Individual Opinion of Henri Alvarez
(pursuant to Article 48(4), ICSID Convention)

I. INTRODUCTION

1. Unfortunately, I find myself in disagreement with my esteemed colleagues with respect to a number of points. While I agree with a number of the conclusions in the Majority Decision and recognize the desirability of unanimity, I am compelled to write this separate, dissenting opinion to address a number of important, basic points.

2. The particular investments at issue in this arbitration are those made by Total in Argentina. This arbitration is, in essence, three large arbitrations combined. Total made investments in companies that explored for and produced hydrocarbons; that generated power; and that transported natural gas in Argentina. Total has been an investor in Argentina's exploration and production sector since 1978. Total's investments in gas transportation and power generation came later – in 2000 and 2001, respectively.[1]

3. The parties to this arbitration agree that Argentina has had a turbulent economic history. In the 1970s and again in the late 1980s, the Argentine economy was plagued by hyperinflation and economic crises and it was difficult for Argentina to attract foreign investment to assist in the development of its infrastructure. By the late 1980s, Argentina's power generation sector was in a state of crisis. Power shortages were common and the system required an overhaul and significant investment to function. In order to address these problems and attract foreign investment, Argentina made a number of changes to its laws. The basic instruments governing Argentina's economic reforms were Law 23,696 on the Reform of the State of 1989, Law No. 23,928 on Currency Convertibility of 1991 and Decree No. 2128/91 pegging the value of the Argentine peso to the US dollar. Further, specific instruments were enacted to govern the privatization of a number of industries and the provision of certain public services. Relevant to this arbitration are the further measures related to the gas transportation sector, the exploration

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[1] In the gas transportation sector, Total entered into a share purchase agreement with the TransCanada Group on 30 May 2000 for its shares of Gasinvest; Total's indirect purchase of 19.23% of TGN closed on 23 January 2001. In the power generation sector, Total purchased the shares of Central Puerto and the shares of HPDA from Gener in July and September 2001, respectively.

and production of the hydrocarbons sector and the power generation sector, each of which has been discussed in detail in the Majority Decision.

4. In order to induce foreign investors to invest hundreds of millions of dollars on infrastructure in Argentina, Argentina had to create an investment environment that was stable enough to justify the associated risks related to long-term investment. It accomplished this in a number of ways. In relation to natural gas, through the Gas Law and the Gas Decree, Argentina established ENARGAS,[2] a regulator charged with maintaining the economic equilibrium: setting tariffs that would be sufficient to cover all reasonable costs of providing the service, taxes, amortization and a reasonable rate of return while protecting consumer rights through access to reasonably priced natural gas. Tariff reviews were to be conducted on a regular basis and both licensees and consumers were able to require ENARGAS to carry out an extraordinary review in the event that there were unforeseen circumstances that justified modifications to the tariff. Under the Gas Law, the Consumer Gas Tariff comprised the well-head gas price represented by a reference price; the gas transportation tariff; and the gas distribution tariff. Simplistically, the reference price is the portion that the gas producer receives; the gas transportation tariff is the portion that the gas transportation company receives; and the gas distribution tariff is the portion that the gas distributor receives. The gas distributor collected the Consumer Gas Tariff from consumers. The distributor would negotiate with the producers to establish the well-head gas price, which ENARGAS was supposed to pass through to consumers as part of the overall tariff.

5. In the power generation sector, the system was privatized and designed to encourage investment by allowing the market to set electricity pricing, which assured recovery of the system's economic cost and rewarded efficiency by promising a uniform price in the spot market for all producers as well as free negotiation of term contracts. The Electricity Law, the Electricity Decree and related decrees set up the system and the wholesale market was regulated by CAMMESA.

6. In the exploration and production sector, Argentina converted existing long-term contracts between the State-owned energy company, YPF, and Total's consortium of foreign

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[2] Unless otherwise noted, capitalized terms in this individual opinion have the same meaning as in the Majority Decision.

investors into a concession system in which investors had the right to freely dispose of the hydrocarbons that they produced at deregulated prices. YPF was then privatized. The effect of deregulation was to allow holders of production concessions to own the hydrocarbons that they extracted and to dispose of those hydrocarbons either domestically or to export them at prices they could freely negotiate.

7. Thus, in the early 1990s, Argentina privatized part or all of a number of its State-owned energy companies and created a legal framework that was supportive of foreign investment. Argentina recognized that foreign investors were the only ones with sufficient operational experience and access to financial markets to fund the necessary long-term investments required to upgrade and modernize the country's energy infrastructure.[3] It also passed laws aimed at restructuring its economy and curbing inflation (the Convertibility Law). Argentina also entered into a number of bilateral investment treaties to signal its commitment to the international community. The legislative framework set up for each sector (gas transportation, power generation and exploration and production of hydrocarbons) was designed to allow markets to react to economic changes without the need to make *ad hoc* changes, thus signalling a shift from the old regime characterized by political interference from the State. This legal framework operated successfully for almost a decade without any fundamental changes by the Argentine government.

8. In Argentina, as in many jurisdictions, activities in the energy sector are highly regulated by the State. There has been a transition from State monopolies to privatized energy companies over the past three decades, as described above. While there may be some rationale for a State entity to operate at a loss, the same rationale does not transfer to privately owned investors who are accountable to shareholders. The tension between attracting investment in an essential part of the economy that requires large, up-front investments that need to be recouped over a number of years from consumers and the desire to keep consumer tariffs at a reasonable level to encourage development results in heavy regulation. Argentina is no exception. There is no doubt that Argentina has the right to regulate its energy sector, or any other sector it chooses. This arbitration concerns the commitments, if any, that Argentina made to investors, in particular

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[3] See generally, Claimant's Memorial at paras. 21 – 25 and the sources cited there, including World Bank/FIEL Working Document No. 39 Workshop on "Private Investment Finance in Infrastructure Sectors", dated December 1993 at Exh. C-93(2).

Total, and whether Argentina's interventions in response to the economic crisis, which altered the various regimes it had established in order to induce investment, violated the legitimate expectations of investors who had relied on those commitments. If so, Argentina is liable to compensate those investors for losses that they suffered as a result of those violations.

9. In late 1999, Argentina's economy was in a recession. By late 2001, the economy was (again) in a state of crisis. However, at the time of this economic crisis, there was no energy crisis. That is, up to and until 2003, the Argentine market for natural gas was characterized by oversupply.[4] In order to deal with the economic crisis, Argentina passed emergency legislation and a number of implementing decrees and regulations. These general Measures had a very profound impact on investors in the energy sector. Argentina began to regulate what had been a free market system in order to control consumer prices. Total argues that these Measures violated its rights under the BIT.

10. I set out this basic background in order to provide context for this dissenting opinion. I do not disagree that the Measures passed by Argentina, and of which Total complains in this arbitration, were taken in the face of a grave economic crisis. I agree that Argentina was entitled to take any measures it thought appropriate to deal with that economic crisis. However, I believe that Argentina made commitments to foreign investors, including Total, which, if breached by measures of certain types causing damage to those investors, require compensation.

II. THE ARGENTINA – FRANCE BILATERAL INVESTMENT TREATY

11. In this arbitration, Total claims that Argentina breached a number of its obligations under the BIT. In particular, Total complains that the Measures breached Article 3 (duty to afford fair and equitable treatment), Article 5(1) (obligation to provide full protection and security), Article 5(2) (no expropriation or equivalent measures without full compensation) and Article 4 (duty to extend national and most favoured nation treatment). The Majority Decision has dealt with each of these obligations in turn. In general, I agree with the reasoning of the Tribunal with respect to the analysis of Articles 4, 5(1) and 5(2) of the BIT and, accordingly, agree that Argentina did not breach any of these treaty obligations in respect of Total's investments. However, I must

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[4] Transcript ("TR") (English) Day 3, 888:9 – 10; direct examination of Yves Grosjean, Transcript (English) Day 3, 888:11 – 22; CPHB at para. 678.

respectfully disagree with my colleagues on their interpretation and application of Article 3 of the BIT. It is this difference of opinion which compels me to dissent from the majority in the interpretation and application of the duty to afford fair and equitable treatment, as provided in Article 3 of the BIT.

12. Article 31(1) of the VCLT requires treaties to "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Article 31(2) of the VCLT confirms that "context" includes the text of the treaty, including its preamble.

13. The preamble to the BIT provides as follows:

> The Government of the French Republic and the Government of the Argentine Republic, hereinafter referred to as "the Contracting Parties",
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> Desiring to develop economic cooperation between the two States and to create favourable conditions for French investment in Argentina and Argentine investments in France,
>
> Convinced that the promotion and protection of such investments are likely to stimulate transfers of capital and technology between the two countries in the interest of their economic development,
>
> Have agreed on the following provisions: ...[5]

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[5] The French text provides as follows:

> *Le Gouvernement de la République française et le Gouvernement de la République Argentine ci-après dénommès << les Parties contractantes >>,*
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> *Désireux de renforcer la coopération économique entre les deux Etats et de créer des conditions favorables pour les investissements français en Argentine et argentins en France,*
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> *Persuadés que l'encouragement et la protection de ces investissements sont propres à stimuler les transferts de capitaux et de technologie entre les deux pays, dans l'intérêt de leur développement économique,*
>
> *Sont convenus des dispositions suivantes :*

The Spanish text provides as follows:

> *El Gobierno de la República Argentina y El Gobierno de la República Francesa, en adelante denominados "las Partes Contratantes",*
>
> *CON EL DESEO de intensificar la cooperación económica entre los dos Estados y de crear las condiciones favorables para las inversions francesas en la Argentina y las inversions argentinas en Francia.*
>
> *CONVENCIDOS que la promoción y la protección de estas inversions son propicias para estimular las transferencias de capital y de tecnología entre los dos países con vistas al desarrollo económico de ambos, HAN CONVENCIDO las disposiciones siguientes:*

14. The ordinary meaning of "promote" is to "help forward; encourage; support actively"[6] and not just to allow or permit. The Spanish text uses the same word as the English version "promoción". The French text of the BIT uses the word "encouragement", which has the same connotation. Argentina and France committed to both encourage and promote investment. Argentina and France also agreed "to create favourable conditions for French investment in Argentina". The BIT should be interpreted with this context in mind.

15. Article 3 of the BIT provides:

> Each Contracting Party shall undertake to accord in its territory and maritime zone just and equitable treatment, in accordance with the principles of international law, to the investments of investors of the other Party and to ensure that the exercise of the right so granted is not impeded either *de jure* or *de facto*.

16. The BIT, which Argentina signed, specifically provides for "just and equitable treatment" and not the "international minimum standard of treatment". The language that the State parties to the treaty specifically chose must be interpreted in light of the context of the treaty.

17. Other international tribunals have applied the fair and equitable treatment standard by determining whether, in all of the circumstances, the actions in question were fair and equitable or unfair and inequitable. This has been discussed as an objective standard.[7] Perhaps the most widely cited and accepted definition of the fair and equitable treatment standard is the following:

> The Arbitral Tribunal considers that [the fair and equitable treatment] provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its

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[6] *The Canadian Oxford Dictionary*, s.v. "promote". The definition in Spanish is similar: "iniciar o impulsar una cosa o un proceso, procurando su logro." See the definition in the Diccionario de la Real Academía Española.

[7] *Compañìa de Aguas del Aconquija S. A. and VivendiUniversal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award 20 August 2007 (English) ("*Vivendi II*") at para. 7.4.12; F.A. Mann, "British Treaties for the Promotion and Protection of Investments", (1981) 52 Brit. YB Int'l L. 241 at 244; *CMS Gas Transmission Company* v. *Argentine Republic* (English) ("*CMS*"), ICSID Case No. ARB/01/8, Award 12 May 2005 at para. 280 (the conclusion that the "fair and equitable treatment" standard was an objective one was not challenged by Argentina in its annulment application and the Tribunal's reasoning with respect to "fair and equitable treatment" was found by the Committee to be "adequately founded on the applicable law and the relevant facts", see *CMS* Annulment Decision 25 September 2007 at para. 85.

> investments, as well as the goals of the relevant policies and administrative practices and directives, to be able to plan its investment and comply with such regulations.[8]

18. Similarly, in interpreting the US-Argentina BIT, the *Azurix* tribunal said the following with respect to the meaning of "fair and equitable" with respect to that treaty:

> ...it follows from the ordinary meaning of the BIT that fair and equitable should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. The text of the BIT reflects a positive attitude towards investment with words such as "promote" and "stimulate". Furthermore, the parties to the BIT recognize the role that fair and equitable treatment plays in maintaining "a stable framework for investment and maximum effective use of economic resources."[9]

19. While I agree with the majority that decisions of other ICSID tribunals are not binding on this Tribunal, it would not be beneficial for the legitimacy of the investment treaty system for tribunals to reach inconsistent decisions based on similar facts without compelling analysis of why the differences exist and are justified. Not only have other tribunals found that the fair and equitable treatment standard should be objectively determined, I concur in their reasoning in this respect. Importing a subjective standard into the interpretation of "fair and equitable treatment", in my opinion, has the effect of incorporating a margin of appreciation approach that is not appropriate at the first stage of the analysis, which concerns whether a breach of the standard has occurred. Some consideration must be given to all of the circumstances, as those circumstances affect both the State and the investor. In my view, concluding that the Measures were justified to deal with the economic crisis without also giving adequate consideration to the profound impact those Measures had on investors in the context of the commitments and promises made to them does not fairly consider all of the circumstances. In my opinion, this approach by the majority amounts to a back door way of admitting an element of Argentina's necessity defence into the fair and equitable treatment analysis.[10] I wish to make it clear that I agree with the majority that Argentina failed to make out its necessity defence in this case either on the law or on the facts.

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[8] *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award 29 May 2003 ("*Tecmed*") at para. 154.

[9] *Azurix* v. *Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006 ("*Azurix*") at para. 360.

[10] While the Majority Decision rejects Argentina's defence of necessity at customary international law, I believe that the manner in which the majority's fair and equitable treatment analysis has been conducted has the effect of importing consideration of this defence into the assessment of whether the BIT has been breached. The margin of appreciation approach was not the subject of argument by the Parties.

III. THE NATURE OF THE PROMISES

20. With respect to its claims in the gas transportation and power generation sectors, Total relies on the existence of a detailed legislative framework, which set mechanisms for pricing that were designed to maintain the economic equilibrium of the system. In these sectors, there is no agreement concluded directly between Total and any Argentine State entity that sets out the promises at issue.

21. In the gas transportation sector, Total's investment, TGN, does have a license, which sets out a number of obligations owed to it by Argentina. Argentina says, however, that any promise made in the licence was to TGN, not Total. Argentina also argues that Total is unable to rely on the information memoranda circulated to potential investors at the time of privatization, as Total made its investment later, in a much different economic context. Finally, Argentina argues that a general, legislative framework is not a guarantee and that Total cannot argue that by changing the framework, Argentina violated its rights under the BIT.

22. The majority of the Tribunal accepts the first two arguments, finding that Total is not entitled to rely on the TGN License and that Total cannot invoke the promises made in the information memoranda.[11] The majority then goes on to characterize the remaining issue as whether it was legitimate for Total to expect "stability" of the legal framework.[12] I agree that Total cannot rely on either the TGN License or the information memoranda as promises made directly to it by Argentina. However, I disagree to the extent that the existence of the detailed license granted to TGN and documentation which clearly set out Argentina's intentions in privatizing the energy sector have not been considered as part of the relevant circumstances in determining Total's legitimate expectations at the time of its investment. The TGN License specifically provides that the government will not modify the basic rules without consultation with the Licensee or without adjusting the tariff if economic equilibrium is affected. Further, freezing of tariffs and price controls are prohibited.[13]

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[11] See Majority Decision at paras. 99 – 101.

[12] See Majority Decision at paras. 101 – 102.

[13] See Exh. C-53, TGN License, at sections 1, 9.1, 9.2, 9.5, 9.8 and 18.2.

23. The majority then goes on to an analysis of whether Total was entitled to "stability under a fair and equitable treatment clause".[14] I believe that this mischaracterizes Total's arguments. I do not understand Total to have argued that any change in the legislative framework would have been a breach of the obligation to provide fair and equitable treatment under the BIT. The majority acknowledges this when it says that "Total submits that it is not challenging the pesification of Argentina's economy as effected by the Emergency Law".[15] However, the majority then goes on to review the various specific promises alleged by Total to have been made by Argentina and to find that the calculation of tariffs in US dollars[16] and US PPI adjustments were not promises on which Total could rely.[17]

24. I do not consider this to be a "close case". Viewed objectively, the Measures taken by Argentina in response to its crisis had an unjust and inequitable effect on investors in the gas transportation sector of the economy. In the early 1990s, Argentina consciously decided to break from its turbulent economic past and to create a stable and welcoming environment for desperately needed foreign investment in its energy sector. In the gas transportation sector, Argentina promised investors economic equilibrium – tariffs sufficient to cover costs and to generate a reasonable rate of return. It constructed a regulatory system (the Gas Law and Gas Decree) that ensured this promise through regular tariff reviews, dollar calculated tariffs, tariffs adjusted semi-annually by the US PPI and no freezing of tariffs without the licensee's consent. Based on these promises, over a number of years, investors invested hundreds of millions of dollars in fixed assets in Argentina. The system operated successfully for almost a decade until

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[14] See Majority Decision at para. 122.

[15] See Majority Decision at para. 142. Note that when I use the terms "pesification" or "pesify" in this Individual Opinion, I am referring to the Measures contained in the Emergency Law through which all obligations existing on the date of the enactment of that law that were payable in dollars were converted into pesos (redenomination) at a fixed exchange rate (forced conversion at the artificial rate of one dollar to one peso subsequent to the delinking of the peso from the dollar).

[16] See Majority Decision at para. 180. Note that the majority finds that the right to tariffs in US dollars was linked to the Convertibility Law. This finding is contrary to most of the previous awards that have looked at this issue, which also consider the right to calculation of tariffs in U.S. dollars to exist independently, see for example *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.* v. *Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability 3 October 2006 ("*LG&E*") at paras. 133 – 134; *CMS*, supra note 7, at paras. 134 – 137, 160 – 161; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award 28 September 2007 ("*Sempra*") at paras. 141 - 151. I agree with the conclusion reached by these tribunals on this issue.

[17] See Majority Decision at para 145 et seq. Note that the majority's findings with respect to the US PPI adjustment and US dollar tariffs are inconsistent with the vast majority of the other ICSID cases which have considered these issues in the same factual context.

Argentina's reaction to the crisis at issue. The Measures did not tinker with this system; they totally and completely dismantled it.

25. Requiring Total to point to a specific "stabilization clause" or guarantee made directly to it in order for it to succeed in demonstrating that Argentina breached the obligation to treat it fairly and equitably is, in my respectful view, not the proper analysis for the determination of legitimate expectations. Argentina negotiated a treaty with the express purpose of creating "favourable conditions for French investment in Argentina". As evidenced by the modernization of the energy sector, Argentina was successful in creating this environment. These investments were meant to be long-term and the legislative and regulatory frameworks by their prospective nature were not meant to attract only initial investment in the system, but to encourage the ongoing modernization, expansion and efficiency of the energy infrastructure. The evidence clearly established that Total relied on this framework in making its decision to expand its investments in Argentina.

26. In my view, the question should then be whether, to use the words of the *Tecmed* tribunal, it was fair and equitable for Argentina to "affect the basic expectations that were taken into account by the foreign investor to make the investment" and whether Argentina acted "in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices and directives, to be able to plan its investment and comply with such regulations".[18] This approach was also adopted by the *Saluka* tribunal. The Tribunal in *Saluka* was also faced with a bilateral investment treaty which did not specifically refer to the stability of the host State's legal framework. In this context, the tribunal applied a balanced approach to the interpretation of the fair and equitable treatment standard in the bilateral investment treaty between The Netherlands and the Czech Republic and determined:

> "Seen in this light, the [FET] standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time

[18] *Tecmed*, supra note 8 at para. 154.

> of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable."[19]

27. The legal framework will consist of "legislation and treaties, of assurances contained in decrees, licences and similar executive assurances as well as in contractual undertakings. A reversal of assurances by the host state that have led to legitimate expectations will violate the principle of fair and equitable treatment."[20] I note that with respect to the gas transportation sector, the TGN License did contain a specific promise that the Government would not change the framework without the consent of the licensee. Total may not be able to rely on the license as a contractual or quasi-contractual promise made to it, but surely the existence of such a clear promise granted to the investment itself created a legitimate expectation on Total's part that Argentina would not totally and unilaterally dismantle the system.

28. Further, requiring a specific stabilization clause deprives the regulatory framework of all of the benefits that it was designed to create – Argentina's entire purpose was to create a stable regulatory environment that induced and promoted foreign investment so that it could benefit from access to US dollars for its infrastructure upgrades and the experience of foreign companies in modernizing systems to generate real benefits for the local economy through reliable service and competitive pricing.

29. The purpose of the BIT, outlined in the *Mensaje del Poder Ejecutivo* which accompanied the BIT for ratification by the Argentine Congress, was to maintain a stable environment which would mitigate a foreign investor's concerns relating to political risks:

> "The main objective of this type of agreement is to encourage genuine and productive investment and consequently to prevent certain acts which could impinge on the value of the investment.
>
> [...]
>
> To create a stable and satisfactory environment which mitigates the concerns of foreign investors with regard to non-commercial risks, in other words political risks, and to encourage the international movement of capital."[21]
>
> [Emphasis added.]

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[19] *Saluka Investments B.V. v. The Czech Republic*, Partial Award 17 March 2006 ("*Saluka*") at para. 301.

[20] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (New York: Oxford University Press, 2008) at p. 134.

[21] *Mensaje del Poder Ejecutivo al Congreso de la Nación* for Law 24,100/1992 (**Exhibit C-89**).

30. It is also interesting to note the *Mensaje del Poder Ejecutivo* with regard to other BITs entered into by Argentina. Although these statements do not directly concern the France-Argentina BIT at issue, they are nonetheless useful in ascertaining Argentina's general intentions as to the protection of foreign investments within its territory. In the context of the ratification of the BIT between Argentina and Italy, the Argentine *Poder Ejecutivo* stated the following:

> "It should be assumed that, in the real world, the only way to establish and maintain an adequate international stream of capital is by setting and keeping clear, balanced, equitable, and institutionalized rules which are appealing for investors and, at the same time, compatible with the laws of the host country.
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> Basically, foreign investors will no longer fear the instability of legal norms and economic policies, including the risk of a decrease in the value of their investments [...].
>
> [...]
> The risks covered by this agreement are non-commercial, or political risks, that is to say, those with no relation to the commercial aspects of the operation, and which stem from the political and legal framework in which the investment is carried out....."[22]

31. The *Poder Ejecutivo*'s statement at the time of the ratification of Argentina's BIT with the UK is to the same effect.[23]

32. As has been discussed, the France-Argentina BIT sets forth in its Preamble the importance of fostering the promotion and protection of foreign investments in the following terms: "[Translation] Convinced that the promotion and protection of such investments will be conducive to the stimulation of transfers of capital and technology between the two countries in the interest of their economic development".[24] Although the stability and predictability of the legal environment are not mentioned, tribunals faced with similar wording have nevertheless found that the principles of stability and predictability of the legal and business framework were inherent to the fair and equitable treatment standard.[25]

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[22] *Mensaje del Poder Ejecutivo al Congreso de la Nación* for Law 24,122/1992 (**Exhibit C-88**).

[23] *Mensaje del Poder Ejecutivo al Congreso de la Nación* for Law 24,184/1992 (**Exhibit C-87**).

[24] See para. 13, above and note 5.

[25] For instance, the Tecmed award, supra note 8, was based on the 1995 BIT between Spain and Mexico, which provided for fair and equitable treatment in the following terms:

33. As discussed above, despite the fact that the Mexico-Spain BIT made no reference to the stability of the legal environment, the *Tecmed* tribunal came to the conclusion that the basic expectations taken into account by the foreign investor included the rules and regulations that will govern its investment.[26]

34. The tribunal in *Tecmed* continued as follows:

> "If the above were not its intended scope, Article 4(1) of the Agreement would be deprived of any semantic content and practical utility of its own, which would surely be against the intention of the Contracting Parties upon executing and ratifying the Agreement since, by including this provision in the Agreement, the parties intended to strengthen and increase the security and trust of foreign investors that invest in the member States, thus maximizing the use of the economic resources of each Contracting Party by facilitating the economic contributions of their economic operators. This is the goal of such undertaking in light of the Agreement's preambular paragraphs which express the will and intention of the member States to '...intensify economic cooperation for the benefit of both countries...' and the resolve of the member States, within such framework, '...to create favourable conditions for investments made by each of the Contracting Parties in the territory of the other...'."[27]

35. The tribunal in *Saluka* was also faced with a bilateral investment treaty that did not specifically refer to the stability of the host State's legal framework. In this context, the tribunal applied a balanced approach to the interpretation of the fair and equitable treatment standard in the BIT between The Netherlands and the Czech Republic and determined:

> "Seen in this light, the [FET] standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An

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"Article 4(1): Each Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party."

[26] See para. 17, above, and *Tecmed*, supra note 8 at para. 154. This interpretation by the *Tecmed* Tribunal has been cited with approval by a number of Tribunals, for example in the following cases: *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award 27 August 2008 ("*Plama*") at para. 176; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award 6 February 2007 ("*Siemens*") at para. 299; *MTD Equity Sdn. Bhd. & MTD Chile S.A.* v. *Chile*, ICSID Case No. ARB/01/7, Award 25 May 2004 (*MTD*) at paras. 114-115; *Azurix*, supra note 9 at paras. 371-373; *Occidental v. Ecuador*, LCIA Case No. UN3467, Award 1 July 2004 ("*Occidental*") 12 ICSID Reports 59 at para. 185; *Duke Energy Electroquil Partners et al v. Ecuador*, ICSID Case No. ARB/04/19, Award 18 August 2008 at para. 340; *Saluka*, supra note 18 at para. 302; *LG&E*, supra note 15 at para. 127; *CMS*, supra note 7 at para. 279; *Enron* at para. 262; and *Sempra*, supra note 15 at para. 298.

[27] *Tecmed*, supra note 8 at para. 156. See also para. 167 *in fine*.

> investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable."[28] [Emphasis added]

36. The *BG Group v. Argentina* case was determined pursuant to the UK-Argentina BIT, which, like the France-Argentina BIT, does not mention the objective of maintaining a stable framework for investment either in its Preamble[29] or its fair and equitable treatment provision.[30] In spite of the wording of the UK-Argentina BIT, the tribunal found that "[t]he duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest"[31] and that Argentina had violated the legal stability and predictability inherent to the fair and equitable treatment standard.[32]

37. Thus, in my view, the fair and equitable treatment standard under the France-Argentina BIT does not differ significantly from the standard applied by tribunals in the context of other bilateral investment treaties and, in particular, under the US-Argentina BIT and UK-Argentina BIT. As I explain in detail below, I believe that by totally destroying the regulatory framework that existed at the time Total made its investment, Argentina breached its obligation to treat Total fairly and equitably.

38. The situation is similar with respect to the power generation sector. As has been described by the majority, in the early 1990s, Argentina revamped its power generation and distribution sector in order to attract desperately needed private investment. The new system was designed to respect free-market rules and to create a spot market with a uniform tariff based

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[28] *Saluka*, supra note 18 para. 301.

[29] Preamble of the UK-Argentina BIT: "The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina; Desiring to create favourable conditions for greater investment by investors of one State in the territory of the other State; Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States; Have agreed as follows".

[30] Article 2(2) of the UK-Argentina BIT: "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."

[31] *BG Group Plc. v. Argentina*, Final Award, 24 December 2007 ("*BG Group*") at para. 298.

[32] *Id.* at para. 307.

on the economic cost of the system. Argentina created a wholesale electricity market (the "MEM"). In late 1991, Argentina passed Law 24,065 (the "Electricity Law"), which established the roles of each of the market participants, the State and its regulatory agencies.[33] The system is described at length in the Majority Decision. To summarize, the spot price system was characterized by a uniform spot price paid to all dispatched producers based on the variable costs declared by the marginal producer (the highest cost dispatched generator); and a separate capacity payment and "risk of failure" payment, each fixed in US dollars, set by the Secretary of Energy and intended to encourage investment in the system; and generators were also free to negotiate sales contracts with other market participants on mutually agreed terms. The prices were set by market forces, cost-efficient producers were rewarded by larger margins and investment in the system was successfully encouraged. The term market allowed generators to sell the power they produced directly through contracts freely negotiated with other market participants. The Measures radically altered the operation of this detailed legislative framework and undermined the economic equilibrium upon which it was based and upon which Total relied when making its investments in this sector.

39. With respect to the exploration and production of hydrocarbons, the nature of the promises is different. Total does not rely on a general legislative framework, but rather specific instruments that were renegotiated as Argentina's hydrocarbons sector evolved over the three decade span of Total's investments in this sector. As will be discussed in detail below, Total and its consortium members had a detailed agreement with the Government, which was confirmed by legislative decree.

IV. THE MEASURES

40. The majority concludes that "the abolition of the convertibility of pesos assets, value and tariffs, that were under the convertibility regime interchangeable with their expression in dollars (the dollar being in free circulation in Argentina, accounts being freely available in dollars, etc.), was within the competence of Argentina and not barred by the BIT clauses invoked by Total."[34] With all due respect, I believe this misses the point entirely. I agree that Argentina, as a sovereign nation, has every right to change its laws in any way it sees fit. The BIT does not limit

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[33] See, for example, Ex. C-709(w).

[34] See paragraph 317 of the Majority Decision.

Argentina's sovereignty. Rather, its adoption reflects the exercise of Argentina's sovereignty. Argentina agreed to compensate investors when it acted in such a way as to deny investors fair and equitable treatment and that denial caused the investor to suffer damages. Total did not argue that Argentina did not have the competence to change its laws. Neither did Total argue that Argentina did not have the competence to abolish the convertibility of peso assets. Total did argue that all of Argentina's Measures, taken together, breached the duty to provide fair and equitable treatment to investors under the BIT. The majority finds that not only pesification generally, but also the pesification of tariffs required by legislation to be calculated in US dollars and adjusted in accordance with the US PPI, were not a breach of the BIT because pesification was a general measure and thus non-discriminatory.[35]

41. The pesification may have been carried out in a non-discriminatory way, but it did have a profound effect on businesses operating in Argentina. All private law contracts, which previously had prices or terms expressed in US dollars, were automatically converted to pesos. This redenomination, when coupled with the subsequent conversion of those currency amounts at a 1:1 ratio had the effect of instantly reducing the amounts received under those contracts by about two-thirds. Then, in the energy sector, tariffs so reduced were legislated to stay that way, as Argentina froze the tariffs at the newly converted rates. It is the pesification coupled with freezing that Total argues amounted to a breach of its rights under the BIT. These Measures were taken at the outset of the economic crisis. The majority has found that a breach of the fair and equitable treatment standard did not occur until after the expiry of the first renegotiation period imposed by Argentina. I agree that the failure to review the tariffs as promised clearly amounted to a breach of the fair and equitable treatment standard. However, for the reasons just described, I believe that the initial pesification and freezing of tariffs was, from the outset, a breach of the fair and equitable treatment standard and, accordingly, I would have found a breach

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[35] See paragraph 317 of the Majority Decision:

> "The Tribunal has also justified its conclusion why even tariffs specifically fixed in US dollars and periodic readjustments to be made based on a US price index (PPI) could be pesified in the circumstances without breaching the BIT. This is because of the serious reasons that forced Argentina to cut the peg of the peso with the dollar when the country was faced with a major economic, monetary and social crisis, entailing by the end of 2001 the loss of competitiveness, the capital flight, the loss of reserves, the de facto devaluation, etc. The Tribunal has found that the pesification affected all sectors of the economy and was carried out in a non discriminatory way."

as of 6 January 2002, the date of the Emergency Law. I think that it was legitimate for Total to expect that Argentina would adjust tariffs in accordance with the detailed legislative framework that existed for that purpose, either through regular or extraordinary tariff reviews and not to reduce the tariffs by two thirds and then freeze them indefinitely. I note that finding a breach of fair and equitable treatment at the time the Measures were taken is consistent with the vast majority of other tribunals that have considered the Measures and their impact on investors in the energy sector.[36]

42. I note that this disagreement impacts my opinion with respect to the finding of a breach of the standard of fair and equitable treatment in all three of the sectors in which Total maintains its claims: gas transportation, power generation and exploration and production. To the extent my reasoning is relevant, I will discuss it below in the context of each sector.

V. GAS TRANSPORTATION

43. The majority has found that Total was not treated unfairly or unjustly as a result of the general measures (pesification, forced conversion at 1:1 and the freezing of tariffs) in part because the measures were of general application and in part because it found that Argentina did not make specific promises to Total, as Total did not purchase its shares of TGN directly from Argentina. With all due respect to my colleagues, I cannot agree with these findings.

A. The Timing of the Investments

44. Whether or not Argentina breached the duty to afford fair and equitable treatment owed to Total depends on whether Total's legitimate expectations with respect to its investments were violated. The analysis of whether Total's expectations were legitimate must be carried out at the appropriate point in time, *i.e.*, at the time Total made its various investments.

45. Argentina says that the context in which Total made its investments in the gas transportation sector was very different from the context in which investments were made in the

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[36] *BG Group*, *CMS*, *Enron*, *LG&E* and *Sempra*, all of which dealt with investments in gas transportation. I note that only the tribunal in *National Grid*, a case which dealt with the power generation sector, found a breach of the fair and equitable treatment standard as of June 25, 2002 "when the Respondent required that companies such as the Claimant renounce to the legal remedies they may have recourse as a condition to re-negotiate the Concession." See *National Grid* at para. 180. I note that a number of these decisions have been reviewed and some annulled by ICSID annulment committees. None of the criticisms contained in the recent annulment committee decisions are relevant to the analysis on this point.

early 1990s at the time of the privatization pursuant to State Reform Law No. 23,696 of 1989. Argentina says that Total invested much later in a context which could not reasonably give rise to the expectations upon which Total says it relied in making its investments. Argentina goes so far as to argue that "[t]here is a 10-year distance and there exist huge differences between the facts stated by TOTAL's legal counsel and the real context of its investment. Nobody went to look for TOTAL for it to invest in Argentina. TOTAL took part in no *road shows* and did not invest in Argentina based on alleged promises."[37] Argentina says that by the time Total made its investments in both the gas transportation and power generation sectors, there existed a desperate policy to save the Argentine economy and the country's economic and social situation was in a "deep depression process". In this regard, Argentina emphasized that in January and July 2000, TGN and the other Licensees had entered into agreements with the Government suspending the US PPI Adjustment of tariffs; in August 2000, following the initiation of the claim by the National Ombudsman, the courts issued an injunction suspending US PPI adjustments pending the final ruling by the court; in October 2000, Law No. 25,344, *Emergencia Económica Financiera*, which, *inter alia*, permitted the State to terminate public sector contracts and to consolidate its debts, had been adopted.[38]

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[37] Argentina's Post-Hearing Brief ("RPHB"), unofficial English translation at para. 81.

[38] See RPHB, ¶¶68-86. ¶¶79-82 provide as follows:

> 79. But TOTAL fails to make clear that such context was not the context in which such company made its investment neither in oil, which began in the height of the last Argentine military dictatorship, nor in gas and electricity. Indeed, with respect to these last two cases: (a) instead of a "conscious policy of the Argentine Government to attract foreign investment", there existed a desperate policy to save the economy; (b) instead of a State Reform Law implementing a "massive privatization program", there was an Economic Emergency Law authorizing the intervention of administrative contracts; (c) instead of the recent signature of 39 BITs, there were two Agreements and a preliminary injunction with effects with respect to natural gas transportation and distribution licenses, and an investor (CMS) who resorted to the ICSID; and (d) instead of a recent currency pegged to the US dollar pursuant to the Convertibility Law as a measure against hyperinflation, there was a currency heading for a mega-devaluation, and an economic and social situation that was described in an emergency law as a "deep depression process".
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> 80. All this took place before, and was the context in which, TOTAL made the investments in gas and electricity. Curiously, TOTAL, later, would claim damages for another emergency law.
>
> 81. There is a 10-year distance and there exist huge differences between the facts stated by TOTAL's legal counsel and the real context of its investment. Nobody went to

46. Total says that it was properly entitled to rely on the commitments contained in the gas regulatory regime and the Electricity Law at the time it made its investments in the gas transportation and power generation sectors. The protection of investments under international law, and the BIT specifically, is not limited to investments made through the bidding processes immediately after privatizations but, rather, the protection carries over to the subsequent acquisition of those investments, the benefit of which continues to enure to Argentina. Total says that it was entitled to rely upon the stability of the legal and business framework in place at the time it invested in the gas regulatory framework in 2000 and that it could legitimately have expected that Argentina would apply the various provisions of the gas regulatory framework which had been put in place precisely to promote and protect investment from the effects of the economic and financial emergencies experienced by Argentina in the past. Total points to a number of other companies that made substantial investments in Argentina's privatized gas assets after the privatization process and says that, in light of the successful implementation and application of the gas regulatory framework over a period of eight years, it would have had greater expectations than those who invested at the time of privatization.[39]

47. Total also contests the suggestion made by Argentina that it invested in the midst of an economic crisis. Rather, Total says that it made its decision to invest when the economy was in a recessive cycle that had recuperated slightly. Further, Total says that it conducted appropriate due diligence and was aware of Argentina's history of economic instability. Total submits that as a long-term investor in the country, it was familiar with Argentina's history of economic instability and frequent devaluations as well as the cycles in capital intensive sectors like oil

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> look for TOTAL for it to invest in Argentina. TOTAL took part in no *road shows* and did not invest in Argentina based on alleged promises.
>
> 82. If it decided to invest in a country undergoing a declared emergency state it must take responsibility for such action. This is not to insinuate that the Argentine Government is entitled to do anything or that private parties cannot object to certain measure, but it is clear that the expectations of an investor cannot be the same as in regular conditions.

[39] See Total's Post-Hearing Brief ("CPHB"), ¶¶377-380. With respect to the latter, Total refers to the following companies: Sempra made its initial investment in Argentine gas assets in 1996 and made additional investments in October 2000 and December 2001, all of which the tribunal in that case held to be "investment decisions made in good faith"; BG Group PLC made its initial investment at the time of privatization in 1992, but made additional investments in 1994 and 1998 increasing its stake in the relevant gas Licensee from 28.7% to 45.11%; CMS acquired its stake in TGN after privatization in 1995; LG&E made its initial investment in Argentine gas assets in 1997 and made additional investments in March 1999; Enron made its initial investment in TGS in 1992 and then increased its stake in 1996 and 1999.

exploration, gas transportation and power generation. It says it reasonably and legitimately expected that Argentina would observe the basic principles of its gas regulatory framework which had been designed to address the macro economic risks inherent in an investment in Argentina.[40] Further, Total says that a number of other investors, lenders and credit rating agencies continued to have faith in TGN during the recession which commenced in 1998 and at the time that Total made its investment in TGN. Total says that it had no expectation that the Government of Argentina would unilaterally terminate and dismantle the gas regulatory regime, including the guiding principles of the Gas Law as implemented in the Gas Decree and TGN's license as well as the other elements of the gas regulatory regime.[41]

B. Due Diligence

48. Argentina also says that Total did not conduct an adequate due diligence enquiry or economic analysis before investing in TGN. Argentina says that if Total had done so, it would have foreseen the crisis that occurred in December 2001 and the adoption of emergency measures as a consequence of that crisis.[42]

49. Total's first opportunity to invest in TGN arose in October 1998 when the Argentine company SCP, through its subsidiary Compañía General de Combustibles ("CGC"), offered for sale a number of its investments in various assets, including its indirect 19.2% stake in TGN (through its 27.2% holding in GasInvest). At the time, Total had been an investor in Argentina since 1978 when it became the first foreign oil and gas company to invest in the country. In light of its investment in oil and gas production in Argentina, Total submitted that it considered it important to invest in the gas transportation system connecting its production with its customers. Consistent with this, Total made its first investment in gas transportation in June 1998 by purchasing a 10% stake in the GasAndes pipeline. Based on these previous investments, Total had some knowledge of the general regulatory framework applicable to the gas industry and certain aspects of the gas transportation sector. Nevertheless, when the opportunity to invest in TGN first arose in October 1998, Total conducted what it refers to as an "in-depth analysis of the

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[40] CPHB, ¶¶382-385.

[41] See CPHB, ¶387.

[42] See RPHB, ¶¶85, 202-228, 289-313. According to Argentina, what happened with the adoption of the Emergency Law of January 2002 was the same as what had occurred in the past in each case of the declaration of a national state of emergency; see ¶85.

regulatory framework applicable to TGN and the gas transportation sector in Argentina".[43] In addition to its own internal resources, Total was assisted by a number of external advisors, including US and Argentine legal counsel, financial advisors and accountants.[44] A number of the due diligence reports and memoranda prepared during the due diligence exercise were entered in evidence. These were substantial.[45] In addition, Total reviewed and discussed the various due diligence reports it received with its advisors who had authored them. Total concluded that TGN was a profitable company which guaranteed, statutorily and contractually, a long-term, stable and predictable US dollar based revenue stream, adjustable in accordance with US PPI and sufficient to provide the company with a reasonable rate of return. Total valued the 19.2% stake in TGN being offered by SCP at USD 207 million.[46]

50. Ultimately, Total's efforts to purchase part of CGC's investment in TGN through GasInvest did not succeed. In or about December 1999, Total learned that TCPL (which had merged with Nova in June 1998) was interested in selling its stake in TGN along with a number of other assets. Total entered into negotiations with TCPL for the acquisition of the assets which were of interest to it. Total again engaged a team of legal and financial advisors to conduct a due diligence review and carry out a new valuation of TGN. In light of the recent due diligence and valuation undertaken in respect of the potential purchase of CGC's share in TGN, the due diligence exercise was more limited in nature.[47] Total's new valuation of the 19.23% stake in TGN was approximately USD 230 million.[48] Total made an initial offer for all of TCPL's assets in the southern cone of South America in March 2000. That offer was rejected and negotiations continued on the basis of a more limited number of assets in respect of which Total presented a formal offer on 21 April 2000. On 30 May 2000, Total and TCPL signed a binding Share Purchase Agreement.[49]

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[43] See Charpentier, WS1, ¶27. For a description of the due diligence process undertaken by Total, more generally, see Charpentier, WS1, ¶¶26-80.

[44] Proskauer Rose LLP in New York; Péres Alati Grondona Benits Arntsen & Martínez de Hoz (PAGBAM) in Buenos Aires; investment banks (Chase Manhattan and JP Morgan); and accountants (Arthur Andersen).

[45] See CPHB, ¶¶369-370 and the various sources cited there, including PAGBAM due diligence and financial reports at Ex. C-346, C-347, C361, C-362, C-363, C-348 and C-114.

[46] See Charpentier, WS1, ¶47.

[47] The initial due diligence reports were updated in the following exhibits: C-359, C-360, C-361, C-362, and C-363.

[48] Charpentier, WS1, ¶70.

[49] See Ex. C-55.

51. According to Total, only one relevant development had occurred in respect of the key provisions of the gas regulatory framework between the completion of its first due diligence exercise conducted in 1998 and the signature of the Share Purchase Agreement with TCPL. On 6 January 2000, ENARGAS and the gas transportation and distribution licensees signed an agreement in which the latter agreed to defer the US PPI adjustment of their tariffs for a period of six months from 1 January to 30 June 2000 (the "January Agreement").[50] Total was aware of this agreement and took it into account in its due diligence and valuation of TGN. Total says that the agreement was the result of an unusual increase in the US PPI as compared to the local

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[50] *Acta Acuerdo* of 6 July 2000: Ex. C-119. The *Acta Acuerdo* reads, in relevant part, as follows:

> ...
>
> 2. That in accordance with said purpose, under the integrity guarantee of the applicable legal framework and the granted licenses, and in compliance with the commitments and agreements in force executed in the context of Gas del Estado privatization, the Secretariat of Energy of the Nation has shown concern for the current economic situation and the need to provide solutions in keeping with the economic plan designed by the national authorities, without this preventing compliance with the applicable legal framework.
>
> 3. That to these aims, during the meeting of December 22, 1999, the Secretary of Energy deemed it convenient to invite the Concessionaires to reconsider on a temporary basis the application of the PPI-based adjustments prescribed for in art. 41 of law 24,076 and paragraph 9.4.1.1 of the Basic Rules of the Licenses, from January 1 and June 30, 2000, thus deferring their application until July 1, 2000, as an exception, with the consent of the Parties and without this modifying the applicable legal framework.
>
> 4. Moreover, the representatives of the Licensees, aware of the social needs emerging from the economic general situation of the country, wish to make clear that this situation is not foreign to their own economic situation and outcome; therefore, it is of utmost importance for them that privatization public policies remain in full force.
>
> 5. That this, as accepted by the Licensees, should not impact negatively on the economic or financial integrity of their income, and should hold them harmless from any resulting loss, with the express acknowledgment by the authorities that this will not entail grounds for amendment or effective amendment to the applicable legal framework.
>
> ...
>
> **THEREFORE**
>
> **THE PARTIES AGREE**
>
> 1. Licensees hereby agree to suspend, on an exceptional and one-time basis, the application of the PPI adjustment during the deferral period and under the conditions prescribed for in recitals 3, 4, 5 and 8 herein, and to set for full recovery of the suspended adjustments the period spanning from July 1, 2000 to April 30, 2001.

price index in the context of a recession in Argentina.[51] Total notes that the January Agreement expressly stated that the deferral would be made on an "exceptional and once only" basis and was to be recovered six months later with interest. Further, the deferral was stated to constitute neither a precedent nor an amendment to the gas regulatory framework and provided that the licensees would be indemnified for all losses resulting from the deferral. In their negotiations, TCPL and TGN agreed that the relevant share of TGN's profits from 1 January 2000 until the date of closing a year later would be split between them. As a result, the six month deferral of the US PPI adjustment would have only a limited impact on Total. In light of the foregoing, Total says that it did not take the six month deferral of the US PPI pursuant to the January Agreement into consideration in its valuation of TGN in April 2000.[52]

52. The Share Purchase Agreement between Total and TCPL provided that Closing was required to occur on or before 28 February 2001.[53] In fact, Closing occurred on 6 January 2001. However, in the meantime and after execution of the Share Purchase Agreement, a number of further developments regarding the US PPI adjustment of TGN's tariffs occurred.

53. On 17 July 2000, the Ministry of Economy and ENARGAS signed an agreement with the licensees for the transportation and distribution of natural gas (the "July Agreement") to defer the US PPI adjustment of tariffs from 1 July 2000 to 30 June 2002.[54] The July Agreement also provided for the application of the US PPI adjustment that had been deferred pursuant to the January Agreement by requiring ENARGAS to incorporate the deferred PPI adjustments into the tariff tables as of 1 July 2000. As in the case of the January Agreement, the deferral was stated to be without precedent and did not modify the rules provided for in the regulatory regime. In addition, the agreement provided for the implementation of two tariff increases in July and October 2000, the proceeds of which would be paid into a US PPI stabilization fund where they would accrue interest during the two year deferral period. The proceeds from the suspended tariff increases were to be paid out to the licensees commencing in July 2002 and additional

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[51] In this regard, see CPHB, ¶¶354-357, and the Table of Comparative Price Indices at ¶354.

[52] Charpentier, WS1, ¶¶57-58.

[53] Ex. C-55, ¶7.1(b).

[54] See Ex. C-54, Annexo I – Acta.

US PPI adjustments occurring in the interim were to be factored into the adjusted tariffs as of that date.[55] The July Agreement was approved by Decree 669/2000.[56]

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[55] See Ex. C-54, Annexo II. Article 4 of the agreement provided that the Parties recognized that the deferral of payment of the US PPI adjustments provided for in the basic rules of the relevant licenses required the consent of the Licensees pursuant to Article 41 of the Gas Law (Law 24.076) and, consequently, approval by the Executive in its capacity as grantor of the licenses was required.

[56] Ex. C-54. Decree 669/2000 reads in relevant part as follows:

> CONSIDERING:
>
> ...
>
> That the rationale of the Legal Gas Framework consists of, *inter alia*, encouraging investments securing long-term natural gas supply, which require legal certainty and guarantee of compliance with the commitments undertaken by the national State in the context of GAS DEL ESTADO SOCIEDAD DEL ESTADO privatization. In particular, the Agreement of January 6, 2000, entered into by the ENTE NACIONAL REGULADOR DEL GAS, an autarchic body of the SECRETARIAT OF ENERGY OF THE MINISTRY OF ECONOMY and the Licensees and any prospective subscribing party, in relation to the regime securing the collection of tariffs for the public services of Natural Gas Transportation and Distribution (regarding Articles 38 and 39 of Law 24,075).
>
> That the privatization process and the investments resulting therefrom are protected by the applicable rules and, in particular, by the Treaties concerning the Reciprocal Promotion and Protection of Investments executed by the ARGENTINE REPUBLIC and ratified by several laws.
>
> That Article 41 of Law 24,076 and the Basic Rules of the Gas Transportation and Distribution Licenses under Decree No. 2255 of December 2, 1992, ANNEXES A and B, SUB-ANNEXES 1: BASIC RULES, provide for a semi-annual adjustment of the Tariffs by application of the fluctuation of the Producer Price Index – Industrial Commodities (PPI) of the United States of America.
>
> That such adjustment system is the fundamental condition of the bidding rules and the winning bids, and therefore, it must be considered a legitimately acquired right of the Licensees.
>
> That in this sense, the application of international market indicators has been enshrined to reflect any "changes in assets and services value representing suppliers' activities."
>
> That, furthermore, the country is facing a deep economic-financial crisis as a result of the lack of resources, public debt enlargement and wide-spread recession affecting a many sectors of the population, which is being overcome progressively.
>
> That this economic-financial situation calls for exceptional instant measures to reduce the negative impact that an increase in tariffs would cause on the society as a whole, as well as the need to make said measures compatible with the commitments undertaken by the National State.
>
> That the NATIONAL EXECUTIVE POWER is currently analyzing the situation and adopting measures that would help overcome the crisis.

54. On 18 August 2000, a federal judge issued an order suspending the adjustment of gas transportation and distribution tariffs. This order was issued as an interim measure pending the court's decision on a claim brought by the National Ombudsman against the National Executive Power and ENARGAS for a declaration that Articles 41 and 96 of the Gas Law (Law 24,076) were unconstitutional inasmuch as they permitted the indexation of gas tariffs. The claim also requested a declaration that Decrees 1738/92 and 2255/92 were unconstitutional and that Decree 669/00, which approved the July Agreement, was null.[57] The court's interim order prohibited increases to transportation and distribution tariffs and suspended the application of Decree 669/00 pending a final decision on the claim. As a result of the court's order, ENARGAS ordered TGN to maintain the tariff rate approved for May 2000.[58] TGN then appealed against ENARGAS's Note 3480/2000.[59] On 22 September 2000, ENARGAS, the Ministry of Economy and the Attorney-General submitted an appeal of the Federal Court's

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> That, for this reason and in order to fully acknowledge the gravity of the crisis, it is imperative that the National State and the gas Licenses, with the sole specific purpose of mitigating the economic impact of international market indications on the natural gas tariffs paid by consumers, accept the measures aiming at preventing an excessively harmful economic effect on the population in general and the industrial sector in particular.
>
> ...
>
> THE PRESIDENT
> OF THE ARGENTINE REPUBLIC
> DECREES:
>
> Article 1°: The application of the adjustment provided for in paragraphs 9.4.1.1 and 9.4.1.4 of the Basic Rules of the Transportation and Distribution License is hereby deferred from July 1, 2000, through June 30, 2002.
>
> Article 2°: The adjustment system based on the Producer Price Index, Industrial Commodities (PPI), provided for in article 41 of Law 24,076, its rules and paragraphs 9.4.1.1 and 9.4.1.4 of the Basic Rules of the Gas Transportation and Distribution Licenses, in force on January 1, 2000, be applied on a deferred basis on July 1, 2000, under the terms and conditions prescribed in Annexes I and II hereof, which are hereby approved.

[57] See Ex. C-122.

[58] See ENARGAS Note 3840/2000, dated 30 August 2000. This excluded the application of the US PPI tariff adjustment due in January 2000 and July 2000. See Charpentier, WS1, ¶78.

[59] See Ex. C-124, dated 13 September 2000.

interim injunction.[60] According to Total's witnesses, TGN believed that the suspension of the US PPI tariff adjustments was only temporary and that the court's decision was based on weak legal grounds, particularly in light of the fact that ENARGAS, the Ministry of Economy and the Attorney-General of Argentina had all filed the appeal against the interim measure.[61]

55. In October 2001, the Appeals Court rejected the Government parties' appeal against the interim injunction. A further appeal was submitted to the Argentine Supreme Court. That appeal was still pending when the Emergency Law was adopted in January 2002.

56. The majority of the Tribunal emphasizes the fact that immediately after the court declared that the July Agreement was null, CMS, a shareholder in TGN, sent a trigger letter to the Argentine government notifying its intention to commence ICSID arbitration under the US-Argentina BIT as a result of the court's decision suspending US PPI adjustments.[62] I do not attach the same import to this fact. The fact that an existing investor in the gas transportation sector (subjectively) considered that the adjustments of US PPI suspensions were themselves a violation of its rights under an investment treaty does not mean that it was objectively unreasonable or illegitimate to expect that Argentina would abide by the January Agreement and the July Agreement. In those agreements and the related decrees, Argentina reconfirmed the licensee's rights to the US PPI adjustments under the existing legislative framework and ENARGAS and the State defended those agreements before the national courts. It is difficult to understand how either CMS's stance on Argentina's treaty obligations (*i.e.*, that even a delay in payment of US PPI adjustments was a treaty violation) or the January and July Agreements themselves can be interpreted as a harbinger of the complete demise of the legislative framework in the energy sector. As indicated by the majority, and as set out above, Argentina has argued that Total should have foreseen the economic crisis and, accordingly, could not have legitimately

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[60] See Ex. C-125. In their extensive appeal submissions, the Government parties alleged a number of basic procedural defects and substantive grounds.

[61] See Charpentier, WS1, ¶178: WS2, ¶31. As a result, Total did not consider that the interim injunction impacted its valuation of TGN or the completion of the sale. In addition, Total says that it was not significant enough to permit Total to terminate or to modify the binding shareholders' agreement it had signed with TCPL on 30 May 2000. See, Charpentier, WS2, ¶47. In addressing this submission, the majority, notwithstanding the clear wording of the January Agreement and July Agreement and the Government's subsequent defence thereof before the courts, says that "[e]xpecting that after a 2-year block the government would have been willing and able to impose to the *usuarios* to pay retroactively the PPI increase for that period appears contrary to common sense or experience." See Majority Decision at para. 156.

[62] See paras. 66 and 155 of the Majority Decision.

expected the existing legal framework to survive. Argentina says the following with respect to the context in which Total made its later investments in the gas transportation and power generation sectors:

> ... (a) instead of "a conscious policy of the Argentine Government to attract foreign investments," there existed a desperate policy to save the economy; (b) instead of a State Reform Law implementing a "massive privatization program," there was an Economic Emergency Law authorizing the intervention of administrative contracts; (c) instead of the recent signature of 39 BITs, there were two Agreements and a preliminary injunction with effects with respect to natural gas transportation and distribution licences, and an investor (CMS) who resorted to the ICSID; and (d) instead of a recent currency pegged to the US dollar pursuant to the Convertibility Law as a measure against hyperinflation, there was a currency heading for a mega-devaluation, and an economic and social situation that was described in an emergency law as a "deep depression process."[63]

57. This characterization is strongly dependent on hindsight and is inconsistent with what the Argentine Government was telling Total, other investors and the public at the time.

58. In my view, by accepting this argument, the majority has attributed to the foreign investor a higher level of foresight with respect to the Argentine economy and political reaction thereto than Argentina, itself, possessed at the time. While I agree that the appropriate time at which to assess Total's legitimate expectations was the time at which it made its various investments and that the circumstances at that time should be considered in assessing those expectations, I do not think that it is appropriate to confer on the investor a requirement to be prescient. In essence, Total submits that its expectations with respect to its investments in the gas transportation and power generation sectors were that the regulatory regimes would continue to reflect the government's commitment to economic equilibrium, which had, over the previous decade, led to massive foreign investment in Argentine energy infrastructure, modernization and improvement of Argentina's energy sectors, and some of the lowest energy prices for consumers as a result of the competition in the market. Total had been an investor in Argentina for over 20 years when it decided to make its further investments in the gas transportation and power generation sectors. It had weathered numerous economic crises in that time. However, in the decade leading up to its additional investments, Argentina's economy had performed remarkably well. It was no coincidence that this positive performance followed privatization and a commitment to free market principles in the energy sector.

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[63] RPHB at para. 79.

59. The legislative and regulatory framework set up at the time of privatization was designed to provide flexibility, survive downturns in the economy and maintain the economic equilibrium of the system. Economic equilibrium by definition is not meant to benefit investors alone. The system was designed to allow investors to recover their costs and achieve a reasonable rate of return on those investments while providing energy at reasonable tariffs to consumers. It may not have been legitimate for an investor to expect that the rate of return on its investments would remain the same or that the government would allow tariffs to reach disproportionately high levels to the detriment of consumers and to the benefit of investors. However, this is not what Total expected, nor is it what it has argued here. In my opinion, at the time Total made its investments it was reasonable and legitimate to expect the government to continue its commitment to the economic equilibrium of the system that it had created and that had been so successful for almost a decade. It was also reasonable and legitimate for Total to expect that the government would set tariffs at levels that would permit it to earn a reasonable rate of return and would not force investors to operate their investments at a loss over a period of a number of years. In my view, Total was entitled to rely on the promises made by Argentina through its privatization programme; the related, supportive, transparent legislative framework; consistently worded licenses; the network of bilateral investment treaties; and almost a decade of consistent practice and successful results. Finally, it was legitimate for Total to expect that Argentina would not completely dismantle this system at the expense of investors alone.

60. I agree that a bilateral investment treaty should not provide insurance for bad business decisions. However, I have been persuaded by the evidence presented that Total performed thorough and reasonable due diligence before deciding to invest more of its shareholders' money in Argentina and that, in doing so it relied, legitimately, on the Gas Regulatory Framework, including US dollar tariffs and US PPI adjustments, as established by Argentina. The evidence was clear that Total's losses were not caused by commercial problems; they were caused by changes to the regulatory framework.

61. In *LG&E* v. *Argentina*, the Tribunal found that:

> ... it was unfair and inequitable to pass a law discarding the guarantee in Decree No. 1738/92 that the tariffs would be calculated in U.S. dollars and then converted into pesos. As pointed out by Claimants, this was not merely an economic and monetary policy of the Argentine Government which materialized through the Convertibility Law. Rather, it

> was a guarantee laid down in the tariff system. This guarantee was very important to investors to protect their investment, which was made in dollars, from a subsequent devaluation of the peso.[64]

62. With respect to Argentina's actions in eliminating the right to calculate tariffs in US dollars, the *Sempra* tribunal made the following findings:

> If the Gas Law, Gas Decree and Basic Rules of the License all unequivocally refer to the calculation of tariffs in U.S. dollars, and if such feature was also explained in the same terms by the Information Memorandum, there cannot be any doubt that this is the central feature governing the tariff regime.
>
> Given the emphasis that this regulatory framework placed on the stability of the tariff structure, it is not surprising that the calculation of tariffs in U.S. dollars, as well as the PPI adjustment, were assigned a significant role therein. While the possibility of devaluation intervening at some time was not ignored, it was hardly addressed from the viewpoint of stability being the principal aim or, as will be explained, from that of the problem being corrected by means of the automatic adjustment of tariffs to the new exchange rate level.
>
> The Respondent has devoted particular attention to the link which it alleges exists between these clauses and the Convertibility Law. ... The Gas Law indeed made a link to the first aspect by referring to pesos convertible under the Convertibility Law. The reference of the License to a given parity established under the convertibility decree was more qualified, however. In fact, Clause 9.2 of the License takes into account the fact that the parity and the ratio could be amended in future, as it expressly refers to the eventual modifications of convertibility through Decree 2128/91. [...] The distinction drawn by [Argentina] between the modification of the convertibility regime and its abandonment is unpersuasive. Guarantees and stabilization are meant to operate specifically when problems arise, not when business continues as usual. The tariff regime approved was devised as a permanent feature of the privatization, not a transitory one."[65]

63. The *LG&E* tribunal also found that:

> "Argentina acted unfairly and inequitably when it prematurely abandoned the PPI tariff adjustments and essentially froze tariffs prior to the onset of the public disorder and threats to its essential security in December 2001, and when it refused to resume adjustments when conditions had normalized in April 2003, forcing instead the licensees to renegotiate."[66]

64. As already discussed above, I agree that an investor's legitimate expectations need to be assessed at the time of the investment. For Total, with respect to its investment in TGN, the relevant time is 2000. Total agreed to purchase TCPL's shares in May 2000. At that time, the Gas Law had been effectively regulating gas distribution for almost a decade. Also at that time,

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[64] *LG&E*, supra note 15 at para. 134.

[65] *Sempra* supra note 15 at paras. 141 – 151.

[66] *LG&E* supra note 15 at para. 136. Note that the LG&E tribunal found that there was a period of necessity between 1 December 2001 and 26 April 2003 and exempted Argentina for damages suffered during that period.

the Government had agreed with the distributors that the US PPI adjustments would be deferred (the January Agreement). Six months later, the Government and the distributors agreed to a further deferral (the July Agreement). In both cases, the deferred amounts were to be repaid with interest. Argentina submits and the majority accepts that, as a result of the January Agreement and the July Agreement, Total should have known that Argentina was on the brink of a financial crisis and that it was therefore not legitimate for Total to expect the gas regulatory regime to remain intact. I do not agree with this assessment of the facts. In January 2000, the Government demonstrated its commitment to the gas regulatory regime by negotiating (as provided in the license) with the gas distributors a suspension of the US PPI adjustment in response to the recessionary environment in Argentina. Six months later, they renegotiated that suspension. There was no indication at the time that the Government intended to dismantle the entire system. In fact, when the US PPI adjustments were challenged, the Government defended in the courts the adjustments as rights granted to the investors. In my opinion, it is inappropriate for Argentina to now argue that Total should have known that Argentina would renege on all of its promises.

VI. POWER GENERATION

65. The Majority Decision has already set out in detail Total's holdings in the power generation sector in Argentina. Total's investments in this sector were ownership interests in two major power generation companies: Central Puerto S.A. ("Central Puerto") and Hidroélectrica Piedra de Aguila S.A. ("HPDA"). Total made its investments in 2001.[67] Total sold these investments in 2006,[68] at which time there had been no meaningful negotiations with the regulator regarding the changes to the system made as a result of the Measures in 2002.[69]

66. As a result of the Measures, the capacity and risk of failure payments were pesified and the spot price was no longer set based on market principles, was no longer uniform and was capped. Further, power generators were not paid even the artificial, reduced rates and were required to convert their receivables into further investment through FONINVEMEM.

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[67] CPHB at para. 835.

[68] CPHB at para. 98.

[69] Total's Reply at para. 687.

67. The majority of the Tribunal, reiterating its findings with respect to the Measures generally, rejects Total's claims with respect to the pesification of the capacity and risk of failure payments. For the reasons expressed above, I do consider pesification and freezing of tariffs to be a breach of the duty to afford fair and equitable treatment, as I consider it legitimate for Total to have expected Argentina to maintain the basic economic equilibrium of the power generation regulatory system upon which Total relied when it decided to make its investment.

68. Further, the majority expresses the view that Total's decision to invest in the power generation sector in September 2001 was imprudent, as Total should have taken into account the possibility of an abandonment of the fixed parity with the US dollar.[70] As discussed above with respect to the timing of Total's investments in the gas transportation sector, I think that this subjective requirement imposed by the majority requires greater foresight by a foreign investor than the Argentine government itself had at the time. Even if the abandonment of the link of the US dollar was a possibility, Argentina did more than just abandon the link – it redenominated contracts that were in US dollars through a forced conversion at the abandoned former linked rate and then froze tariffs and payments such that they could not be adjusted through the operation of market forces to economically viable levels. The Majority Decision recognizes this to some extent when it says that "the pricing system that the SoE progressively put in place after 2002 is at odds with the principles spelled out in the Electricity Law"[71] before it goes on to find that the alteration of the uniform marginal price mechanism was a breach of the duty to afford fair and equitable treatment. I agree that the alteration of the uniform marginal price mechanism was a breach of this duty. However, I would also have found a breach of this duty as a result of the decision to pesify the capacity and risk of failure payments.

69. I agree with the majority's reasoning and conclusions with respect to the non-payment of receivables and the forced participation in the FONINVEMEM scheme.

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[70] See Majority Decision at para. 324.

[71] See Majority Decision at para. 328.

VII. EXPLORATION AND PRODUCTION OF HYDROCARBONS

A. The Concession Decree

70. Total's investments in this sector, the Measures taken by Argentina and their alleged impact on Total's investment are set out in detail in the Majority Decision[72] and will not be repeated here. Unlike Total's investments in gas transportation and power generation, Total's investments in exploration and production of hydrocarbons were made early (commencing in 1978) and involved specific and detailed agreements between Total and Argentina. In particular, Argentina had negotiated with Total for the conversion of its "take or pay" contract with YPF to a separate exploitation permit and concession, according to which Total had the ownership, and the right to freely dispose, of the hydrocarbons that it produced. This agreement is found in the Concession Decree, which incorporates the terms of the *Acta Acuerdo* agreed between Total and Argentina. The Majority Decision describes this history, but goes on to find that the ownership and free disposition rights granted to Total were limited by other laws and decrees, such that Argentina could, in essence, dictate how, to whom and for what price Total must sell the hydrocarbons that it produced.[73]

71. The majority's analysis starts with the clear language contained in the Concession Decree that Total holds "*property and free disposition*" of the hydrocarbons it produced "*under the provisions of* [the *Hydrocarbons Law* and the Deregulation Decrees]". It then looks at the requirements in Article 6 of Decree No. 1589/1989 that the Executive must give 12 months' notice of projected restrictions on crude oil exports prior to their coming into force and that, in such cases, the Executive may fix the crude oil price in a certain manner unless international crude oil prices, due to exceptional circumstances, are exceptionally high. The Majority Decision then goes on to conclude that because the general *Hydrocarbons Law* of 1967 gave the Executive the right to regulate prices and exports in the event of a domestic shortage of crude oil, "Total's right freely to dispose of petroleum does not entail the right freely to fix its prices or to export it without limitations."[74]

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[72] See Majority Decision at paras. 347 – 405.

[73] See Majority Decision at para. 427.

[74] Majority Decision at para. 427.

72. With all due respect, I cannot agree with this interpretation of what, in my opinion, is very clear language in the Concession Decree. In my view, the majority's interpretation also expands Argentina's limited rights under the various general decrees by not analysing whether the conditions precedent to Argentina's ability to limit Total's rights of free disposition were met in this case. It must be remembered that the Concession Decree was negotiated to replace the "take or pay" contract that Total had with the State-owned energy company. Under the "take or pay" contract, Total did not have the right to freely dispose of the hydrocarbons it produced – it had to sell all of them to YPF who, in turn, was obligated to purchase all of them at above-market prices.[75] The Concession Decree changed this situation. It also sought to preserve the security of supply for the domestic market in exceptional circumstances by incorporating earlier, general regulatory decrees. There was no evidence that these exceptional circumstances existed in this case. In fact, there was evidence that there were no restrictions on exports of crude oil until May 2002, when short-term restrictions were introduced, which occurred again in December 2004.[76] So, while I agree that the Executive had some ability to limit Total's rights of free disposition to protect the domestic supply of hydrocarbons (and, only then, if appropriate compensation was paid to Total), I do not agree that these limitations generally impaired Total's right to freely fix its prices or to decide whether to sell its products domestically or to export them. Total was granted ownership and the right to freely dispose of the hydrocarbons that it produced.[77] The majority's interpretation of this clause deprives it of virtually all meaning. What does "ownership and the right to freely dispose" mean if not the right to sell its products to whomever it chose at whatever price could be freely negotiated?

B. The Hydrocarbons Law

73. In my view, the proper interpretation of Total's rights and legitimate expectations with respect to its investment in the exploration and production sector requires a review of the history of that investment and the context in which it was made and, at the insistence of Argentina, modified.

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[75] Contract 19,944 dated 24 April 1979 at Ex. C-63(1); also see Contie WS2 at paras. 7 – 17.

[76] Direct examination of Yves Grosjean, Transcript, (English) Day 3, 897:7 – 15.

[77] "*el dominio y la libre disponibilidad*".

74. When Total made its initial investment in 1978, the *Hydrocarbons Law* was in place. It constituted the basic legal framework applicable to the production, industrialization, transport and commercialization of liquid and gaseous hydrocarbons, which were to be provided by State enterprises and private entities pursuant to the provisions of the law and future regulations adopted by the National Executive power. Pursuant to the terms of the law, its principal purpose was stated to be to meet the country's need for hydrocarbons with the production from its own deposits and maintaining reserves to ensure that goal ("*satisfacer las necesidades de hidrocarburos del país con el producido de sus yacimientos, manteniendo reservas que aseguren esa finalidad*"). Article 11 of the Law provided that State companies would be key actors in the achievement of those goals. It also provided that, in the future, the National Executive could assign new areas to those State corporations which would be entitled to exploit them directly or by way of contracts with private entities. Article 6 of the *Hydrocarbons Law*, quoted in the Majority Decision, provided that permit holders and concessionaires had ownership ("*el dominio*") of the hydrocarbons which they extracted and, consequently, that they could transport, sell and industrialize them pursuant to the regulations adopted by the National Executive on reasonable technical-economical bases which addressed the needs of the internal market and stimulated exploration and production of hydrocarbons. Article 6 also provided that when national production of liquid hydrocarbons was not sufficient to cover internal needs it would be mandatory for all such hydrocarbons of national origin to be used in the country, except where legitimate technical reasons made this unadvisable.

75. Article 6 goes on to provide that if in the said period (during which national production did not meet internal needs), the Executive set the sale prices for crude petroleum products in the internal market, such prices were required to be equal to those established for the relevant State company, and, in any event, could not be less than the prices for imported petroleum of similar condition. In the event that the price of imported petroleum increased significantly due to exceptional circumstances, those prices were not to be considered for the setting of sale prices in the internal market. Rather, the latter could be set on the basis of the actual cost of production of the State company, the technically applicable depreciation rate and a reasonable rate of return on the investments made by the said State entity. Any prices fixed for sub-products were required to be compatible with those set for petroleum.

76. With respect to the export of hydrocarbons, the Executive was required to permit export of hydrocarbons or derivatives not required to adequately meet internal needs, provided that such exports were carried out at reasonable commercial prices. Further, the Executive was empowered to set rules for the internal market in order to ensure rational and equitable access to it by all producers in the country.

77. The *Hydrocarbons Law* was adopted well before the privatization of the State enterprises (YPF and Gas del Estado) which dominated the sector. In summary, the Law's primary objective was to ensure that the internal need for hydrocarbons was met by production from deposits within Argentina and that adequate reserves were assured. Hydrocarbons not required to meet internal needs were expressly permitted to be exported provided that exports were at reasonable commercial prices. With respect to liquid hydrocarbons (crude petroleum), in the event that national production was insufficient to cover internal needs and the National Executive decided to set sale prices in the internal market, the law provided that those prices would be the same as those set for the relevant State entity and, in any event, could not be less than the prices for comparable imported petroleum. An alternative method of setting prices was provided for in the case of "exceptional circumstances".

78. With respect to natural gas ("*hidrocarburos gaseosos*"), the law provided a preferential right for the use of gas by, first, production facilities and, second, the State entity responsible for public distribution of gas subject to purchase within a reasonable time frame and at agreed prices which assured a reasonable rate of return on the relevant investment. With the approval of the relevant authority, any remaining gas could be disposed of freely by the Concessionaire. Finally, Article 6 provided that the sale and distribution of gaseous hydrocarbons would be subject to the regulations adopted by the National Executive.

79. As indicated above, Decree 1212/89 called for the renegotiation of existing contracts between foreign investors and YPF. Pursuant to the terms of the decree, YPF was required to negotiate the conversion of existing service contracts to the concession system provided for in the *Hydrocarbons Law*. In its preamble, Decree 1212/89 provided that there was a need to do the following: substitute for State intervention free market mechanisms and free disposition of

crude petroleum and its derivatives; permit prices for hydrocarbon products of national origin to reflect international prices; and permit the free sale of crude petroleum and its derivatives.[78]

80. Decree 1212/89 referred to Decree 1055/89, which had been adopted one month previously (12 October 1989). That decree stated that it was the objective of the national Government to replace State intervention in the setting of prices, margins and quotas with market mechanisms and the free play of offer and demand. It also stated that, with respect to hydrocarbons, it was the Government's policy to deregulate the sector to permit effective and free competition as quickly as possible in order to reflect international values and that, therefore, it was necessary to permit the free disposition of hydrocarbons both in the internal market and the export market. The decree also recited that the National Executive was authorized to undertake and implement these policies pursuant to specific provisions of the *Hydrocarbons Law*. The decree then went on to require YPF to assemble information with respect to certain areas and deposits for the purpose of organizing a public tender for the rights to explore and exploit hydrocarbons in these areas. Further, the decree provided, in general terms, that hydrocarbons produced from concessions would benefit from a full right of free disposition. This was defined to mean that the products could be sold freely in the internal and the external markets, within the terms of the applicable legal framework.[79]

81. The third of the Deregulation Decrees, Decree 1589/89, in its preamble, noted the interest of the Government in establishing clear and definite rules which guarantee the stability and legal security of existing contracts in the petroleum sector. Among other things, the decree went on to address the consequences of restrictions by the National Executive on exports of crude petroleum and its derivatives and on the right of free disposition of natural gas. In the case of the former, Article 6 of the decree provided that the provisions of Article 6 of the *Hydrocarbons Law* would apply, pursuant to which the affected producers, refiners and exporters would receive per unit of product a value no less than that of petroleum products and derivatives of similar condition (grade/quality). In the event of restrictions on the free disposition of gas, Article 6 provided that the price could not be set lower than a minimum price calculated by reference to international petroleum prices (of 35% of the international price for a cubic metre of Arabian Light at 34° API

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[78] These principles were set out in the provisions of the decree quoted in the Majority Decision at paragraph 352.

[79] The relevant provisions are quoted in the Majority Decision at paragraph 353.

for 1000 m^3 of gas at 9,300 kilocalories). Finally, Article 6 went on to provide that the National Executive was required to give 12 months' notice before the entry into effect of any restriction on the export of crude petroleum and/or derivative products.

82. In 1991, Argentina adopted the Reconversion Decree which noted and referred to the provisions of the Deregulation Decrees and authorized YPF to proceed to renegotiate its existing service contracts and convert these into new agreements providing for exploration permits and exploitation concessions. It went on to specifically set out the rights to which holders of the new concessions negotiated with YPF would be entitled. These included the ownership of the hydrocarbons produced in the concession-holders' respective areas, consistent with Article 6 of the *Hydrocarbons Law*, and the right of free disposition of the same in accordance with Article 15 of Decree 1055/89, Article 4 of Decree 1212/89 and Articles 5 and 6 of Decree 1589/89. It also provided that any restriction on the rights of free disposition would give the concession-holders the right to receive compensation, at a level no less than that determined by Article 6 of Decree 1589/89, for the period of the restriction.

83. In 1992, Argentina adopted the *Gas Law* to address the transportation and distribution of natural gas. Article 3 of the law deals with the import and export of natural gas. With respect to exports, the article provides that exports of natural gas shall be authorized by the National Executive within 90 days of receipt of a request to the extent that internal supply is not affected. The article deems failure to respond or silence as acceptance of the request.[80]

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[80] Article 3 of the *Gas Law* provides as follows:

> III Natural gas export and import
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> Art. 3° – Natural gas imports, for which no prior approval shall be required, are hereby authorized.
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> Natural gas exports shall be, in each case, authorized by the national Executive Power within ninety (90) days as from reception of the application, provided they do not affect domestic supply.
>
> Failure to provide an answer shall be deemed an admission.
>
> Importers and exporters shall file a copy of their contracts with the *Ente Nacional Regulador del Gas*.

84. As described in the Majority Decision, YPF and Total entered into negotiations to convert Contract 19,944 into a concession agreement pursuant to the terms of the Reconversion Decree. After lengthy negotiations, the Parties reached agreed terms and, on 23 November 1993, Total and YPF signed the *Acta Acuerdo.* In the recitals at the beginning of that agreement, the Parties provided as follows:

> (d) That such reconversion entails the transformation of the CONTRACT into a hydrocarbon Exploitation Concession concerning a set of exploitation lots located within the CONTRACT AREA and a hydrocarbon Exploration Permit covering the remaining parts of the AREA which have not been converted into exploitation lots, the effects of which need to be ruled under the *ACTA ACUERDO* and Law 17,319, in accordance with the conditions prescribed for in Decrees 2411/91, 1055/89, 1212/89 and 1589/89.
>
> (e) That such reconversion entails the termination of an agreement in force between the PARTIES, but termination thereof may only become effective prior consent of the parties.
>
> (f) That it has been taken into consideration that the reconversion of the CONTRACT entails a substantial legal change for the parties, by terminating their status as YPF's contractors and undertaking, in certain cases after the mining risk stage, the economic risk and cost of the hydrocarbon exploitation and marketing as well as transportation expenses.
>
> (g) That owing to the fact that the reserves hold large gas reservoirs, the undertaking of gas marketing in the case of this CONTRACT entails substantial constraints for the COMPANIES because of the significant difference in their favour resulting from the price that YPF must pay for it under the CONTRACT, *vis-à-vis* the price fixed by the NATIONAL EXECUTIVE POWER for such gas.
>
> (h) That as a result, it is necessary to apply agreements aimed at maintaining the economic balance of the project for the COMPANIES, taking into account the loss they would otherwise suffer and the new risks they undertake under the reconversion.

85. The agreement goes on to provide for the reconversion of Contract 19,944 into an exploration permit with a term until 1 May 1996 and a production concession with a term of 25 years plus a possible extension of ten years in return for the rescission of Contract 19,944. The agreement specifically incorporates by reference the terms of the Deregulation Decrees, and provides for the ownership and free disposition of the hydrocarbons produced from the concession areas (consistent with Article 6 of the *Hydrocarbons Law* and in accordance with the Deregulation Decrees) for the full term of the Concession. Article 10 provides for compensation for any restriction on the free disposition of hydrocarbon products in an amount no less than that provided for in Article 6 of Decree 1589/89. In this regard, the *Acta Acuerdo* also provided in Article 21 that, in the event that Total and the other Consortium members were prevented from

exercising their rights pursuant to the terms of the agreement by any fact or act emanating from a public authority, the National Executive would be required to instruct the appropriate authority or entity to receive the hydrocarbons produced from the Concession areas in accordance with the terms of Article 6 of Decree 1589/89 for the period of any restriction of the right of free disposition and that the National Executive would remain liable for indemnification and compensation which might arise pursuant to the application of Article 519 of the *Civil Code* of Argentina.

86. The *Acta Acuerdo* also attached as an annex a draft decree approving and incorporating the terms of the *Acta Acuerdo*. This draft decree was then adopted and published as Decree 214/94, the Concession Decree, on 15 February 1994. The most relevant portions of that Decree for present purposes are set out in the Majority Decision at paragraph 359. These are reproduced here for convenience:

> That the reconversion of Contract No. 19,944 implies for its holders, a substantial juridical change for the abandonment of its position as contractor of *YPF SOCIEDAD ANÓNIMA*, preserved, to a great extent, from the economic risk of exploitation once the mining risk phase had been overcome. The important change in their economic position is also relevant for them upon the extinction of *YPF SOCIEDAD ANÓNIMA*'s obligation to receive the hydrocarbons produced and to pay higher prices than the ones established by the National Executive for them.
>
> Therefore, it becomes necessary to implement agreements tending to maintain the economic balance of the project for the Companies which are holders of the Contract No. 19,944 in the light of the damage that they may otherwise sustain and the new risks that they may assume due to the reconversion.
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> ....
>
> Art. 6. Holders of the Exploration Permit, of the Exploitation Concessions and of UTE Agreements celebrated between *YPF SOCIEDAD ANÓNIMA,* according to the attributions conferred by Articles 3 and 4 of the Law No. 24,145 and their Bylaws and *TOTAL AUSTRAL SOCIEDAD ANÓNIMA, DEMINEX ARGENTINA SOCIEDAD ANÓNIMA* and *BRIDAS AUSTRAL SOCIEDAD ANÓNIMA* for the complementary exploitation, development and exploration of the Areas "AGUADA PICHANA" and "SAN ROQUE", emerging from the conversion of the Contract No. 19,944 established in Article 1 hereof, shall have the ownership and the free availability of the hydrocarbons that are produced in the respective areas, pursuant to the provisions of the Law No. 17,319 and Decrees No. 1055, dated 10 October, 1989; No. 1212, dated 8 November, 1989; No. 1589, dated 27 December, 1989 and No. 2411, dated 12 November, 1991, whose terms are in full force and effect as from 23 November, 1993, shall be incorporated in the titles of the corresponding Exploitation Concessions and the Exploration Permit and the aforementioned UTE Agreements for the validity term thereof.
>
> ....

> Art. 8. Every restriction to the free availability referred to in Article 6 hereof shall empower holders of the Exploration Permits, the Exploitation Concessions and the UTE Agreements mentioned in Article 6 of this Decree, to receive a value not lower than the one established in Article 6 of the Decree No. 1589, dated 27 December, 1989, for the duration thereof.
>
> Art. 9. Holders of the Exploitation Permits of Exploitation Concessions and UTE Agreements mentioned in Article 6 herein shall be subject to the general fiscal legislation which apply to them, but the provisions that may be imposed on the person, judicial condition, or the activity of the permit holder or the concessionaire or the property intended for the execution of the respective tasks shall not be applicable in a discriminatory or specific way.
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> ....
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> Art. 17. In case that, as a consequence of the facts or the acts deriving from the Public Powers, the holders of the Exploration permit, of the Exploitation Concession and of the UTE Agreements mentioned in Article 6 of this Decree are prevented from exercising the rights emerging hereof, despite their intention to do so, they shall have the right to cause the National Executive Power to instruct the Application Authority or whoever it may correspond to receive the hydrocarbons produced pursuant to Article 6 of Decree No. 1589, dated 27 December, 1989, for the duration of the restriction, pursuant to the terms of the Exploration Permit, of the Exploitation Concessions and of the UTE Agreements. The National Executive shall be responsible for the applicable indemnification and compensation pursuant to Article 519 of the Civil Code.

87. The conversion of Contract 19,944 proceeded on the basis set out in the *Acta Acuerdo* and the Conversion Decree. Thereafter, as set out in the Majority Decision at paragraphs 360 - 363, Total expanded its exploration and hydrocarbon production activities in Argentina. It also entered into a series of long-term contracts with local distributors for the sale of natural gas and export contracts with Chilean customers.

88. In my view, the sequence of legislation and events described above reflects a clear intention on behalf of Argentina to induce investors in the exploration and production sector, and Total and the other members of the Consortium in particular, to convert service contracts with YPF into concessions. Total's Contract 19,944 with YPF was lucrative and provided Total with a number of advantages including favourable prices and the avoidance of a number of risks. Argentina wished to change its regime and sought to induce Total to convert its contract by way of certain assurances or commitments, including stability and legal security of existing contracts in the petroleum sector (Decree 1589/89 – Preamble); ownership and free disposition of hydrocarbons that concessionaries extracted (Decree 1055/89, Articles 14 and 15; Decree 1589/89 – Article 5; *Acta Acuerdo* – Article 8; Concession Decree – Article 6); the need to maintain the economic equilibrium of the contracts of the companies converting their contracts

to concessions (*Acta Acuerdo* – Preamble, paragraphs (f), (g), (h); Concession Decree – Preamble); compensation and damages for restriction of the right of free disposition of hydrocarbons produced from the concessions (Decree 1589/89 – Article 6; Reconversion Decree – Articles 5 and 7; *Acta Acuerdo* – Articles 10 and 21; and Concession Decree – Articles 8 and 17). The evidence of Total's witnesses with respect to the negotiation and agreement of the *Acta Acuerdo* and adoption of the Concession Decree amply support this.[81]

89. Argentina relies heavily upon the *Hydrocarbons Law*, and particularly Article 6, to argue that, despite what the Deregulation Decrees, the Reconversion Decree, the *Acta Acuerdo* and the Conversion Decree say about the rights of ownership and free disposition of hydrocarbons of the concessionaires and, in particular, Total, these were all subject to a broad power to regulate and to limit the right of free disposition by restricting sales and controlling prices. The majority accepts this position at paragraph 427 of the Majority Decision. In my view, this is not the correct interpretation of the *Hydrocarbons Law* and its Article 6, particularly in the context of Total's investment, the regulations adopted to induce and facilitate the conversion of service contracts to concessions and the negotiations leading to the signature of the *Acta Acuerdo* and the adoption of the Concession Decree. The majority's interpretation of Article 6 of the *Hydrocarbons Law* and its effect deprives the language of the various decrees and of the *Acta Acuerdo*, which guarantee to Total and other investors who converted their service contracts ownership and free disposition of the hydrocarbons they produce, of any real meaning. Further, it permits the arbitrary treatment of Total in breach of the standard of fair and equitable treatment provided for in Article 3 of the BIT.

90. As indicated, the *Hydrocarbons Law* was adopted in 1967, well before the significant privatizations and restructuring of the hydrocarbon sector undertaken by Argentina commencing in approximately 1989. Article 6 establishes that permit holders and concessionaires have the ownership of the hydrocarbons they extract and, consequently, are entitled to transport, process and sell derivatives in accordance with regulations decreed by the National Executive on reasonable technical and economical bases which take into account the needs of the internal market and the need to stimulate exploration and production of hydrocarbons. It expressly limits

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[81] For example, see the evidence of Mr. Contie, TR, Day 4, pp. 997-1003. Argentina provided no knowledgeable witness on the negotiations leading to the *Acta Acuerdo* and the Concession Decree.

the right to export hydrocarbons only in the case of petroleum ("*hidrocarburos líquidos*") in the event that national production of these is insufficient to meet internal needs and, if this applies, fixes sale prices in the internal market for crude petroleum during the period of shortage. Any such prices must be fair in that the prices must not be less than those for similar imported petroleum products. Where, due to exceptional circumstances, the price of imported petroleum increases significantly, prices shall be set on the basis of the true costs of production plus depreciation and a reasonable profit margin.

91. Article 6 goes on to establish the principle that the National Executive shall permit the export of hydrocarbons and derivatives not required to meet internal needs provided those exports are at commercially reasonable prices.[82] With respect to gas ("*hidrocarburos gaseosos*"), Article 6 provides that, subject to approval, the Concessionaire will be free to dispose of the gas not required for use at the production facilities or purchased by the State gas distribution entity. Finally, the statement that sale and distribution of gaseous hydrocarbons would be subject to regulations adopted by the National Executive is unremarkable. The adoption of the *Gas Law* and related regulations in 1992 is an important example of this.

92. While Article 6 of the *Hydrocarbons Law* refers to future regulation by the National Executive, it does not provide for a broad form of immunity of the State from liability arising from such future regulation nor does it provide for a broad, unfettered right to limit disposition rights, to limit exports or to fix prices. It only addresses the possibility of limiting prices during periods when national production is insufficient to meet internal requirements for liquid hydrocarbons. In such cases, it specifically provides for the payment of fair prices to producers during the period of the shortage of supply. It also provides that the price to be paid by the State distribution entity for natural gas must be agreed and provide for a reasonable rate of return to investors.

93. The *Hydrocarbons Law* was a general law adopted to regulate the hydrocarbons industry at an early stage of its development in Argentina. Since the privatizations undertaken in the late

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[82] "*El Poder Ejecutivo permitirá la exportación de hidrocarburos o derivados...*: "The State shall permit the export...."

1980s, a number of its provisions have become antiquated. For example, the reference to State companies in Articles 6 and 11 of the law are now long out of date.

94. The National Executive did, of course, adopt regulations to implement national policy with respect to hydrocarbons. One important example of this was the Deregulation Decrees which led to the conversion of service contracts. It is worth noting that Contract 19,944, the "take or pay" contract between Total and its Consortium members and YPF, was negotiated after the adoption of the *Hydrocarbons Law*. This agreement turned out to be favourable to Total and the Consortium members, especially once Argentina became a net exporter of gas. Argentina and YPF wanted to renegotiate this agreement and, supported by regulations issued by the National Executive, this occurred.

95. The Deregulation Decrees reflect the clear intention by Argentina to induce holders of service or "take or pay" contracts to convert these to concessions in return for ownership of the hydrocarbons extracted and free disposition of these. Decree 1589/89, the last in the series of these decrees, noted the importance for the Government to establish clear and definitive rules which guaranteed the stability and legal security of existing agreements in the petroleum industry. It went on to provide that in the event that the National Executive should establish restrictions on exports, the provisions of Article 6 of the *Hydrocarbons Law*, pursuant to which producers, refiners and exporters were entitled to receive a value no less than similar imported products, would apply. It also provided a specific minimum price in the event that restrictions on free disposition of gas were imposed. It did not in any manner expand the provisions of Article 6 of the *Hydrocarbons Law*. Rather, it imposed the additional requirement that the National Executive give 12 months' notice of any restrictions on the export of crude oil and derivatives. The Reconversion Decree confirmed the Government's intention that market rules in the setting of prices and the free disposition of hydrocarbons was the governing principle of the Deregulation Decrees and of the conversion it mandated. It went on to incorporate by reference into the new concessions the terms of Article 15 of Decree 1055/89, Article 4 of Decree 1212/89 and Articles 5 and 6 of Decree 1589/89.[83]

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[83] The intention of the regulations was reflected in YPF's "prospectus". See Ex. C-308 and para. 359 of the Majority Decision. Further, Argentina's witness, Mr. Guichón, confirmed that the Deregulation Decree and the Reconversion Decree reflected the fundamental aspect of the applicable framework and that these Decrees

96. It was in this context that YPF, on behalf of Argentina, and Total negotiated the conversion of Contract 19,944 to a concession. The evidence was clear that Total explained during the course of the negotiations that Contract 19,944 was favourable to the Consortium and that it would lose a number of advantages and assume a number of risks with the conversion and that these had to be addressed adequately in order for the Consortium to agree to the conversion.[84] These concerns were addressed in the *Acta Acuerdo* which recorded the fact that the conversion had to take into account the assumption of a number of added risks by the new concessionaire including the important price difference between what had been paid by YPF under the contract and the price to be set by the National Executive under the Concession and the importance of maintaining the economic equilibrium of the Concession for the Consortium in light of the prejudice and the new risks that they would face by reason of the Reconversion (Preamble, paragraphs (f), (g), (h)). As indicated above, the *Acta Acuerdo* then goes on to provide specifically for the rights of ownership and free disposition of the hydrocarbons produced from the Concession and the payment of minimum prices in the event that the National Executive were to impose any restrictions on the right of free disposition of these while such restrictions lasted. These provisions were specifically made applicable during the full term of the production Concession and exploration permits granted. These provisions were also all reflected in the Concession Decree.

97. In my view, it was entirely reasonable for Total, and the other Consortium members it represented, to expect that they had the full right of ownership and free disposition of the hydrocarbons they produced from the Concessions granted pursuant to the *Acta Acuerdo* and the Concession Decree, subject only to the possibility of restrictions where national production of hydrocarbons did not meet internal demand and subject to the specific minimum compensation provided for in these instruments should the situation arise. These commitments were made directly to Total through the negotiations for, and the contractual agreement contained in, the *Acta Acuerdo* and by way of public regulation, the Concession Decree. In my view, there is nothing in Article 6 of the 1967 *Hydrocarbons Law* which addresses the State's right to regulate or restrict the rights of ownership and free disposition of hydrocarbons beyond what is provided

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remained part of the said framework as late as 2006. See cross-examination of Diego Guichón, TR, Day 5, pp. 1359-1362.

[84] See, for example, the evidence of Michel Contie: TR, Day 4, pp. 997-999.

for in its text. Certainly, there is no provision which immunizes the State from liability for paying compensation for a substantial departure from the limited cases of restriction on the right of exports provided for in the law. In fact, the subsequent detailed decrees adopted to implement the conversion confirmed and reinforced the rights of ownership and free disposition of hydrocarbons and the rights to compensation in the event of the restriction of those rights. Further, the *Acta Acuerdo* and the Concession Decree recognized the significant change in regime from the take or pay contract to a concession and reflected the intention to maintain the economic equilibrium of the production projects. To adopt the interpretation put forward by Argentina, and accepted by the majority, in these circumstances is to deny any meaning to the clear commitments to ownership and free disposition of the hydrocarbons produced by Total.

98. In my view, the Deregulation Decrees, Reconversion Decree, *Acta Acuerdo* and Conversion Decree all implemented the national policy of Argentina and all were consistent with the provisions of the *Hydrocarbons Law*. Not only were these instruments consistent with that law, but they were subsequent, more specific expressions of a concerted policy of the Government of Argentina. Total and the other members of the Consortium had a reasonable and legitimate expectation that Argentina would comply with its specific commitments contained in both legislation and a publicly approved agreement. The evidence demonstrated that it was on the basis of those commitments that Total agreed to the conversion of Contract 19,944 and continued to invest in the concessions granted in exchange. It cannot have been the intention or the expectation of the parties that a reference to Article 6 of the *Hydrocarbons Law* would permit the complete avoidance of the rights acquired under the new decrees. In my respectful view, if the reference to the 1967 *Hydrocarbons Law* in the subsequent decrees and the *Acta Acuerdo* is interpreted to mean that Argentina exchanged its obligation to take all of the gas Total and the Consortium members produced at profitable (for Total) prices for an unrestricted right to require Total to sell all of the hydrocarbon products it produced at much lower, fixed prices, it leads to a manifestly absurd result.

(i) The Measures in the Context of the Hydrocarbons Law

99. The Measures adopted by Argentina do not fall within the limited restrictions contemplated by Article 6 of the *Hydrocarbons Law*, the Deregulation Decrees and the Reconversion and Concession Decree. Neither the *Emergency Law* nor the subsequent measures

adopted to pesify and freeze the reference price in the consumer gas tariff had as its objective to ensure the domestic supply of hydrocarbons, whether of crude oil or gas. The purpose of these instruments was, in fact, quite different.[85]

100. Moreover, all of the available evidence indicates that the Argentine market for natural gas was characterized by over-supply until 2003.[86] It was not until 2004 that Argentina decided to suspend the export of natural gas due to a shortage of gas to meet internal needs.[87] The evidence clearly indicates that by this time, Argentina had recovered in large part from the conditions that gave rise to the *Emergency Law* and the initial measures adopted by Argentina. The evidence indicated that the later shortages were the result of the significant reduction and freezing of the price of gas which resulted in, amongst other things, a significant downturn in exploration to find hydrocarbons and a surge in the consumption of natural gas.[88]

C. The Specific Claims Related to the Exploration and Production Sector

(i) The Measures in the Context of the Concession Decree

101. With respect to its investments in the exploration and production sector, Total argues that the Measures (redenomination, pesification and the freezing of tariffs) and, later, the imposition of export taxes and the elimination of the exemption from such taxes for exports from Tierra del

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[85] In this regard, see: the *Emergency Act*, Ex. C-13; NR Gas Resolution 2612/2002, dated 24 June 2002, Ex. C-155; NR Gas Resolution 2665/2002, dated 15 August 2002, Ex. C-158; NR Gas Resolution 2614/2002, dated 24 June 2002, Ex. C-34(1); NR Gas Resolution 2653/2002, dated 22 August 2002, Ex. C-34(2); NR Gas Resolution 2654/2002, dated 22 August 2002, Ex. C-34(3); NR Gas Resolution 2660/2002, dated 22 August 2002, Ex. C-34(4); NR Gas Resolution 2663/2003, dated 22 August 2004, Ex. C-34(5); NR Gas Resolution 2703/2002, dated 25 September 2002, Ex. C-34(6).

[86] See Grosjean, TR, Day 3, p. 888; Contie, WS1 at para. 2; This condition had been long-standing as demonstrated by the disclosure made in YPF's 1993 Information Memorandum which stated:

> The current supply of deliverable gas in Argentina exceeds the demand for gas by a substantial margin, and this condition is expected to continue for the foreseeable future.

Ex. C-308, p. 13. Further, the approval by the Secretary of Energy of Total's various export contracts for natural gas confirmed this situation: see SoE Resolution 131/01, dated 9 February 2001, Exhibit C-133; the latest contracts were approved in 2002, see Ex. C-427/428 and cross-examination of Mr. Grosjean, TR, Day 4, 958:20 – 959:3.

[87] See Secretary of Energy Resolution 265/2004, Ex. C-205 ("*programa de racionalización de exportaciones de gas*") and Under-Secretary of Fuels Disposition 27/2004, Ex. C-206. These were replaced by Secretary of Energy Resolution 659/2004 of 18 June 2004, Ex. C-215.

[88] See the evidence of Mr. Grosjean, TR (English), Day 4, pp. 934-935. According to Mr. Grosjean, he warned Argentine officials that the suppression and freezing of the price of natural gas would have precisely these effects.

Fuego, violated its rights to free disposition granted in the Concession Decree. The arguments and impact vary slightly depending on the product at issue (crude oil, natural gas or LPG) and the specific regulations. However, I consider it useful to discuss the Measures in this context generally before turning to specific arguments related to each product and market.

102. Total's arguments with respect to the Measures and their impact in this sector are similar to its arguments for its investments in gas transportation and power generation. However, in my view, the analysis for the investments in this sector is different. As has been set out in detail in the Majority Decision, Total was one of the first foreign investors in Argentina's exploration and production sector and has maintained and increased its investments in this sector for over 30 years. At the time of its original investment, this sector of the Argentine economy was in its infancy. Initial investments were made to explore for hydrocarbons in the remote and isolated region of Tierra del Fuego. The hydrocarbons produced were all sold to the State-owned energy company, thus guaranteeing Total a market for its products. At Argentina's request, this system was changed and Total and Argentina negotiated a change to their relationship. Instead of a "take or pay" contract, Total was granted an exploration permit and a concession, which was memorialized in the Concession Decree. Later developments in the other sectors, in particular the privatization and free market pricing systems established in the gas transportation sector through the Gas Regulatory Framework also impacted Total as a producer of natural gas. However, its claims as a producer are based not on the general regulatory frameworks, but on the specific promises made to it as part of the concession process.

103. Thus, in my view, with respect to Total's claims as a producer, the Tribunal must review the Measures and their impact on Total and determine whether they violated the express promises made in the Concession Decree and other instruments. Total was granted the right to freely dispose of the hydrocarbons it produced and, in the event that Argentina limited those rights, the agreement provided for specific means of calculating the compensation that would be paid. Accordingly, I consider the analysis with respect to this sector to be different from the analysis with respect to the others at issue in this arbitration. The question is not simply whether it was legitimate for Total to expect that Argentina would maintain its commitment to free market pricing and economic equilibrium of the gas transportation and power generation systems evidenced by the elaborate legislative frameworks designed for this purpose, but whether the

Measures violated specific promises made by Argentina to Total. If so, the Tribunal must consider whether Argentina should be required to compensate Total. As I have already discussed, I consider the pesification and freezing of tariffs taken together as a breach of the obligation to provide fair and equitable treatment to investments in the gas transportation and power generation sectors. I reach the same conclusion with respect to the exploration and production sector.

(ii) Crude Oil

104. Total argues that pesification and the imposition of export taxes on crude oil breached its right to fair and equitable treatment in light of the specific promises contained in the Concession Decree. With respect to the arguments related to pesification, the majority repeats its earlier conclusion (from the gas transportation analysis) with respect to pesification, *i.e.*, that "[s]uch changes in general legislation in absence of specific stabilization promises to the foreign investor are legitimate exercise of the host State's governmental powers that are not prevented by a BIT's Fair and Equitable obligation and not in breach of same."[89] As I have already discussed, this case is not about stabilization promises, *per se* and, in general, I do not understand Total's argument to be that Argentina was not entitled to change its legislation. In any event, with respect to its investments in the exploration and production sector, Total's arguments are different than with respect to its investments in the other sectors. This is because of the Concession Decree, which evidenced the bilateral agreement between Total and Argentina. Total summarizes its argument in these words:

> Total does not advocate that Argentina should have been captive to legal or regulatory immobility. Of course, legal frameworks do evolve and adapt to changing circumstances. What is clear, however, is that a framework that Argentina promised to Total in the Concession Decree would remain stable for the life of its investments – and relied on by Total – may not be dispensed with without compensation.[90]

105. The Concession Decree was for a limited period of time. It required Argentina to ensure that the financial equilibrium of all renegotiated contracts be preserved.[91] In my view, this was a specific promise made by Argentina to maintain the financial equilibrium of the contracts. It did not necessarily mean that Argentina could not change its laws or even change them in such a

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[89] Majority Decision at para. 429.

[90] CPHB at para 684.

[91] Decree 1212/1989, which was incorporated in the Concession Decree.

way as to impact the underlying framework on which Total relied in making its investment. However, if such changes were made, Argentina was required to either maintain the financial equilibrium of the contracts or to compensate Total. Pesification very clearly impacted the equilibrium of the contracts, as it reduced the amount that Total received for its products by two-thirds. Pesification altered the price terms in contracts between Total and various refineries for the sale of crude oil. Total was only able to mitigate some of these losses through renegotiation of its contracts and claims for its remaining losses. In the context of the specific promises granted by the Concession Decree, I have no trouble finding that Argentina breached the duty to treat Total fairly and equitably when it unilaterally converted all of the amounts due under Total's private contracts from dollars to pesos at a forced conversion rate of 1:1.

106. With respect to export taxes on hydrocarbons, the majority finds that these taxes form part of the general fiscal regime and, as such, Total agreed to be subject to them.[92] I do not think that this approach gives due consideration to the impact of the specific taxes at issue. Through Resolution 397/07, Argentina imposed a tax on crude oil exports that effectively prevented Total from receiving more than US$42 per barrel of oil produced despite international prices in excess of US$100. It is difficult to classify this tax as anything but a price control. Although Total was free to set its export prices, it could never realize more than US$42 per barrel because of Argentina's export tax. As discussed in detail above, Argentina promised Total that it would have the right to ownership and free disposition of its products. Through the Concession Decree, Total gave up a guaranteed buyer for its product, taking on significantly more risk. The parties agreed to allocate that risk and the potential benefits in a certain way by negotiating an economic equilibrium in the Concession Decree. By imposing an export tax that effectively capped the price that Total could receive from its export customers for crude oil, Argentina altered that balance. In my view, this was improper and a violation of Total's legitimate expectations and the obligation to treat Total fairly and equitably. Argentina expressly stated in Resolution

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[92] Citing Article 9 of the Concession Decree, which provides:

> Art. 9. Holders of the Exploitation Permits of Exploitation Concessions and UTE Agreements mentioned in Article 6 herein shall be subject to the general fiscal legislation which apply to them, but the provisions that may be imposed on the person, judicial condition, or the activity of the permit holder or the concessionaire or the property intended for the execution of the respective tasks shall not be applicable in a discriminatory or specific way.

394/2007 that the export tax was intended to cap domestic prices of crude oil. The export taxes not only decreased Total's revenues on its export contracts, they also impacted the domestic price of crude oil. In light of the specific promises contained in the Concession Decree, I consider the export taxes to be a breach of the fair and equitable treatment obligation for which Argentina should have to compensate Total.

107. I note that the majority considers Argentina's right to restrict the export of crude oil in the event of national shortage as set out in Article 6 of the *Hydrocarbons Law* as a general restriction on Total's right to ownership and free disposition of its products. While I agree that there were potential situations in which Argentina may have been able to invoke the provisions of Article 6 of the *Hydrocarbons Law* in order to ensure domestic supply and, in exceptional circumstances, even pay less than international prices for that crude oil, there was no evidence that that is what happened here. The export tax on crude oil was not intended to ensure the domestic supply. It was not suggested that the impact of the export tax on the domestic price of crude oil was intended to mimic the alternate pricing structure set out in the *Hydrocarbons Law*. It was not argued that there was a relationship between the possible specific limitations on exports (in the case of national shortage) with a promise of international pricing and the export taxes imposed. There is no such relationship. In my view, in order to avail itself of the rights it had reserved to itself in the *Hydrocarbons Law* (especially in light of the subsequent, detailed Concession Decree), Argentina needed to satisfy the preconditions, *i.e.* demonstrate that there was a shortage and take measures designed to deal with the shortage. Further, in order to derogate from the clear default international pricing compensation provisions in the *Hydrocarbons Law*, Argentina needed to submit some evidence of international price increases due to exceptional circumstances. There was no evidence that the significant increase in global oil prices at the time of the imposition of the export taxes was as a result of exceptional circumstances. In the absence of that evidence, at a minimum, Argentina was required to compensate Total at international prices.

108. Total also argues that the elimination of the tax-free status for both oil and natural gas exports from Tierra del Fuego is a further breach of its rights under the BIT. The majority accepts this argument on the basis that the retroactive change to the customs status (from 2007) was contrary to specific assurances made to Total that Tierra del Fuego would maintain its tax-

free status. I concur with this part of the Majority Decision. However, the majority finds that the elimination of the tax-free status generally, *i.e.*, commencing in 2007, was not a breach of Total's rights under the BIT, as it did not see any basis for concluding that the exemption could not be revoked by a later statutory enactment.[93] In my view, this conclusion ignores the evidence of Michel Contie who testified that Total would not have made its investments in Tierra del Fuego but for the tax exemption and absence of export restrictions from the region.[94] Mr. Contie specifically referenced assurances made by Argentine officials to Total that the Mercosur deal regarding special economic zones would continue through 2013 at a minimum.[95] Argentina did not challenge this evidence.[96] In light of this evidence, I consider it unfair and inequitable for Argentina to have revoked the tax-free status for Tierra del Fuego without notice or without any consideration of how the elimination of this exemption would impact the economic equilibrium of the investments.

(iii) Natural Gas

109. Similar to its arguments with respect to crude oil, Total argues that pesification and the imposition of export taxes on natural gas breached its right to fair and equitable treatment in light of the specific promises contained in the Concession Decree. Total says that the Measures changed the prices for natural gas that it had negotiated for its private contracts (effectively reducing the revenue under those contracts by two-thirds) and the freezing of the tariff had the effect of *de facto* setting the well head price in the natural gas market. As I have already discussed, I consider the language in the Concession Decree granting Total the right to freely dispose of the hydrocarbons it produced to be clear and to necessarily include the right to sell its products for the prices that it could negotiate freely with its contractual partners. Accordingly, notwithstanding the fact that the Measures were general in nature and in response to a genuine economic crisis, I would have found that the Measures breached Total's rights to fair and equitable treatment under the BIT as they eviscerated the specific rights granted to Total under the Concession Decree and the *Acta Acuerdo*. Referring to its earlier reasoning with respect to pesification in the context of the gas transportation sector, the majority finds no breach of the

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[93] Majority Decision at para. 439.

[94] Contie WS2 at paras. 18 – 23.

[95] Contie WS2 at para. 22.

[96] RPHB at paras. 150 – 166.

obligation to provide fair and equitable treatment.[97] However, with respect to the freezing of natural gas tariffs, the majority concludes that Argentina breached Total's treaty rights to the extent that it did not compensate Total at the rate envisaged in Decree 1589/89, the rate to be paid in the event that Argentina restricted Total's rights to freely dispose of natural gas.[98] I agree with this conclusion and join with the majority on this portion of the decision.

(1) Price Path Recovery Agreement

110. By way of Decree 181/2004 (Exhibit C-197), the National Executive authorized the Secretary of Energy to enter into agreements with producers of natural gas to adjust the price of natural gas paid to producers in order to re-direct the production and sale of natural gas in the internal market towards a return to the free market pricing system. Pursuant to the terms of the decree, this was to be achieved by a scheme which was to be completed by 31 December 2006 and the Secretary of Energy signed with a number of gas producers, including Total, an agreement dated 2 April 2004. This agreement, known as the Price Path Recovery Agreement, was approved by way of Resolution 208/2004 adopted by the Ministry of Planning.[99] A number of gas producers, including Total, signed a copy of the Resolution as well as the annex setting out the step price increases over time provided for in the Ministry of Planning's Resolution.

111. Annex 2 attached to Resolution 208/2004 provides for a commitment by the producers not to initiate new lawsuits and to suspend existing lawsuits against distribution companies and electrical energy producers in respect of claims relating to the pesification of prices initiated under the *Emergency Law*. This annex also provides for the suspension of the running of limitation periods during the currency of the Price Path Recovery Agreement. Further, it says that provided that the terms of the Price Path Recovery Agreement are all fulfilled, the producers agree to waive any actions they may have against distributors or electrical energy producers. No mention is made of the waiver of any claims against the Government of Argentina or any of its ministries or institutions.

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[97] Majority Decision at para. 446.

[98] Majority Decision at paras. 452 – 455.

[99] See Ex. C-208, which contains the Ministry of Planning's Resolution and copies of the agreement signed by the parties. The agreement signed by the parties is attached as Annex 1 to the Resolution and the supplementary agreement dealing with the suspension and possible waiver of rights as between the producers and gas distributors and energy generating companies is attached as Annex 2 to the Resolution.

112. The oral evidence indicated that, during the course of negotiations for the agreement to implement the Price Path Recovery Agreement, Argentina requested that the producers waive any claims against it.[100] Mr. Grosjean testified that Total refused to waive any such claims.[101] A review of the Ministry of Planning's Resolution 208/2004 and the attached annexes reveals no indication of any waiver by Total, or any other producer as against Argentina. The only undertakings made by the producers were with respect to the distribution companies and electrical generation companies in respect of claims the producers may have brought against those companies in relation to the effects of the *Emergency Law* and related measures. Further, a condition of the suspension and possible eventual waiver of any such claim was clearly made subject to full compliance with the terms of the Price Path Recovery Agreement by Argentina, including the completion of the normalization scheme, by 31 December 2006.[102]

113. Total alleges that the Price Path Recovery Agreement was never fully implemented and its objective was never met. It says that amongst other failures, the last step of the price path and the return to the free market for industrial consumers was never fully implemented because of further measures implemented to introduce new forms of protection.[103] The majority discusses the validity of the Price Path Recovery Agreement, *i.e.*, that Total signed the agreement, but does not address Total's reservation of rights argument.[104]

114. On the basis of the evidence and arguments presented, I must conclude that Total did not waive any claims it may have against Argentina by virtue of its signature of the Price Path Recovery Agreement. The language of the agreement and of Resolution 208/2004 is clear that any limitation, suspension or waiver was with respect to lawsuits or proceedings against

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[100] See Guichón, TR (Spanish), Day 5, 1337:1 – 11.

[101] See Grosjean, TR, Day 3, pp. 891-893. Mr. Grosjean was clear that under The Price Path Recovery Agreement, Total was prepared to waive rights as against the distribution companies and electrical generation companies, but not as against Argentina. In his evidence, Mr. Guichón admitted that in the drafts of the Price Path Recovery Agreement that he saw, Argentina had requested from Total and the other natural gas producers a waiver of all claims related to the *Emergency Law* and related measures. He also stated that he was aware that this was an issue that had been discussed until the last minute. See, Guichón, TR, Day 5 (Spanish), p. 1337.

[102] See Ex. C-208, Anexo II, Art. 2.6. Art. 2.7 goes on to state that the suspension and waivers provided for could not be raised by the parties with respect to other claims not covered by the agreement. Other articles of the agreement also require the completion of agreements between the producers and the distribution and electrical power generating companies.

[103] See Secretary of Energy Resolution 752/2005, dated 23 May 2005, Ex. C-497 and Secretary of Energy Resolution 659/2004, dated 18 June 2004, Ex. C-215.

[104] Majority Decision at paras. 456 – 457.

distribution companies and generators of electrical power, only. There is no basis in the Price Path Recovery Agreement to find that Total somehow waived its rights pursuant to the BIT against Argentina. Further, the evidence of the history of negotiation indicates that, in fact, Argentina requested the waiver of all claims against it, but was unsuccessful in obtaining this. With respect to whether the Government of Argentina fully complied with the obligations contained in Decree 181/2004 and the Price Path Recovery Agreement, a decision on this issue is not required to address Argentina's argument regarding waiver.

115. The Price Path Recovery Agreement is, clearly, relevant to the assessment of damages suffered by Total and must be taken into account in assessing those damages. Further, the assessment of whether the terms of the Price Path Recovery Agreement were fully complied with can best be addressed as part of that exercise. On the basis of the evidence currently before the Tribunal, it does not appear that the stepped price increases provided for in the Price Path Recovery Agreement were fully implemented by the end date of that agreement, 31 December 2006 or at all, or that the price payable to producers ever returned to the original system of freely negotiated prices.

(2) Restrictions on Natural Gas Exports

116. Total argues that Argentina restricted natural gas exports by interfering with export contracts that had been approved by the Government and by requiring producers to supply additional volumes of natural gas to the local market before being permitted to comply with their export commitments.[105]

117. The majority finds that Argentina has breached the fair and equitable treatment standard in interfering with Total's gas export contracts.[106] I agree with this conclusion.

118. The majority also finds that Argentina has breached the fair and equitable treatment standard of the BIT in so far as the domestic gas prices set by the Government were below the minimum price set out in Article 6 of Decree 1589/89[107] in the event that Argentina required

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[105] The revocation of tax free status for exports from Tierra del Fuego has been discussed above in the context of export taxes on crude oil.

[106] Majority Decision at para. 461.

[107] 35% of the international price per cubic meter of Arabian light oil, 34° API

producers to sell into the domestic market because of shortage.[108] I agree with this conclusion. However, the majority goes on to find that by signing the Price Path Recovery Agreement, Total waived its right to claim for compensation of past losses (*i.e.*, before June 2002). As discussed at paragraphs 110 to 115, above, I do not consider Total to have waived its right to make claims against Argentina by signing the Price Path Recovery Agreement. Further, and in any event, that agreement was never fully implemented because of further measures taken by Argentina. Accordingly, I disagree with the majority's conclusion on this issue and would have found a breach of the fair and equitable treatment obligation from the time the Measures were implemented.

(iv) LPG

119. As noted by the majority, Total's arguments with respect to its losses as a result of the LPG Law and losses on export taxes mirror its arguments with respect to crude oil.

120. With respect to the LPG price claims in the domestic market, Total claims that the LPG Law dated 8 April 2005[109] capped the prices for domestic sales of LPG, thereby breaching Total's right to free disposition of LPG granted under the Concession Decree. Argentina's defence with respect to this claim is that Total waived its rights by signing the LPG Agreement dated 26 July 2002.

121. In deciding Total's claim with respect to pesification of prices, the majority refers to its general reasoning and finds no breach of the fair and equitable treatment obligation. Again, I must disagree. Setting the price domestically interfered with Total's right to free disposition. The *Hydrocarbons Law* contemplated regulation of prices in certain circumstances, none of which were adequately argued or demonstrated by Argentina with respect to LPG price caps. Accordingly, I would have found that the LPG Law resulted in a breach of Article 3 of the BIT.[110]

122. I also disagree with the majority's analysis with respect to the effect of the LPG Agreement. In 2002, Total and Argentina entered into the LPG Agreement, which set LPG

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[108] Majority Decision at para. 455.

[109] Law 26,020 dated 8 April 2005 at Exh. A RA 170.

[110] LPG Law passed 8 April 2005, see Law 26,020 Exh. A RA 170.

prices and provided certain benefits to the producers, such as decreased export taxes on LPG. Total does not claim any losses under the LPG Agreement but, in any event, Total says that the LPG Agreement was signed by Total under protest and with a full reservation of rights.[111] I agree with the majority that the evidence did not support this second position. However, I note that this finding is irrelevant to Total's claim under the LPG Law, which was passed a number of years after the LPG Agreement was signed. I also disagree with the majority's analysis to the extent that it relies on the LPG Agreement as its basis for finding that LPG prices were not established by the market at the time the LPG Law was passed.

VIII. CONCLUSION

123. In conclusion, I disagree with the majority primarily with respect to the analysis of the breach of the fair and equitable treatment obligation as it relates to redenomination and forced conversion at a rate of 1:1,[112] particularly when combined with the freezing of tariffs and prices. I believe that Argentina breached this obligation in respect of Total's claims in each of the three sectors: gas transportation, power generation, and exploration and production. In my view, these Measures were particularly egregious in the context of the promises made by Argentina to Total in the Concession Decree and, consequently, as they impacted Total's investments in the exploration and production sector. Although the *Hydrocarbons Law* allowed Argentina to impose some limits on Total's rights to ownership and free disposition of its products, it was clear from the evidence that Argentina did not pass the Measures in response to a shortage of hydrocarbons in the domestic market and neither did it compensate Total for those limits, as contemplated by that law, Argentina's civil code or the subsequent decrees which provided for compensation. As set out in detail above, I also disagree with the majority's assessment of a variety of issues including the timing of Total's investments in the gas transportation and power generation sectors, its due diligence in making its investment in the gas transportation sector and the effect of the Price Path Recovery Agreement.

124. I join with the majority in its findings of other breaches by Argentina of Article 3 of the BIT through subsequent acts. Since these findings do not coincide with the basis on which Total made and calculated its claims for damages, Total shall have the opportunity to present argument

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[111] CPHB at para. 780.

[112] What I have referred to as pesification in this Individual Opinion.

and evidence in support of its claims for damages as they relate to these breaches in a subsequent damages phase of the proceedings.

[*Signed*]

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Mr. Henri Alvarez
Arbitrator
Date: [*21 December 2010*]

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