. The actions undertaken by ENREJA in the Province of Salta on the occasion of the revocation of ENJASA's License – which has become final ever since – could not have violated or breached the standard fixed by Article 4 (1) and (2) of the BIT, as Claimants assert, since ENJASA's revoked asset (administrative rights of a licensee) was not, by its nature, liable to any kind of expropriation in the Argentine legal system of the Province of Salta. No-one expropriates itself either directly or by adopting measures having a tantamount effect. In addition, the revocation of ENJASA's License did not cause a total and permanent loss in the value of Claimants' investment in ENJASA or the control of the company.
234. In the case at issue, the revocation measure disputed by Claimants was a "sanction" imposed on ENJASA by the Regulatory Agency and Enforcement Authority of Law No. 7020 of the Province of Salta on account of previous violations or breaches by the company of its obligations as a Licensee, upon conclusion of ordinary administrative proceedings known to and admitted by the company (and by Claimant foreign shareholders), which renders the so-called "sole effects" doctrine or criterion inapplicable in this case, because, in the event of sanctions revoking licenses or concessions, merely weighing the effect(s) of the measure when the purpose of any sanction, by definition, is to cause an adverse effect on the party being sanctioned leads to a manifestly absurd or unreasonable outcome, an oxymoron, unless foreign investors are claimed to enjoy in the territory of the host State of the investment the privilege of an immunity which does not exist under international law, a hypothesis that has not been raised by Claimants.
235. The adverse effects of the revocation of ENJASA's License do not entitle Claimants to compensation, since that measure is not an internationally wrongful act by Respondent as such giving rise to international responsibility *vis-à-vis* Claimants, and *quad non* as

neither Claimants nor the majority Award have shown that, on the occasion of such revocation, Respondent incurred any other “internationally wrongful” act of such relevance and to such extent as general international law requires for the effects of this potential wrongful act, such as a “denial of justice,” to prevail over the international customary rule invoked by Respondent as a defense on the merits.

236. Lastly, in a case like this one, where the measure adopted sanctioned ENJASA’s improper conduct as a consequence of its repeated violations or breaches of its legal and contractual obligations as Licensee, requesting that Respondent compensate Claimants for the allegedly indirect adverse effects of that sanction on their investment is a proposition that defies reason and is, thus, unacceptable for the ridiculous outcome to which it would lead. It is also inadmissible for attempting against the legal certainty that should govern the relations between foreign investors and the host State, in both the domestic and the international framework. Moreover, in view of the fact that, in the instant case, it was Claimants themselves who controlled, managed, ran and administered ENJASA when most of the violations or breaches that were sanctioned occurred, claiming compensation is inadmissible in an ICSID arbitration governed by good faith.

**B. Claimants’ Second Claim: Alleged Violation by Respondent of Article 4(3) of the BIT (Direct Expropriation)**

**(a) Relevant Texts**

237. The Argentina-Austria BIT is a treaty authenticated in German and Spanish, as provided for by its final clause: “DONE in Buenos Aires, on August 7, 1992, in two counterparts, in the German and Spanish languages, each version being equally authentic.” Both texts are duly signed by both the representative of the Argentine Republic and the representative of the Republic of Austria, which is why they have been established as authentic and definitive (Article 10 of the Vienna Convention on the Law of Treaties (VCLT)). The Parties so admit, and neither has claimed the existence of amendments or modifications to the BIT after 7 August 1992, but they disagree on the meaning and scope of the provision contained in Article 4 (3) of the BIT. Based on the German text, Claimants assert that Respondent committed a direct expropriation of their investment for violating Article 4 (3) of the BIT (Compensation), while Respondent, on the basis of the Spanish text, denies Claimants’ allegation and

deems it inadmissible in light of the provisions of Article 33 of the VCLT on the interpretation of treaties authenticated in two or more languages.

238. In the jurisdictional phase, Respondent had already filed a preliminary objection for lack of *ratione materiae* jurisdiction over this second claim, on the grounds that Claimants' shareholding in ENJASA was not an "*activo financiero*" ("financial asset") in the express terms of the authentic text in Spanish of Article 4 (3) of the BIT: "*Cuando una Parte Contratante expropie los activos financieros de una sociedad ...*" ("Where a Contracting Party expropriates the financial assets of a company.") Claimants, in turn, rejected this preliminary objection, arguing that the authentic text in German of Article 4 (3) of the BIT uses the word "*Vermögenswerte*," a broad term which did not limit the material scope of application of the provision to "*activos financieros*" ("financial assets").
239. Hence, an interpretation dispute arose between the Parties as to the meaning and scope of the provision included in Article 4 (3) of the BIT, which was not settled in the Decision on Jurisdiction adopted by the majority and which, therefore, the Arbitral Tribunal is to resolve now in this merits phase - as a preliminary question in relation to Claimants' second claim - by application of Article 33 of the VCLT in order to be able to decide on the merits of Claimants' second claim. The text of Article 33, which the jurisprudence of the ICJ considers declaratory of customary international law on the matter, reads as follows:

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

**(b) Consideration of the Interpretation Question Preliminary to the Second Claim**

240. By virtue of the interpretation dispute between Claimants and Respondent described *supra*, the Arbitral Tribunal must first resolve such dispute before being able to decide on the merits of Claimants' second claim (direct expropriation), which, in turn, compels it to verify and determine the material scope of application of Article 4 (3) of the Argentina-Austria BIT by application of Article 33 of the VCLT.
241. Article 33 of the VCLT corresponds to Article 29 of the Draft Articles on the Law of Treaties of the International Law Commission (ILC), which served as basic proposal for the work undertaken by the United Nations Conference on the Law of Treaties. The text of the said Article 33 adopted by the Conference is materially identical to that of Article 29 of the ILC Draft Articles, except for paragraph 4 *in fine* where the Conference added the words "having regard to the object and purpose of the treaty" to the text of the ILC.
242. These words were added by the Drafting Committee of the Conference after taking into account amendments proposed by the U.S. and Australia that the Plenary Commission had submitted to its consideration. Both amendments suggested reinforcing and facilitating the application of the rule of "a meaning which as far as possible reconciles the texts" proposed by the ILC in Article 29 (3) of its Draft Articles. The ILC had codified such rule for deeming it consistent with the general principle of international law on the matter of equality of languages and equal authenticity of the respective texts, in the absence of a specific clause providing otherwise in the treaty subject to interpretation. This principle was accepted absent objections by any of the States taking part in the Plenary Commission of the Conference. The amendments referred to *supra* were submitted without a prior vote thereon to the consideration of the Drafting Committee, so that it would determine the extent to which the application of the rule codified by the ILC could be improved, not for the purposes of modifying or distorting such rule.
243. It is in compliance with such mandate that the Drafting Committee added the words "having regard to the object and purpose of the treaty." The Drafting Committee believed that such addition facilitated the application of the rule of "a meaning which as far as possible reconciles the texts" of customary international law proposed by the

ILC. Finally, the Plenary Commission of the Conference adopted Article 33 of the VCLT including such addition with no votes against it.

244. On the other hand, the application by the Arbitral Tribunal of Article 33 of the VCLT in order to settle the interpretation dispute between the Parties in this arbitration poses no jurisdictional and/or procedural difficulty for the following reasons: (i) it is allowed by the definition of “proper law” applicable to this arbitration under Article 8 (6) of the BIT; (ii) both Argentina and Austria are Parties to the VCLT; (iii) in any case, the ICJ expressly declared that Article 33 (4) of the VCLT reflects customary international law (*LaGrand*, Judgment, I.C.J. Reports 2001, p. 502, para. 101); (iv) the original texts in German and Spanish of the BIT are duly authenticated by the signatures of the representatives of the respective Republics; and (v) as stated *supra*, the final clause of the BIT cannot be clearer when providing that the BIT: “DONE in Buenos Aires, on August 7, 1992, in two counterparts, in the German and Spanish languages, each version being equally authentic” (emphasis added).
245. Once verified, by comparing the authentic texts in German and Spanish, that Article 4 (3) of the BIT actually coexisting - as it follows from that alleged by the Parties - the term “*activos financieros*” in the Spanish text and the term “*Vermögenswerte*” in the German text, I opine that the Arbitral Tribunal, in accordance with the “proper law” defined in Article 8 (6) of the BIT – has a duty to apply the rule of international law of “a meaning which as far as possible reconciles the texts” codified in Article 33 (4) of the VCLT in order to resolve the present dispute. Furthermore, to such effect, the Arbitral Tribunal must follow the sequence indicated in the very rule codified in such paragraph, i.e., starting with “the application of articles 31 and 32” of the VCLT and bearing in mind at all times the legal presumption that “[t]he terms of the treaty [...] have the same meaning in each authentic text” as prescribed by Article 33 (3) of the VCLT.
246. The Parties to this arbitration did not provide the Arbitral Tribunal with any *travaux préparatoires* of the Argentina-Austria BIT, but did submit the complete original texts in German and Spanish of the BIT duly authenticated by means of their signature. This allows us to know the entire context, including the text, of the provision contained in Article 4 (3) of the BIT, as well as the object and purpose of such Treaty, for the purpose of application of the *general rule of interpretation* of Article 31 of the VCLT as a

prelude to the application of the rule of “a meaning which as far as possible reconciles the texts” under Article 33 (4) of the VCLT.

247. The provision included in Article 4 (3) of the BIT in its context, as defined by Article 31 (2) of the VCLT, confirms that such provision, like the rest of the provisions of the BIT, States rights and obligations that, without exception, are reciprocal in nature. In addition, the object and purpose of the Treaty is undoubtedly the mutual protection and promotion of the investments made by nationals of a Contracting State in the territory of another Contracting State, and vice-versa, pursuant to the Treaty itself. Like other BITs, the Argentina-Austria BIT is, therefore, a bilateral treaty based on strict principles of mutuality and reciprocity, and its provisions state, without exception, rights and obligations consented *ad idem* by Argentina and Austria.
248. The foregoing conclusions, which result from following the sequence of applying, first, the general rule of interpretation under Article 31 of the VCLT as prescribed by Article 33 (4) of the Convention, do not resolve as such the issue of the equal meaning to be given to the German and Spanish terms in dispute, but they pave the way for its resolution by following that sequence, i.e., by applying, next, the rule of “a meaning which as far as possible reconciles the texts,” having regard to the “object and purpose” of the BIT.
249. In view of the fact that the rights and obligations stated in Article 4 (3) of the BIT are, as we have just concluded, reciprocal in nature, the meaning that can reconcile the German text and the Spanish text to a greater extent is, undoubtedly, the term having the most limited material scope, which, in this case, is “*activos financieros*” of the authentic text in Spanish. It is only as regards the material scope of the term “*activos financieros*” of the Spanish text that it can be asserted that the rights and obligations under Article 4 (3) of the BIT are the same for investors who are nationals of both Contracting Parties, since the German text encompasses the term “*activos financieros*” of the Spanish text, whereas the Spanish text does not encompass the term “*Vermögenswerte*” of the German text. As stated by the PCIJ in the case concerning the *Mavrommatis Palestine Concessions* and cited by the ILC in paragraph (8) of its commentary to Article 29 of its Draft Articles on the Law of Treaties:

“The Court is of opinion that, where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, (the Court) is bound to adopt the more limited interpretation which can be made to harmonize

with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties” (PCIJ, 1924, Series A, No. 2, p. 19).

250. The *Mavrommatis* case adamantly supports the principle of reconciliation or harmonization of texts and that is why it was proposed by the ILC and approved by States at the Vienna Conference where the VCLT was adopted. Such jurisprudence of the PCIJ fully corresponds to the rule of “a meaning which as far as possible reconciles the texts” now codified in Article 33 (4) of the VCLT. Moreover, the application of such rule in the instant case poses no difficulty whatsoever, as the Argentina-Austria BIT is a bilateral treaty for the mutual and reciprocal promotion and protection of the investments made by Austrian investors in Argentina and by Argentine investors in Austria by means of identical treaty standards for the nationals of both Contracting States of the BIT.

**(c) Conclusion on Claimants’ Second Claim**

251. Given that, as a result of the application of Articles 31 and 33 of the VCLT to the interpretation dispute between the Parties concerning the equal meaning to be given in both languages to the relevant terms of Article 4 (3) of the Argentina-Austria BIT, it is the term “*activos financieros*” that prevails, Claimants’ claim on “direct expropriation” is inadmissible.

**C. Claimants’ Third Claim: Alleged Violation by Respondent of Article 2 (1) of the BIT (Fair and Equitable Treatment)**

**(a) Relevant Texts**

252. Article 2 (1) of the Argentina-Austria BIT, entitled “Promotion and Protection of Investments,” provides as follows:

“Each Contracting Party shall, to the extent possible, promote in its territory investments made by investors of the other Contracting Party, admit such investments in accordance with its legislation, and accord them at all times fair and equitable treatment.”

Under this BIT provision, Respondent has undertaken the obligation to accord fair and equitable treatment to investments made by Austrian investors *admitted in the territory of the Argentine Republic in accordance with the legislation thereof* and Austria has undertaken an obligation of similar content and scope with respect to investments made in its territory by Argentine investors.

253. But, as it usually happens in bilateral agreements for the promotion and protection of foreign investments, the Argentina-Austria BIT fails to define the content and scope of “fair and equitable treatment” (FET; in Spanish, “TJE” for “*tratamiento justo y equitativo*”) standard. Neither is there in said BIT any reference to the defining criteria or constituent components of the FET standard it formulates. In addition, Claimants and Respondent in this arbitration disagree on the content and scope of the above-mentioned standard. I am of the view that it is practical to reproduce, as a starting point in the consideration of the FET standard of the applicable BIT, a general reference to the International Law Institute’s (ILI) collective doctrinal contribution on the matter, namely, Article 13 of the Institute’s Resolution entitled “*Legal Aspects of Recourse to Arbitration by an Investor against the Authorities of the Host State under Inter-state Treaties*” adopted in its (2013) Tokyo session on the basis of reports submitted by the subject-matter rapporteur at the Institute, Professor Andrea Giardina. The Resolution, which is in the public domain, is published in the *Annuaire de l’IDI* of the above-mentioned session. The text of the aforementioned Article 13 provides the following on the “fair and equitable treatment” standard:

“Fair and equitable treatment, which is a key standard of investment protection, must accord investors and investments, in particular: (i) due process, (ii) non-discrimination and non-arbitrary treatment, (iii) due diligence, and (iv) respect of legitimate expectations.

The notion of legitimate expectations, as applied to investors, shall not be construed to include mere expectations of profit, in the absence of specific engagements undertaken towards them by competent State organs.

Compensation due to an investor for violation of the FET standard shall be assessed without regard to compensation that could be allocated in case of an expropriation, in accordance with the damages suffered by the investor.”

254. It is also advisable to bear in mind, given that the question is raised at the outset of the instant case, that States’ conduct, their respective BIT Models, treaties and other relevant international instruments, and the practice of international investment arbitral tribunals, reveal the existence of a fundamental division on the FET content and scope as a standard of protection of foreign investment that the UNCTAD has described in the following terms: “... whether the obligation to grant ‘fair and equitable treatment’ is synonymous with the minimum standard of treatment of foreign investment required under customary international law, or whether it means something different ... albeit

with some overlap” (*Identifying Core Elements in Investments Agreements in the APEC Region*, UNCTAD Series on International Investment Policies for Development, 2008, p. 29.

255. In other words, the “fair and equitable treatment” standard is an autonomous standard and of a scope wider than that provided for by customary international law as held, for instance, by the *Pope and Talbot* case tribunal, or it is identical to the so called “customary international law minimum standard” as held by other investment arbitral tribunals, notwithstanding eventual customary evolutions of this so called “minimum standard.”

**(b) Consideration of the Claim**

**(i) The Prior Question of Distinction between Company Rights and Their Shareholders’ Rights**

256. In their third final conclusion, Claimants assert that due to the revocation of ENJASA’s license Respondent would have incurred in a violation of the “fair and equitable treatment” laid down in Article 2 (1) of the Argentina-Austria BIT regarding their investment in ENJASA. This conclusion raises a prior question given the fact that general international law distinguishes between the rights of the company holding the license, *i.e.*, ENJASA, and the rights of its shareholders, Claimants in these arbitral proceedings, as reflected in the ICJ case law in the *Barcelona Traction, ELSI* and *Diallo* cases.
257. There is no doubt whatsoever that this international law distinction can give rise to the submission of an inadmissibility substantive objection as defense in the merits stage of a particular case (see: Gabriel Bottini, *Admissibility of Shareholder Claims under Investment Treaties*, Cambridge University Press.) Nevertheless, in this arbitration, Respondent has not questioned Claimants’ ability to directly file a claim for violation of the fair and equitable treatment standard laid down in the applicable BIT. What divided the Parties in the instant case regarding such treatment was the definition and scope of the FET standard that shall apply in this case, not the admissibility of Claimants’ third claim based upon such standard.
258. The double presence in these arbitral proceedings of Claimants as a Party and of the Argentine company in which they made their indirect majority investment as shareholders of L&E, *i.e.*, of ENJASA as holder of the revoked license, is one of the

particular circumstances of this dispute. I am of the view that the Arbitral Tribunal cannot ignore, with reference to the consideration of Claimants' third claim, the principle of good faith, given that not only were Claimants indirect majority shareholders of ENJASA, but they were also directly managing and running the company in its daily activities at the time of occurrence of most of the violations or breaches by Licensee of its obligations which were decisive for the imposition by ENREJA of the license revocation sanction provided for under Article 13 of Law No. 7020 of the Province of Salta.

**(ii) Respondent's Position on the Content and Scope of the "Fair and Equitable Treatment" Standard**

259. For Respondent, the content and scope of the FET standard would correspond to the provisions set forth by the rule of customary international law that provides for the level of treatment to be accorded to aliens and/or their property, generally referred to as the rule of "international minimum standard." Besides, this standard would not affect the State's power to adopt regulatory or police measures although these latter may have adverse effects for foreign investors, provided that for that customary international law "minimum standard" those measures would be inapposite due to their being manifestly arbitrary or unfair for said legal system.
260. In other words, for Respondent, the FET standard does not operate as an exception to the customary rule of international law regarding the exercise by the State of the regulatory and police powers thereof but, on the contrary, application of any such standard is subject to the non-application of said rule should it be in the sense that the adverse effects for the foreign investor of the exercise by the State of the aforementioned powers are not protected by FET standard applicable to foreign investments, which, as held by the *Methanex v. USA* tribunal in its final award: "i(t) is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police power of a State, compensation is not required" (*MethanexCorp. v. USA*, Final Award, 3 August 2005, 44 ILM 1343, para. 410 (2005)).
261. In addition, the practice of international investment arbitral tribunals that Respondent shares suggests that the States regulatory or police measures at issue shall be adopted in good faith, pursue a legitimate public purpose and be reasonable in the context of the prevailing circumstances (*e.g.*: *SD Myers v. Canada*, Partial Award of 13 November

2000, paras. 261-263; see also *Saluka v. Czech Republic*, Partial Award of 17 May 2006, paras. 304-307).

262. Respondent also recalls the wide margin of appreciation governmental authorities enjoy in the definition of State public policies, quoting in that regard the following excerpt by the *Philip Morris v. Uruguay* tribunal:

“The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal... Some limit had to be set, and the balance to be struck between conflicting considerations was very largely a matter for the government ... Provisions such as Article 3 (2) do not preclude governments from enacting novel rules, even if there are in advance of international practice, provided these have some rational basis and are not discriminatory” (Award of 8 July 2016, paras. 418 and 430).

263. This citation is significant in order to understand and apply the FET standard as per the trend shared by Respondent even if in the instant case legal matters of temporary nature, for instance, because of new legislation or new regulations are not present. As we have seen *supra* the amendment in 2001 of Law No. 7020 by Law No. 7133 did not introduce legislative changes relevant for the resolution of this dispute, although there was an attempt to mislead the Arbitral Tribunal into the opposite. Besides, any such 2001 amendment is also prior to the relevant facts of the instant case. The measure adopted by the competent authority of the Province of Salta was, as demonstrated herein, a sanction by the Enforcement Authority of Law No. 7020 to the company ENJASA, in its capacity as Licensee of an activity (games of chance) of provincial jurisdiction, imposed pursuant to the provisions set forth under Article 13 of Law No. 7020 for violation of the obligations laid down under Article 5 thereof. None of these two articles of Law No. 7020, or, naturally, the License Agreement was subject to modifications by Law No. 7133 in 2001.

264. It is worth recalling that the Argentine Republic is not alone in its interpretation of the content and scope of the FET standard, it is accompanied by other States, among which, as it is well known, NAFTA Members (Canada, USA, and Mexico) stand out. Article 1105 (1) of the NAFTA provides for that Contracting Parties shall afford protected foreign investors treatment in accordance with international law, including fair and equitable treatment. Besides, this provision has been subject to a mandatory interpretation by the NAFTA “Free Trade Commission” which, *inter alia* states as follows:

“Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard to be afforded to investments of investors of another Party. The concepts of “fair and equitable treatment” and “full protection and security” *do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens*. A Determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been breach of Article 1105 (1)” (Respondent’s CM, paragraph 561.) (Emphasis added)

265. Other States also participate of this same approach as the following paragraph of the Commentary to Article 1 of the 1967 OECD Draft Convention on the Protection of Foreign Property shows:

“The phrase ‘fair and equitable treatment’, customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that – subject to essential security interests (See Article 6(i) – protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the ‘minimum standard’ which forms part of customary international law” (Respondent’s CM, paragraph 560)

266. For Respondent, the applicable FET standard is part of general international law and its nature is customary given that it corresponds to the aforementioned “international minimum standard” due by States with regard to the persons or property of foreign nationals. It is this threshold which makes it possible to appreciate whether treatment afforded in a concrete case to a foreign person or their property (thus, to their investments) by a certain State is or not in accordance with the provisions set forth by international law. Respondent quotes with approval the “international minimum standard” classical formula of the USA-Mexico Claims Commission in *Neer* (1926) the applicability of which has continued being recognized in this century by investment arbitral tribunals such as, the *Glamis v. USA* arbitral tribunal (2009). Respondent - despite admitting that at the present moment the “international minimum standard” reflects more recent evolutions - underscores that the threshold to determine the violation of the standard is still high (“grossly unfair or arbitrary”) as recognized by several arbitral tribunals, such as: *Thunderbird*, *Lauder*, *S.D. Myers*, *Genin*, etc. The *Waste Management v. Mexico* tribunal defines a conduct in breach of the FET standard in the following terms:

“... the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant...” (Award of 30 April 2004, para. 98.)

267. Determination of whether a conduct is in breach or not of the FET standard threshold depends, to a great extent, on its factual context, *i.e.*, the prevailing factual circumstances, as pointed out, among many others, by the *Noble Ventures v. Romania* tribunal (Award of 12 October 2005, para. 181). In general, the parties to international investment arbitration proceedings also admit that it is not possible to determine *in abstracto* whether there has been a violation of the FET standard and that the question shall be solved in light of the specific or particular circumstances of the case at issue. In the instant case, one of the most significant circumstances is undoubtedly that the measure disputed between the Parties, namely, the revocation of the License ENJASA held, is a “sanction” imposed by the competent body, ENREJA, to the company sanctioned for violations or breaches of its obligations as Licensee.
268. The BIT formulas laying down the FET standard are not uniform, and they can even lead to misunderstanding. But this is not the case of the Argentina-Austria BIT, Article 2 (1) of which simply provides that each Contracting Party shall, to the extent possible, promote in its territory investments made by investors of the other Contracting Party, *admit such investments in accordance with its legislation, and accord them at all times fair and equitable treatment*. The obligation to accord investments made by investors of the Other Contracting Party fair and equitable treatment is thus, beyond all questions, evident, as it is also the fact that the investments protected by the FET standard of the BIT are only those admitted in the territory of the host State in accordance with its laws.
269. In the instant case, Claimants’ investment was admitted on the occasion of the privatization of ENJASA, an Argentine company priorly created in the Province of Salta, holder of an exclusive license for the operation of games of chance in the provincial territory pursuant to provincial Law No. 7020 and subject in its business activity to the regulatory framework of said law and the company corresponding

License Agreement. Potential violations or breaches by Licensee of legal or contractual obligations thereof was subject to sanctions by the Regulatory Agency and Enforcement Authority of Law No. 7020. This “business risk” was known and undertaken by Claimants when they participated in the *UTE* that acquired ENJASA shares and when they afterwards acquired the majority of said *UTE* shares and, thereafter, controlled, managed, ran, and administered ENJASA. Claimants’ investment was, with no doubt whatsoever, duly admitted in Respondent’s territory on the occasion of the privatization according to certain laws of the Argentine Province of Salta and it was, protected as such by the FET standard of the Argentina-Austria BIT but, provided that the company did not violate those laws and/or the License Agreement, in which case it could be sanctioned by the ENREJA, even, as it occurred, through the revocation of the License. Therefore, Claimants are not alien to the conduct adopted by ENJASA which determined the revocation sanction of the license the company held since, at the time of occurrence of the violations or breaches the revocation was grounded on, they had been controlling, managing, running, and administering ENJASA for years, what has been evidenced, beyond any reasonable doubt whatsoever, by Claimants’ behavior following the adoption by ENREJA of Resolution No. 240/13.

270. In their PHB, Respondent alleges that, in the circumstances of the instant case, the Arbitral Tribunal should essentially decide two questions regarding the applicable FET standard. The first one is determining whether due process and the right of defense were respected on occasion of the revocation of the license ENJASA held and, the second one, whether revocation of ENJASA’s license was a reasonable measure.

**(iii) The Content and Scope of the “Fair and Equitable Treatment” Standard Invoked by Claimants**

271. Nevertheless, Claimants disagree with Respondent’s opinion on the applicable FET standard. For Claimants, the standard at issue would not be basically defined by the customary international law “international minimum standard,” but for one called “autonomous treaty standard.” Not only would this treaty standard be different, but it would also operate independently (autonomous) from the customary international law “international minimum standard,” and it would comprise a certain number of components or elements that would have been identified in recent decades by investment arbitral tribunals established under inter-State treaties, such as BITs. This

would be the FET standard to which – according to Claimants – Article 2 (1) of the Argentina -Austria BIT would refer. The expression “autonomous treaty standard” has been already used by some arbitral tribunals, such as *Lemire v. Ukraine* (Decision on Jurisdiction and Liability of 14 January 2010, para. 284) but its concept and doctrine are far from clear, besides raising legal conundrums which, in the instant case, require certain elaborations and comments.

272. First, in the case at issue the “law applicable” to the resolution of this dispute does not relieve the Parties or one of the Parties. It has been defined by Argentina and Austria under Article 8 (6) of the BIT they concluded in 1992 which, as already mentioned herein, does not exclude customary international law, quite the contrary. Secondly, the expression “treaty standard” used in this context by Claimants is particularly misleading since we are in no way whatsoever before a “treaty standard”, i.e., before a standard defined in a written instrument concluded between subjects of international law and governed by said law, as per the definition of “treaty” in Article 1 of the Vienna Convention on the Law of the Treaties. Besides, the practice of ad hoc international investment arbitral tribunals regarding the FET standard has multiple versions, it is frequently contradictory, and it should not be categorized in any way whatsoever as jurisprudence in the sense such term has in Article 38 of the Statute of the ICJ. Thirdly, Claimants’ “treaty standard” lacks the fixity and objectivity any standard purported to be of regulatory nature shall have since the content and scope thereof are presented as a kind of a la carte menu that each litigator can shape to their liking, dismissing what makes them uncomfortable.

273. This legal uncertainty inherent in Claimants’ “treaty standard” disqualifies it as a standard of regulatory nature of mandatory compliance by this Arbitral Tribunal. In any event, it does not fit in any of the three sources of “law applicable” to this dispute laid down in the aforementioned Article 8 (6) of the applicable BIT. Nor is it admissible that through the alleged and requested FET standard Claimants attempt to displace customary international law rules of unquestionable relevance for this dispute resolution. This question is not petty, since as it has been correctly pointed out by some investment arbitral tribunal, e.g., the *Mondev v. USA* tribunal, the fair and equitable treatment standard shall be determined “by reference to international law, i.e., by reference to the normal sources of international law determining the minimum standard of treatment of foreign investors” (Award of 11 October 2002, para. 120).

274. Claimants qualify their alleged standard as “autonomous” possibly for the purpose of setting it completely free from customary international law just as other claimant investors resort to the term *lex specialis* to the same end, when not even the so called self-contained regimes are such with respect to general customary international law as explained by the 2006 International Law Commission (ILC) study on the fragmentation of international law recently quoted by the *Manuel García Armas (and others) v. Venezuela* tribunal (Award on Jurisdiction of 13 December 2019, paras. 702 and 703) which, following up the assertions by the ILC on such study, concludes with the following paragraph, applicable *mutatis mutandis* to the instant case:

“It shall also be borne in mind that the relationship between *lex specialis* and self-contained regimes, on the one hand, and international law, on the other, is not subject to any concrete act of ‘incorporation’ whatsoever. Unless expressly repealed, principles imported from the general international custom apply. In other words, investment international arbitration is not a sphere entirely divorced from general international law. And this is particularly true when, like in the instant case, it is the Treaty between Spain and Venezuela itself, in Article XI (4) (b) which requires the Tribunal to apply the “*rules and principles of International Law*”” (*Ibid.* para. 704 of the aforementioned Award.) [Translated by me]

275. Pursuant to Article 8 (6) of the Argentina-Austria BIT, this Arbitral Tribunal shall adjudicate this dispute on the basis of, *inter alia*, “the applicable principles of international law.” This reference confirms the full applicability of customary international law to this dispute, as described at the paragraph quoted hereinabove. It is, thus, confirmed that not having been expressly set aside from the Argentina-Austria BIT, customary international law, its relevant principles and rules are fully applicable, when appropriate, to this dispute. The ILC’s conclusions in its aforementioned 2006 study, are in line with the ICJ jurisprudence in the matter in the *ELSI* (1989) case, also mentioned *supra* herein. Besides, as provided for by the international law treaty rule of Article 8(6) of the Argentina-Austria BIT, Respondent’s law shall also apply.

276. As expressly recognized by their allegations, Claimants have elaborated the so called “autonomous treaty standard” on the basis of citations of international investment arbitral tribunals’ awards and decisions that have followed a trend more or less similar to that they advocate for in this arbitration and, particularly, of the statements by the *Murphy v. Ecuador* tribunal with respect to the question of whether the fair and equitable treatment standard under the Treaty extends or not beyond the customary

international law minimum standard (Partial Final Award of 6 May 2016). The *Murphy* tribunal, which repeatedly quotes awards such as *Tecmed*, *Duke Energy* and *Azurix*, begins its considerations on the issue raised pointing out as follows:

“The international minimum standard and the **treaty standard** continue to influence each other, and, in the view of the Tribunal, these standards are increasingly aligned. This view is reflected in the *jurisprudence constante* not only of NAFTA case law, as discussed above, but also in the **arbitral case law associated with bilateral investment treaties**. Some tribunals have gone so far as to say that the standards are essentially the same. The Tribunal finds that there is no material difference between the customary international law standard and the FET standard **under the present BIT**. Certainly, the FET standard of the BIT is not lower than the international minimum standard. The Tribunal does not find it necessary to determine for the purposes of the present case whether the FET standard **reflects an autonomous standard** above the customary international law standard” (para. 208 of the Award) (Emphasis added.)

277. This citation from *Murphy* on the FET standard of the BIT applicable to said case begins by drawing a distinction between the customary international law “international minimum standard” and what it calls the “treaty standard”, that is to say, *in casu* the USA-Ecuador BIT, but it concludes refraining from deciding on the essential question of whether or not the latter standard was “an autonomous standard” with respect to the customary international law standard and “above” thereof. In these arbitral proceedings, Claimants go a long way beyond the position in *Murphy* since for them it is only relevant the “treaty standard”, *i.e.*, in the instant case the standard of the 1992 Argentina-Austria BIT, which, as already asserted, does not define the FET standard. Consequently, the “treaty standard” is no other than the *a la carte* menu mentioned hereinabove.
278. Besides, according to Claimants, their treaty standard would be “autonomous” with respect to the customary international law standard. The underlying intention to all this approach seems apparent. Claimants attempt to close at all costs the door not only, as we have already seen in another context, to Respondent’s law, but also, in this context, to any application to the instant case of the customary international law FET standard which is sought to be displaced through a requested, subjective and extreme definition devised by themselves which is neither in line with the considerations of the *Murphy* tribunal they quote nor with the “law applicable” to the present dispute as defined by the Argentina-Austria BIT which incorporates among its sources customary international law.

279. Lastly, the support Claimants look for their own position in the award of the *Murphy* tribunal falls apart with no alleviation if one compares the relevant provisions of the USA-Ecuador BIT with those pertaining to the Argentina-Austria BIT. Article II (3) (a) of the USA-Ecuador BIT is not limited to laying down the duty to accord FET to investments made by nationals of the other Contracting Parties, but it adds the following phrase: “and shall in no case be accorded treatment less than that required by international law”. Facing this text, the *Murphy* tribunal is right when drawing a distinction between the customary international law standard the text guarantees and the higher standard that may be accorded which it calls “treaty standard.” In addition, the USA-Ecuador BIT is based upon a BIT model much different from that of the Argentina-Austria BIT given that: (i) it addresses the prohibition of arbitrary or discriminatory measures in a sub-article separated from that concerning the FET (Article II (3) (b)); (ii) it has a broader definition of the term “investment” (Article I); and (iii) Article VI on investor-host State dispute resolution lacks a sub-article on the “applicable law.”
280. The Argentina-Austria BIT is limited to stating, in Article 2 (1) thereof, the Contracting Parties’ duty to accord investments made by nationals of the other Party “at all times fair and equitable treatment,” without adding to the text any material appurtenant, condition or clause or any other indication enabling the interpreter to conclude or presume that for the Argentina-Austria BIT there are (i) two FET standards: a “customary international law standard” and a “BIT standard” or (ii) only a “BIT standard” or one of a potentially applicable multilateral treaty. There is no FET treaty standard in the “law applicable” to this dispute, there is only, in the applicable BIT, a reference to “fair and equitable treatment” to be accorded at all times and this treatment cannot be other than that provided for by the “customary international law standard” fully applicable to this dispute under the provisions of both Article 8 (6) of the Argentina-Austria BIT as well as the ICJ case law in *ELSI*. It is nonsensical that Claimants invoke a so called “autonomous treaty standard” without the slightest piece of evidence or sign of the instrument where this alleged standard is found and failing to demonstrate that application of any such alleged standard by the Arbitral Tribunal is allowed by the Argentina-Austria BIT.
281. As already explained herein, in order to exclude a principle or rule of customary international law it is necessary to make it clear in the relevant treaty instrument as

stated by the ICJ, not the other way around as some investment arbitral tribunals mentioned by Claimants seem to have done. In order to exclude a principle or rule of customary international law it is necessary to “contract it out” not to “contract it in.” It is as easy as that and the recurrence of the mistake by *ad hoc* arbitral tribunals reveals systemic deficiencies of understanding in the application of public international law by those tribunals.

282. In these arbitral proceedings, the so called “autonomous treaty standard” of the FET is a construction by Claimants that lacks virtuality to be able to displace application of the customary international law FET standard. There is no piece of evidence on the record prior, contemporary or subsequent to the 1992 BIT, that makes it possible to conclude that when Argentina and Austria adopted the reference to the FET in Article 2 (1) of the BIT, they had the intention to define the investment protection standard on the basis of the conclusions reached years later by other investment arbitral tribunals pursuant to bilateral treaties concluded between other States that might have agreed there between to go beyond the customary international law minimum standard. A different question would be to wonder whether after 1992 the international custom FET standard has developed its level of protection upwardly and, also, whether Argentina and Austria had the common intention in 1992 to ascribe (in Article 2 (1) of their BIT) an evolutive or dynamic sense to the expression “fair and equitable treatment.” In this arbitration, Claimants have failed to allege or attempt to show neither.

283. Lastly, Claimants seem to imply that the particular content they ascribe to the FET mentioned in Article 2 (1) of the BIT would be of mandatory compliance by the members of this Arbitral Tribunal. Should this pretense be confirmed, I can only reject it since the requested “autonomous treaty standard” is a self-construction with no regulatory effect whatsoever for this Arbitral Tribunal on the basis of none of the three sources of “law applicable” to this dispute laid down in Article 8 (6) of the Argentina-Austria BIT.

**(iv) Applicability of Customary International Law to the Determination of the Content and Scope of the “Fair and Equitable Treatment” Standard**

284. Claimants’ attempt to exclude the customary international law “fair and equitable treatment” standard contradicts, as already explained *supra*, the ICJ case law in *ELSI* since the Argentina-Austria BIT has not expressly rejected any such standard, and the ICJ case law specifically states that an “important principle of customary international

law should (not) be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so”. (*ELSI, Judgment, ICJ Reports 1989*, p. 42, para. 50.)

285. Application of the customary international law FET standard - as it occurs with the customary rule that a State is not bound to compensate an alien for the adverse effects arising from the normal exercise by its agencies of the State’s regulatory and police powers - has not been expressly dispensed with by the Argentina-Austria BIT and, therefore, any such standard is also fully applicable in this ICSID arbitration to the resolution of Claimants’ third claim. Article 8 (6) of said BIT so confirms it when ordering to apply, *inter alia*, “applicable principles of international law,” as well as Article 42 (1) of the ICSID Convention with its reference to “such rules of international law as may be applicable.” In that regard, it shall be borne in mind that a distinction shall be drawn between citations from awards or decisions by *ad hoc* international investment arbitral tribunals that confirm or explain a certain international law principle or rule (such as the *Sicula* award) and those which are mere declarations by the arbitral tribunal laying them down and which, as such, are not of mandatory compliance by other *ad hoc* international arbitral tribunals.
286. There is no doubt whatsoever that Claimants assert Respondent has violated the “fair and equitable treatment,” but they do not assert so upon the basis that Respondent has violated the customary international law objective standard in the matter, but upon the basis of an alleged self-devised FET standard qualified as “autonomous treaty standard,” (which, by the way, *has not been violated by Respondent either*) and failing to prove the mandatory nature thereof either for Respondent or for this Arbitral Tribunal. In any event, with the invocation of its so called “autonomous treaty standard,” Claimants place themselves outside the “law applicable” by this Arbitral Tribunal defined in Article 8(6) of the Argentina-Austria BIT, since the source of this alleged standard is not the Respondent’s law, or the Argentina-Austria BIT provisions, or the applicable principles of international law.

**(v) Claimants’ Assertion that Respondent Has Violated its Self-Defined “Fair and Equitable Treatment” Standard is Wrong**

287. In view of their position of principle on the content and scope of the autonomous treaty FET standard invoked as applicable to the present dispute, it is striking that Claimants have made no efforts in order to explain the regulatory and mandatory nature of such

standard. They have merely cited a given number of passages from awards rendered or decisions issued by *ad hoc* arbitral tribunals concerning disputes between foreign investors and host States, which are certainly part of a diverse practice (case law), but, as stated *supra*, do not constitute as such a jurisprudence that works as a subsidiary means for the determination of rules of international law within the meaning of Article 38 of the Statute of the ICJ. ICSID *ad hoc* arbitrations do not entail judicial decisions issued by a permanent tribunal such as the ICJ, and the ICSID Convention is not like the Statute of the ICJ, which is an integral part of the Charter of the United Nations.

288. However, it is on the weak basis offered by a most diverse practice that Claimants find support so as to conclude in their PHB, that Respondent allegedly violated the following components or constituent elements of their so-called “autonomous treaty standard” of FET that they claim to apply: (1) protection of legitimate expectations and obligation to act in good faith; (2) duty to act transparently; (3) protection from arbitrary state conduct; (4) due process; and (5) fair and equitable treatment, and the principle of estoppel and acquiescence.
289. These components of Claimants’ FET standard do not even correspond to all the components of such standard invoked by claimants in *Murphy v. Ecuador* from which they claim to be their source inspiration. The Murphy’s claimants asserted that the FET standard required a host State to: (1) protect and observe an investor’s legitimate expectations; (2) ensure the stability and predictability of the legal and business framework; (3) act consistently and transparently towards the investor and its investment; and (4) act in good faith and treat the investor and its investment free from coercion and harassment (para. 196 of the Partial Final Award of 6 May 2016). A simple *prima facie* comparison ratifies that, for this trend, which is shared by Claimants, the content and scope of the FET standard would be some kind of *a la carte* menu in permanent expansion designed by the foreign investor according to its needs or whims in any given case. Anyways, all the components of Claimants’ FET standard in the instant case, like those of claimants’ FET standard in *Murphy*, are significantly higher in number than those identified in 2013 by the IIL in its Tokyo resolution, namely: (1) due process; (2) non-discrimination and non-arbitrariness; (3) due diligence; and (4) observance of legitimate expectations (see *supra* paragraph 253 of this Opinion).

290. In their arguments, Claimants apply the “autonomous treaty” standard of FET designed thereby to what they call an “analysis of the facts” of this case. Such analysis is, rather, a neat narration of their narrative on Respondent’s purported violation of the standard defined by Claimants, which, on the other hand, is unsupported by vital evidence of the facts under study, but does not prevent them from concluding in their PHB that: (i) ENREJA failed to meet essential elements of the fair and equitable treatment standard, such as the obligation to act in good faith, transparently and in accordance with the legitimate expectations of the investor; (ii) ENREJA’s conduct was allegedly arbitrary and failed to comply with basic notions of due process; and (iii) the revocation of the License was purportedly arbitrary. These conclusions are based on “allegedly analyzed facts” which are neither supported by the relevant evidence nor shown to have been admitted by Respondent.
291. Nevertheless, my considerations and conclusions on the regularity of the “administrative proceedings” pursued by ENREJA, whereupon ENJASA’s License was revoked, on account of proved, serious and repeated violations or breaches by the company of its legal and contractual obligations, disprove all Claimants’ conclusions mentioned *supra* to which I refer as far as Claimants’ third claim is concerned. Such proceedings pursued by ENREJA which were concluded by Resolution No. 240/13 fully complied with due process requirements, ENJASA was ensured its right of defense before, during and after such Resolution, and the revocation of the License was a sanction provided for by Law No. 7020, which was known to and accepted by Claimants when, as members of the *UTE* in question, they participated and prevailed in the administrative proceedings pursued on the occasion of the privatization of ENJASA, which would have been impossible if they had not assumed at the time any and all ENJASA’s obligations as Licensee stated in such Law, as well as in the company’s License Agreement. Otherwise, the Transfer Agreement for ENJASA’s Class “A” Shares between the said *UTE* and the Province of Salta would not have been concluded, and, thus, Claimants would not have invested in the exploitation of games of chance in the Province of Salta.
292. ENREJA imposed on ENJASA the sanction of revoking the company’s License in the regular exercise of its duties and functions as Regulatory Agency and Enforcement Authority of Law No. 7020 due to Licensee’s repeated and serious violations or breaches of the legal obligations stated in Article 5 thereof concerning, *inter alia*, the

prevention of money laundering. Moreover, those serious and repeated violations or breaches occurred after ENREJA had expressly warned the company, more than once, that such conduct was inconsistent with the public purpose of preventing and prosecuting money laundering, and that its persistence could give rise to the revocation of the License, as was finally the case.

293. There is no contemporary information on record on complaints by privatized ENJASA about the regularity of the administrative proceedings pursued against it, whereupon ENREJA imposed the sanction of revoking its License, or on other complaints, which are worth mentioning, that the Regulatory Agency and Enforcement Authority had violated due process and/or its right of defense to the detriment of the company in the course of such administrative proceedings. When ENREJA adopted the revocation sanction, it did nothing but meet its obligation to protect an evident public interest and it did so pursuant to the laws in force and effect, as well as ENJASA's License Agreement, in strict compliance with due process and the right of defense. All this is duly documented and proved on record.
294. In their arguments, Claimants often adopt the position of being, allegedly, the party aggrieved by ENREJA's revocation of the License when it was a measure adopted by the Enforcement Authority of Law No. 7020 as a sanction imposed on account of ENJASA's conduct of repeatedly violating or breaching its obligations as Licensee. The revocation was not the outcome of an undue initiative by ENREJA, but rather a measure adopted thereby *in response* to a repeated illegal conduct by ENJASA, which, when most of the relevant facts occurred, was controlled, managed, run and administered by Claimants, who now seek compensation for the adverse effects of ENREJA's sanction on their investment. In other words, Claimants are requesting this Arbitral Tribunal to award them compensation for the adverse consequences thereto of the sanction imposed by the Regulatory Agency and Enforcement Authority of Law No. 7020 due to an illegal conduct by ENJASA, which was controlled thereby! In these circumstances, Claimants' frequent direct or indirect references in their arguments to Respondent's bad faith or arbitrariness do not make much sense and are groundless.
295. Lastly, the "legitimate expectations" of a foreign investor such as Claimants cannot consist, by definition, i.e., for being "legitimate," in that the host State tolerates in its territory that the national company in which they have made the investment violates or breaches its legal and/or contractual obligations as Licensee. That is why, in the case

at issue, Claimants' allegation of violation of their "legitimate expectations" has no *raison d'être*, unless it is admitted that a foreign investor enjoys the privilege of total immunity from the adverse effects of the wrongful acts that the company in question has committed or may commit *when the investor manages and runs the ordinary course of business of the company in question, as in this case*, which, anyway, has not been contended by Claimants.

296. In addition, that does not seem to have been the intention of Argentina and Austria when they concluded their BIT in 1992, because (i) the definition of the term "investment" refers to any kind of asset invested "*provided the investment has been made in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made*" (Article 1 (1)); (ii) the contents and scope of the rights for the different categories of assets shall be determined by the laws and regulations of the Contracting Party in whose territory the investment is made (Article 1, *in fine*); (iii) the article on the "promotion and protection of investments" provides, *inter alia*, that each Contracting Party shall accord, in its territory, fair and equitable treatment to the investments admitted "*in accordance with its legislation*" (Article 2 (1)); and (iv) the laws of the Contracting Party involved in the dispute are, *inter alia*, proper law applicable in order to settle investment disputes (Article 8 (6)).
297. Lastly, in international investment arbitration between investors and host States of the investment, there have been several cases related to the revocation, cancellation or denial of licenses, concessions or permits, some of which have been cited or mentioned by one or both of the Parties in these arbitration proceedings, but the circumstances or the facts and the law of none of which appear to be similar to those of the present dispute, where the injury alleged by the investor stems from a final legitimate sanction imposed by the host State's competent regulatory agency and enforcement authority on account of legal violations or breaches by the company in which the investor was not only the indirect majority shareholder when most of such violations or breaches were committed, but also controlled, managed, ran and administered the company on which the sanction was imposed.

**(vi) Claimants' Allegations on Arbitrariness, Due Process and the Right of Defense, Denial of Justice and Legitimate Expectations Have Not Been Proved**

298. Since their first allegations, Claimants have asserted that Respondent violated the FET standard for having: (i) arbitrarily revoked ENJASA's License; (ii) breached due process when revoking such License, as well as specific commitments that the Province of Salta had purportedly assumed in relation to their investment in ENJASA; and (iii) used ENREJA's supervisory function to harass ENJASA (para. 430 of the Memorial). But, of course, one thing is the narrative on account of these general assertions, and another one is proving what is stated. And, in the instant case, Claimants have not submitted the relevant evidence to the Arbitral Tribunal.

299. As regards the assertion that the revocation of ENJASA's License was arbitrary, Claimants have submitted no evidence whatsoever that ENREJA's actions in the administrative proceedings against ENJASA due to violations or breaches of the obligations mentioned in Article 5 of Law No. 7020 as Licensee were contrary to the "rule of law," which is what must be proved so as to adduce the existence of arbitrariness under international law. As the ICJ stated in *ELSI*:

"Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law'. It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety" (ICJ Reports 1989, p. 76, para. 128).

300. The treatment accorded in the Province of Salta to Argentine company ENJASA was, in each and every successive stage of its creation, privatization and performance of its duties, consistent with the procedural and substantive law in force and effect in the Province on the exploitation of games of chance, a well-known right of ENJASA as Licensee and of Claimants as shareholders of the company through their participation in the *UTE* that was the successful bidder. There was no arbitrariness at any level and at any time, but quite the opposite. The "rule of law" governed all the relevant actions taken by the provincial authorities. Nor was a new law applied on the occasion of the revocation of ENJASA's License that could have had a surprise effect on the company or its shareholders. What is apparent from those actions is precisely the complete lack of arbitrariness in the conduct of the competent provincial authorities and their tolerance towards a company which, between 2005 and 2013, gave reasons for the

Regulatory Agency and Enforcement Authority of Law No. 7020 to institute more than 21 formal administrative proceedings for having violated or breached its obligations as Licensee, which ended with the imposition of sanctions, generally in the form of fines, which were paid with no objection from the company in almost all cases.

301. The revocation of the License was not an arbitrary or a capricious measure, but a sanction prescribed and necessary so as to reestablish the integrity of the obligations assumed by the company when it was granted the License. Claimants were cognizant of these obligations when they invested in the company upon its privatization, and later, even after its License was revoked under ENREJA's Resolution No. 240/13. That explains the reason why Claimants have been unable to prove in this arbitration that ENJASA was treated, at some point, not just in connection with the revocation of the License, with "arbitrariness," let alone, of course, that Claimants who were shareholders were subject to "manifest arbitrariness" as serious as that required by international law in order to prevail, as an exception, on the customary rule concerning the regular exercise by the competent body of the State's regulatory and supervisory or police powers invoked by Respondent.
302. As to "due process" and the right of defense, Professor García Pullès, Claimants' legal expert, described in his fourth report (para. 125) the constituent elements of the right to be heard and admitted at the hearing, without reservations, that ENJASA had had the opportunity to exercise its right of defense by answering charges, having access to and taking copies of files, and submitting evidence in its defense. Furthermore, (i) ENJASA obtained a well-founded resolution revoking the License as a sanction for the violations or breaches of its obligations as Licensee; (ii) next, the company was able to request and was granted interim relief, whereupon the application of the revocation decision was suspended while the recourse for reconsideration submitted by ENJASA was pending; (iii) the company was entitled to file a recourse against the revocation decision by means of such recourse for reconsideration or the appeal that it failed to choose; (iv) the company obtained a resolution dismissing the recourse for reconsideration, which specified in detail the reasons of fact and of law behind the resolution revoking the License, including the procedural question whereby no new evidence could be submitted during the recourse for reconsideration; (v) the company went on to exercise its right to resort to courts of justice by instituting contentious-administrative proceedings before the competent court for the Province of Salta,

requesting the annulment of ENREJA's Resolutions Nos. 240 and 315; and (vi) the company withdrew from such contentious-administrative proceedings in Salta due to the fact that it had instituted these ICSID arbitration proceedings upon Claimants' request, not having thus exhausted the local court remedies available in the Province of Salta or, eventually, in the Argentine Republic. All these actions, proceedings and enquiries developed in the Province of Salta as usual from a legal and administrative standpoint, i.e., without incidents and in an absolutely peaceful and orderly manner. There is no evidence to the contrary in the documents submitted to this Arbitral Tribunal by both Parties.

303. In view of the non-exhaustive list of the foregoing paragraph, I wonder how can Claimants allege that ENJASA suffered a denial of "due process" and/or an attempt against its "right of defense" in Salta? And how can Claimants contend that that could happen without having exhausted the local court remedies available in the Province of Salta and, eventually, in the Argentine Republic? The subject-matter of this phase of the arbitration is not the issue of Respondent's consent to the ICSID arbitration governed by Article 26 of the ICSID Convention, but the Parties' rights and obligations in connection with the claims on the merits raised by Claimants in their Request for Arbitration and Respondent's rejection thereof. Therefore, the rule of previous exhaustion of local remedies – described by the case-law of the ICJ as an important principle of customary international law (ICJ Reports 1989, p. 42, para. 50) – is fully applicable, as it has not been expressly ruled out by Article 8 (6) or any other provision of the Argentina-Austria BIT. It is as applicable as it was in *ELSI* when the Chamber of the Court rejected the objection filed by the US to the application of the principle of previous exhaustion of local remedies invoked by Italy. That explains the reason why I believe not only that Claimants have failed to prove the allegation that there was a denial of "due process" or an attempt against ENJASA's "right of defense," but also that such allegation by Claimants is inadmissible, because they have not exhausted Respondent's local court remedies.

304. Notwithstanding the foregoing, the documents submitted to the Arbitral Tribunal by the Parties show that "due process" and ENJASA's "right of defense" were observed and applied by the competent bodies of the Province of Salta at every phase and moment in accordance with the "Regulatory Framework of Games of Chance" under Law No. 7020 and its regulations, ENREJA's regulatory operative rules, and the

provincial Law of administrative procedure of the Province of Salta. Furthermore, as I have been expounding in this Opinion, there is no evidence of animosity towards ENJASA, as contended by Claimants. The company was heard by ENREJA at all times. In the exchanges subsequent to Resolution No. 240, as well-known witnesses for Claimants informed, the company was offered Casinos Salta and Boulevard. Even after the recourse for reconsideration of the revocation was dismissed by ENREJA's Resolution No. 315, the company was invited to participate in the Transition Plan in order to obtain a new license, which ENJASA refused, an attitude which, by the way, for the purpose of a potential reparation, appears to have contributed to the injury that it claims to have suffered (Article 39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts).

305. In addition - and notwithstanding what has been stated about the non-exhaustion of Respondent's local remedies - Claimants' arguments on the merits on Respondent's violation of "due process" and ENJASA's "right of defense" vanish when reading the company's License Agreement. This Agreement expressly authorized the Provincial Executive Branch to declare ENJASA's License extinct or cancelled by operation of law in the event of violations or breaches of Article 5 of Law No. 7020. Nonetheless, Salta did not choose the executive avenue, which was also legitimate, but the avenue of the guarantees of "due process" and "right of defense" of the administrative proceedings pursued by ENREJA as Regulatory Agency and Enforcement Authority of Law No. 7020 and its regulations, which offer the twofold possibility of filing administrative recourses, and resorting to the competent courts in contentious-administrative matters for the Province of Salta and instituting court proceedings against ENREJA's decisions.
306. The non-exhaustion of Respondent's local court remedies readily dispels other express or implied allegations by Claimants, such as those of "manifest arbitrariness," "evident inequality," or "denial of justice." As recalled by the tribunal in *Toto Costruzione v. Lebanon*, citing Paulsson (*Denial of justice in international law*, 2005, p. 306):

"[...] National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected... The very definition of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial of justice before exhaustion" (Decision on Jurisdiction of 11 September 2009, para. 164).

On other issues frequently raised in connection with the FET standard, such as “due diligence,” Claimants made virtually no allegations in this arbitration, and the “discrimination” contention was ruled out by the Arbitral Tribunal in its Decision on Jurisdiction.

307. The requirement of a transparent and consistent conduct on the part of the State is fully met in the present case. The regulatory legal framework of games of chance of the Province of Salta and ENJASA’s License Agreement are known to the public and did not suffer unforeseeable alterations after Claimants’ investment in the company, given that, as stated *supra*, the criteria for determination of the license fee were modified in 2008 by means of a Memorandum of Understanding (UNIREN) in which ENJASA participated. Consequently, they complied with the requirement of a predictable and transparent legal framework.
308. With regard to Claimants’ “legitimate expectations,” I have already stated the reason why, in the instant case, it is an allegation that does not go a long way, since the relevant expectations must be “legitimate” by definition. In this arbitration, Claimants are not in a position that allows them to contend that, when they invested in ENJASA, they had the protected expectation that the potential violations or breaches of Article 5 of Law No. 7020 by Licensee (which are also expressly stated in the “License Agreement”) would not be sanctioned with the revocation of the License held by the company in which they invested in full cognizance of the situation. What is more, had they been “protected legitimate expectations,” Claimants would not have been able to be disappointed at the actions of the provincial authorities of Salta, due to the fact that they never adopted an opaque or inconsistent conduct in relation to the legal and contractual obligations as Licensee of the company in which Claimants decided to invest through an *UTE*, nor at the scope of ENREJA’s sanctioning powers in response to Licensee’s violations or breaches of its obligations. In any case, Claimants have failed to furnish any evidence that, at the time of their investment, they were given any kind of unimaginable guarantee that allowed them to expect that ENREJA could refrain from or tone down the exercise of its sanctioning powers were that to have adverse effects on Claimants’ investment.
309. In view of the foregoing and even though “legitimate expectations” *per se* may undoubtedly be protected by the applicable FET standard, except, pursuant to the ILL Tokyo Resolution, in the event of “mere expectations of profit, in the absence of

specific engagements undertaken towards (the investors) by competent State organs,” of which there is no evidence in this case; and in spite of the fact, as stated *supra*, that:

“... [t]he obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly” (*MTD Equity v. Chile, ad hoc Committee, Decision on Annulment, para. 67*).

310. Lastly, there is no doubt that the general principle of law of good faith also informs the “fair and equitable treatment” standard, but it is shocking that Claimants, as direct majority shareholders in L&E and indirect majority shareholders in ENJASA, at the time when the events giving rise to the revocation of the License occurred, invoke good faith against Respondent, making inapposite references to estoppel and acquiescence, when it was under their very control and management that ENJASA committed the serious and repeated violations or breaches by Licensee of the obligations set out in both paragraphs of Article 5 of Law No. 7020, which led ENREJA to revoke the License as a sanction for such serious and repeated violations or breaches.
311. The rhetoric of notions or epithets in international arbitral proceedings does not take the proponent too far if the narrative is not supported by the relevant evidence in each of the claims made. Furthermore, in the instant case, in their Reply Claimants had acknowledged that the fair and equitable treatment standard does not abolish the State’s right to adopt regulatory measures affecting investors’ interests (para. 469 of the Reply), provided that measures are adopted in good faith, pursue a legitimate purpose, and are not unreasonable in the specific circumstances of the case. Claimants have failed to prove that the relevant actions taken by the authorities of the Province of Salta were governed by bad faith or pursued an illegitimate purpose nor that, in the specific circumstances of the case, the revocation of ENJASA’s License was an unreasonable measure.
312. In addition, it should be recalled that, in the face of Respondent’s defense on the merits, it does not suffice for Claimants to prove that there was a mere *quod non* violation by ENREJA of a given element or aspect of the FET standard under international law in order to prevail over Respondent’s defense, such as a “flagrant violation of the rule of law,” or a “complete lack of due process,” or a “denial of justice,” etc. In other words,

they must demonstrate that Respondent committed a most serious flagrant and manifest violation of customary international law. Claimants have not even attempted to prove anything remotely similar.

**(vii) The Underlying Reasonableness of the Sanction Revoking the License**

313. ENJASA's obligations as Licensee of the exploitation of games of chance in the Province of Salta were perfectly clear and known to both Parties, as evidenced by the documents submitted to the Arbitral Tribunal. Such obligations cannot and should not be ignored as the majority Award attempts to do so as to prove the thesis that there was an abuse or unreasonableness on the part of Salta's authorities at the time of revoking ENJASA's License.
314. The same can be said about the truth of the violations or breaches by ENJASA that gave rise to a series of sanctions imposed by ENREJA since 2005, which were not at all challenged at the time by the management of ENJASA (which had been in Claimants' hands at least since 2007), which, as a general rule, tried to evade responsibility for such violations or breaches by the company without denying the facts as such, which were deemed to be accepted by the company, since ENJASA complied with the sanctions imposed without objecting thereto. It was after the revocation of the License that some of those facts were questioned by ENJASA and/or by Claimants, which was rather late to prevent the effects of their admissions on the administration of evidence. It is also worth recalling that ENREJA weighed at all times the more or less serious nature of the violation or breach in question before imposing the relevant sanction, as reflected in the statement of reasons of the resolutions. See, for example, Resolutions Nos. 32/008 (C-151), 39/2010 (C-164), 104/2010 (C-152), 128/2010(C-158), 129/2010 (C-159), 130/2010 (C-160), 151/2010 (C-161), 152/2010 (C-162), 153/2010 (C-163), 200/2010 (C-165), and 178/2012 (C-166).
315. In addition, ENJASA was a Licensee that repeated its violations or breaches, in particular, in connection with obligations relevant to the prevention of money laundering, such as those stated in *Article 5 of Law No. 7020*, which, eventually, led to the revocation of the License determined by the Regulatory Agency and Enforcement Authority by means of Resolution No. 240/13, pursuant to Article 13 of such Law, after the "due process" in which ENJASA's right of defense was fully *observed*. It is worth highlighting that Article 4 of the License confirmed, *inter alia*, that *Licensee* had an

obligation to comply in its exercise of the License with all the provisions set forth in Law No. 7020 and the regulatory decree, as well as with all the rules issued by the Regulatory Agency within the framework of its competence.

316. Article 5 of Law No. 7020 - the relevance of which to the prevention of money laundering at casinos and gaming houses is evident - plays a vital role within the “regulatory framework” of games of chance in the Province of Salta, as expressly reflected in Article 6 of ENJASA’s License Agreement which prescribed that failure to comply with the obligations imposed by *Article 5 of Law No. 7020* shall be grounds for extinction and/or automatic cancellation of the License by operation of law. Therefore, it is perfectly understandable that the violations or breaches of the provisions of such Article 5 raised the alarm and caused the Regulatory Agency and Enforcement Authority to impose more severe sanctions as the violations or breaches became more recurrent until the License was eventually revoked by ENREJA in the course of administrative proceedings where “due process” and ENJASA’s “right of defense” were fully observed, as explained *supra*.
317. Besides, the repeated disregard for or failure to obtain the authorizations, carry out the controls or keep the records provided for in Article 5 of Law No. 7020 not only contravened public interest in the prevention of money laundering, but also influenced the determination of the amount of the yearly license fee to be paid by ENJASA, given that, in accordance with the Memorandum of Understanding (UNIREN) of 2008, the license fee scheme originally stipulated was replaced by a new calculation system based on a percentage of *ENJASA’s duly recorded income* for the immediately preceding year, as a result of which it was absolutely necessary in order to comply with the new license fee to keep a strict control of ENJASA’s real income, as it was on the basis of such income that the yearly percentages that ultimately determined the amount of the yearly licensee fee to be paid by the company to the Province of Salta were calculated.
318. Surprisingly, the Parties have not said much about the adverse effects of the violations of Article 5 of Law No. 7020 on the calculation of the annual amount of the new fee and therefore on public financing of the Province of Salta. An online system was created but only to control income and prizes from slot machines, rather than income from table games at casinos. The concern about a proper estimate of the new fee also explains the issuance of Decree dated 26 November 2008, in which the Governor of

the Province of Salta provided that ENREJA would be in charge of “controlling, supervising, auditing and taking any necessary action in order to follow up and collect the fee payable by ENJASA to the Provincial State for the license to operate games of chance on an exclusive basis” (Official Gazette of the Province of Salta, Decree No. 5313/08) [Translated by me]. This Decree answers Claimants’ complaint about being unduly harassed by ENREJA in the years before revocation of the license. In other words, the violations or breaches of Licensee’s obligations listed in Article 5 of Law No. 7020 have not only weakened the struggle against money laundering, but also had a negative impact on the Province’s financing.

319. In analyzing the reasonableness of ENREJA’s decision to revoke the license held by ENJASA, consideration should be given not only to the cultural, social and geographical context of the Province of Salta where the facts took place, but also to the legal context of the revocation after ENJASA was sanctioned for breach and violation of Law No. 7020 more than twenty times and warned by ENREJA that such a repeat behavior on the part of Licensee could lead to revocation of the License, as set forth in Article 13 of said Law. The purpose and appropriateness of ENREJA’s decision were also endorsed by the increasing concern in the States and the international community about preventing money laundering, a crime considerably developed in the decade when the disputed facts took place, adopting new measures, laws and agreements at both levels in order to prevent it as part of the struggle against drug trafficking, smuggling and terrorism.
320. ENREJA’s responsibility and duty of involvement in such struggle, within the scope of its jurisdiction, are unquestionable and understandable for two reasons: first, the power to regulate and control games of chance is constitutionally vested in the Province of Salta and, second, casinos and the sector of games of chance are generally vulnerable to money laundering and the border geographical location of the Province makes it particularly exposed to criminal activities of money laundering, which requires a very strict control and severe regulations as explained in detail by Mr. Biagosh, expert for Respondent, in his expert reports and at the hearing. That clearly explains the pioneering nature of the laws of the Province of Salta on this matter. Recently, the Financial Information Unit (UIF, for its Spanish acronym), the body in charge of following up and monitoring compliance with the FATF recommendations at the national level in Argentina, has imposed the maximum fine upon ENJASA and its

officers, including Mr. Tucek, for violation of rules and recommendations against money laundering. Seemingly, this case is currently on appeal, but it can nevertheless be stated that such decision from the UIF confirms the general conclusion that ENJASA violated or breached its obligations as Licensee, which was also why ENREJA sanctioned it with revocation of the License (now apparently in appeals proceedings).

321. Moreover, it should be recalled that the obligation to obtain prior authorization from ENREJA to hire third-party operators (the violation of such obligation was one of the grounds for revocation of the license), undertaken by ENJASA both under Article 5 (first paragraph) of Law No. 7020, matches the recommendation 28 (a) of the FATF (FATF, 40 Recommendations, February 2012) which reads as follows:

“Casinos should be subject to a comprehensive regulatory and supervisory regime that ensures that they have effectively implemented the necessary AML/CFT measures. At a minimum:

- Casinos should be licensed;
- competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of, a significant or controlling interest, holding a management function in, or being an operator of, a casino; and
- competent authorities should ensure that casinos are effectively supervised for compliance with AML/CFT requirements.”

It is thus confirmed, by a particularly competent third party, that, in order to prevent money laundering, knowing the identity of the owners, operators, managers, employees and other members of the personnel of casinos and gaming halls facilitates the States’ follow-up of the activities conducted by said individuals, so that they are not directly or indirectly involved in customers’ money laundering practices.

322. The same applies to the obligations of identification and registration of gamblers and their operations, as well as the methods of payment of prizes exceeding ARS 10,000, as provided in Article 5 (second paragraph) of Law No. 7020, which was the second ground for revocation of ENJASA’s License. I have already explained *supra* in this Opinion that the manner of paying and recording those prizes, as required by ENREJA under applicable laws, had already been accepted in 2005 by ENJASA (letter from Mr. Petersen, attorney-in-fact for ENJASA, to the President of ENREJA, dated 30 August 2005, RA-193). It is not reasonable that Claimants, on the one hand,

maintain ENJASA's continuity and, on the other, dispute the effects of said acknowledgment by the company once they became majority shareholders of Leisure & Entertainment S.A.(L&E). Additionally, there is no doubt in that regard since ENJASA's License Agreement listed—among the obligations of Licensee—the obligation to “enable and provide for the measures, proceedings, control and surveillance that ENREJA shall apply on a periodic basis” (Article 4.1.7 of ENJASA's License).

323. Contrary to what is often the case in international arbitration of investment disputes, in this case there was also no relevant statutory or contractual modification after privatization of ENJASA likely to affect Claimants' potential legitimate expectations, since the fee was modified by means of the Memorandum of Understanding (UNIREN) executed between the Province and the company when Claimants were already majority shareholders of the company through L&E. Hence, there is no reason to refer to “Claimants' expectations frustrated” by statutory amendments or reviews of ENJASA's license agreement. Moreover, as explained in my Statement annexed to the Arbitral Tribunal's Decision on Jurisdiction, I disagree with the opinion that the “legitimate expectations” protected by Argentina-Austria BIT could be deemed subjective expectations of investors with no basis on the License Agreement, Law No. 7020 of the Province of Salta or, eventually, specific agreements between ENJASA and/or its shareholders and the Province of Salta, whose existence has not been established on the record of these proceedings.
324. Thus, for example, the allegation by a claimant who, upon investing in ENJASA, had believed that the exclusive license was irrevocable during its 30-year effective term could not be deemed a “legitimate expectation”, since the relevant provisions of Law No. 7020 and the License Agreement provide for the possibility, in specific cases, to revoke the license at any time as a sanction for Licensee's violation or breach of Article 5 of said Law, by decision of the Regulatory Agency and Enforcement Authority upon completion of the relevant administrative proceedings, and that the License Agreement itself may be declared terminated and/or expired automatically and by operation of law by the Provincial Executive prior to the License's expiration date for any of the grounds listed in the agreement.
325. When a foreign investor claims having had a “legitimate expectation” frustrated by an action of the State in whose territory they made an investment, they must be as accurate

as possible in identifying the allegedly frustrated “legitimate expectation”. It is not good enough to simply repeat general statements that their expectations have been frustrated. The investor must specify which expectation has been frustrated and the reasons of the purported frustration, as well as when and how. For example, in the instant case, when Claimants’ counsel time and again referred to their clients’ “legitimate expectations”, they did so without further detail. Thus, there is no way to know, for example, if they had those expectations when they owned 5% of the shares of L&E, when they became majority shareholders with 60%, or when, after revocation of ENJASA’s license, they acquired approximately the remaining 40%, or if they had “legitimate expectations” at all times since they were, by nature, independent from their shareholdings.

326. In the course of their latest allegations and at the hearings, Claimants and some of their experts attempted to spread the idea that somehow the amendments of Law No. 7020/99 by Law No. 7133 of 2001 had adverse effects on ENREJA’s measures to ENJASA’s license. Such conclusion is inapposite. As already explained in this Opinion, this dispute should not be decided on the basis of the provisions on additional competencies and sanctions vested in ENREJA by Law No. 7133/01 as regards the exercise of police power against natural and legal persons that incur administrative infractions in relation to games of chance in the Province, but rather on the basis of the provisions of Law No. 7020 on the obligations of licensees as such in their dealings with the Province of Salta, like those listed in Article 5 of the Law, and the applicable sanctions to such licensees for violation or breach of such obligations are those set forth in Article 13 of the Law. The majority Award incurs a manifest error in assuming, in whole or in part, such Claimants’ arguments in that regard.

327. ENREJA Resolution No. 240 already rejected ENJASA’s attempt to qualify the violations by ENJASA of the obligations listed in Article 5 of Law No. 7020 as “administrative infractions” in order to describe the fact that ENREJA punished it with one of the sanctions listed in Article 13 of the Law (*i.e.*, “revocation of the license”) as an abuse. Since Claimants have attempted to do something similar in these proceedings, it should be recalled that ENREJA has at all times underscored that the powers to fulfill its purpose, under Article 33 of Law No. 7020, include *two different situations*. For example, Resolutions Nos. 030/10 and 128/10 of March and May 2010, respectively, state as follows:

“...Law No. 7020 as amended () conferred (upon the Agency) jurisdictional and disciplinary powers (Article 33) and, as regards the latter, a distinction should be drawn between two situations: the breaches or violations of the law, its regulations, license agreements and rules issued by the Agency, which shall be sanctioned by Warning, Fine, Disqualification, Suspension of the License and Revocation of the License (Article 13); and administrative infractions subject to, either singly or in combination, Fine, Disqualification, Seizure or Closure (Article 41). Additionally, in terms of sanctions, Article 5 of Decree No. 3616/99 provides for six events of extinction and/or cancellation of the license” (first page of both Resolutions). [Translated by me]

328. Once again, the underlying consistency and reasonableness of the decision to revoke the license are confirmed. Respondent’s legal expert, Professor Marcer, is right in his report when he distinguishes, within the provincial “regulatory framework” of games of chance of Law No. 7020, the provisions applicable to a licensee, like ENJASA, in its dealings as such with the Province of Salta, including the sanctions listed in Article 13 thereof for “[f]ailure to comply with the obligations imposed by Article 5 of Law No. 7020”, from the provisions of the Law on “[a]dministrative infractions applicable to natural or artificial persons”, added by Law No. 7133/01.

**(viii) Assessment and Extent of the Sanction and the Alleged Proportionality Criterion**

329. The “proportionality” criterion as such is neither a constituent element of the “fair and equitable treatment” standard, nor does it directly control the application of such standard unlike, for example, good faith. However, the “proportionality” criterion might be an integral part of a rule or principle or affect the extent of the seriousness of a violation. This is the case here since, under Article 8 (6) of Argentina-Austria BIT, Argentine law is “applicable law” in the settlement of this dispute, and both Article 13 of Law No. 7020 and Article 5 of ENJASA’s License Agreement expressly refer to the existence of “proportionality” between the sanction and the seriousness of the committed infraction.
330. Indeed, as mentioned *supra* herein, Article 13 of Law No. 7020 of the Province of Salta provides *in fine* that, in adopting sanctions under said Article, ENREJA shall take into account “the seriousness of the violation or breach, notwithstanding any criminal liability or liability for contraventions.” In turn, Article 5(1) and (2) of ENJASA’s License Agreement stipulated that “[e]ach of the violations or breaches on the part of the licensee to Law No. 7020, its regulation provisions and the regulations issued by

ENREJA shall be punished with the sanctions and graduation established in Law No. 7020 and its implementing regulation” and that “[c]onsideration, application and grading of the sanction shall be analyzed by ENREJA and sanctions should be proportional to the seriousness of the committed infraction.”

331. Therefore, undoubtedly, ENREJA must take into account the due proportionality between “the seriousness of the committed infraction” and the “sanction”, regardless of the administrative and/or judicial recourses available to the sanctioned Licensee. As stated *supra* in this Opinion, Article 5(3) of the License Agreement sets forth how ENREJA should proceed in considering *in concreto* the application of a sanction, namely, weighing the seriousness of the infraction, the extent to which the rule of law, morality and good customs are impaired, the damages it causes to the provincial State and/or private persons, the social commotion it may produce and the licensee’s record of recidivism.
332. The system does not allow ENREJA acting without taking into account the due “proportionality”, as appropriate. But that is no impediment to wonder whether ENREJA, upon deciding to revoke ENJASA’s license, duly assessed such proportionality under Argentine applicable law and, if not, whether it could be concluded that its actions violated the FET standard of Article 2(1) of Argentina-Austria BIT. Nonetheless, in my opinion, the issue was settled when, in response to the question about how the term “proportionality” should be defined under Argentine law, Claimants’ legal expert, Professor Bianchi, replied at the hearing that:

“Well, in reference to the principle of proportionality, to put it in a nutshell, proportionality is reasonableness. If there’s something that is proportional, that means it is reasonable. And what does “proportional” mean in Argentinian law? It means that means is adequate to the end. That is the principle of proportionality, sir, and the principle of reasonableness.” (Hearing on the Merits, Day 5, 121:8-15)

333. This answer by Professor Bianchi was disputed by neither Party. Thus, under Argentine law, the revocation of ENJASA’s license was proportional since it was a reasonable measure adopted for the legitimate purpose of preventing money laundering in an activity as prone to the commission of such crimes as the operation and management of games of chance, conducted in a Province particularly exposed to those crimes due to its border geographical location. However, money laundering practices might also have an adverse impact on the determination of the fee stipulated under the

Memorandum of Understanding. Accordingly, the sanction to revoke ENJASA's license met the aforementioned proportionality criterion, as it was a reasonable measure, on account of its appropriateness and consistency with its purpose, adopted to eradicate from the Province of Salta the said practices which ENJASA could not or refused to accept despite the sanctions applied and the warnings given before revocation of the license by ENREJA Resolution No. 240/13.

334. The documentation submitted by Respondent to the Arbitral Tribunal confirms that ENJASA repeatedly violated its obligations as Licensee and that these breaches ensued on a continuous basis without the company denying them, but merely alleging that they were unintentional, insignificant, or just mistakes by ill-informed employees. In any case, ENJASA paid the fines or complied with the sanctions applied by ENREJA during the period from 2005 to August 2013, without filing any administrative appeal against those sanctions or resorting to the competent courts for the Province of Salta. These acknowledgements confirm that ENJASA repeatedly acted in violation or breach of its obligations as Licensee, even with respect to money laundering prevention, which ultimately led ENREJA to decide to revoke the License held by the company.
335. This revocation sanction could not surprise either ENJASA or Claimants, as there is documentary evidence that it had been preceded by more than one warning from ENREJA. Additionally, the sanction was applied by ENREJA in strict compliance with the applicable legal provisions of Law No. 7020, previously accepted and acknowledged by ENJASA and well known by Claimants as both shareholders and executive directors of the company, which provisions were also incorporated into Licensee's License. The reference made in the recitals of Resolution No. 240/13 to the 21 preceding Resolutions in which the Regulatory Agency and Enforcement Authority under Law No. 7020 had to formally sanction ENJASA, evidence the repeated nature of the anomalies identified in Licensee's behavior and the need to protect the integrity of the "regulatory framework" of games of chance in the Province of Salta of Law No. 7020 and the License Agreement, comply with the calculation of the statutory annual fee payable by ENJASA under the Memorandum of Understanding, and restore the very authority of the Regulatory Agency and Enforcement Authority under such Law. The grace period that lasted a few years ended in August 2013 when ENREJA adopted—in accordance with the principle of legality and the proportionality criterion under Argentine law—Resolution No. 240, without prejudice to the internal

administrative and judicial recourses available to Claimants, which ENJASA had access to at all times until Claimants filed these proceedings with the ICSID before exhausting the aforementioned local recourses.

336. There is no other proportionality criterion applicable to this dispute under the BIT, non-existing investment agreements, or the FET standard of customary international law applied to this dispute. Also, the “proportionality” is not a part of the rule of customary international law relied upon by Respondent in its merits defense. Moreover, there is no room within the definition of “applicable law” under Article 8(6) of the BIT to refer to guidelines, methods or estimates of proportionality not regulated under “applicable law”, which might distort or violate said “applicable law” agreed upon under the BIT between Argentina and Austria, such as the proposal to artificially introduce in the decision-making process of the Arbitral Tribunal an abstract weighting of the “rights of the investor” against the “host State action” by means of the so-called “proportionality *stricto sensu*”, mentioned but not elaborated on by Claimants.
337. In any event, restricting the assessment to the “rights of the investor”, on the one hand, and the “host State action”, on the other, means requesting or conditioning the answer. Indeed, both the “rights and obligations of the foreign investor” and the “rights and obligations of the host State” should be weighed, if appropriate. Otherwise, the aforementioned method is inadmissible under the system of public international law in which States are the primary subjects. For example, in a case like this, the revocation of the license is not a mere “State action” but a legitimate sanction applied by the competent State authority against the previous violation by Licensee of the rights of the “provincial State” that owned and granted the License.
338. It is not uncommon that these academic legal exercises are, deliberately or inadvertently, focused on limiting the rights of the host State in the interest of private foreign investors by using *prima facie* equitable terms or concepts, and even intending to do so when the compensation requested by the investor is not only legally groundless but also evidently disproportionate to the capital invested by the investor as in the instant case, based on the evidence on record. I say evidence because I am yet to receive from Claimants a clear answer to the question posed to their first witness during the jurisdictional phase, and asked again at the hearing on the merits, on the total amount of their capital contribution as investors in ENJASA.

339. Having been submitted by the Parties, both the improved economic bit of the *UTE* (CAIH, Boldt S.A. and Iberlux Int. S.A.) and the agreement between said *UTE*—successful bidder—and the Province of Salta, that is, the so-called “Transfer Agreement” of ENJASA, annexed to Decree No. 419 dated 15 February 2000, are known to the Arbitral Tribunal. The *UTE*’s improved economic bid consisted of an annual fee of USD 2,500,000 for the first three years, an annual fee of USD 4,100,000 for the 27 subsequent years, and a total investment based on the “Tourism Development Investment Plan” of USD 20,770,000 (paragraphs 7 and 9 of the recitals of Decree No. 419 of 15 February 2000.) In turn, Article 3.1 of said Agreement for the Transfer of Shares to the *UTE Leisure & Entertainment (L&E)*, titled “Sale of Class ‘A’ Shares”, sets forth: “The Seller agrees to sell to the Purchaser, and the Purchaser agrees to purchase from the Seller ten thousand eight hundred (10,800) registered, non-endorsable, common Class A shares representing NINETY PERCENT (90%) of the capital stock of ENJASA, with a face value of ONE PESO (ARS 1) each.” Moreover, the *UTE*’s shareholding upon purchase of said Class “A” shares of ENJASA was as follows: CAIH 5%, Boldt 5%, and Iberlux 90%.
340. In light of this information, the cost of 5% of the “Class A” shares for CAIH was likely more than 5% of the ARS 10,800 paid by the UTE for all the shares purchased, which means that the cost of its first shares in ENJASA for CAIH was about ARS 1,000. As for the second aspect of the privatization transaction, more specifically the purchaser’s obligation to comply in due time and manner with the Tourism Development Investment Plan, the Parties agree that the Hotel Sheraton Salta was built and that the construction was performed by *Complejo Monumento Güemes (CMG)*. Moreover, Respondent has explained how the Hotel was built, submitting the “Notes to the Statement of Financial Position” of CMG of 31 May 2002 (note 2, at CEMA 27), then the examination of witness Ortiz Fernández by Mrs. Etchegorry (Day 3 of the Hearing, 78:4-79:9) and, finally in a summary at paragraph 266 of the Post-Hearing Brief (PHB) which reads:

“With respect to the ownership and operation of Hotel Sheraton Salta, the revocation of the License did not affect its ownership and operation. In effect, ENJASA continued to be the owner of this hotel and obtained considerable economic benefits derived from it. Furthermore, *it has been established that the hotel was built with tax allowances and benefits and subsequently sold at market price. For this sale transaction, ENJASA yielded a considerable accounting reference.*” [Source: ENJASA’s Financial Statements as of 31 December 2017,

Notes 3, 15, 19 and 20 (Exhibit C-299). According to Note 3.15, the profit obtained from the sale was ARS 20,590,902.]

341. The Arbitral Tribunal knows that: (i) Hotel Sheraton Salta was effectively built within the scope of the Tourism Development Investment Plan; (ii) the revocation of the License did not affect ENJASA's ownership or operation of the Hotel; (iii) the Province of Salta contributed to the construction of the Hotel with tax allowances and benefits; and (iv) after revocation of its License, ENJASA yielded an accounting profit in the order of ARS 20,590,902 from the sale of the Hotel to Inversiones Hoteleras Salta S.A. on 1 March 2017 . It is still unclear whether there was any connection between the tax allowances and benefits granted by the Province during the construction of the Hotel and compliance by the *UTE* with its improved economic bid of making an aggregate investment under the Tourism Development Investment Plan of approximately USD 20,770,000, and whether there would possibly be a relationship, based on how that aid is quantified, with regard to the commitment included in the *UTE*'s improved economic bid.
342. In any case, the Province of Salta contributed to the construction of the Hotel without claiming any participation in either ownership or operation of the Hotel. In other words, it was a non-refundable aid from the Province to the company. Other capital contributions made by Claimants were necessarily in the two transactions that increased their shareholding, that is, in 2007, when they increased their interest in L&E from the initial 5% to 60% and, in November 2013, a few days following ENREJA Resolution No. 315/13, when they increased said interest from 60% (in 2007) to almost 100%.
343. Claimants have not been so accurate about the price paid for the new shares in L&E. As for the increased interest in 2007, the offer to purchase presented to Iberlux was for USD 23,000,000 (Exhibits C-076, C-0077 and C-078), but other testimonies mention that the disbursement was of about USD 17.4 million plus an additional capital investment of USD 6.6 million (Day 8 of the Hearing, page 4 *in fine* of the English transcript). As regards the 2013 increase in shareholding after revocation of the License in September 2013 (purchase from Iberlux of 40% of L&E's shares), Mr. Tucek merely indicated at the hearing that the disbursement was relatively small compared to the amount invested by Casinos in Argentina ever since 2000 (Day 2 of the Hearing, pages 246/247 of the English transcript). However, in that regard, the First CEMA Report explains that Casinos Austria paid USD 2.82 million to Iberlux for such interest and

the promise of an additional payment of USD 1 million if the Province restored ENJASA's License, which did not occur (paragraph 184 of said Report). As represented in the statement by Claimants' expert, Mr. Rosen, ENJASA "was very profitable" (Day 8 of the Hearing, page 6 of the English transcript) the capital invested by Claimants in the stock purchase was relatively small and as such bears no proportion to the compensation requested by them in their Post-Hearing Brief, based on the reports and the statements made by their expert, Mr. Rosen.

344. Undoubtedly, for that reason, the compensation requested by Claimants has been calculated in terms of "loss of profits", rather than the amount of capital invested in ENJASA through L&E. Indeed, "loss profits" may be included in "compensation" for the damage concerned where it is the result of an "internationally wrongful act" not existing in the instant case, provided such loss of profits has been duly established (Article 36(2) of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts). It is therefore undisputed that speculative elements are taken into account to determine such loss of profits, as Mr. Rosen did who, in assessing "loss of profits", considered the fact that Claimants alleged having suffered from termination of the existing agreement between ENJASA and Video Dromo, an event which has not been established on the record.
345. The capital *contribution* made by Claimants in ENJASA was relatively modest, as confirmed by the fact that their request for compensation in this arbitration is not based on the depreciation of that contribution as a consequence of the revocation of the license held by the company, but on Claimants' loss of profits or benefits (dividends) as ENJASA's shareholders through L&E. Therefore, Claimants are seeking a higher compensation than they should have been entitled to, if appropriate, on account of the depreciation of the capital invested. In any case, the conclusions in the reports and statement of Mr. Rosen are clearly speculative and disproportionate. They do not match the factual and legal elements of this dispute because the expert adopts "*(the) value of what was taken*" in Salta as the baseline of his analysis (Day 8 of the Hearing, page 37). Nothing has been taken from anyone in this dispute. Rather, Respondent's competent body has revoked a license as a sanction for ENJASA's violation of its obligations as Licensee, taking into account *inter alia* the proportionality criterion under Argentine law which is the "applicable law" in this treaty claim.

346. In response to such a distortion of the factual and legal reality of this case, that is, the transformation of a “revocation” into an alleged “confiscation”, the well-known phrase of the tribunal in Azinian that “*labelling... is no substitute for analysis*” would suffice. The reports and statements of Respondent’s expert, Mr. Dapena, explain, in a convincing manner, the speculative and disproportionate nature of the findings of Mr. Rosen as regards the compensation sought by Claimants. In addition to these findings from Mr. Dapena, it should be noted, in this context, that Claimants are seeking compensation without previously establishing that the revocation of ENJASA’s License was an “internationally wrongful act” which Respondent should remedy, as demonstrated in this Opinion.
347. It should be noted that, having requested compensation on the basis of ENJASA’s lost profits leading to revocation of the company’s 30-year exclusive License, Claimants have added another reason to those mentioned *supra*, which confirms Respondent’s allegation that no compensation is owed to Claimants (PHB, paragraphs 270 to 356). Why has this happened? Because international law on the promotion and protection of foreign investments distributes risk factors between the host State and the foreign investor concerned, allocating some of those factors to the State and others to the foreign investor. For example, under such law, the State assumes liability for the adverse effects of any modification of the agreement, the laws or the treaty that affects the legitimate expectations of the investor, whereas the investor bears the risk of any adverse effects of management, direction or administration of the company (or business or economic activity) in which it has invested, that is, the “business risk”. In the instant case, when the violations or breaches that caused revocation of the license were committed, Claimants were not only shareholders of the company but also entrepreneurs that managed, ran and administered it, and therefore, as investors, they had to cope with the adverse effects of the “business risk” inherent in the license of the company in which they freely invested, as such license was revocable in nature—and was indeed revoked—pursuant to the Applicable Law and the License Agreement, at any time within its 30-year term of duration. Thus, in this case, the adverse effects of revocation of the license shall be borne by Claimants in their dual capacity as investor and entrepreneur.
348. To sum up, ENREJA duly applied the “proportionality criterion” of Law No. 7020 of the Province of Salta and ENJASA’s License Agreement, and it is not for this Tribunal

to substitute said criterion *for mere authors' criteria or a proportionality stricto sensu imported from sources outside this investment dispute*, since (i) the decision to revoke the license has become final; (ii) the proceedings in the Province of Salta are outside the scope of this dispute, but shall be applicable law in this dispute according to the Argentina-Austria BIT, and (iii) Claimants do not apply a proportionality *stricto sensu* between their investment and the compensation in determining the amount requested, as evidenced in their reports and the statement of Respondent's expert, Mr. Dapena, on Day 8 of the Hearing.

**(ix) On the Political Conspiracy Alleged by Claimants**

349. The references in Claimants' allegations to terms or expressions such as lack of transparency, concealed purposes, bad faith, xenophobia, or the like, by the authorities of the Province of Salta, in relation to events prior to, contemporary with or subsequent to revocation of ENJASA's License, are part of their statements on the existence of political conspiracy by said authorities, repeatedly mentioned though never established, aimed at excluding them from the sector of games of chance within the jurisdiction of the Province. Though the political conspiracy argument has been losing weight throughout these arbitral proceedings, several paragraphs of Claimants' PHB deal with it, which compels me to express my view on this unfounded allegation.
350. The theory of conspiracy was, at the beginning of this arbitration, a merely argumentative construction of a strategic nature, unrelated to Claimants' current situation in the Province of Salta. This theory might have been developed in order to create the image of a presumption of liability on the part of the host State, as generally reflected in the practice of the Iran-United States Claims Tribunal, established by the Algiers Declaration as a result of the international crisis of hostages, which presumption operates as a backdrop for the case-law of said Tribunal on indirect expropriation.
351. But this Arbitral Tribunal is not the Iran-United States Claims Tribunal, the Argentina-Austria BIT is not comparable to the Algiers Declaration, and the revocation of ENJASA's License is not related to or based on any revolutionary act but aimed at restoring the legality violated by Licensee's improper behavior. It was a peaceful act adopted upon completion of a perfectly organized and arranged procedure, in accordance with previous laws and regulations, known to and accepted by said

Licensee and Claimants in this arbitration, and applied to ENJASA by the competent provincial Regulatory Agency and Enforcement Authority within the framework of the constitutional and democratic principles of the rule of law of the Argentine Republic and its Province of Salta. A presumption as that of the Iran-United States Claims Tribunal is therefore absolutely alien to this arbitration, because the situation in the Province of Salta of the Argentine Republic before, during and after the aforementioned revocation was completely normal, and the stages of the procedures followed were in accordance with the principles of legality, due process and guarantee of the right of defense of a Licensee which also violated both the Law 7020 and the License Agreement.

352. The revocation was decided by the competent body in the regular exercise of its duties as a sanction upon ENJASA for having repeatedly violated and breached its obligations as Licensee. As we have seen, such revocation was not contrary to Respondent's duty to afford Claimants' investment a fair and equitable treatment under customary international law. Respondent did not violate the FET standard and hence ENREJA committed no internationally wrongful act in sanctioning the serious and repeated violations of ENJASA's obligations as Licensee under Article 5 of Law No. 7020 on money laundering prevention at casinos and gaming halls. Such decision by ENREJA, attributed to Respondent, did not violate any legal system included within the "applicable law" of this dispute, listed in Article 8(6) of Argentina-Austria BIT and, in the absence of this objective element of international responsibility of a State, there is no internationally wrongful act.
353. At the beginning of this arbitration, Claimants alleged political conspiracy against them in order to facilitate, in addition to insisting on the non-strict application of applicable law, a certain tolerance from the Tribunal towards Claimants' nonfulfillment of the conditions that Respondent's consent to arbitration is subject to under Article 8 of the Argentina-Austria BIT. Having accomplished this purpose, at this phase on the merits, Claimants have made no evidentiary effort to establish the existence of said conspiracy, though they continued recalling it from time to time, without further detail and insistence. The statement by Mr. Tucek at the hearing, in the course of his examination as a witness, put an end to any eventual remaining credibility of this allegation when he recognized that the proposition to "oust the Austrians" was reduced to a mere saying of a third party (an "*oui-dire*"), unknown to this Arbitral Tribunal.

354. The truth is that, in the course of these arbitral proceedings, Claimants' allegation on conspiracy has never been accompanied with objective probative elements that establish its veracity. The allegation has always lacked credibility. At the hearings, when Mr. Tucek was asked about the existence of a political purpose goal concealed behind revocation of ENJASA's license, he was unable of showing that CAI was being pursued. He acknowledged having signed a letter that evidenced his good relationship with the president of ENREJA and he further explained that he had no personal knowledge of the alleged harassment suffered by ENJASA at the hands of ENREJA but instead actually heard it from a colleague at the office. In view of this statement by the most senior witness of all witnesses appearing for Claimants, there is nothing from the allegation on political conspiracy submitted at the beginning of this arbitration.
355. But nostalgia for Claimant's allegation on political conspiracy has caused the majority of this Tribunal to make inappropriate suggestions in the Award as regards a letter following Resolution No. 315/13, sent by an operator called "Video Drome" to ENREJA on 25 November 2012, and other irrelevant events to adjudicate the merits of this dispute. There *is* evidence that the revocation of ENJASA's license was not secretly aimed at excluding Claimants from the games of chance industry in the Province of Salta. As acknowledged by Mr. Tucek himself and other witnesses for Claimants, during the discussions between Claimants and authorities of the Province of Salta and the exchanges immediately following the issuance of Resolution No. 240/13, their spokespersons in the Province of Salta suggested him that CAI agreed to remain in possession of Salta and Boulevard Casinos.
356. This proposal was not temporary, as demonstrated by the proven fact, already mentioned in this Opinion, that Claimants had the chance to take part in the "transition plan" of the Province of Salta but decided not to do it thus contributing to the damage that they now allege before this Arbitral Tribunal. Indeed, on 2 September 2013, ENREJA initiated an internal procedure to prepare such plan, which ended up with the issuance of Resolution No. 324/13 of 20 November 2013, whereby ENREJA submitted the "transition plan" to the Provincial Executive and ENJASA's shareholders—*i.e.*, Claimants—were allowed to request to participate in the new license system on equal footing with the other "managers" or "administrators" involved in said plan, in the following terms: "..., the cases of Cachi Valle Aventura S.A. and Casinos Austria [SIC] Casino Austria GmbH., especially the latter, recognized internationally as an Operator

of Gaming and Tourism, should be left pending until further judgment elements be gathered.” (C-219) This contrasts with the fact that Mr. Collorichio, who had worked with ENJASA and violated the anti-money laundering regulations, was not allowed to participate in the distribution of the new licenses, whereas Casinos Austria and CAIH—indirect shareholders of the sanctioned ENJASA—could have requested so, which confirms the non-existence of hostility against Claimants.

357. This evidence of non-existence of the alleged conspiracy to exclude Claimants from the operation of games of chance in the Province of Salta is irrefutable and has not been refuted. Also, the measures adopted by the Provincial Executive and ENREJA in the stages of development of the “transition plan” during the period from ENREJA’s rejection of the request for reconsideration in November 2013 to completion of said plan with the distribution of the new licenses on 29 May 2014, evidenced no sign of hostility against Claimants or undue struggle or hustle, or had no adverse effects on ENJASA’s equity. There was also cooperation or mutually beneficial understandings among the new operators as regards relocation of most of ENJASA’s old staff, without any charge for the company, and one or two arrangements or agreements between ENJASA and new licensees in order to facilitate the transition, such as in the case of Casino Golden Dream’s. Throughout this transition period and afterwards, Claimants continued controlling the Hotel and other property owned by ENJASA. It has been established that in 2017 the balance of ENJASA’s financing was not negative.
358. Lastly, “the theory of conspiracy” failed to explain the need for the authorities of the Province of Salta to resort to it, as if they had had the intent that Claimants allege they had, they could have merely applied Article 6 of the License Agreement executed by ENJASA, which, as mentioned *supra* herein, provides that “the following shall be grounds for extinction and/or automatic cancellation of the license by operation of law:” failure to comply with the obligations imposed by Article 5 of Law No. 7020, operation of any games of chance without the previous consent of ENREJA, total or partial assignment or transfer of the powers granted under this license without previous consent of the Provincial Executive Branch, among others.
359. Rather than the alleged political conspiracy, the chronology of events evinces that the sanctions applied by ENREJA for the violations or breaches incurred by ENJASA have increased since two events that took place almost simultaneously in 2007/2008, which entices us to consider Claimants’ majority interest in L&E and ENJASA, and the

change of approach to calculate the fee payable under the Memorandum of Understanding. However, the Parties said little about the potential effects of these events on the creation of this dispute. In addition to these two events, shortly before revocation of ENJASA's license, Claimants had fled Chile and, accordingly, their refusal to participate in the "transition plan" of the Province of Salta put an end to their business operations in the Southern Cone of Latin America.

**(c) Conclusion on Claimants' Third Claim**

360. In light of the facts established or acknowledged and the applicable law as defined in Article 8(6) of Argentina-Austria BIT, I reject the third claim submitted by Claimants and thus the responsibility of the Argentine Republic for the alleged violation of the standard of "fair and equitable treatment" that should have been accorded to Claimants under customary international law. Neither upon revocation of ENJASA's License as such, nor during the administrative proceedings followed by ENREJA in that regard, nor upon rejection by ENREJA of the request for reconsideration, nor later upon application of the "transition plan" by ENREJA and the Provincial Executive, have any measures been adopted which are attributable to Respondent which meant a violation by the Argentine Republic of the FET standard applicable to Claimants' indirect investment in ENJASA, as provided by Article 2(1) of the aforementioned BIT.
361. The adverse effects of the revocation of ENJASA's old license for Claimants were not the result of an arbitrary measure or political conspiracy. There was no such dramatism or the slightest lack of transparency. What happened was merely that a national company to which an exclusive 30-year License had been granted for the operation of games of chance within a provincial jurisdiction repeatedly violated or breached its obligations as Licensee to prevent money laundering, and *in response* to said violations or breaches, after warning ENJASA of the risk of revocation upon failure to remedy such conduct, ENREJA revoked the License pursuant to applicable laws. Adopted at the provincial level in the regular exercise of the regulatory and police powers of the Argentine Republic as a sovereign State, said revocation has not violated the FET standard under international law and thus there is no right to compensation whatsoever, let alone a violation to an extent or level that prevails over the rule of customary international law relied upon by Respondent as a defense on the merits.

362. Also, international law on the promotion and protection of foreign investment provides as a general rule that the “business risk” shall be borne by the entrepreneur in question (rather than the host State where the investment is made) and, by the time of the disputed facts, Claimants, as stated *supra*, were not only indirect shareholders of ENJASA, but also controlled, managed, ran, and administered the company just like any businessperson.

### **PART III: GENERAL CONCLUSION**

#### **A. General Conclusion on the Basis of “Applicable Law” as Provided in Article 8(6) of Argentina-Austria BIT**

363. Having, on the one hand, acknowledged as a defense on the merits the rule of customary international law relied upon by Respondent and, on the other hand, rejected the first and third claims submitted by Claimants for fundamental reasons and having declared their second claim inadmissible, I conclude on the basis of both considerations as follows:

1. To accept the defense alleged by Respondent that revocation of ENJASA’s License was a sanction for prior violations and breaches by the company of its obligations as Licensee, imposed by the competent body of the Province of Salta in the regular exercise of its duties, which reveals the regulatory and police powers of the Argentine Republic.

2. To reject the first and third claims submitted by Claimants about “indirect expropriation” and “fair and equitable treatment”, respectively, for failing to establish in the context of either of them that Respondent violated an international obligation towards Claimants, that is, in the absence of the key objective element of the existence of an internationally wrongful act committed by the Argentine Republic against Claimants.

3. To dismiss Claimants’ second claim as inadmissible, which deals with “direct expropriation” pursuant to Article 33 of the Vienna Convention on the Law of Treaties in relation to the interpretation of treaties authenticated in two or more languages.

4. In view of the conclusions 1, 2 and 3 *supra*, Respondent has not incurred any international responsibility towards Claimants.

5. Therefore, the compensation sought by Claimants is not sustained.

**B. Rejection of the Conclusions of the Majority Award for Disregarding the “Applicable Law” as Defined in the Argentina-Austria BIT**

364. I reject the conclusion of the majority Award that Respondent has incurred “indirect expropriation” with the resulting international responsibility towards Claimants for the adverse effects of the revocation of ENJASA’s License by ENREJA as a legal sanction for major and repeated violations or breaches by Licensee of its obligations set forth in Article 5 of Law No. 7020 of the Province of Salta, for the purposes of preventing money laundering, pursued by both the Argentine Republic and the other States in their fight against nowadays culprits such as capital flight, drug trafficking and terrorism. Respondent has not violated any international obligation towards Claimants; therefore, it has not committed any internationally wrongful act with the ensuing international responsibility towards them and owes them no reparation whatsoever, either by way of compensation or any other form of reparation under international law. This conclusion is based on the “applicable law” of this dispute relating to investments, as defined in Article 8(6) of Argentina-Austria BIT and Article 42 (1) (second phrase) of the ICSID Convention, as well as the evidence of the relevant facts produced by the Parties and their respective acknowledgements.
365. To conclude that there was “indirect expropriation” subject to compensation, the majority Award, rhetoric aside, had to act like an *appellate court*, assuming roles it was not entitled to and replacing the “applicable law” of the dispute with a so-called “*Applicable Legal Standard*”, created by the majority itself. This standard, qualified as “applicable” by the majority, is nothing but an extreme expression of the “sole effects doctrine”, today overcome and, in any event, inapplicable on account of its absurd and unreasonable results where the disputed measure is a legal sanction to revoke a license or concession in response to prior violations or breaches by the licensee or concessionaire of its legal and/or contractual duties. It is common sense that where the measure is *a sanction for violations or breaches by the Licensee* of its obligations, examining only the adverse effects of the measure on the protected investor, as the majority Award did, is inadmissible because the purpose of any sanction

is—by definition—to impose a penalty on the sanctioned party for its breaches or violations. An arbitrator who, in the circumstances of this case, only considers the adverse effects of the sanction on the investor, ignores the right of every State to apply in those cases the sanctions set forth in their local laws to a company in breach of its obligations, which the majority’s rhetoric denies being their opinion, though the recitals and conclusions of their Award say quite the opposite.

366. In any case, if we admit any evidence that the States have the power to sanction any violation or breach by Licensees of their legal and/or contractual obligations under both local and international law, we should also accept that the so-called *sole effects* doctrine of the majority Award is perfectly inapplicable herein as absurd, and it is upon this absurdity that the conclusions of the Award are based. When the disputed measure is a *sanction revoking a license*, there is no doubt that it is common sense that an arbitral tribunal must also consider other elements and not merely the adverse effects of the sanction on the shareholder-investor, as correctly stated by arbitral tribunals and publicists, under penalty of necessarily incurring an oxymoron. In order to avoid such a logical contradiction and incurring an arbitral error, there is no remedy other than also considering other elements such as, in the first place, *the cause of the measure, the nature of the rights of the sanctioned company, and the contents and scope of the rights of the shareholder-investor*.
367. Therefore, we reject as contrary to both the applicable law and the statement of the majority Award that the first issue to be discussed is: “whether the termination of ENJASA’s license has reached the threshold of a substantial and permanent deprivation of Claimants’ shareholdings” (paragraph 352 of the majority Award). We reject it both as requested and in view of the petition that said issue be examined by the Arbitral Tribunal prior to deciding whether the revocation of ENJASA’s license was a measure adopted by ENREJA in the regular exercise of the regulatory and police powers of the Argentine Republic as a sovereign State, as submitted by Respondent in this arbitration as a defense on the merits, since in every international arbitral or court proceedings Respondent’s objections must be logically examined prior to Claimants’ claims. This simple procedural matter further evidences the clear *infra petita* treatment of Respondent’s defense on the merits in the majority Award.
368. The regular exercise by the competent body, ENREJA, of Respondent’s powers to sanction the violations or breaches by ENJASA of its legal or contractual obligations

as Licensee, is by no means limited by an obligation under the customary international law of Argentina-Austria BIT. The threshold set in that regard in the majority Award does not exist under the “applicable law” of this dispute as defined in such BIT. It has been imported from other cases involving different measures and a different applicable law, which the majority has included in their self-defined “Applicable Legal Standard”. Such importation is inapposite in this arbitration. In these proceedings, the exercise of disciplinary power by ENREJA was in no way bound by an international obligation of the Argentine Republic that imposed upon such power the limitation that the sanction applied by the Regulatory Agency and Enforcement Authority upon ENJASA could not ultimately have the adverse effect of substantially and permanently causing the shares acquired by Claimants in the company to lose value, without creating international responsibility and/or a duty to compensate the Respondent, which was not the case here.

369. The applicable BIT in this case provides no guarantee to the protected investor that the eventuality described above would not occur or that Respondent should compensate the investor upon such a loss of value. The Argentina-Austria BIT is not an agreement on guarantees, nor does it include any specific provision to such effect in relation to the investment. As regards customary international law, it is for the investor to run the “business risk” entailed by the company’s activities, with the host State assuming other types of risks. This distribution of risks explains why the “business risk” is one of the elements that differentiates “an investment” from other economic transactions at the international level. Moreover, as in this case, by the time of most violations or breaches by ENJASA, sanctioned by ENREJA with revocation of the license, Claimants were not only majority indirect shareholders of ENJASA through L&E but also controlled, managed, ran and administered the company, on a daily basis, as any businessperson does. It would have been more prudent if the majority Award had not referred to the principle of good faith in relation to Respondent, as good faith is not a principle sufficiently evidenced by Claimants’ fable on “political conspiracy”, discussed but ultimately dismissed as untenable in the majority Award.
370. As stated, in an arbitration like this, consideration must be given not only to the adverse effects of the sanction on the investor’s investment but also to specific elements such as the cause of the measure, the nature of the rights of the sanctioned company, and the contents and scope of the rights of the shareholder-investor. The cause of the measure

is undeniable: the revocation of ENJASA's License was the sanction that had to be applied by ENREJA, as it was obliged to, for the serious and repeated violations by ENJASA of the obligations of the Licensees listed in both paragraphs of Article 5 of Law No. 7020 of the Province of Salta, in relation to money laundering prevention. It was not a consequence of "political conspiracy" against Claimants. Also, it was not the result of mere "administrative infractions" by ENJASA, as suggested by Claimants and included, to the astonishment of those acquainted with the record of these proceedings, in the majority Award. Law No. 7020 provides that games of chance in the provincial jurisdiction shall be operated through licenses granted by the Provincial Executive, and that ENREJA shall be vested under the terms of said law with "the necessary and sufficient powers to regulate Games of Chance in all their forms", such as the issuance of regulatory and disciplinary operating rules. In the 2005 -August 2013 period, ENREJA punished each violation or breach by ENJASA, regardless of their seriousness, pursuant to Article 5 of Law No. 7020, with the sanctions specified for those offenses in Article 13 of said law, which have nothing to do with the sanctions for mere "administrative infractions" of Article 41 of Law No. 7020. In support of its conclusions in that regard, the majority Award completes its analysis by mixing, as suggested by Claimants, the sanctions applicable to the cases described in Article 5 with those of Article 41 of Law No. 7020, thereby creating a new, even more incomprehensible *totum revolutum* than in the majority Decision on Jurisdiction.

371. The majority Award recalls on many occasions that ENJASA's License was an exclusive license granted for thirty years and that it was revoked seventeen years prior to its expiration date. This is perfectly true but the inference from this circumstance contained in the majority Award is a genuine fallacy as it was not accompanied with the slightest analysis of the nature of the rights and obligations of ENJASA as Licensee under Law No. 7020, as well as the License Agreement which the majority Award completely dispenses with, despite it is an instrument of utmost significance to know the nature of those rights and obligations of ENJASA, and despite said Agreement is part of the "Privatization Agreement" of ENJASA, that is, the series of documents that made up the litigation proceedings pursued upon the privatization of ENJASA won by the UTE L&E, in which Claimants had an interest since its creation. In light of all these instruments, it is undisputed that ENJASA's License was for thirty years though subject to revocation *at any time in case of violation of the obligations imposed in Article 5 of*

*Law No. 7020, pursuant to Article 13 of said Law and Article 5 of the License Agreement* by resolution of ENREJA, as was the case on 13 August 2013, and also the License could, for the same reason, be declared extinct and/or automatically cancelled by operation of law by the Provincial Executive in accordance with Article 6.1 of the License Agreement in the following terms:

“Notwithstanding the grounds set forth in the share transfer agreement which shall result in the termination of the bidding process established under Article 7 of Decree No. 2126/98, the following shall be grounds for extinction and/or automatic cancellation of the license by operation of law: ...Failure to comply with the obligations imposed by Article 5 of Law No. 7020.”

372. The revocable nature of ENJASA’s License, regardless of its effective term of thirty years, is undeniable, admitted and perfectly known by Claimants when they invested in ENJASA through L&E. Another relevant feature of the license to sustain the claim on “indirect expropriation” submitted by Claimants is that the company did not own the License. Its license was certainly not an asset of the company or the like for the purposes of expropriation. The License belonged to the grantor, that is, the Executive of the Province of Salta which, as set forth in Article 4 of Law No. 7020, shall not only grant the license but also determine “its terms and conditions”. Also, the License was not an asset which, by its nature, was subject to expropriation or a similar measure under the domestic laws of Respondent, as further evidenced by the fact that ENJASA did not file any proceedings with the courts of justice for Salta alleging having been subject to unfair expropriation. Moreover, there is nothing in the record of these proceedings that allows inferring that under the Argentine Republic’s domestic law the revocation of an administrative license may qualify or be deemed comparable to indirect expropriation. In any case, it would have been certainly unreasonable that the Province of Salta had been indirectly expropriated itself, when it could have merely declared ENJASA’s License extinguished or cancelled by operation of law for violation of Article 5 of Law No. 7020, and also revoked—as it did—the License by decision of ENREJA. The License was not an asset which, by its nature, could have been subject to expropriation by the authorities of the Province of Salta, let alone before this Arbitral Tribunal since “for there to have been an expropriation of an investment or return [...] the rights affected must exist under the law which creates them”, that is, in this case, the laws of the Argentine Republic (Award of the tribunal in *Encana v. Ecuador* of 2006, para. 184).

373. The Argentina-Austria BIT expressly confirms beyond reasonable doubt that is also the case in this arbitration. Why is this so? Because of two legal reasons. The first reason is because the definition of the term “investment” of Article 1(1) of the above-mentioned BIT provides *in fine* as follows:

“The content and scope of rights for the various categories of assets, shall be determined by the laws and regulations of the Contracting Party in whose territory the investment is located.”

Therefore, the content and scope of the category of asset of Article 1 (1) (b) of the BIT invoked by Claimants when instituting the instant case before the ICSID, namely “shares and any other form of participation in companies,” shall be determined in this arbitration by the laws and regulations of Respondent’s domestic law by mandate of the Argentina-Austria BIT. And what do any such laws and regulation state? That ENJASA’s License, as we just pointed out in the preceding paragraph, is not a company asset capable of being subject to direct or indirect expropriation in the domestic forum. The majority Award ignores it, incurring in a serious breach of the BIT, since it constructs its decision on Claimants’ “indirect expropriation” claim ignoring the non-expropriatory nature of the License in Respondent’s domestic law.

374. The second reason is because, as we have been pointing out throughout this Opinion, the Argentina-Austria BIT provides, also expressly, in Article 8 (6) regarding investment dispute resolution, that the arbitral body shall decide the dispute, *inter alia*, “in accordance with the laws of the Contracting Party involved in the dispute,” *i.e.*, in the instant case, on the basis of *inter alia* the Argentine Republic’s national or domestic law. Nevertheless, the majority Award, in its considerations and conclusion on Claimants’ “indirect expropriation” claim radically excludes Respondent’s domestic law as the law applicable to this dispute resolution. It is a second and inexcusable challenge to what the Argentina-Austria BIT mandates.

375. In point of fact, the majority Award radically adopts in its analysis the so called “*sole effects*” doctrine (applied under different circumstances, by some international investment arbitral tribunals) and completely excludes the determinants of the “indirect expropriation” claim originating in the Argentine Republic domestic law applicable to these arbitration proceedings, limiting such determinants to the above-mentioned doctrine sole criterion, which I deem inapplicable to the instant case due to its being utterly incompatible with the “applicable law” as defined in Article 8 (6) of the

Argentina-Austria BIT. According to paragraph 353 of the Award the only issue raised would be determining whether: “the revocation of ENJASA’s license (...) permanently and substantially deprived Claimants of their indirect investment in ENJASA and their direct investment in L&E.” The Award concludes that has actually been the case and, with no further consideration whatsoever the majority concludes at paragraph 356 of the Award that the revocation of the license constituted a permanent and substantial deprivation of Claimants’ indirect investment in ENJASA and of their direct investment in L&E. According to the majority, that is the only issue that calls for analysis. Next, the Award proceeds to consider the use by ENREJA of its regulatory powers.

376. I have already contested this conclusion by the majority *supra* in my analysis of Claimants’ “indirect expropriation” claim, notwithstanding my main conclusion that Respondent did not incur in any international responsibility *vis-à-vis* Claimants when ENREJA, having acted in the regular exercise of the Argentine Republic’s regulatory and police powers as a sovereign State, revoked ENJASA’s license and, consequently, the adverse effect of a regular exercise of such powers by the Argentine State’s competent body does not constitute an internationally wrongful act and, it is thus, non-compensable. With respect to the issue mentioned in the preceding paragraph regarding “indirect expropriation,” my rejection of the majority Award’s conclusion is premised on a number of apparent considerations duly documented on the record such as: (i) that the purchase and sale related to ENJASA’s privatization was a single legal business consisting of two components, the purchase of the company shares and an economic contribution to the provincial tourism development plan consisting, mainly albeit not solely, in the construction of the Golden Dreams Hotel in Salta. All relevant documentation confirms it, beginning with the revised proposal with which the UTE L&E won the tender bid and ending with the Memorandum of Understanding (UNIREM) of May 2008 (C-131); (ii) that in that legal business the price paid by the UTE for ENJASA’s shares was merely formal (one Argentine peso per share), while the actual economic consideration of the UTE was the economic promise of investing an amount of several million dollars in the tourism development plan; (iii) that the revocation of the license did not affect the ownership and exploitation of the Hotel or any other ENJASA asset, nor did it dissolve or nationalize the company; (iv) that the adverse effects for Claimants are not total but partial and are to be borne by the

company since they result from a legal sanction as a consequence of having previously violated ENJASA's obligations laid down under Article 5 of Law No. 7020 imposed by both such Law and the License Agreement; (v) that the rejection by ENJASA (under Claimants' control, direction, management and administration) of the invitation to participate in the new distribution of licenses has contributed to the fact that the partial adverse effects of the revocation for Claimants have been greater than they could have been following ENJASA's refusal to participate in any such distribution. Contrary to what the majority Award avers, this latter consideration is by no means an issue only related to the determination of the amount of a potential compensation.

377. I firmly believe that investment ICSID arbitrations are "arbitrations of law" and that, consequently, arbitrators are called upon to interpret and apply pre-set legal rules to the particular facts and circumstances of the case taking into account the evidence advanced by the parties or in the public domain, as well as said parties' respective admissions. In other words, I reject arbitrators undertaking functions of legislative nature not pertaining thereto or which they deem to be authorized by nobody knows who to solve an investment dispute on the basis of the arbitrator's sole discretion instead of doing so through the application of the "applicable law" preset by the parties to the dispute and, otherwise, by the BIT, that in this arbitration is the BIT Argentina and Austria concluded in 1992. Unfortunately, the majority of this Arbitral Tribunal has a different view since it repeats the approach I condemned in the jurisdiction phase. In that phase the victims were the sub-articles of Article 8 of the BIT regarding the pre-conditions accompanying arbitration offer by Argentina and Austria and in this stage on the merits the victims are the BIT provisions regarding the definition of "investment" (Article 1(1)) and the "law applicable" to the dispute resolution (Article 8 (6)) and the provisions on expropriation (Article 4 (1) and (2)). This ascertainment leads me to quote here, because of its relevance, an excerpt by Professor James Crawford, current Member of the ICJ and former Special Rapporteur of the ILC on the field of International Responsibility of States, of the conclusion of his well-known article entitled "*Treaty and Contract in Investment Arbitration*" - an excerpt applicable *mutatis mutandis* to an "indirect expropriation" claim - which states as follows:

"What a BIT does is to provide an additional layer of protection for the one transaction: the investment is protected by the BIT, but the BIT should not be used as a vehicle to rewrite the investments arrangements ...At the level of the merits it must be borne in mind that the investment contract is itself an allocation

of risks and opportunities, and that allocation is relevant in determining, in particular, whether there has been fair and equitable treatment under the BIT. In particular, the doctrine of legitimate expectations should not be used as a substitute for the actual arrangements agreed between the parties, or as a supervening and overriding source of the applicable law” (<http://www.kluwerarbitration.com/print.aspx?id=ipn30591>, p. 25.)

378. The majority Award is premised on an initial misunderstanding which needs to be clarified. This misunderstanding consists in using the *dictum* of the ICJ judgment in *ELSI* quoted at paragraph 341 of the majority Award to justify the unusual conclusion of excluding Respondent’s domestic law from the law applicable to this dispute in full and conscious contradiction with the provisions set forth in this regard in Article 8 (6) of the Argentina-Austria BIT. The ICJ *dictum* is absolutely correct, but what the majority seeks to infer therefrom in its Award is a fallacy. It is apparent that an act’s conformance with a State’s national or domestic law and conformance thereof with an international treaty provisions are different issues but that does not imply that both legal systems are hermetic compartments with no correlation between themselves. International law rules can take part in a domestic law dispute resolution and domestic law rules can apply to an international dispute resolution. It is perfectly normal and frequent in both directions by reception methods and proceedings well known by jurists. In the instant case, the Arbitral Tribunal is authorized to apply Respondent’s domestic law and it also has the obligation to do so by mandate of the provision in Article 8 (6) of the Argentina-Austria BIT, and also in Article 42 (1) of the ICSID Convention. The majority Award fails to comply with this obligation.
379. It is evident that any such mandate does not mean that Respondent’s domestic law is to be applied when it is not relevant, as it equally happens with the BIT provisions and the rules and principles of international law that also constitute the “law applicable” to this treaty claim. But the Arbitral Tribunal is bound to apply Respondent’s domestic law, as well as the other regulations of the “applicable law”, provided that they are relevant for the dispute resolution as it occurs for a considerable number of legal issues raised in this arbitration. This relevance is absolutely normal given that the beginning of this litigation was the revocation sanction by ENREJA of a license granted to ENJASA in accordance with the legal and contractual provisions of the Argentine Republic’s domestic law. The best evidence thereof are the Parties’ written arguments, the witnesses and experts they presented, the majority Decision on Jurisdiction and this majority Award itself with its references to Law No. 7020 of the Argentine Province

of Salta and ENREJA's resolutions, currently final, regarding the aforementioned sanction, *i.e.*, Resolution No. 240 adopting any such sanction and Resolution No. 315 confirming the revocation. Additionally, the exclusion by the majority of Respondent's domestic law as law applicable to this treaty claim resolution is legally aberrant and erroneous. It is also a violation of the Argentina-Austria BIT's mandate on the "law applicable" to investment dispute resolution.

380. Exclusions by the majority of the Argentine Republic's domestic law and the provisions on "applicable law" of the Argentina-Austria BIT in breach of this latter's mandate do not put an end to such exclusions. International law is also a victim of that. As we have already referred to in the Introduction hereof, the ICJ in *ELSI* stated that "the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispense with, in the absence of any words making clear an intention to do so" (*ICJ Reports 1989, Judgment*, p. 42, para. 50.) Neither the Argentina-Austria BIT nor the Parties hereto have dispensed with those customary principles or rules of international law in the resolution hereof. Therefore, all those customary principles or rules are potentially applicable to the extent they are relevant for this dispute resolution. Among such principles and rules we find, for instance, the following:

1. The rule setting out that a State is not bound to compensate an alien for the adverse effects arising from the regular exercise by its competent agencies of the State's regulatory and police powers inherent to its sovereignty (invoked by Respondent.)

2. The rule setting out prior exhaustion of local remedies when primary rules of international law are subject to any such condition (Article 44 of the ILC Articles on International Responsibility of States.)

3. The rule setting out that for an internationally wrongful act to exist, it is essential, *inter alia*, that a conduct of the State, consisting of an action or omission constitutes a breach of a prevailing international obligation of the State (Arts. 2 and 13 of the ILC Articles.)

4. The rule setting out that the international responsibility of the State results or arises from an international wrongful act (Art. 28 of the ILC Articles.)
  5. The rule setting out that the obligation to make full reparation exclusively concerns the injury caused by the relevant internationally wrongful act (Art. 31 of the ILC Articles.)
  6. The rule setting out that in the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of any person or entity in relation to whom reparation is sought (Art. 39 of the ILC Articles.)
  7. The rule setting out that international tribunals do not have the power to substitute their own interpretation of a State's domestic law for that given by the competent authorities of the relevant State.
381. The majority Award also excludes or sets aside all those customary rules or other rules of international law that may be relevant in this ICSID arbitration. It is thus confirmed that in this dispute resolution not only does any such Award dispose of the Argentine Republic's domestic law and the relevant provisions of the Argentina-Austria BIT, but it also disposes of customary international law, *i.e.*, all the "applicable law" as defined in Article 8 (6) of said BIT. The objective criterion of "applicable law" of the aforementioned BIT provision is substituted in the Award by the so called "Applicable Legal Standard" mentioned *supra*, which is a subjective standard premised at will by the majority of the Arbitral Tribunal and without any previous communication to the Parties of this significant change for adjudication of the dispute. As the Award expressly admits, the majority of the Tribunal "considers it appropriate to focus on the manifest character of errors as an indicator of the lack of good faith and arbitrariness" of Respondent (paragraph 350 of the majority Award.) This unprecedented and outrageous speculative prejudice, alleged with no supporting evidence whatsoever instead of the "applicable law" of the BIT, discredits itself on its own and prevents, in my opinion, that this majority Award be qualified as a "*de jure* award" in accordance with the 1965 ICSID Convention.
382. The majority Award's conclusion that Respondent, because of the revocation of the License by ENREJA incurred in international responsibility towards Claimants by an

“indirect expropriation” that would violate Article 4 (1) and (2) of the Argentina-Austria BIT and that, accordingly, it has the duty to make reparation for the adverse effect of the revocation for Claimants through compensation, is developed at paragraphs 352-429 of the majority Award. The Award begins with the consideration of ENREJA’s Use of its Regulatory Powers, and it concludes with the Respect of Due Process. Between these two subjects the majority Award considers the following issues: (a) Plan to Oust ENJASA from operating in the Gaming Sector; (b) ENREJA’s Power to Revoke the License under Article 13; (c) ENREJA’s Determinations of ENJASA’s Breaches of the Regulatory Framework; and (d) Proportionality of Resolution N° 240/13. Following consideration of those subjects and issues, the majority Award concludes, at paragraphs 427-429, as follows:

1. That the Tribunal has not found a breach of due process, its findings on arbitrariness and the lack of proportionality are sufficient to conclude that ENREJA did not properly use its regulatory and supervisory powers when it decided to revoke ENJASA’s exclusive license.
2. That such revocation destroyed ENJASA’s game operation business and Claimants’ investment in ENJASA.
3. That the revocation and subsequent transfer of game operation to third party operators cannot be considered as a regular exercise by ENREJA of its regulatory and supervisory powers.
4. That, consequently, the revocation constituted an indirect expropriation (sic?) of Claimants’ shareholding in L&E and an its indirect shareholding in ENJASA.
5. That this indirect expropriation was unlawful as it has not been implemented for a public purpose and was not accompanied by compensation as required under Article 4(2) of the BIT; and that
6. Respondent therefore is liable for breach of Article 4(1) and (2) of the BIT.

383. These are the conclusions of the majority Award following application to the facts related to Claimants' "indirect expropriation" claim of its "Applicable Legal Standard" not the "applicable law" defined by the Argentina-Austria BIT in Article 8 (6). My rejection of those conclusions adopted failing to apply to the facts the BIT's mandate on the "law applicable" to the dispute resolution is because they are absolutely erroneous in light of the applicable law, to a large extent speculative, and they disregard the evidence produced by Respondent, including that provided for by Law No. 7020 of the Province of Salta and Resolution No. 240/13 itself. It is so established by this Opinion relevant considerations and conclusions *supra* at the Introduction (paragraphs 1-40), Part I dealing with the customary rule of international law concerning the regular exercise by the competent bodies of the State's regulatory and police powers inherent to its sovereignty invoked by Respondent (paragraphs 41-100) and Part II (Section A) related to Claimants' first claim concerning "indirect expropriation" for violations of Article 4 (1) and (2) of the BIT (paragraphs 101-236). Consequently, it is not necessary to reiterate such considerations and conclusions in this General Conclusion. I shall thus finish this General Conclusion commenting the insufficiencies, contradictions, and silences of the Award in light of the inappropriate standard constructed and applied by the majority instead of the "applicable law" defined by the Argentina-Austria BIT.
384. The first ascertainment is that the majority Award excludes from its analysis the customary rule invoked by Respondent as defense on the merits against Claimants' claims, a rule of systemic nature in the international legal order. How does it do it? Departing from the wrong premise that application to this dispute of the customary rule at issue - of high-rank and ancestry in public international law because of its being inherent to the State's sovereignty - is limited or subordinated, both as regards its considerations and conclusions reached, by the "*sole effects*" doctrine promoted in the context of investment litigation by an outdated trend and, besides, that said limitation or subordination is of such scope that the aforementioned customary rule can be dispensed with, absent prior examination, when an "indirect expropriation" claim is admitted. Any such proposition is in most cases nonsense and with regard to a case like this one dealing with a sanction of revoking a license adopted by the Regulatory Agency and competent authority in response to serious and repeated violations by Licensee of its "licensee's obligations" is an utter oxymoron. On ENJASA's breaches

described by ENREJA as “serious” and “very serious” see paragraph 22 of Respondent’s PHB.

385. Another insufficiency of the Award is that in order to reach its conclusion on Claimants’ “indirect expropriation” claim, the majority has had nothing less than disregard the Arbitral Tribunal’s competence and ascribe thereto the role of a *court of appeals* of the decisions made in the Province of Salta by the ENREJA, in its capacity as Regulatory Agency and Enforcement Authority of Law No. 7020. And how has it been able to do so? By disregarding the fact that Respondent’s domestic law is the law applicable to this dispute resolution. That is to say, violating the Argentina-Austria BIT’s mandate in the matter, given that ENREJA’s Resolutions No. 240 and No. 315 are final resolutions in Respondent’s domestic law and, accordingly, they are also final in this arbitration as it is so provided for in Article 8 (6) of the BIT. That is why this Opinion quotes what was decided in those Resolutions and it abides by their conclusions and decisions since I am not responsible for participating in the *ultra vires* revision the majority Award makes of the considerations, conclusions, and decisions of ENREJA’s Resolutions No. 240 and No. 215 with respect to fact-finding Resolutions Nos. 380/12, 381/12 and 384/12 object thereof. What I am responsible for is recalling that Resolutions Nos. 240 and 315 have become final due to the withdrawal by ENJASA (under Claimants’ control, management, direction, and administration) of the contentious-administrative proceedings that it had instituted with the competent court for the Province of Salta due to the incompatibility set out by the BIT between international arbitration and ongoing domestic court proceedings. And it is also worth recalling that the Arbitral Tribunal’s decision ordering the withdrawal lacked my support. As pointed out in a Dissenting Declaration, I proposed that these arbitration proceedings before the ICSID be stayed while the court proceedings instituted by the company in the Province of Salta were pending.
386. A third insufficiency of the majority Award is that it absolutely disregards the nature and purpose of the disputed measure. In the instant case, the measure is not a mere administrative measure adopted at the initiative of the Administration as it occurs in most investment disputes related to licenses, concessions or permits. The measure is a *sanction* by the Administration of prior serious and repeated violations by Licensee of legal and contractual obligations important for the Legislator. The competent administrative body adopted the sanction in compliance with its supervisory and

sanctioning duties and it did so after ENJASA had been sanctioned several times for violation of those obligations and after it had been warned that, should it not change its behavior, its license was at risk of being revoked, all of which Claimants were perfectly aware. But the behavior of ENJASA (under Claimants' control, management, direction, and administration) did not change, as evidenced by ENREJA's fact-finding Resolutions mentioned at the preceding paragraph. Footnote 23 to paragraph 23 of Respondent's PHB identifies four ENREJA's Resolutions warning ENJASA of the consequences the breaches by Licensee could entail in connection with its License, even specifically clarifying that they could warrant revocation of the License. They are Resolutions Nos. 39/10 (C-164), 104/10 (C-152), 128/10 (C-158) and 161/10 (C-157).

387. This also raises a bad faith issue by Claimants that the majority Award completely ignores and which, in contrast, reproaches, as we have already seen *supra* to Respondent in a "doble standard" exercise uncommon in international arbitration proceedings. The revocation actually put an end to ENJASA's business and indirectly affected Claimants regarding the company's lost profits (not the capital invested by Claimants or the company's equity assets.) It is the consequence of a sanction measure applied to an ENJASA under Claimants' direction and control, and which after having been warned, continued adopting a behavior contrary to the "licensee's obligations" laid down under Article 5 of Law No. 7020.

388. The possibility of a sanction like the one imposed to the company by the ENREJA was assumed by Claimants when they invested in ENJASA as evinced by the documentation related to the company privatization and, particularly, because of the License Agreement accuracy in terms of sanctions, ignored by the majority Award probably because of its clarity on the "obligations by a licensee." Public administrations' sanctions are not a whim but a need both in the Argentine Republic as well as in the Republic of Austria and their purpose in both Republics is by definition to inflict a sanction to the party being sanctioned as a result of which the "*sole effects*" doctrine is absolutely inappropriate and not applicable when the disputed measures are sanctions, as is the case in this arbitration, and, consequently, all the arbitral awards cited in the majority Award which apply such doctrine to measures that are not of a sanctioning nature are perfectly irrelevant for these arbitration proceedings. An adverse effect for the party being sanctioned by a sanction is a natural effect. There is nothing extraordinary therein. What is unprecedented is expecting that the party being

sanctioned by the violation or breach of the obligations that gave rise to the sanction be rewarded by the sanctioning party with compensation. This is indeed nonsensical. Lastly, one shall obviously bear in mind that, in transactions related to protected investment, the risk of sanctions is a “business risk” ascribed as such to the investor/businessperson, except otherwise provided for in the BIT or in possible specific agreements and, in the instant case, when the violations or breaches of Law No. 7020 that were sanctioned with revocation of the License, Claimants were not only shareholders of the company, but they also controlled, managed, ran and administered ENJASA as an a businessperson, thus they are by no means a third party with respect to such violations or breaches [Translated by me.] On all these considerations the majority Award has nothing to say except that ENREJA acted in bad faith!

389. The Award fails to explain the reason why the majority considers the revocation of ENJASA’s license cannot be deemed a regular exercise by the ENREJA of its regulatory and supervisory or police powers. I have explained in detail herein the reasons why I consider such conclusion by the majority is contrary to the law applicable to this dispute. But in this context, the question to be analyzed is the reason why the majority considers the revocation of the license was not a regular exercise by the ENREJA of the above-mentioned powers. Apparently, in light of the conclusion at paragraphs 395 and 427 of the majority Award, the revocation decision would have been arbitrary and lacking proportion. The first question this conclusion poses is with respect to what is there arbitrariness and lack of proportionality for the majority? This Opinion has shown that ENREJA’s revocation decision was neither arbitrary nor lacking proportionality in light of Argentine domestic law, which ENREJA had the obligation to apply, and which it did apply in the Province of Salta. But as the majority Award does not apply Argentine domestic law as the law applicable to this dispute, I assume that the arbitrariness and lack of proportionality of the majority Award conclusion refer to the “Applicable Legal Standard” constructed by the majority and that, according to said majority, this standard would be a standard of international law that would incorporate the conditions of arbitrariness and lack of proportionality (without defining them) as a limitation to the application of the customary rule of international law that recognizes and respects the State’s regulatory and police or supervisory powers invoked by Respondent.

390. However, the position adopted by the majority Award encounters insurmountable legal obstacles under public international law that converge in this arbitration, which is why there is no alternative but to reject it. First, the inevitable question is: how can an arbitral award find that the Argentine Republic violated the alleged international standards of non-existence of arbitrariness and lack of proportionality at the time ENREJA decided to revoke the License when neither ENJASA nor Claimants previously exhausted Respondent's domestic remedies? The conclusion reached by the majority Award cannot stand if it is not proved that such domestic remedies were previously exhausted, since, failing that, ENREJA's revocation of the License may not entail an internationally wrongful act under international law giving rise to international responsibility to an arbitral tribunal applying international law. And there can be no internationally wrongful act, as the primary rules of international law on the treatment of foreign persons and property are rules of international law *subject* to the previous exhaustion of such remedies before a party can allege that they have been violated. Such remedies not having been exhausted, it cannot be found that there was a violation of such international primary rules, and, thus, the secondary rules of international Responsibility of the State do not admit an international claim based on a violation of such primary rules, since there has been no violation thereof provided that any local remedy has not been exhausted (Article 44 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts).
391. In the instant case, evidence of non-exhaustion is clear, because ENJASA, which was controlled, managed and run by Claimants, withdrew from the court proceedings that it had instituted in the Province of Salta, as stated *supra* in paragraph 385. Moreover, and this is the second obstacle, for the arbitrariness and lack of proportionality found in the majority Award to constitute an exception under international law to the customary rule invoked by Respondent, the previous exhaustion of domestic remedies is not the only requirement. The arbitrariness or lack of proportionality must be extremely serious, i.e., reach such a high threshold of seriousness as to entail, for example, a "denial of justice," as pointed out in Part I of this Opinion. Nor does the majority Award show that Claimants have established that they had met this fundamental requirement in the case at issue. Consequently, it is now worth examining the alleged "arbitrariness" and the alleged "lack of proportionality" in turn.

392. The majority Award concludes that the decision to revoke the License was an arbitrary act on the part of ENREJA but fails to elaborate on the content and scope of the notion of “arbitrariness” under international law. Customary international law actually recognizes that, in certain circumstances, a manifestly serious arbitrariness can entail a limit on the application of the customary rule of international law invoked by Respondent, which, in any case, international tribunals apply with remarkable caution and deference that are missing in the majority Award. The reason is self-evident: such limit affects the State’s exercise of its sovereignty, and, under international law, limits on the State’s sovereignty are not presumed. In addition, as I have just stated, not any arbitrariness can exceptionally limit the rule invoked by Respondent. It must be an extremely serious arbitrariness, and, of course, no matter how serious the arbitrariness in question is, the customary rule of international law that protects the State’s regulatory and supervisory or police powers is not repealed.
393. I completely agree with Claimants that the formula adopted by the case-law of the ICJ in *ELSI* strengthens what is now to be understood as the content and scope of an international arbitrariness that may limit the application of the rule invoked by Respondent. In accordance with such formula: “Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law” (ICJ Reports 1989, Judgment, p. 76, para.128). In the present dispute, the international law arbitrariness of Claimants’ “Applicable Legal Standard” must be an arbitrariness that is contrary to the “rule of law.” Therefore, only a serious arbitrariness contrary to the “rule of law” would hinder the application of the customary rule of international law invoked by Respondent. None of the conclusions reached by the majority Award on its “arbitrariness” is objectively as serious. This is confirmed by another conclusion in paragraph 426 of the majority Award whereby “it is unable to find a violation of any international due process rights, as claimed by Claimants.” If there has been no violation of “due process rights,” there could not have been, and has not been, an arbitrariness contrary to the “rule of law.”
394. The majority Award also finds that ENREJA’s revocation of the License was a disproportionate decision in paragraph 417 whereby, “even if the allegations underlying Resolutions Nos. 380/12, 381/12 y 284/12 had been true, and their legal evaluation under domestic law accurate, a revocation of ENJASA’s license would not have been proportionate under international law and would not have constituted a

regular exercise of ENREJA's regulatory powers [...].” This conclusion mixes two issues. The first is a question of Argentine domestic law that has been thoroughly examined and rejected in this Opinion in relation to both Claimants' first claim (indirect expropriation) and third claim (fair and equitable treatment). I refer to the foregoing examination in this context. Hence, the same considerations and conclusions on arbitrariness apply to the “lack of proportion” under Argentine domestic law of ENREJA's Resolution No. 240/13 declared in the majority Award, namely: (i) the final nature of ENREJA's Resolution No. 240; (ii) the non-existence of an internationally wrongful act for failure to exhaust the Argentine Republic's local remedies in accordance with the primary rules of international law on the matter; and (iii) the lack of international responsibility without violation of an international rule, the existence of attribution not being sufficient.

395. But, as we say, the above-mentioned conclusion of the majority, also concerns a question of international law when it states that ENREJA's revocation decision “would not have constituted a regular exercise of ENREJA regulatory powers.” Nevertheless, paragraphs 397 to 416 of the majority Award preceding the conclusion regarding “Proportionality of Resolution No. 240/13” do not mention any single rule or instrument of public international law warranting or supporting the conclusion discussed. To know what the majority relies on so as to state in the Award that the decision to revoke the License was not a regular exercise by ENREJA of its regulatory powers, it is necessary to refer to subsequent parts of the majority Award where it is explained that it is not a rule of international law, but the “Autonomous Treaty Standard” elaborated by Claimants. The majority Award fails therefore to judge ENREJA's decision on the basis of international law. A reading of the above-mentioned paragraphs also confirm that the “Applicable Legal Standard” of the majority Award is nothing but a reformulation of Claimants' “Autonomous Treaty Standard” and thus, it lacks, like the original, normativity in public international law as evidenced herein.

396. In other words, the standard applied by the majority is not part of the “law applicable” to this dispute resolution as defined by Argentina and Austria in Article 8(6) of the BIT. It is composed, with no further analysis, of an amalgam of citations of statements taken from the practice by some *ad hoc* arbitral tribunals of a certain scholarly trend failing to take into account the distinctive features of the instant case. Oddly enough, this is

the so called “standard” upon which the majority of the Tribunal relies to assert that Resolution No. 240/13 was not the result of the regular exercise by ENREJA of its regulatory powers and not, as mandated by the BIT, on the basis of “the applicable principles of international law.” For “the principles of international law” the lack of proportionality of the majority Award is irrelevant because as a result of its lack of normativity it has no ability to limit, in any way whatsoever, the scope of the customary rule invoked by Respondent, and that is so whichever the degree of seriousness of the lack of proportionality alleged. In other words, some publicists’ “proportionality *strictu sensu*” is not a legal rule or a condition of a legal rule limiting the customary rule regarding the regular exercise by the competent bodies of the State’s regulatory, supervisory or police powers invoked by Respondent.

397. What happens with proportionality both in domestic laws as well as in international law is that there are particular legal rules that incorporate it as, for instance, Article 13 of Law No. 7020 of the Province of Salta and Article 5 of ENJASA’s License Agreement do at the domestic level or, for example, the rules codified in Articles 35 (Restitution), 37 (Satisfaction) and 51 (Countermeasures) of ILC Articles on International Responsibility of States do at the international level. As far as this arbitration is concerned, proportionality does not limit the scope of application of the customary rule invoked by Respondent, neither is the proportionality criterion integrated in any other relevant rule of international law. Nor should the “proportionality” of a rule or a legal decision be identified with the “reasonableness” thereof. In any case, the Argentina-Austria BIT does not set out any transversal criteria of proportionality in relation to the legal rules it defines as the “law applicable” to investment disputes like the one at issue, although it does not exclude proportionality as long as the criterion is incorporated in a rule of domestic law or international law which is applicable and relevant.
398. In general international law, proportionality does not operate in an autonomous fashion as, for example, good faith does, since it is not a “general principle of law.” In the instant case, the only rules of the “applicable law” defined by the BIT that incorporate the reciprocity criterion are the rules of Respondent’s domestic law laid down in Law No. 7020 of the Province of Salta and in ENJASA’s License Agreement with which ENREJA’s decision to revoke the License fully complied. The majority Award is thus declaring the Argentine Republic’s international responsibility for “lack of

proportionality” at the international level failing to specify what international law obligation Respondent has violated in that regard in its relationship with Claimants.

399. But the “deficiencies,” to use a soft term, of the majority Award mentioned so far are not the only ones, since even though the Award: (i) disregards the “applicable law” defined by the BIT; (ii) substitutes Resolution No. 240/13 for the majority’s ruling in the Award retried what ENREJA had judged in Salta which is a final Resolution; and (iii) reduces to the *minimum minimorum* the number of violations by ENJASA of Article 5 of Law No. 7020 confirmed by ENREJA, all that did not suffice to be able to justify the Award conclusions, due to ENJASA’s recidivist condition. This recidivism took place during the 2005-August 2013 period and, in particular from 2007/2008 when Claimants acquired the majority shares and controlled and ran the company, an event that is almost coincident with the modification of the method to calculate the yearly license fee by the Memorandum of Understanding (UNIREN). Prior to Resolution No. 240/13, ENJASA was actually sanctioned twenty times for violation of the above-mentioned Article 5 of Law No. 7020, six of which were for violations similar to those sanctioned by Resolution No. 240/13. This situation could not be concealed. Additionally, Resolution No. 240/13 itself expressly mentions the four criteria ENREJA took into account when adopting the sanction to revoke the License, the first of those enumerated being “ENJASA’s background” (see paragraph 226 *supra*.) In turn, ENJASA’s License Agreement also mentioned in Article 5 “recidivism” as one of the elements for grading the sanctions.
400. Facing this situation, how does the majority Award proceed in its treatment of the fact that ENJASA was a recidivous Licensee? Well, denying the greatest, *i.e.*, what the text of Law No. 7020 of the Province of Salta reads: How does it do that? By means of two moves. The first, mixing up the essential distinction drawn by Law No. 7020 between “particular obligations of a licensee” which are exclusive obligations by licensees (Article 5 of Law No. 7020 begins with the words: “The licensee shall act in accordance with...”) and “general obligations” that the Law calls “administrative infractions” (Article 40 of Law No. 7020 begins as follows “Any natural and/or legal persons who, with or without authorization and with not-for-profit purposes or otherwise, carry out any of the activities defined in Article 2...”) And the second move consists in disregarding that, as stated by the Law, sanctions for violations and breaches of licensees’ specific obligations set out in Article 5 are laid down in Article 13, whereas

sanctions for infractions of the general administrative obligations set out in Article 40 of Law No. 7020 are laid down in Article 41. That is why Article 13 mentions the suspension and revocation of the license since it exclusively punishes conducts contrary to the obligations by licensee, whereas Article 41 does not mention the license at all because the obligor of the administrative obligations violated by the infractions is any natural and/or legal person. The present dispute exclusively concerns the violation by ENJASA of the obligations it had *in its capacity as, or condition of licensee* by virtue of the obligations set out in Article 5 of Law No. 7020 which ENJASA violated or breached under Claimants' control and direction, giving rise to ENREJA, in the regular exercise of its functions and powers, sanctioning it as recidivist, prior warning, with the revocation of the License.

401. All this is perfectly clear in Law No. 7020, that is why a simple reading of the Law suffices to apply it correctly. It is true that, lacking arguments, Claimants, with some of their experts' help tried to create confusion on the respective application scopes of Article 5 and Article 40 of Law No. 7020. But an arbitrator shall see things as they are, not as the parties at stake say they are. I say this as a matter of principle because this Opinion has already shown that ENREJA properly exercised its sanctioning power in accordance with Law No. 7020 and its regulatory provisions. What is being analyzed in this context is what the majority says in its Award about Law No. 7020, *i.e.*, why has the majority tried to rewrite Law No. 7020 instead of applying it? Why does it attempt to transform violations by ENJASA of Article 5 of Law No. 7020 in administrative infractions of Article 40? The most credible explanation is that with any such transformation the majority has attempted to overcome the difficulty posed by ENJASA's *recidivism* in the violation of the above-mentioned Article 5 so as to be able to hold that ENREJA applied an excessive sanction, although it also fails in doing so.
402. The majority Award concludes that ENJASA only incurred two violations or breaches of the second paragraph of Article 5 of the Law and no violation or breach of the first paragraph of said article. Departing therefrom, the majority presupposes that "the fewer the number of violations" or "violations they consider of minor importance" it is possible to reclassify the violations of Article 5 by ENJASA that the majority recognizes as "administrative infractions." And what happens if the Law does not allow it? Well, the Law is rewritten, which would allow us to introduce in addition in the consideration of this dispute as the majority Award does all articles from Article 40 to

51 of Chapter IV (Administrative Infractions) of Title II of Law No. 7020. What happens is that not only does Law No. 7020 not admit the reading the majority makes thereof, but it excludes it with no remedy whatsoever, given that for Law No. 7020 any violation or breach of Article 5 obligations (whichever the number or seriousness thereof) is a violation or breach by Licensee of its *obligations as licensee laid down in said article and, accordingly, it is subject to the sanctions of Article 13 of the Law and to be weighted within the framework of said article, taking into the account, as appropriate, its recidivist condition in the violation of obligations by a Licensee as was ENJASA*. In other words, according to Law No. 7020, violations of the obligations contained in Article 5 of the Law by the Licensee bound to comply therewith do not become “administrative infractions” in no case whatsoever, regardless of the number or degree of seriousness thereof, contrary to the conclusions of the majority Award. The revocation of the License was not a sanction for having violated the general administrative obligations laid down in Article 40 of Law No. 7020, but ENJASA was sanctioned for having violated the particular obligations of Licensee set out in Article 5 of that Law. That is the reason why ENJASA could file, and did file, a recourse for “reconsideration” against Resolution No. 240/13 since for “administrative infractions” Article 50 of Law No. 7020 only admits motions for clarification and/or an appeal for review.

403. In order to endorse the misguided reading of Law No. 7020, the majority Award invokes an excerpt of the ICJ case law in *Diallo*, which reads as follows:

“The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loan, Judgment N° 14, 1929, P.C.I.J., Series A, N° 20, p.46* and *Brazilian Loans, Judgment N° 15, 1929, P.C.I.J., Series A, N° 21, p. 124*). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation” (*ICJ Reports 2010 (II), Judgment, p.665, para. (in fine)*).

Following this quote, the ICJ states, in the following paragraph, that there was no room for a different interpretation to that given by the State authorities in question with these words:

“although it would be possible in theory to discuss de validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic

law for the purpose of the decision of the case.” This statement shows all the deference of the International Court of Justice, main organ of the United Nations, towards the interpretation by a State of its own national or domestic law, which, unfortunately the majority of this ad hoc Arbitral Tribunal lets itself reject entirely in this majority Award. I reject this Arbitral Tribunal’s complete lack of deference toward Respondent regarding the interpretations of Argentine law by the Regulatory Agency and Enforcement Authority of Law No. 7020 appointed by the Law itself, i.e., the ENREJA. The ENREJA sanctioned the Argentine company ENJASA for violating its legal obligations as Licensee in the territory of the Republic, a company that Claimants in this arbitration - which had made an investment therein - controlled and ran at the time the greatest number of violations and breaches that determined the above-mentioned sanction occurred. A situation this that a majority Award so concerned about Respondent’s good faith should have weighed with respect to Claimants’ good faith, instead of keeping a secretive silence in that regard.

404. As regards international law in this matter, the ICJ in the excerpt quoted *supra*, confirms the effectiveness of the principle that international tribunals, including the ICJ itself, do not have the power to substitute their own interpretation of a State’s domestic law for that given by the competent authorities of the relevant State. This principle of international law, that is “law applicable” to this dispute resolution, has been absolutely violated by the majority Award with respect to both the final ENREJA Resolution No. 240/13 and Law No. 7020 of the Province of Salta. As regards the exception related to State interpretations that are “manifestly incorrect” of the quote, it is not relevant in the case of revision by Respondent of such Resolution and such Law, because the majority Award does not “interpret” but “revises” both instruments of Argentine domestic law. As per confirmation by the *Diccionario de la Real Academia Española de la Lengua* for which: (i) the verb “interpret” means “to state or explain the meaning of something and mainly of the text lacking clarity”; and (ii) the verb “revise” means “to submit something to a new examination so as to correct it, amend it or repair it” The pertinence of the reference in the majority Award to the exception on the interpretation of the quote of the ICJ commented hereinabove is, thus, inapposite in this context.
405. At the end of its reasons section, the majority Award concludes, with no greater developments, that Respondent has breached Article 4 (1) and (2) of the Argentina-Austria BIT incurring thereby in international responsibility towards Claimants for

“indirect expropriation” of their investment in ENJASA because there was no public purpose for the revocation of the license and because there was no compensation for such alleged expropriation. Neither of those two reasons are true. As regards the first, the lack of “public purpose” assertion, one may, at least, wonder how can the majority assert any such thing when the sanction consisting in the revocation of the License was adopted by the ENREJA in response to the violation by the company of its legal obligations as Licensee and in order to reestablish thereby the integrity of the breached Article 5 of Law No. 7020? It makes no sense to assert there is no public purpose. But if, in addition, one verifies the nature of the obligations breached and their purpose of preventing money laundering in the national and international struggle against capital flight, drug trafficking and terrorism, as well as the fact that money laundering also affected the finances of the Province for its bearish incidence in the determination of the amount of the company’s yearly license fee, the majority’s assertion is astonishing. It is difficult to find so much “public interest” in the grounds for an administrative sanction.

406. As for the second reason, the lack of compensation, court and arbitral decisions and the doctrine have for long been explaining that lack of compensation does not in itself render the expropriation unlawful, in particular, when there is, like in the instant case, a dispute regarding the existence of the alleged expropriation or when the question is *sub judice*. In addition, in this case, Article 4 of Argentina-Austria BIT does not reproduce the “Hull formula” of the 1920s. We shall quote here, because of their authority, the statements in such regard by the *Venezuela Holdings (and others) v. Venezuela* ICSID tribunal (Guillaume, Kaufman-Kohler, El-Kosheri) in their award of 9 October 2014: “the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful” (para. 301 of the Award).

407. In sum, I reject this majority Award as it is a decision that fails to apply to this dispute resolution the “applicable law” defined by the Argentina-Austria BIT in Article 8 (6). What the majority Award does is substituting the “law applicable” to the dispute resolution for a so called “Applicable Legal Standard” devised by the majority. In particular:

1. The majority Award fails to apply Law No. 7020 of the Province of Salta or the final ENREJA Resolutions Nos. 240/13 and 315/13 that are Respondent’s domestic law and,

as such, “law applicable” to this dispute resolution as provided for by the Argentina-Austria BIT, nor does it take into account that ENJASA having withdrawn from the contentious-administrative proceedings before the competent court for the Province of Salta requesting annulment of such Resolutions, the two aforementioned Resolutions are final decisions;

2. It fails to apply the provisions of the Argentina-Austria BIT regarding (i) the definition of the content and scope of “shares and any other form of participation in companies” (Article 1(b)) and (ii) the applicable law (Article 8 (6)); and it improperly applies (iii) the provisions of expropriation (Article 4 (1) and (2));

3. It fails to apply the customary rule of international law that the adverse effects to third parties of the regular exercise by the competent bodies of a State’s regulatory, supervisory or police powers are not a ground for such State’s international responsibility and, accordingly, they are non-compensable, the Award incurring *infra petita* with respect to any such defense invoked by Respondent;

4. It subjects consideration of said customary rule of international law invoked by Respondent as defense on the merits, to prior ascertainment that there is no “indirect expropriation” when any such subordination is alien to international law, also violating the procedural rule applied by international tribunals which sets forth that consideration of objections precedes that of claims;

5. It errs when considering that the mere ascertainment of an “indirect expropriation” has the effect of excluding consideration of the customary rule of international law invoked by Respondent on grounds such as “arbitrariness” admitted by international law, when any such exception to the application of the aforementioned customary rule shall be of such a degree or level that it is tantamount to denying the rule of law;

6. It errs when considering that the “lack of proportionality” of the self-proclaimed “Legal Standard” the majority applies *in lieu of* the “applicable law” defined by the Argentina-Austria BIT is as such one of the grounds of high degree or level that by way of exception international law admits to eventually exclude application of the

customary rule invoked by Respondent which has satisfied the proportionality condition of Argentine law that is the “law applicable” to this dispute resolution;

7. With reference to ENREJA Resolution No. 240/13 revoking ENJASA’s license, it states that the Argentine Republic has acted arbitrarily and lacking proportionality with the Claimants not having exhausted Respondent’s local remedies as required in this matter by both the relevant primary rule of international law as well as the secondary rule of the same law which proclaims that the responsibility of a State may not be invoked when the claim is one to which the primary rule of exhaustion of the aforementioned local remedies applies (Article 44 of the ILC Articles on International Responsibility of States);

8. It states that Respondent has incurred international responsibility, with the Argentine Republic not having breached any international obligation in its relationships with Claimants since the “indirect expropriation” it ascertains under Respondent’s responsibility based on the self-proclaimed “Legal Standard” mentioned above does not breach the provisions for “direct expropriations” set forth by Article 4 (2) of the Argentina-Austria BIT.

9. It disregards the customary rule regarding investments that sets forth the allocation of risks between the investor and the host State when failing to assign Claimants, that controlled, managed, ran and administered the company the “business risk” of the revocation of the License for breaches by ENJASA of its legal obligations, without the Argentina-Austria BIT as well as non-existing particular agreements between the Parties having repealed in the instant case the risk allocation of the aforementioned customary rule;

10. It errs when, Claimants having failed to demonstrate it, the majority Award questions with appalling lightness in some excerpts thereof the good faith of the Authorities of the Province and that of the ENREJA itself regarding the revocation of the license (and even the “transition plan”) when the revocation was adopted at the conclusion of a “due process” and in full observance of ENJASA’s right of defense and, alternatively, such Authorities could have declared the extinction and/or automatic cancellation of the License by operation of law in application of Article 6 of the License

Agreement. By contrast, the majority Award does not show the same interest in analyzing, in no context whatsoever, the good faith of Claimants, that controlled, managed, ran and administered ENJASA when the company repeatedly breached Article 5 of Law No. 7020. Treatment in the majority Award of the good faith principle is utterly uneven.

11. It substitutes its alleged interpretation of Law No. 7020 and Resolution No. 240/13 of Argentine domestic law for the interpretation of such Law and such Resolution by the Argentine Republic's competent bodies in contradiction with the principle of international law stated by the ICJ in *Diallo* that international tribunals do not have the power to substitute their own interpretation of a State's domestic law for that given by the competent authorities of such State.

#### **PART IV: THE COMPENSATION AWARDED TO CLAIMANTS BY THE MAJORITY AWARD**

408. As we have already pointed out in paragraph 26 of the Introduction hereto, the resolution of the present dispute does not raise any question on the assessment of injuries or adverse effects, as Respondent has not engaged in any conduct in violation of the Argentina-Austria BIT. The majority, however, has erroneously concluded that Respondent has incurred international responsibility towards Claimants for breach of Article 4 (1) and (2) of such BIT (indirect expropriation) and, accordingly, that Claimants have suffered, as they allege, an *injury* that shall be compensated by Respondent. The grounds of the Award try to justify the reasons why the majority awards compensation to Claimants, the quantum of which amounts to USD 21,160,000 plus compound interest (sub-paragraph (3) of paragraph 610) of the majority Award Decision).
409. As already explained herein, Respondent: (i) has exercised, as a sovereign State, the regulatory, and supervision or police powers in its territory when sanctioning ENJASA, an Argentine company, with the revocation of the Licensee it held for the exploitation of games of chance in the Province of Salta for breaching the obligations by Licensee laid out in Article 5 of Provincial Law No. 7020; and (ii) in the exercise of such sovereign powers Respondent has not violated any of the provisions of the Argentina-Austria BIT invoked by Claimants with respect to any of their three claims. Therefore, in this part of the Opinion, I shall confine myself to make some critical observations

and comments of legal nature which in the present context also evidence that the majority has failed to properly apply the “law applicable” to this dispute as defined by Article 8 (6) of the above-mentioned BIT.

410. My first observation on this part of the majority Award devoted to compensation is the following: the majority of the Arbitral Tribunal erroneously assumes that Respondent has incurred international responsibility towards Claimants for “indirect expropriation” and that such “indirect expropriation” is a *necessary* and *sufficient* condition for the Arbitral Tribunal to award, without further ado, compensation to Claimants and determine its quantum. Nothing is more erroneous, because even though any such conclusion is a certainly *necessary* condition, it is not, by contrast, a *sufficient* condition. For a *sufficient* condition to exist, Claimants should have proved, in accordance with the general principle on evidence production (*actori incumbit probatio*) the injury they allege to have suffered as a result of the “indirect expropriation” Respondent would have incurred for the breach of Article 4 (1) and (2) of the Argentina-Austria BIT according to the majority Award.
411. In my opinion, Claimants have failed to produce any such evidence, which is confirmed by the Award when awarding them compensation in an amount considerably lower than the minimum figure requested. Neither have they proved having suffered an *injury* in the quantum granted thereto by the majority Award. The majority has helped Claimants when awarding them the aforementioned amount. But this has a cost: it worsens the dysfunctions in the application of the “applicable law” that characterize the majority decision in this Award.
412. The jurisprudence of the ICJ is crystal clear in such regard: in order to award compensation by way of reparation for the commission of an internationally wrongful act, it is claimant (and not the tribunal itself, or respondent) that shall demonstrate having suffered an *injury* as a direct consequence of any such wrongful act and its extent, as well as the fact that the injury at issue can be subject to financial assessment. According to the ICJ, in order to award compensation it shall be clearly ascertained, first *whether damage has been proved* and then, whether the damage proved has a sufficiently direct nexus with the wrongful act that caused any such damage. In the matter *Certain Activities Carried Out by Nicaragua in the Border Area* the Judgment of the Court on compensation of 2 February 2018 reads as follows:

“In order to award compensation, the Court will ascertain whether, and to what extent, each of the various heads of damage claimed by the Applicant can be established and whether they are the consequence of wrongful conduct by the Respondent, by determining whether there is a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered by the Applicant” (ICJ Reports 2018, p. 15, para. 32.)

413. In international arbitration practice in investment matters it is also necessary that a sufficient nexus between the wrongful act and the alleged *injury* exist and, in addition, there is emphasis on the fact that it is claimant that bears the burden to prove the existence and extent not only of the internationally wrongful act it has been subject to but also of the *injury* the wrongful act at issue has allegedly caused thereto. There are numerous awards that expressly state that for compensation to exist claimant shall have met the burden to prove the *injury* suffered. For instance:

“the burden is on (the Claimant) to prove the quantum of the losses in respect of which it put forward its claims; compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached” (*S.D. Myers v. Canada*, Partial Award, 13 November 2000, para. 316;)

“a claimant has the burden of proving both the breach and the claimed loss or damage” (*Grand River v. United States*, Award, 12 January 2011, para. 237;)

“It is clear that it is the Claimant that bears the burden of proof in respect to the fact and the amount of loss” (*Crystallex v. Venezuela*, Award, 4 April 2016, para. 864;)

“It is a basic tenet of investment arbitration that a claimant must prove its pleaded loss. must show, in other words, what alleged injury or damage was caused by the breach of its legal rights” (*Pey Casado v. Chile (II)*, Award, 13 September 2016, paras. 205-206;)

“(the) Tribunal considers that the burden of proving the existence of loss or damage suffered by Claimants lies with them” (*Valores Mundiales v. Venezuela*, Award, 25 July 2017, para. 695;)

“The Claimant bears the legal burden of proving its case on compensation. This general principle is well established under international law: *onus probandi actori incumbit*. If and to the extent that the Claimant does not prove its case on the assessment of compensation, it follows that its claim for compensation must be dismissed by the Tribunal” (*9Ren Holding v. Spain*, Award, 31 May 2019, para. 405.)

414. The doctrine confirms it is the investor that has the burden to prove it has suffered a damage caused by the violation ascribed to the host State and that failing to meet any

such burden of proof prevents its being awarded compensation. See, *e.g.*, Meg Kinnear, *Damages in International Investment Arbitration*, at Katia Yannaca-Small, *Arbitration under Investment Agreements*, 2010, p. 556. Also, *inter alia*, in the same line: Craig Miles and David Weiss, *Overview of Principles Reducing Damages*, at John A. Trenor, *The Guide to Damages in International Arbitration*, 2017, p. 78.

415. Therefore, in the present arbitration it is for Claimants to prove the *injury* they have allegedly suffered for the revocation of the License ENJASA held, as well as the quantum of compensation they claim by way of reparation of any such *injury*. In principle, there is thus no room for compensation should Claimants fail to satisfy both proofs. In their Post Hearing Brief (PHB) Claimants request the Arbitral Tribunal to award them compensation in *no less than USD 51,919,998* (items 4 and 5 of their final conclusions) but they have not been able to prove it. In fact, both for the majority Award as well as for the drafter of this Opinion, Claimants have failed to prove that the *injury* they allege the aforementioned revocation have caused them is of a quantum tantamount to or in excess of the *51,919,998 dollars* mentioned hereinabove. The majority Award actually provides at sub-paragraph (3) of its decision (paragraph 610 of the Award) that Respondent pay compensation to Claimants in the amount of USD 21,160,000 plus interest, that is to say, an amount significantly lower than the compensation requested by Claimants.
416. This corroborates the disproportion of the compensation requested by Claimants, not only for the figure significantly *lower* than the amount requested thereby, but also, especially, if it is borne in mind that the majority decides the amount of 21,160,000 dollars by way of compensation at the conclusion of a reasoning in which the majority adapts *in toto* or in its key aspects, the valuation model, the pertinent cash flow and the discount or update rate proposed by Claimants and their expert, Mr. Rosen. It is with respect to the exchange rate between pesos and dollars and in connection to the claim by Claimants of expenses allegedly incurred after the revocation of ENJASA's License that the majority adopts the proposal by Respondent and its expert, Mr. Dapena.
417. Besides, the difference between the amount requested by Claimants and that awarded by the majority in their Award is not ascribable to the fact that Claimants had requested an amount no less than USD 51,919,998 for the alleged breach of the BIT by Respondent for three reasons: (i) breach of Articles 4(1) and (2) (indirect expropriation); (ii) breach of Article 4(3) (direct expropriation) and (iii) breach of

Article 2(1) (fair and equitable treatment), whereas the Award states, at sub-paragraph (1) of the Decision, that Respondent has breached Article 4(1) and 4 (2) of the BIT (indirect expropriation) and, at its subparagraph (2), it fails to rule on the other two reasons alleged by Claimants through the following formula: “The Tribunal makes no findings as to the claimed breaches by Respondent of Arts. 4(3) and 2(1), *as any such breaches would be consumed by the finding under (1).*”(Emphasis added.) My general conclusion, as already mentioned in paragraph 363, is that Respondent has not breached the BIT on account of any of the three reasons alleged by Claimants.

418. It is thus confirmed that the compensation requested by Claimants is doubly disproportionate, which suggests that the implied acknowledgment that Mr. Dapena’s expert assessment on whose expert report Respondent has relied on to allege that for the *qua non* purposes of a potential reparation the amount was not in excess of USD 13 million was, all in all, more accurate than that endorsed by Claimants and their expert, Mr. Rosen on the question of *determining the amount of compensation claimed by Claimants*. In fact, the compensation awarded by the majority Award is much closer to the *no more than 13 million* of Respondent and its expert than to the *no less than 51 million* of Claimants and their expert. And it should be even closer to the 13 million if the majority of this Arbitral Tribunal had adjusted more its valuation to the provisions set forth by the applicable rules of public international law on *injury* assessment, as well as to the higher relative evidentiary value of the evidence produced in such regard by Respondent and its expert, than to the elements produced on the matter by Claimants and their expert.
419. The legally more relevant questions for determining the alleged adverse effect (lost profits) suffered by Claimants’ investment following revocation are considered by the majority Award in paragraphs 530 to 543 under the title “The Relevant Cash Flow.” The assessment of such effect or injury through the “discounted cash flow” (DCF) method, implies the weighting of different risk and probability elements and thus requires accuracy in its application.
420. The majority adopts as the basis of its own analysis conclusions of Mr. Rosen’s expert report which lack accuracy because of its use as evidence (of several decisive questions) mere requested instructions given to the expert by Claimants for the purposes of the instant case, or non-corroborated spreadsheets of an ENJASA run by Claimants. The majority fails to take into account objective evidence, that being duly

audited financial statements or balance sheets, used by Mr. Dapena, the latest of which pertains to the year 2012, or the logical considerations based on historical information provided to the Arbitral Tribunal by the addition of those financial statements or balance sheets with respect to the profits obtained during thirteen years by Claimants, for their investment in ENJASA through L&E.

421. The analysis the majority Award makes at the paragraphs mentioned hereinabove assumes Claimants' unproven overstatements on their "lost profits" - by intermediation of Mr. Rosen's expert report - for the purpose of reaching the amount of USD 21,160,000 awarded thereto as compensation by any such Award, with Claimants having failed to prove that ENJASA's cash flows on the valuation date, *i.e.*, 13 August 2013, warrant any such amount. Just one example of this behavior by the majority suffices to illustrate what we say. Paragraph 534 of the majority Award that qualifies "The real difference between the cash flow analysis of both experts starts in the year 2014" with respect to income originating in slot machines managed by Video Drome within the framework of its Joint Venture decides, in paragraph 535, the question with these words: "For this reason, the Tribunal is not convinced that the basis for Mr. Rosen's projections for the year 2013 is defective and would lead to inappropriate results." It is with this statement that the majority Award dismisses Mr. Dapena's accurate criticism that Mr. Rosen's projections at issue were unacceptable because, on the valuation date, cash flows originating in the aforementioned slot machines were ENJASA's "uncertain" flows, given that on the valuation date they were Video Drome's cash flows and the relevant agreement of that company with ENJASA was still in force on such date.
422. In any event, the decision to include or exclude the aforementioned cash flows is an issue of legal nature and Messrs. Dapena and Rosen did not testify as legal experts. It shall, thus, be resolved in accordance with the applicable relevant provisions of international law that reject with no palliative whatsoever, as contrary to international law, that a claimant can use uncertain, speculative, or remote arguments or elements as Claimants and their expert Mr. Rosen have done in this arbitration and which has been endorsed by the majority Award. The Iran-United States Claims Tribunal unequivocally stated in 1987 that "(o)ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damages can be awarded" (*Amoco International v. Iran*, Partial Award, 14 July 1987,

para. 238.) It is on the basis of the provisions set forth by the applicable international law that I reject the majority Award decisions of adding to ENJASA's relevant cash flows: (i) the above-mentioned Video Drome's cash flows for being speculative and uncertain on the valuation date; and (ii) Cachi Valle's cash flows, added as well, for being remote with respect to the sanction revoking ENJASA's License.

423. Arbitration Tribunals in investment matters share the tenet stated by the Iran-United States Claims Tribunal quoted *supra*, since they have themselves stated in many instances, in their awards, the same principle, as evidenced by the following quotes:

“Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent” (*Gemplus v. Mexico*, Award 16 June 2010, para. 12.56;)

“damages cannot be speculative or uncertain” (*Khan Resources v. Mongolia*, Award, 2 March 2015, para. 375;)

“(w)hat must be proven is both the existence of an injury to the claimant and that particular injury is the sufficiently proximate consequence of the specific breach” (*Pey Casado v. Chile (II)*, Award, 13 September 2016, para. 2118.)

424. ENJASA's earnings projection for the purpose of determining the quantum of lost profits Claimants allege to have suffered through the aforementioned discounted cash flow method have also been unduly increased by the majority Award - in contradiction with the applicable rules of international law - for the legal effect of the two following factors: (i) an unreasonable definition of the “discount rate used,”; and (ii) the silence on “Claimants' contribution to the injury” they allege to have suffered due to the revocation of the License. This last factor is considered *infra* in paragraphs 439 to 446, but the first is to be examined in this context. It is worth pointing out that to the extent the Parties and their experts have failed to pronounce themselves, in whole or in part on such factors, I consider them under the *jura novit curia* defined by the PCIJ in the *Lotus* case as follows:

“The *jura novit curia* principle means that, in order to decide that the parties' conclusions are founded on law, the Court shall not solely rely on the parties' allegations regarding the applicable law” (*PCIJ, Series A, No. 10*, p. 31) (Translation of the French original by me).

425. For consideration of the first of those factors it is convenient to bear in mind that, in accordance with international law, when the financial assessment of the injury caused by the internationally wrongful act consists in “lost profits”, as in the instant case, any such assessment can be actually made on the basis of such profit, but only *insofar as it is established* (Article 36, paragraph 2, of the ILC). An international tribunal shall thus confirm to what extent there has been “lost profits” before determining the quantum of the corresponding compensation. Besides, when the subsequent financial assessment of the “lost profits established” is conducted through a method that implies different elements of risk and probability, as the “discounted cash flow” used by the majority Award, the tribunal shall exercise extreme caution, since, as the ILC warns in paragraph 26 of the commentary to Article 36:

“Difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (*e.g.* discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.”

426. The majority has failed to act with sufficient caution since the Award uses an inappropriate update or discount rate. Any such rate reflects that when ENJASA’s License was revoked there were still seventeen years of effectiveness of the License. This temporary element is correct, but it is not the only factor that shall be taken into consideration with respect to the fixing of any such rate. There was also the possibility to terminate the License at any time, before expiration, by way of revocation decided by ENREJA pursuant to Provincial Law No. 7020 or by extinction and/or automatic cancellation of the License by operation of law on the grounds laid down in Article 6 of the License Agreement. Accordingly, it is not correct to use in the calculation of any such rate only the temporary element of the aforementioned seventeen years of effectiveness the License still had. In any such calculation, besides the company’s debts, the risk that the License fail to reach its term as a result of early revocation, cancellation or extinction shall also be taken into account.

427. In other words, to the projection of ENJASA’s profit or income probabilities during the aforementioned seventeen years, the debt and also the projection of losses resulting from the quantification of the above-mentioned early revocation, cancellation or

extinction risk shall be subtracted, what the majority Award has failed to do. It is not acceptable to project possible income and exclude possible losses. The future income projection of an entitlement of revocable nature or subject to the possibility of cancellation or extinction before expiration of its effectiveness, as it occurred with ENJASA's License, cannot be the same as that of an entitlement which is not subject to any such conditions.

428. The ILC in its commentary to Article 36 (Compensation) distinguishes “three categories of loss of profits.” The third category precisely relates to claims for loss of profits in the context of concessions and other contractually protected interests, highlighting the incidence in the matter of contractual provisions and of other pertinent limitations:

“31) ... Again, in such cases, lost future income has sometimes been awarded. In the case of contracts, it is the future income stream which is compensated, up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State, or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

32) In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest... Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected (income) figures.”

429. Apart from the compensation of USD 21,160,000 as principal sum mentioned *supra*, the majority Award adds at paragraph 610 (3) that Respondent “(is liable) [to pay] interest at a rate of 4 % per annum compounded annually from 13 August 2013 until full payment thereof” on such amount of USD 21,160,000. At paragraphs 36 to 39 of this Opinion, I have already explained that the rule of customary international law on responsibility of States for internationally wrongful acts dealing with “interest” awards is codified in Article 38 of the ILC Articles.
430. Article 38 provides that interest shall be payable only “when necessary in order to ensure full reparation” of the injury, since international law on reparation of the injury makes a clear distinction between the “principal sum” of compensation and the “interest” award admitted. Thus, the first thing to be done by an international arbitral tribunal in order to award interest is to verify whether it is necessary to ensure full

reparation of the injury caused by the internationally wrongful act in question and, if so, duly state the reasons in the award. The payment of interest may not be presumed, which is why awarding interest must be reasoned, because, should there be no need to pay interest in order to ensure full reparation of the injury, an international arbitral tribunal is not empowered to make such an award. As the ILC relevantly states at paragraph (1) of its commentary to Article 38, “[i]nterest is not an autonomous form of reparation” and “nor is it a necessary part of compensation in every case.” Consequently, it is neither compensatory nor, of course, punitive interest. Nor is it a way of using the power to award interest as permitted by Article 38 as a disguised means of awarding an additional “principal sum” not proved by claimant.

431. The reasons stated in the majority Award do not provide a satisfactory explanation of why, *in casu*, interest should be added to the compensation awarded for full reparation of the injury proved to be ensured. In other words, the reasons do not clearly explain why it is necessary to award high interest. Moreover, when the principal sum awarded to Claimants has been calculated in view of their “loss of profits” as investors, it is essential to clarify (as stated at paragraph 32 of the ILC commentary to Article 36 on Compensation) whether compensation for loss of profits and the interest award do not give rise to double recovery, given that, as per the commentary, the profit-earning capital cannot be simultaneously earning interest and generating profits.
432. What is absolutely impossible to explain in light of the “applicable law” is that the interest awarded by the majority Award is “compound interest,” since, under international law, such interest is inadmissible, as confirmed by international tribunals’ refusal to award that kind of interest. This is also confirmed by paragraph (8) of the ILC commentary to Article 38 (Interest) whereby “[t]he general view of courts and tribunals” has been against the award of “compound interest.” Judicial and arbitral institutions, such as the PCIJ, the ICJ or the Iran-US Claims Tribunal, have consistently denied claims for “compound interest.”
433. In such regard, it is worth recalling once again that, as mandated by the Argentina-Austria BIT, this Arbitral Tribunal has a duty to apply to reparation of the injury (wrongly verified by the majority) the relevant rules of public international law in force and effect, which are the codified customary rules on “compensation” (Article 36) and “interest” (Article 38) adopted by the ILC in 2001. At paragraph (9) of the commentary

to Article 38, the ILC states that, “given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.” If an injured State does not have such entitlement under customary international law, and the Argentina-Austria BIT contains no provision repealing that customary rule in favor of its respective national private investors, nor can these investors have an entitlement to “compound interest” being awarded by this Arbitral Tribunal.

434. In ICSID arbitration practice, tribunals have sometimes chosen to award “simple interest” (for example, in *CMS Gas Transmission v. Argentina*, 2005), while, in other cases, they have opted to award “compound interest” (for example, in *MTD Equity v. Chile*, 2004). I ignore the reasons why “compound interest” was awarded in these latter cases, and I do not know why the “compound interest” awarded in such cases was based on a rule of law that tribunals were bound to apply or whether such interest was awarded at the tribunals’ discretion. In any case, the award of “compound interest” by ICSID tribunals has not been accompanied, in general, by the proper reasoning that would be expected, given the denial of that kind of interest under general international law.
435. The citation in the majority Award of the tribunal in *Gemplus v. Mexico* is one of the few that explain the award of “compound interest,” but, of course, has no authority to modify the international law codified by the ILC in Article 38. As to the content of the passage cited, I opine that the citation cannot be more wrong when referring to the “practice” of international investment tribunals as “jurisprudence” and attributing this so-called “jurisprudence” the power to repeal the international law in force that this Arbitral Tribunal has a duty to apply to the assessment of the “interest” that it is entitled to award pursuant to Article 8 (6) of the Argentina-Austria BIT.
436. In the present case, there is absolutely no doubt that the Parties totally disagree on the issue of “compound interest.” Claimants requested it, but Respondent requested the Arbitral Tribunal that, “[i]nterest, if any, should be calculated as simple interest and at a short-term, risk-free rate” (paragraphs 350-356 of its PHB). Nor do the Parties agree on the dispute liable to disregard the rule of general international law denying “compound interest.” Therefore, the Arbitral Tribunal’s decision to award “compound interest” is supported neither by applicable international law, nor by the Argentina-Austria BIT or the disputing Parties’ agreement. Nor are we facing one of those “special

circumstances” which, according to the ILC, “*justify some element of compounding as an aspect of full reparation*” (paragraph (9) of the ILC commentary to Article 38).

437. The “compound interest” awarded by the majority Award applies to the period both pre- and post-Award and accrues as from the date on which Resolution No. 240/13 revoking the License was adopted, i.e., 13 August 2013. Such date ignores the fact that, between that date and the date on which Resolution No. 315/13 was adopted, ENJASA continued exploiting games of chance in the Province of Salta as usual, and, thus, the profits made by controlling Claimants during the period elapsed between the dates of both Resolutions do not seem to have been affected, subject to evidence to the contrary. This anomaly may give rise to double recovery. In addition, the interest rate of 4% and the “annual computation” of the compound interest awarded by the majority Award are excessive in order to ensure full reparation in this case. It is wrong to use an interest rate that includes a risk premium so as to discount the amount awarded to Claimants by the majority Award, because the amount awarded as compensation for the injury is a certain and specific sum of money, a risk-free asset, and, thus, should be discounted by means of a short-term, risk-free rate that only makes up for the *time value of money*, which, as usual, is done through the rate of return of one-year U.S. Treasury bonds. What the majority Award does is to apply not only the “expected inflation premium,” but also a “risk premium,” to a “risk-free asset.” This decision adopted by the majority Award distorts the limited function of interest awards that is to ensure full reparation under the international law on responsibility of States for internationally wrongful acts.
438. In sum, neither “compound interest” nor its application in the majority Award are based on applicable international law. Therefore, it is neither lawful nor fair for the majority Award to order Respondent to pay that kind of interest, or for both pre- and post-Award interest to accrue as from 13 August 2013. In relation to the former, before awarding interest of any kind, it is also vital to determine whether they are warranted in light of certain considerations of fairness, as well as the following established facts: (i) Claimants had failed to exhaust Respondent’s local court remedies in connection with the decision to revoke the License when instituting this ICSID arbitration; (ii) ENJASA continued pursuing its business activities as usual under Claimants’ control until Resolution No. 315/13 was adopted; (iii) Respondent is not responsible for the time elapsed in the arbitral proceeding between Claimants’ submission of their Request for Arbitration before ICSID and both Parties’ submission of their Post-Hearing Briefs (24

January 2020), as the proceeding was conducted as determined by the Arbitral Tribunal subject to the agreement of the Parties and/or prior consultation with them; and (iv) Respondent is not at all responsible for the fact that the Arbitral Tribunal has needed around a year and a half as from the date of submission of Post-Hearing Briefs to prepare the Award.

#### **PART V: THE SILENCE IN THE MAJORITY AWARD ON CLAIMANTS' CONTRIBUTION TO THE INJURY ALLEGED THEREBY**

439. The Award incurs yet another unacceptable subjectivity as to the determination of *quantum*. Once again, the victim is “applicable law.” I refer to the silence in the majority Award on Claimants’ contribution to the injury that they allege to have suffered as a consequence of the revocation of ENJASA’s License.
440. It is inadmissible to invoke or apply the principle of the duty to make full reparation for the injury caused by the commission of an internationally wrongful act (laid down by the PCIJ in the case concerning the *Factory at Chorzów*) without taking into consideration the claimant’s prospective contribution to the injury, since the respondent liable for the internationally wrongful act in question only has a duty to make reparation for the injuries actually caused thereby. The case-law of the ICJ so confirmed both before the ILC Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (for example, in *Gabcikovo-Nagymaros*) and afterwards (for example, in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area with Costa Rica*.)
441. The text of Article 39 (Contribution to the injury) of the ILC Articles cannot be clearer:

*“In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”* (Emphasis added.)

The commentary to Article 39 specifies, *inter alia*, in relation to such provision, that: (i) its focus is on situations which in national law systems are referred to as “contributory negligence”, “comparative fault”, “*faute de la victime*”, etc. (paragraph 1); (ii) this is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act, as well as consistent with fairness (paragraph 2); (iii) only those actions or omissions which can be considered as willful or negligent are taken into account, even though the willful or

negligent action or omission has not reached the level of being serious or gross (paragraph 5); (iv) the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case (*ibid*); and (v) the phrase “account shall be taken” under Article 38 indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation. .

442. Once the said Articles on Responsibility of States for Internationally Wrongful Acts were adopted by the ILC in 2001 and endorsed by the General Assembly of the United Nations in the same year, international investment arbitration tribunals have stated that the provision of Article 39 is declaratory of customary international law, and that, in determining reparation, they have reduced the amount of compensation by applying a percentage calculated on the basis of the role played by the claimant investor in the generation of the damage or injury alleged thereby. The awards cited as examples include, *inter alia*, the following:

“BITs are not an insurance against business risks and the Tribunal considers that Claimants should bear the consequences of their own actions as experienced businessmen” (*MTD Equity v. Chile*, Award, 23 May 2004, para. 178);

“The Tribunal agrees that an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility” (*Occidental Petroleum v. Ecuador*, Award, 5 October 2012, para. 678);

“Art. 39 ILC requires that the Claimants’ conduct be taken into account in determining compensation. Indeed, in investment cases, Tribunals have reduced damages by a percentage reflecting the investor’s role in the events leading to a loss” (*Anatoli Stati v. Kazakhstan*, Award, 19 December 2013, para. 1331);

“(A)n award of damages may be reduced if the victim of the wrongful act of the respective State also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility ... Having considered and weighed all the arguments which the Parties have presented ...the Tribunal ... finds that, as a result of the material and significant misconduct by Claimants and by Yukos (which they controlled), Claimants have contributed to ... the prejudice which they suffered as a result of Respondent’s destruction of Yukos” (*Yukos v. Russia*, Award, 18 July 2014, paras. 1633 and 1637);

“(T)he general approach taken in all the decisions, whether treated as causation, contributory fault (based on wilful or negligent act or omission) or unclear hands, is materially the same, deriving from a consistent line of international legal materials. The Tribunal decides to apply that general approach in this case. As further explained below, it decides that the Claimant’s injury was caused both by the Respondent’s unlawful expropriation and also by the Claimant’s own contributory negligent acts and omissions and unclear hands. Given that the Tribunal draws no distinction between these different concepts for this case, it prefers to refer only to Article 39 of the ILC Articles” (*Copper Mesa v. Ecuador*, Award, 15 March 2016, para. 6.97).

443. Reductions in the amount of compensation evidently depend on the higher or lower impact that the claimant investor’s willful or negligent actions or omissions have had on the injury caused in any given case, reaching the point of being incredibly significant. For example, in *MTD Equity v. Chile*, the reduction in the amount of compensation on account of the investor’s contribution to the injury was approximately 50% and, in *Yukos v. Russia*, around 25%.
444. Given that the majority Award calculates the value of the injury suffered by 60% of Claimants’ shares in L&E as a consequence of the revocation of ENJASA’s License in an aggregate amount of USD 21,660,000 (paragraph 565 of the Award), CAI’s and CAIH’s contribution to the injury assessed by an expert appointed by the Arbitral Tribunal must be subtracted from such figure so as to adjust the majority’s conclusion to the provision of Article 39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.
445. In the present case, there is absolutely no doubt that, by means of their willful or negligent actions or omissions, Claimants contributed to the injury alleged thereby. They controlled, managed, ran and administered ENJASA when ENREJA imposed most of the sanctions in response to the company’s serious and repeated violations or breaches of its obligations as Licensee under Article 5 of Provincial Law No. 7020. The 21 sanctioning Resolutions prior to ENREJA’s Resolution No. 240/13 have been established, and ENJASA, which was controlled by Claimants (except apparently in one of those cases), admitted to the commission of such violations or breaches, as it failed to object thereto, either before administrative tribunals or courts of justice. Despite ENREJA’s warnings, the violations or breaches continued, which led ENREJA to revoke the License as a sanction.

446. Claimants are responsible for such “inveterate recidivism,” because, as ENJASA’s managers, controllers, and administrators, they contributed to the injury allegedly caused thereto by the revocation of the License. Furthermore, Claimants also contributed to increasing the injury that they allege to have suffered thanks to the conduct they assumed after Resolution No. 240/13. In accordance with the witness statements of Messrs. Tucek and Schreiner, in the conversations held during the weeks following the revocation of ENJASA’s License, provincial authorities orally suggested that they keep Salta and Boulevard Casinos, but they rejected the proposal. Once Resolution No. 315/13 dismissed the recourse for reconsideration of the revocation sanction, Claimants, as proved by documentary evidence, had the administrative opportunity to participate in the “transition plan,” which would have enabled them to obtain the exploitation of one or more new licenses, but declined the invitation and, thus, the mitigation of the injury alleged in this ICSID arbitration. In my opinion, the expert assessment of Claimants’ contribution to the injury that they allege to have suffered should include their willful or negligent actions or omissions both before (as relevant) and after Resolutions Nos. 240/13 and 315/13.

#### **PART VI: THE DECISION IN THE MAJORITY AWARD ON THE COSTS OF THE ARBITRATION**

447. I reject the majority decision on costs which, in the case-specific circumstances, deems inappropriate and contrary to elementary considerations of fairness. I consider that each Party should bear its own expenses and that common expenses be equally shared between both Parties. With regard to the addition of “interest” on arbitration costs, as the formula adopted by the majority does, I think it is outrageous and completely inapposite, as well as contrary to international law. Article 61 (2) of the ICSID Convention, which is cited, makes no reference whatsoever to interest awards. As far as I am concerned, no one has even mentioned or proposed the award of interest in the decision on how and by whom expenses shall be paid in any of the ICSID and PCA investment arbitrations in which I have participated as an arbitrator.

448. In my view, this ICSID Arbitral Tribunal has the power to award simple interest on “any principal amount due” in order to ensure full reparation of the injury caused by an internationally wrongful act, pursuant to ILC Article 38. But it does not have the power to award interest, of whichever kind and method of calculation, on the amount(s) determined in “the decision on how and by whom [arbitration] expenses shall be paid,”

as the majority does at paragraph (4) of this Award in its paragraph 607. This interest is not related to the “principal amount due” by Respondent, but to the enforcement of this Award, which is an issue subject to the national system of the country where the Arbitral Tribunal is sitting.

449. Both the Decision on Jurisdiction and this Award on the merits are based on majority decisions which ignore the “law applicable” to the present dispute, as defined in the BIT and the ICSID Convention. The criterion of “prevalence” of one party over the other does not apply in light of the principle of procedural good faith governing international arbitration. Such Decision and this Award are not based on rules of law of any of the three systems that form the law applicable to the present dispute, namely: (i) Argentine law; (ii) the Argentina-Austria BIT; and (iii) public international law. Applicable law is replaced by mere extreme and subjective interpretations of academic criteria lacking normativity, such as those of “sole effect” and “*strictu sensu* proportionality”, which are not even mentioned in the relevant BIT or the ICSID Convention.
450. This majority Award is a novelty among the countless investment awards cited by Claimants in their written and oral arguments, none of which resemble the circumstances of fact and of law of the instant case. And it is a negative novelty so as to maintain minimum legal certainty in the relationships between foreign investors and host States of investments. The fact that an ICSID arbitral tribunal assumes the role of a court of appeals and modifies a final administrative decision, adopted by the competent Regulatory Agency and Enforcement Authority of the host State, when the domestic law of such State is the law applicable to the settlement of the present dispute as mandated by the BIT itself, is undoubtedly an unacceptable attempt against the fundamental legal certainty that is to govern the relationships between foreign private investors and host States.
451. The decision on costs in the majority Award aggravates that effect by allowing a foreign investor controlling a company on which a sanction was imposed for failing to comply with its obligations as Licensee on the prevention of money laundering to obtain a declaration of unlawfulness of the relevant sanction and compensation for the adverse effects of the sanction on the investment made by such investor, by resorting to an ICSID arbitration, bearing no arbitration costs whatsoever, i.e., free of charge.

452. The message sent by this majority Award to those foreign investors cannot be more disrupting: (i) do not worry about the privatized company in which you have invested repeatedly violating its legal and/or contractual obligations as licensee or concessionaire; (ii) an international investment tribunal will compensate you generously for the adverse effects that the sanctions imposed on the company on account of its breaches may have on your investment; (iii) moreover, it will do so regardless of the provisions of the BIT on the law applicable to the settlement of disputes between investors and host States; (iv) nor will it take into account the fact that you controlled, managed, ran and administered the company when it violated the rules giving rise to the sanction; and (v) or the fact that, under international investment law, the business risk is to be borne by the investor/businessperson.

**PART VII: THE REFERENCES OF THE MAJORITY AWARD TO THE PRESENT DISSENTING OPINION**

453. The majority Award refers in some of its footnotes to specific issues addressed in this Dissenting Opinion. Fourteen of those footnotes refer to issues relating to liability for indirect expropriation, one to liability for direct expropriation, five to compensation, and one to arbitration costs. The majority of those references are accompanied by comments or innuendo that I reject in their entirety for being all of them contrary to the “applicable law” to the present dispute defined in Article 8(6) of the Argentina-Austria BIT, as has already been set out in detail, in each relevant context, throughout the present Opinion. Therefore, I do not consider it necessary to add anything to what has already been said in response to the comments or innuendo of the majority in the referred footnotes.

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Dr. Santiago Torres Bernárdez  
Arbitrator

Date: 25 October 2021