

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

In the arbitration proceeding between

**HOCHTIEF AG**

(Claimant)

and

**ARGENTINE REPUBLIC**

(Respondent)

**(ICSID Case No. ARB/07/31)**

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**AWARD**

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*Members of the Tribunal*

Professor Vaughan Lowe Q.C, President  
Judge Charles N. Brower, Arbitrator  
Mr. J. Christopher Thomas, Q.C., Arbitrator

*Secretary of the Tribunal*

Mrs. Mercedes Cordido-Freytes de Kurowski

*Date of dispatch to the Parties:* December 21, 2016

REPRESENTATION OF THE PARTIES

*Representing Claimant*

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Philip D. Robben  
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New York, NY 10178,  
United States of America

*Representing Respondent*

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Procurador del Tesoro de la Nación  
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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT or the Treaty	Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments dated 9 April 1991, that came into force on 8 November 1993.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes

## **I. INTRODUCTION**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Treaty between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments dated 9 April 1991 which entered into force on 8 November 1993. The dispute concerns a concession for the construction of a toll highway and a bridge between the cities of Rosario and Victoria, and Argentina’s alleged breaches of Claimant’s rights under the BIT.
2. Claimant is Hochtief Aktiengesellschaft and is hereinafter referred to as “Hochtief” or “Claimant.”
3. Claimant is a company incorporated under the laws of the Federal Republic of Germany.
4. Respondent is the Argentine Republic and is hereinafter referred to as “Argentina” or “Respondent.”
5. Claimant and Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (ii).

## **II. BRIEF PROCEDURAL BACKGROUND**

6. On 29 December 2014, in its Decision on Liability<sup>1</sup>, the Tribunal decided that the Respondent had breached its obligation under Article 2 of the Germany-Argentine Republic Treaty to grant Claimant fair and equitable treatment, by reason of:
  - (i) its failure to restore and redress the commercial balance that had been secured by the Concession Contract, after that balance had been disrupted by the pesification law on 6 January 2002; and

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<sup>1</sup> The 29 December 2014 Decision on Liability [hereafter the “Decision on Liability”], the 24 October 2011 Decision on Jurisdiction and the Separate and Dissenting Opinion of Mr. J. Christopher Thomas, Q.C., also dated 24 October 2011, in this case are integral parts of this Award. They are annexed to this Award for convenience.

- (ii) its pesification of operation and maintenance expenses in Resolution 14 of 30 June 2003.

- 7. The Tribunal decided that reparation was due in respect of those breaches.<sup>2</sup>
- 8. In respect of the quantum of damages, the Tribunal decided unanimously that Claimant was entitled to 26% of the damages caused to the Puentes del Litoral S.A. (“PdL”) by the Respondent, corresponding to its share in the equity of PdL.<sup>3</sup> It also decided, by a majority, that such damages were to be assessed as at the date of the Decision on Liability.<sup>4</sup> The Tribunal also decided unanimously that interest on sums due to Claimant would be payable at the rates of short-term US Treasury Bills at the relevant times, compounded quarterly.<sup>5</sup> It did not, however, specify precisely what term would be employed.
- 9. In terms of calculating the reparation due to Claimant (from 23 May 2003 to 29 December 2014), the Tribunal decided, in paragraphs 315 and 316 of the Decision on Liability, as follows:

“315. In broad terms, the measure of the damage is the amount by which the value of Claimant’s 26% shareholding in PdL was reduced by Respondent’s conduct in violation of the BIT. It is to be assumed that this amount is equivalent to 26% of the reduction in value of PdL caused by Respondent’s breaches of the BIT.

316. The main element in the reduction in the value of PdL is the difference between the sums that PdL actually received from tolls and the sums that it should have received if pesification had not occurred and if the toll rates had been revised annually in line with the US Consumer Price Index, as the Concession Contract provided.”

- 10. Paragraphs 325 – 328 of the Decision on Liability read as follows (footnote omitted):

325. The Tribunal has accordingly decided that for the purpose of calculating the reparation due to Claimant in this case, the reduction in value is to be Claimant’s 26% share of the difference in US dollars between the actual value of PdL at the date of this Decision, and the value that PdL would have had if all other factors had remained as they stand in the ‘actual scenario’ except that:

- a) Peso-dollar parity had been maintained; and
- b) The tolls had been revised in accordance with the US Consumer Price Index, as

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<sup>2</sup> Decision, para. 336.  
<sup>3</sup> Decision, para. 307.  
<sup>4</sup> Decision, para. 336(e).  
<sup>5</sup> Decision, para. 334.

provided in Article 25 of the Concession Contract;

c) The numbers of each kind of toll payments had been the actual numbers reduced to take into account the impact of the elasticity of demand as estimated in the lower bounds of Mr Bates' report, as indicated by Claimant's experts in paragraph 109 of their Second Report (2012) ; and

d) The actual operation and maintenance costs and all other financial liabilities incurred by PdL, including all of its debts, had not been pesified or reduced in the insolvency proceedings.

*Temporal limitations on recovery*

326. As far as the temporal limitations on damages are concerned, as noted above, since the Respondent has not effected a proper readjustment of the Concession Contract, the actual losses in the present case begin when the income stream began to be affected, on 23 May 2003, because no earlier loses [sic] have been proven. Respondent's liability arises from its failure after the end of the economic crisis to restore PdL to the economic position upon which the Parties had agreed at the beginning of the Project, and to maintain PdL in that position. That is a continuing failure, and the losses resulting from it continue to accrue. The Tribunal accordingly decides by a majority that damages are to be assessed as at the date of this Decision.

327. The calculation is therefore to be effected by reference to the reduced value of PdL as it stands at the date of the Decision. The Tribunal would reject the claims for the recovery of anticipated losses that may arise after the date of the Award, because the Tribunal has no reason to suppose that Respondent will ignore the implications of this Decision for its continuing obligations towards PdL and Claimant. The approach adopted here does not violate that principle. It is the *present* value of PdL that has been reduced, albeit by taking into account present expectations as to the future treatment of the Project. It is that loss in the present value of PdL that is the basis of the compensation in this Decision.

328. The Tribunal accordingly decides that damages are to be assessed as at the date of this Decision. As noted above, the damages begin when the income stream begins to be affected, on 23 May 2003.

11. Paragraph 335 of the Decision on Liability provided that:

335. The Tribunal has not been able, on the basis of the information submitted by the Parties, to calculate the actual sum that results from the application of the principles set out above. This Decision orders the payment of that sum; and if the Parties are unable to agree within three months on the actual sum in US dollars payable as a result of this Decision, the Tribunal will invite each Party to submit, simultaneously and within a further two months, a brief setting out that Party's calculation of each element of the sum due in accordance with paragraph 325, and an explanation of the points on which there is disagreement. The Tribunal will then fix the actual sum payable.

12. The Parties were unable to agree within the time prescribed on the actual sum payable as a result of the Decision on Liability, and the Tribunal accordingly set about determining that amount.

13. By 19 June 2015, in response to a request from the Tribunal, each Party filed its Submission on Damages.<sup>6</sup> On 10 August 2015, in accordance with the timetable set by the Tribunal, each party filed a responsive (Supplemental or Second) Submission on Damages.<sup>7</sup>
14. As is explained below at paragraph 75, the Tribunal identified what it regarded as a gap in the information available to it, relating to the indebtedness of PdL. On 1 October 2015, the Tribunal sought from Claimant additional information in the form of spreadsheets. That information was provided on 15 October 2015, and in response to an invitation from the Tribunal, Respondent submitted its comments on the additional information on 30 November 2015.
15. On 19 February 2016, the Tribunal wrote to the Parties to say that it considered that it had sufficient evidence and submissions on all points except one. That one point was the legal significance and effect upon the calculation of quantum of the termination of the Concession Contract on 26 August 2014, which had not been brought to the attention of the Tribunal until 2015, after the Decision on Liability dated 29 December 2014 had been issued. The Tribunal regarded that late-discovered development as relevant to the assumption set out in paragraph 327 of the Tribunal's Decision on Liability, which has been set out above.<sup>8</sup> After a telephone conference with the Parties held on 11 March 2016, the Tribunal clarified its questions and directions to the Parties in a letter dated 21 March 2016.
16. The Parties submitted their responses to this request on 2 May 2016.<sup>9</sup> On 12 May 2016, Respondent wrote to the Tribunal concerning the interest rate employed by Claimant in its calculations, and by invitation of the Tribunal Claimant responded on 19 May 2016.

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<sup>6</sup> Hochtief AG's Submission on Damages dated 19 June 2015 ["Claimant's Submission (19 June 2015)"]; Submission on Damages pursuant to the Decision on Liability dated 18 June 2015 ["Respondent's Submission (18 June 2015)"].

<sup>7</sup> Hochtief AG's Supplemental Submission on Damages dated 10 August 2015 ["Claimant's Submission (10 August 2015)"]; Second Submission on Damages Pursuant to the Decision on Liability dated 10 August 2015 ["Respondent's Second Submission (10 August 2015)"]

<sup>8</sup> Para. 10, above.

<sup>9</sup> Hochtief AG's Second Supplemental Submission on Damages dated 2 May 2016 ["Claimant's Submission (2 May 2016)"]; Submission of the Argentine Republic in response to the Tribunal's Questions of 21 March 2016 ["Respondent's Submission (2 May 2016)"].



17. On 10 November 2016, the Tribunal asked each party to submit an updated statement of the costs incurred in the arbitration.
18. On 16 November 2016, each party filed an updated statement of costs.
19. On 21 November 2016, the Tribunal declared the proceeding closed.

### **The Tribunal's Decision on Liability**

20. In the operative part of its Decision on Liability of 29 December 2014, paragraph 336, the Tribunal decided as follows:

336. On the basis of the foregoing, the Tribunal DECIDES as follows:

- a. Having already determined (by a majority) that it has jurisdiction over the claims in this case, the Tribunal concludes, by a majority, that claims made by Claimant in its capacity as a lender to PdL are inadmissible. All the other objections by Respondent to the admissibility of Claimant's claims, are rejected;
- b. As explained in paragraphs 209-288, Respondent breached its obligations under Article 2 of the BIT to grant to Claimant fair and equitable treatment, by (1) the failure to restore and redress the commercial balance that had been secured by the Concession Contract, after that balance had been disrupted by the pesification Law, Law 25,561, on 6 January 2002; and (2) the pesification of operation and maintenance expenses in Resolution 14 of 30 June 2003, and reparation is due in respect of those breaches;
- c. The Tribunal finds that it does not need to resolve Claimant's claims concerning Full Protection and Security [BIT Articles 2(1) and 4(1)], expropriation [BIT Article 4(2)], arbitrary and discriminatory measures, and 'observance of obligations' or 'umbrella clause', because they are all based on essentially the same arguments as the claims based upon the FET standard. As noted under paragraph 291, it has not been argued that these other standards entail a different approach to causation or to determination of quantum, or to liability, and the Tribunal considers that these additional grounds for the claims are adequately addressed by its decisions in respect to the FET standard;
- d. As is explained in paragraphs 292-301, Respondent's submission that the breaches in the present case can be excused or exculpated by reason of the economic crisis and 'necessity' under customary international law, is rejected;
- e. Claimant is entitled to 26% of the damages caused to PdL by Respondent, corresponding to its share in the equity of PdL, and the Tribunal decides, by a majority, that such damages are to be assessed as at the date of this Decision;
- f. The political risk insurance payment that Claimant had arranged with the German Government should not be deducted from the amount due to Claimant, as explained in paragraph 309;
- g. Since the Tribunal has not been able, on the basis of the information provided by the Parties, to calculate the actual compensation to be paid, the Parties are to calculate and submit, in accordance with the principles set out in paragraph 325, the information required under

paragraph 335, in the manner and within the time limits indicated therein;

- h. As decided in paragraphs 332-334, interest on all sums due to Claimant from the date on which the payment should have been made to Claimant, and on any and all sums due under this Decision from the date of the Decision until the date when the payment of such sums is made is payable at the rates of short-term US Treasury Bills at the relevant times, compounded quarterly.
- i. As to costs, and as explained in paragraphs 329-331, Respondent should reimburse the Claimant in the sum of US\$6,925,318.50.

21. The Tribunal's instructions on the calculation of damages were set out in the Decision on Liability, and have been summarized above. The instructions reflected the Tribunal's view that the damages calculated must be directly related to the breaches found in the Decision, and ensure that no damages are awarded for losses resulting from other causes, not caused by Treaty breaches attributable to Respondent. This was of particular importance in this case. It is well established that bilateral investment treaties ("BITs") are not insurance policies against damages flowing from the assumption of business risk. The highway and bridge construction project was structured in such a way that the Concessionaire was contractually bound to finance those construction costs that were not covered by the State's subsidy.<sup>10</sup> The consortium members and the Concessionaire well understood this financial commitment and there was always a risk that the overall economic climate might affect the project's financing. This risk unfortunately materialized. PdL's investors had the misfortune to launch the project at the time when the Argentine Republic began to slip into a recession that developed into a full-blown economic crisis. This, as the Decision on Liability found, adversely affected PdL's ability to secure the necessary funding from the IDB.<sup>11</sup> The lack of third party funding meant that the shareholders had to make loans to finance the company's operations and ultimately Argentina had to conclude the Financial Aid Agreement with PdL to enable the project's completion.<sup>12</sup>
22. It is important therefore to seek to isolate the financial effects of Argentina's breaches of its obligations under the Treaty from those resulting from what the Tribunal described as an "extraordinary financial crisis ... confronting Argentina" in order to differentiate

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<sup>10</sup> Decision, paras. 78-80.

<sup>11</sup> Decision, paras. 222-227.

<sup>12</sup> Decision, paras. 102-114.

between damage proximately caused by the breaches and damage resulting from other causes.<sup>13</sup>

### III. CLAIMANT'S POSITION

23. In summary, Claimant seeks total damages in the sum of US\$54 million (employing the 1-year T-Bill Interest Rate)<sup>14</sup> or its preferred alternatives:

(a) US\$103 million (weighted average cost of capital interest rate);<sup>15</sup> or

(b) US\$72.8 million (commercial interest rate, as referred to in Article 4(2) of the German-Argentine BIT).<sup>16</sup>

24. Claimant has argued that the low interest rate specified in the Decision<sup>17</sup> does not allow for full reparation of the loss caused to Claimant.<sup>18</sup>

25. Out of the US\$54 million, Claimant seeks US\$50 million for losses arising out of Respondent's failure to restore and redress the commercial balance. It seeks US\$4 million for the pesification of operation and maintenance expenses in Resolution 14, reflecting the reduction in the value of PdL (from the period of May 2003 to May 2007)<sup>19</sup> due to PdL being compelled to redirect its revenues to make payments to the Financial Assistance Agreement (FAA) loan that would have been unnecessary were it not for Resolution 14.

26. Claimant also seeks damages for anticipated losses stemming from the fact that on 26 August 2014, after receiving notice of the shareholders' intention to dissolve PdL (a decision taken on 30 June 2014), Respondent adopted a resolution terminating the Concession Contract.<sup>20</sup>

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<sup>13</sup> Decision, para. 324.

<sup>14</sup> Claimant's Submission (19 June 2015), paras. 8-9 and 47.

<sup>15</sup> Claimant's Submission (19 June 2015), paras. 12, and 97-98.

<sup>16</sup> Claimant's Submission (19 June 2015), paras. 13 and 101.

<sup>17</sup> Decision on Liability, paragraphs 332-334, 336(h). The Decision refers to interest "payable at the rates of short-term US Treasury Bills".

<sup>18</sup> Claimant's Submission (19 June 2015), para. 81.

<sup>19</sup> Claimant's Post Liability Decision Report by Manuel A. Abdala (17 June 2015), para. 44.

<sup>20</sup> Claimant's Submission (19 June 2015), paras. 20 and 43; Exhibit CX 170.

27. The decision to dissolve the Company was taken approximately 6 months before the Tribunal issued the Decision on Liability, and the Concession's termination occurred on 26 August 2014, approximately four months before the Tribunal issued the Decision. As was noted above, neither disputing party brought this to the Tribunal's attention prior to its rendering its Decision on 29 December 2014. For its part, Claimant did not inform the Tribunal of this fact until some two months after the issuance of the Decision, on 25 February 2015.<sup>21</sup> It subsequently explained that the termination of the Concession Contract had little impact upon its claim because

“[t]he only future recovery Hochtief anticipated receiving from its investment was a negligible amount as a creditor under the terms of PdL's insolvency plan. Argentina's termination of the Concession Contract on August 26, 2014, therefore had little impact on Hochtief's damages under Compass Lexecon's original model.”<sup>22</sup>

28. Claimant's Submission dated 2 May 2016 summarises the steps leading to the dissolution of PdL by resolution adopted on 30 June 2014, and Argentina's termination of the Concession Contract by resolution adopted on 26 August 2014. In summary, Claimant maintains that PdL faced the risk of mandatory dissolution from 2006 onwards, after the expiry of the suspension of a law setting out the obligation to dissolve a company in the event of a total loss of its corporate capital. After unsuccessfully attempting to renegotiate the Concession Contract in the course of 2006 and early 2007, PdL initiated insolvency proceedings on 2 May 2007 in an attempt to restructure its debts. Despite agreement with its creditors within the framework of the insolvency proceedings, PdL's financial position continued to deteriorate, and on 2 July 2012 PdL wrote to Argentina's President, Cristina Fernández de Kirchner, explaining that PdL's insolvency exposed it to mandatory dissolution under Argentine law, and urging her to sign and implement the Fourth Transitory Agreement. On 27 July 2012, PdL's shareholders attempted to stave off mandatory dissolution by absorbing its accumulated losses up to AR\$ 43,650,000 and increasing its capital by AR\$ 1,000,000 conditionally upon approval of the Fourth Transitory Agreement within 90 days (which condition was not fulfilled). PdL sought the necessary approval from the *Dirección Nacional de Vialidad* (“DNV”) for the amendments

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<sup>21</sup> Claimant's Submission (19 June 2015), para. 33.

<sup>22</sup> Claimant's Submission (2 May 2016), para. 39. The original Compass Lexecon model appears in Manuel Abdala and Pablo T. Spiller, *Losses to Hochtief AG's Investments in Puentes del Littoral S.A.*, 29 April 2010.

to its by-laws that the plan required, but that approval was not granted. PdL followed up its application to DNV in October and November 2012, but approval was still not granted. On 11 June 2013, by which time it had a negative net worth of AR\$ 28,582,450, PdL filed an administrative claim requesting damages and termination of the Concession Contract.<sup>23</sup> PdL's 2013 financial statements showed its negative net worth as AR\$ 121,592,609. On 30 June 2014 PdL's shareholders voted unanimously for its dissolution, thus triggering the automatic termination of the Concession Contract in accordance with its Section 30.9.<sup>24</sup>

29. Claimant maintains that

“the shareholder’s [sic] decision to dissolve PdL was the inevitable consequence of Argentina’s treatment of PdL: for three consecutive years (2011, 2012, and 2013) PdL had showed a negative net worth and at that stage it was clear that Argentina had no intention whatsoever of restoring the economic balance of the Concession Contract.”<sup>25</sup>

30. Claimant submits that due to the Concession Contract’s termination, this has left PdL with no expected cash flow in the actual scenario through 2023, and there can be no renegotiations. This it considers to be “a follow on effect” of the Respondent’s breach of the BIT by failure to rebalance the financial terms timeously.<sup>26</sup> Claimant argues further that even if the Concession had not been terminated, the Tribunal’s stated expectation<sup>27</sup> that the Respondent would abide by the Decision and meet its obligations to Claimant and PdL was not consistent with the Respondent’s past conduct.<sup>28</sup> Claimant maintains that it is therefore entitled to compensation for future losses, covering the period up to the expiry of the Concession Contract as originally stipulated.

#### **IV. RESPONDENT’S POSITION**

31. Respondent maintains that

“the economic-financial equilibrium of the Contract had already been disrupted prior to the

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<sup>23</sup> It appears that Hochtief opposed this decision, and that the shareholders agreed that Hochtief’s vote would not be counted, so that the decision would be unanimously agreed: Respondent’s Submission (2 May 2016), para. 9, Minutes of Special Shareholders’ Meeting of PdL, 14 March 2013 (Exhibit RA 466).

<sup>24</sup> Claimant’s Submission (2 May 2016), paras. 4-30; Concession Contract, Exhibit CX32.b.

<sup>25</sup> Claimant’s Submission (2 May 2016), para. 31.

<sup>26</sup> Claimant’s Submission (19 June 2015), para. 51.

<sup>27</sup> Claimant’s Submission (19 June 2015), para. 48; Decision, para. 327.

<sup>28</sup> Claimant’s Submission (19 June 2015), para. 59.

emergency measures, a situation which was clear to the IDB [sc. Inter-American Development Bank] itself and which influenced the decision to reject the loan request, together with the low level of income evidenced by the traffic rates presented by PdL. This led to a change in the financing strategy—whereby PdL’s shareholders took on the role of creditors at an extremely high cost to PdL—which resulted in the worsening of the financial deterioration of the Concessionaire.”<sup>29</sup>

32. Respondent notes “that PdL had no reserves and that the unappropriated accumulated loss exceeded the capital stock as from 2011; a situation experienced in 2012 and 2013 as well. In sum, PdL was in a position to be dissolved as early as December 2011.<sup>30</sup> It says that PdL’s “level of indebtedness grew exponentially as from 2001, largely because of the intercompany loans expressed in United States dollars and the update of the value with annual 15% rates, after its failure to obtain the IDB [l]oan.”<sup>31</sup>
33. Respondent initially submitted that as of the date of the Decision on Liability Claimant sustained total damages of US\$3.55 million at most.<sup>32</sup> This loss would be due to the failure to restore and redress the commercial balance that had been secured by the Concession Contract. However, assuming that the PdL’s operating costs were expressed in US Dollars, as required by the Decision on Liability, then in its view the damages would be zero.<sup>33</sup> There would be no damages arising out of Argentina’s breaches of the Treaty, because once all the adjustments had been made no dividends would be generated, and PdL’s shareholders would therefore have lost nothing as a result of Respondent’s breaches.<sup>34</sup>
34. In relation to Resolution 14, Respondent’s experts considered that the appropriate valuation period was between 22 May 2003 and 31 December 2006.<sup>35</sup> No compensable losses were suffered and the effect of Resolution 14 was simply delay the repayment of the FAA and

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<sup>29</sup> Respondent’s Submission (2 May 2016), para. 20 (footnote omitted).

<sup>30</sup> Respondent’s Submission (2 May 2016), para. 47 (footnotes omitted).

<sup>31</sup> Respondent’s Submission (2 May 2016), para. 48.

<sup>32</sup> Submission on Damages pursuant to the Decision on Liability dated 18 June 2015 [“Respondent’s Submission (18 June 2015)”], para. 31.

<sup>33</sup> Respondent’s Submission (18 June 2015), para. 32; Updated Damages Valuation Report following the guidelines in the Tribunal’s Decision on Liability dated 18 June 2015 [“Respondent’s Updated Experts’ Report (18 June 2015)”], para. 52.

<sup>34</sup> Respondent’s Updated Experts’ Report (18 June 2015), paras. 53.

<sup>35</sup> Respondent’s Updated Experts’ Report (18 June 2015), para. 43.

no dividends would have been paid over that time period even without the effects of Resolution 14.<sup>36</sup>

35. The Respondent and its experts, Messrs. Sandleris and Schargrotsky, principally focused on Compass Lexecon’s decision to shift away from the valuation method used consistently in their two expert reports submitted in the merits phase, to what Compass Lexecon called a “*simplified cash flow analysis*” in this damages phase.<sup>37</sup> Compass Lexecon’s previous reports employed a “Free Cash Flow to Equity” approach when estimating the losses suffered by Claimant. (Messrs. Sandleris and Schargrotsky did likewise.<sup>38</sup>)
36. However, this changed after the Decision was issued and in employing its “simplified” approach, Compass Lexecon calculated the impact of Respondent’s measures on the cash flows to the firm (*i.e.* the “Firm or Enterprise Value” or “Free Cash Flow to the firm”) rather than “to Equity”.<sup>39</sup> In essence, the damages calculated were based on the difference between the *actual pesified revenues* realized by PdL and the ‘*but-for*’ *dollarized revenues* estimated by Compass Lexecon.<sup>40</sup>
37. This, Respondent contended, had the effect of focusing solely on the difference between actual and ‘*but-for*’ revenues without applying the Tribunal’s instructions to assume no insolvency and PdL’s full repayment of its debts in light of the general priority of creditors’ claims over those of shareholders.<sup>41</sup> Respondent thus argued that Claimant’s experts did not value Claimant’s interest in PdL consistently with the Tribunal’s instructions.<sup>42</sup>

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<sup>36</sup> Respondent’s Updated Experts’ Report (18 June 2015), paras. 46.

<sup>37</sup> Claimant’s Post Liability Decision Report by Manuel A. Abdala (17 June 2015), para. 10.

<sup>38</sup> See Respondent’s Updated Experts’ Report (18 June 2015), para. 15 & fn 16 – explaining that the shareholders’ free cash flow is the cash flow available to be distributed only among shareholders; see also Comments on Claimant’s Submission dated 15 October 2015 filed on 30 November 2015 [“Messrs. Sandleris and Schargrotsky’s 30 November 2015 Comment”], para. 9.

<sup>39</sup> Second Submission on Damages Pursuant to the Decision on Liability dated 10 August 2015 [“Respondent’s Second Submission (10 August 2015)”], paras. 9-10; 12.

<sup>40</sup> Respondent’s Second Submission (10 August 2015), para. 19.

<sup>41</sup> Respondent’s Second Submission (10 August 2015), para. 21.

<sup>42</sup> Respondent’s Second Submission (10 August 2015), paras. 6-7.

38. Respondent also referred to Dr. Abdala’s affirmation in footnote 18 of Compass Lexecon’s report that he:

“...checked that in the but-for scenario as of August 26, 2014, PdL would have already paid all of its debts (including the Emergency Loan to Argentina, the debt with suppliers such as Boskalis-Ballast Nedam, and the loans advanced by PdL’s shareholders, considering the debt amounts as not pesified, and not reduced by the insolvency proceedings).”<sup>43</sup>

39. In Respondent’s view, this was unsupported by any evidence.<sup>44</sup> In this regard, it pointed out that “[n]one of the spreadsheets contains the debt evolution cash flow or shows the repayment of debt as instructed by the Tribunal (CLEX-042).”<sup>45</sup> There was also no reflection of the reduction of ‘*but-for*’ revenues which would have gone towards payments of ‘*but-for*’ debts.<sup>46</sup>

40. Respondent also objected, in its 18 June 2015 Submission, to Claimant’s introduction of the Concession Contract’s termination as a fact to be considered in the quantification of damages. It argued that this was not brought to the Tribunal’s attention and was not therefore analysed during the stage in which the potential liability of the Argentine Republic was under consideration.<sup>47</sup> It observed further that PdL has already brought an action in this respect before the Argentine courts, and there is thus the risk of double recovery.<sup>48</sup>

41. Although it criticised the Tribunal’s ordering of compound interest, the Respondent did not seek a variation of the order<sup>49</sup> and it opposed any attempt by Claimant to re-open the award of interest previously ordered.<sup>50</sup>

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<sup>43</sup> Respondent’s Second Submission (10 August 2015), para. 3.

<sup>44</sup> Respondent’s Second Submission (10 August 2015), para. 3.

<sup>45</sup> Respondent’s Second Submission (10 August 2015), para. 29 & fn 39. The Claimant observes in its Supplemental Submission on Damages dated 10 August 2015 [“Claimant’s Supplemental Submission (10 August 2015)”], para. 29, that “Sandleris and Schargrotsky determine that in the but-for scenario that PdL would have paid off all of its debt by 2013.” See also Respondent’s Updated Experts’ Report (18 June 2015), para. 34.

<sup>46</sup> Messrs. Sandleris and Schargrotsky’s 30 November 2015 Comment, para. 25.

<sup>47</sup> Respondent’s Submission (18 June 2015), para. 14. Respondent’s Submission (2 May 2016), paras. 11-18.

<sup>48</sup> Respondent’s Submission (18 June 2015), para. 28; Respondent’s Submission (2 May 2016), para. 6.

<sup>49</sup> Respondent’s Submission (18 June 2015), paras. 24-25.

<sup>50</sup> Respondent’s Second Submission (10 August 2015), para. 70.



42. Having reviewed Compass Lexecon's worksheets pertaining to the repayment of debt in the 'but-for' scenario, Respondent's experts asserted that the damages suffered by Claimant as of 29 December 2014 would, based on Compass Lexecon's model corrected properly to reflect the evolution of debt as well as its proper linking with the cash flow calculations, be at most US\$ 4.7 million (US\$1.2 million for 2013 plus US\$3.5 million for 2014), and that with certain corrections the damages would be reduced to zero.<sup>51</sup>
43. Finally, Messrs. Sandleris and Schargrodsky separately calculated that the value of Hochtief's shareholding as of 29 December 2014 amounted to US\$8.94 million (as determined by 'but for' cashflows after the date of termination of the Concession Contract and until 14 September 2023).<sup>52</sup>

## V. THE TRIBUNAL'S FINDINGS

44. The Tribunal's task has been assisted by the Parties' submissions on quantum and by the experts' reports.
45. Essentially, there are three major issues that must be addressed to arrive at the Award. Two involve questions of principle and proper procedure: (i) whether the Tribunal should revisit its determination of the appropriate interest rate; and (ii) what is the effect of the dissolution of PdL and the consequent termination of the Concession Contract on this arbitration. Having decided those issues, the Tribunal can then determine whether the experts' approach was faithful to the Tribunal's instructions, and which is to be preferred and to what extent. It will then determine the amount of damages payable.
46. The Tribunal will address each of these questions in turn before turning to the experts' calculations.

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<sup>51</sup> Messrs. Sandleris and Schargrodsky's 30 November 2015 Comment, paras. 26-27.

<sup>52</sup> Sandleris and Schargrodsky Updated Damages Model, 2 May 2016, para. 32.

*(i) The Interest Rate*

47. The Tribunal arrived at its decision on the applicable rate of interest<sup>53</sup> with the assistance of submissions and the evidence adduced by the Parties. In the Tribunal's view, Claimant's interest rate adjustment request amounts to a request for re-consideration of that decision. Leaving aside the issue of whether or not the Tribunal is empowered to reconsider the interest terms set forth in the Decision on Liability, the Tribunal perceives no reason for changing its previous decision on the subject. Hence the interest provisions of the Decision on Liability are carried forward in this Award.

48. The Tribunal accordingly reiterates that interest is payable at the rates of short-term US Treasury Bills at the relevant times. Further, it specifies that "short-term US Treasury Bills" is to be understood to mean one-year US Treasury Bills.

*(ii) Whether the Disolution of PdL and the Consequent Termination of the Concession Contract Requires the Tribunal to Adjust the Approach Taken in its Decision*

49. It is common ground that on 30 June 2014, the shareholders of PdL resolved to dissolve the company and therefore it was no longer in a position to perform the Concession Contract. This led, in accordance with Section 30.9 of the Concession Contract, to the contract's termination. Respondent adopted a resolution on termination on 26 August 2014.<sup>54</sup> Court proceedings have been commenced against the Respondent in relation to its actions relating to the Concession Contract.

50. When it was notified of the dissolution and related events the Tribunal left open, in its letter to the Parties dated 11 March 2015, the possibility of the Parties making out a case (either in their bilateral negotiations, or in their submissions to the Tribunal) for a variation in the process for determining the quantum of damages as set out in the Decision.<sup>55</sup> The letter

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<sup>53</sup> Decision on Liability, para. 334.

<sup>54</sup> CX-170.

<sup>55</sup> "(1) Having considered the Parties' letters of 25 February 2015 and 05 March 2015, the Tribunal reaffirms its Decision on Liability, including its approach to the determination of quantum as set out in paragraphs 311-334 of the Decision, and its fixing of 23 May 2003 and 29 December 2014 as the beginning and end dates for the assessment

referred to the possibility of an effect upon the calculations, but not to any effect upon the factual premises of the Decision on Liability, and paragraph 1 expressly reaffirmed the approach hitherto taken to the determination of quantum.

51. Having considered the Parties' further submissions, the Tribunal's view is that there is no basis for the Tribunal to supplement or vary its prior determinations insofar as the determination of the quantum of damages up to the date of the Decision is concerned. However, that is not dispositive of the issue that has arisen from PdL's dissolution.
52. At paragraph 327 of its Decision, the Tribunal reasoned that it could not be presumed "that Respondent will ignore the implications of this Decision for its continuing obligations towards PdL and Claimant."<sup>56</sup> That finding was based on what the Tribunal then understood the situation to be, namely, that the Concession Contract was in force and that it could be expected that, following the Tribunal's determination of certain Treaty breaches and any order for compensation for Hochtief's losses suffered up to the date of the Decision, Respondent would finally conclude a revised contract with PdL that would re-establish the economic bargain in the changed circumstances and this new arrangement would then govern the Parties' relations for the balance of the Concession Contract's term.
53. Had it been made aware of the decision to dissolve PdL and the consequent termination of the Concession Contract, the Tribunal could not and would not have made the statements in paragraph 327 of the Decision. It would have been squarely presented with the fact of the non-existence of the Concession Contract, and indeed PdL itself, and would have had to determine the consequences of those developments. Claimant has asserted that now that the Tribunal is apprised of these developments it must award damages for the remaining period of the Concession Contract's term because PdL and through it, Hochtief, has no prospect of receiving any revenues from contractual performance. For its part, Respondent asserted that Claimant had raised a new claim which it did not raise earlier in the proceedings, and that it was doing so belatedly.

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of losses. (2) The Tribunal is nonetheless aware that recent developments might be said to have affected the calculations envisaged in paragraphs 325-328 and 332-334 of the Decision."

<sup>56</sup> Decision, para. 327.

54. The Tribunal's description of the failure to notify it of the changed circumstances should not be taken to be a criticism of counsel for either Party. At the time of the Concession Contract's termination the Tribunal had yet to issue its Decision and therefore both sides were unsure what the outcome of this proceeding would be. On Claimant's case, it had suffered from multiple breaches with the result that the Concession had been, among other things, effectively expropriated and therefore substantial damages were in order; for Respondent, the claims should have been dismissed in their entirety. As events transpired, the Tribunal accepted that only two of the measures identified by Claimant breached the fair and equitable treatment standard. The Tribunal also made a series of findings that narrowed the amount of damages that would be payable to Hochtief.<sup>57</sup>
55. The Tribunal initially had a concern that the development has been brought to its attention only through correspondence and without the benefit of detailed evidence and submissions. The present proceeding had not been declared closed after the oral hearing. It was open to either disputing party to bring any new facts to the Tribunal's attention before it rendered its Decision so that they could be considered by the Tribunal after giving both Parties an appropriate opportunity to address them. As this has not occurred, the Tribunal has not been given a detailed and tested account of the circumstances surrounding the dissolution and termination decisions. It is evident from the very existence of the court proceedings as well as in the Parties' exchanges in this arbitration that the reasons for the Concession Contract's termination are a matter of dispute under the applicable law.
56. The Tribunal thus finds itself in the position of having to arrive at a just and legally supported award in light of a development that had not been anticipated when it declined to award damages for lost future cash flows. After carefully reviewing its Decision on Liability, the Tribunal finds that in dealing with the claim for damages suffered from the date of the Decision on Liability to the date of the Contract's expiry, it is not dealing with a new claim, as Respondent contended, but rather a further development –unknown to the Tribunal at the relevant time– in the Concession's life and ultimate demise. It also finds, for reasons explained below, that it is unnecessary to hold a full-blown evidentiary hearing.

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<sup>57</sup> See para. 61 below.

57. The Tribunal considers it helpful to recall certain key findings of the Decision on Liability in order to explain the basis for these findings. In concluding that Respondent breached the Treaty, the Tribunal took note of the fact that “renegotiation was mandated by the Emergency Law, Law No. 25,561 in January 2002. Title IV (and in particular Article 9) of the Emergency Law provided for the renegotiation of public works contracts, and Article 8 of Decree 214/02 provided for adjustments of contracts to be made annually (and in some circumstances, more frequently) so as to ‘preserve the continuity of the contractual relationship in a way equitable for the parties.’”<sup>58</sup>
58. Various draft Transitory Agreements were developed and exchanged over the ensuing years including during the course of the arbitration itself, but none resulted in a final implemented agreement that would achieve the re-balancing that the Emergency Law had promised. During this period, PdL sought creditor protection. The Tribunal took note of the fact that the court conducting the insolvency proceeding considered “that UNIREN’s refusal to continue the renegotiation of the concession agreement was contrary to the aims of Argentine law, and that more than six years after the enactment of Emergency Law 25,561 ‘the grave imbalance in the terms of the [Concession] agreement persists’”.<sup>59</sup>
59. The Tribunal found that “that it was practicable for the Parties to conclude a negotiated settlement by 2006 or 2007 at the latest. PdL was prepared in 2006 to accept – and, indeed, did accept – a negotiated settlement, and the Claimant was also willing to accept that settlement as a shareholder in PdL. But the 2006 Letter of Understanding (*Carta de Entendimiento* or ‘CdE’) that set out the terms of a settlement was repudiated by the presentation of the 2007 CdE to PdL by Respondent on 12 February 2007.”<sup>60</sup> Due to this failure timeously to conclude an agreement, the Tribunal fixed the breach as having occurred by 26 February 2007<sup>61</sup> –the date on which the Claimant sent to Respondent its notice regarding the existence of a dispute under the BIT– but found that for the purposes of calculating damages, the “breach consists in the failure to redress the commercial

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<sup>58</sup> Decision, para. 284.

<sup>59</sup> Decision, para. 285. [Emphasis added.]

<sup>60</sup> Decision, para. 286.

<sup>61</sup> Decision, para. 287.

balance that had been disrupted by the pesification Law, Law 25,561 on 6 January 2002; and the injury for which reparation is due includes losses suffered on and after 6 January 2002.”<sup>62</sup>

60. The majority of the Tribunal then found that no losses could be proved from the period 6 January 2002 to 23 May 2003: “It was after the opening of the road and bridges to toll-paying traffic on that date, that the impact of the pesification and the Emergency Loan upon PdL’s income stream from tolls began to be felt. The Tribunal accordingly decides by a majority that while the renegotiation and ‘rebalancing’ should have occurred by 2006 or 2007, the duty to restore the balance extended back to cover all ‘unbalancing’ losses resulting from the 2002 Emergency Law, and thus covered the losses arising after 23 May 2003.”<sup>63</sup>
61. Three claims advanced by the Claimant were not accepted: (i) the Tribunal, by a majority, rejected as inadmissible the claims made by Claimant in its capacity as a lender to PdL; (ii) the claim for losses flowing from PdL’s inability to obtain the IDB loan, and from the delay in beginning operations (which included the extra costs incurred as a result of the failure of the IDB loan to materialize, and the allegedly excessive costs of the 2003 Emergency Loan), was rejected on the merits;<sup>64</sup> and (iii) the claim for damage to Hochtief’s investment as a result of the fall of PdL towards bankruptcy was also rejected on the merits.<sup>65</sup>
62. This latter claim was not accepted because the evidence showed that PdL had had the misfortune to initiate its project shortly before the Argentinean economy began its slide into the deep recession that triggered the economic crisis. The Tribunal found in this regard that: “Given the Project’s difficult financial straits in the deteriorating financial conditions of Argentina in the months leading up to the Emergency Law’s enactment, ... there is insufficient evidence to warrant the conclusion that the bankruptcy proceedings against PdL were caused by the pesification process or any other breach of the BIT for which

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<sup>62</sup>

*Id.*

<sup>63</sup>

Decision, para. 298.

<sup>64</sup>

Decision, para. 320.

<sup>65</sup>

Decision, para. 323.

Respondent was responsible; and it declines to order the payment of any reparation in respect of PdL's fall towards bankruptcy."<sup>66</sup>

63. This finding in turn led the Tribunal to hold that the calculation of the quantum of damages in the *'but-for'* world of dollarized revenues must at the same time assume that PdL would have paid all of its creditors: "Indeed, the Tribunal's assumption must be that if it requires a revenue stream to be calculated in dollars, in order to avoid any unjust enrichment, it must equally assume that all of PdL's liabilities are similarly to be calculated in dollars. On this basis, and having regard to the normal priority of creditors over shareholders, PdL must be assumed to have been placed in a position to fully repay all of its debts, including to Boskalis-Ballast Nedam, to Argentina (for the Emergency Loan), and to those shareholders such as Hochtief who advanced loans to the company. It follows that the valuation exercise must assume no insolvency and the full repayment of sums owing to creditors without any discount."<sup>67</sup>
64. This set the stage for the Tribunal's instructions to the Parties in paragraph 336 of the Decision, quoted above at paragraph 20, on the approach to be taken in the additional quantum phase.
65. As is clear from the recitation of the key findings listed above, the Tribunal considered that the principal breach (the failure to rebalance the concession) adversely affected PdL's business. This, to the Tribunal's mind, was beyond doubt on the evidence before it. It was the view of the Argentinean insolvency court; and it is also the Tribunal's view. Similarly, the Tribunal found, on contemporaneous evidence, including statements of PdL's own making, that there were other causes of the project's poor financial health, including threatened bankruptcy and the suspension of construction, that predated the financial crisis.<sup>68</sup> What has not been established is the relative ranking of the various causes: but the

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<sup>66</sup> Decision, para. 324.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, para. 253: "...The Tribunal notes, however, that there is evidence that PdL was in financial difficulties even before pesification occurred. In particular: (i) PdL was informing the Grantor in August 2001, four months before pesification, that it was going to have to suspend construction of the bridge at the end of the month; (ii) PdL appeared to be unable to pay its creditors (Boskalis/Ballast Nedam); (iii) PdL told the IDB in October 2001 that it could be petitioned in bankruptcy by its creditors; and (iv) PdL's smaller shareholders' were apparently unable or unwilling to make further capital contributions in September 2001." (Footnotes omitted.)

Tribunal does not need to make that determination in order to be in a position to award damages because its instructions allow financial harm caused by factors not attributable to the breaches to be addressed by the requirement that all debts be assumed to be paid in full and in dollars. Thus, in the ‘*but-for*’ scenario, PdL must pay the debt owed to Boskalis-Ballet Nedam, to Argentina for the FAA, and the debts owed to Hochtief and the other shareholders, before PdL is in a position to declare dividends.

66. In this regard, the Tribunal takes some comfort from the fact that in 2012, when PdL wrote to the President of Argentina urging Argentina to implement the Fourth Transitory Agreement, the shareholders conditionally committed to increase the company’s capital if that occurred.<sup>69</sup> The investors were experienced contractors and had operated the Concession for some nine years by the time of that request and it can be surmised that they believed that they could run the Concession satisfactorily (if not as profitably as originally hoped) if the rebalancing occurred. Accordingly, it warrants noting that even in the actual world in 2012, they were willing to commit more capital to PdL if the rebalancing occurred.
67. Moreover, the key point for the Tribunal is that the experts for both Parties agree that in the ‘*but-for*’ world of a rebalanced concession, PdL would have paid off all debt owing to its creditors including its shareholders and the Argentine Republic by either 2013 or 2014.<sup>70</sup> This allows the Tribunal to put to one side the other non-attributable causes of PdL’s financial difficulties because in the ‘*but-for*’ dollarized world PdL would have been able to surmount those difficulties. It is clear that it would take some time for PdL to pay off its debts, but the seminal point is that both Parties’ experts agree that the Company would eventually have been in a position to pay dividends to its shareholders.
68. Once this is established, the answer to Respondent’s objection is clear. In the ‘*but-for*’ world, PdL’s shareholders would not have voted for dissolution and the Concession Contract would not be terminated on that ground. Rather, by either 2013 or 2014, the company would be ‘cash flow positive’. Accordingly, the Tribunal is in a position to award

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<sup>69</sup> See para. 28 *supra*.

<sup>70</sup> Compass Lexecon believes that the debt would be paid by the end of 2013 whereas Sandleris and Schargrofsky believe that it would be paid off in 2014.



damages for lost profits for the balance of the Concession Contract's term, that is, to 13 September 2023.

69. Having decided the first two issues of principle and procedure, the Tribunal now turns to estimate those damages.

*(iii) Estimates of damages: Shareholders' Cash Flow vs. "Simplified Cash Flow"*

70. After the Decision was issued and further analysis performed, it became clear to the Tribunal that Claimant interpreted the Decision on Liability to mean that it is entitled to 26% of the dollarized cash flows due to PdL directly (evidently without regard to any PdL's liabilities and debts). In contrast, Respondent quantified the entitlement as 26% of the dollarized dividends that Claimant might have received *qua* shareholder of PdL after all of PdL's creditors had been satisfied. This is the key difference between the Parties in respect of the estimation of damages.

71. By way of introduction to this discussion, it may be helpful to recall the instructions that the Tribunal had given in its Decision on Liability with respect to creditors' rights when it came to valuing Claimant's compensable interest in PdL:

(i) *At paragraph 304*: "As a shareholder in PdL, Claimant has obligations as well as rights; and one of those obligations is to accept that the assets of PdL would be properly applied to satisfy the legitimate demands of all PdL's creditors and all PdL's shareholders, according to the priorities laid down by law."

(ii) *At paragraph 324*: "Indeed, the Tribunal's assumption must be that if it requires a revenue stream to be calculated in dollars, in order to avoid any unjust enrichment, it must equally assume that all of PdL's liabilities are similarly to be calculated in dollars. On this basis, and having regard to the normal priority of creditors over shareholders, PdL must be assumed to have been placed in a position to fully repay all of its debts, including to Boskalis-Ballast Nedam, to Argentina (for the Emergency Loan), and to those shareholders such as Hochtief who advanced loans to the company. It follows that the valuation exercise must assume no insolvency and the full repayment of sums owing to creditors without any discount."

(iii) *And at paragraph 325*, when setting out the precise instructions for calculating damages, the Tribunal stated that the “the reduction in value is to be Claimant’s 26% share of the difference in US dollars between the actual value of PdL at the date of this Decision, and the value that PdL would have had if all other factors had remained as they stand in the ‘actual scenario’ ...”, and the last specific instruction stated that: “d) The actual operation and maintenance costs and all other financial liabilities incurred by PdL, including all of its debts, had not been pesified or reduced in the insolvency proceedings.” [Emphasis added.]

72. The necessity to factor in dollarized costs and debt repayments has been settled by the clear terms of the Tribunal’s directions concerning the calculation of damages, which required that the valuation exercise must assume no insolvency, and assume the full repayment of sums owing to creditors without the pesification or reduction of debts in the insolvency proceedings.<sup>71</sup>
73. This conclusion is dictated by the logic of the relationship between Claimant’s ability to claim under the Treaty and its ability to claim under municipal law, and the fact that Respondent can be liable only for damages that are shown to have flowed from its breach of its duties under the Treaty. Claimant accepted the terms of the Concession Contract, which precluded ‘creditor’ claims against Argentina, leaving creditors (including shareholder-creditors who had the protection of the Treaty in their capacity as investors) reliant upon municipal law for the pursuit of their claims.<sup>72</sup> That left Claimant with its right to claim for damage to the value of its investment; and the measure of that damage is the loss in the value of Claimant’s interest as a shareholder in PdL.
74. Notwithstanding the Tribunal’s clear directions, by focusing virtually exclusively on the difference between actual and *‘but-for’* cash flows and essentially equating a 26% interest in those cash flows to Hochtief’s 26% shareholding interest, Compass Lexecon’s Post Liability Decision Report dated 17 June 2015 appeared to *exclude* what the Tribunal had

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<sup>71</sup> See para. 63, above.

<sup>72</sup> Decision, para. 192.

directed must be *included*, namely, the impact of PdL’s financial obligations on its performance.

75. Having asserted that Claimant’s 26% share in PdL was worth US\$29.8 million as of August 2014, Compass Lexecon’s 17 June 2015 valuation appeared to overstate the value of Claimant’s shareholding interest after all PdL’s debt had been paid. But the report also asserted in a footnote (without further explication) that by 2013 all debt would have been paid off. It was Respondent’s view, and the Tribunal believed that there might well be substance to it, that the expert’s report overstated PdL’s value as of 2013. It was for this reason that, on 1 October 2015, the Tribunal instructed its Secretary to write to the Parties, referring to footnote 18 of Compass Lexecon’s report, and requesting Compass Lexecon to provide the worksheets that showed the paying down of the various debts incurred by PdL.<sup>73</sup>
76. On 15 October 2015, Claimant’s counsel submitted a letter accompanied by certain Compass Lexecon spreadsheets in electronic form and describing the analysis contained therein.<sup>74</sup> The letter introduced three additional worksheets to Exhibit CLEX-042 (the Valuation Model previously submitted with Compass Lexecon’s Post- Liability Decision Report dated 17 June 2015):
- (i) Worksheet VI.1 ‘But-for’ Financing: This worksheet calculated the evolution of PdL’s loan debt in the ‘*but-for*’ scenario. Compass Lexecon broke the debt down into “Senior Debt” for the loan extended by Argentina and “Junior Debt”, which included inter-company loans made by PdL’s shareholders. The worksheet showed the breakdown of the principal repayment, the interest due and the interest repayment at the end of each year (for both categories of debt). The worksheet showed that in the ‘*but-for*’ world, by 2013, PdL was debt-free.
  - (ii) Worksheet VI.2 ‘But-for’ Cash Flows 03-13: This worksheet calculated PdL’s ‘*but-for*’ free cash flows available for debt repayment, which was reflected in the

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<sup>73</sup> Letter dated 1 October 2015 from the Secretary of the Tribunal to the Parties [“Tribunal Secretary’s Letter dated 1 October 2015”].

<sup>74</sup> Letter dated 15 October 2015, from Kelley Drye & Warren LLP to the Secretary of the Tribunal.

calculation of the evolution of the loan debt in Worksheet VI.1. The calculations further reflected PdL's and Boskalis-Ballast Nedam's agreement in 2004 that PdL's debt would be US\$25 million plus interest. Accordingly, the calculations showed that that debt was paid off as at the end of 2004. It also showed that PdL took on new Junior Debt to pay off Boskalis-Ballast Nedam.

(iii) Worksheet IV.3 'But-for' Financial Aid Agreement: This worksheet showed the evolution of PdL's debt to Argentina in the '*but-for*' scenario. By the end of December 2005 in the '*but-for*' scenario, PdL would have fully paid Argentina all principal and interest due under the Financial Aid Agreement.

The letter then concluded that there was no disagreement between the Parties' experts in relation to the paying off of debts by the end of 2013 in the '*but-for*' scenario.<sup>75</sup>

77. As contemplated by the Tribunal's 1 October 2015 letter, Respondent took advantage of the offer of an opportunity to comment on Claimant's submission and accompanying material.<sup>76</sup> Due to prior commitments of Respondent's counsel, the Tribunal agreed to its request for additional time and, on 30 November 2015, Respondent filed its own submissions and supporting material.<sup>77</sup>

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<sup>75</sup> Counsel's letter noted at pp. 3-4: "There is no disagreement between the parties in relation to PdL's ability to repay its loan debt and Boskalis by the end of 2013 in the but-for scenario. Indeed, in their 15 June 2015 updated report, Argentina's experts, Drs. Sandleris and Schargrodsky, conclude that in their 'but-for scenario, and according to the normal priority of creditors over shareholders ... [PdL's loan] debt is entirely paid off in 2013....' See Sandleris and Schargrodsky's Updated Damages Model, 2 May 2016, at ¶34."

<sup>76</sup> The Tribunal Secretary's Letter dated 1 October 2015 stated in this regard: "The Tribunal thanks the Parties for their submissions on quantum, which are being carefully studied. In case they should be relevant to the Tribunal's decision, the Tribunal wishes to see the worksheets that lie behind the conclusion noted in footnote 18 of the Compass Lexecon Report dated 17 June 2015. The conclusion reads 'I checked that in the but-for scenario as of August 26, 2014, PdL would have already paid all of its debts (including the Emergency Loan to Argentina, the debt with suppliers such as Boskalis-Ballast Nedam, and the loans advanced by PdL's shareholders, considering the debt amounts as not pesified, and not reduced by the insolvency proceedings).' The worksheets should be sent in electronic form and in hard copy by Thursday, October 15, 2015. If Respondent wishes to request permission to comment upon those worksheets, it should do so by Thursday, October 29, 2015."

<sup>77</sup> Letter from Respondent to the Members of Tribunal dated 30 November 2015, NOTE PTN No. 227/AI/15; Messrs. Sandleris and Schargrodsky's 30 November 2015 Comment; Excel worksheet containing sheet titled "SS Damage Valuation" containing the CLEX Model with Drs. Sandleris and Schargrodsky's calculation ["Messrs. Sandleris and Schargrodsky Damage Valuation"].

78. Respondent's comments were accompanied by a report by Respondent's experts, Messrs. Sandleris and Schargrodsky, analysing Compass Lexecon's approach and how the recently disclosed spreadsheets comported with prior analyses conducted by Compass Lexecon.
79. Messrs. Sandleris and Schargrodsky asserted that Compass Lexecon's simplified model did not comply with the Tribunal's instructions and was problematic (in sum, resulting in the overstatement of the amount of damages). Their main arguments were as follows:
- (i) Change in valuation method: Claimant's experts had switched from the "Free Cash Flow to Equity" method used in their earlier reports to a "Free Cash Flow to Firm" method. The latter was based on the differential between the actual and the '*but-for*' revenues to the company. This was problematic for a number of reasons: (i) it was at odds with fundamental principles of financial theory; (ii) it contradicted the Tribunal's instructions in the Decision in including as damages claims already found to be inadmissible by the Tribunal; (iii) it drew no difference between debts paid in the actual scenario and in the '*but-for*' scenario (thus assuming in the real scenario all debts were repaid, and operating costs and capital investments were the same as in the '*but-for*' scenario); and by considering the revenues obtained by PdL and the liabilities assumed by the PdL as two independent processes, the valuation model incorporated damages without any prior deduction of interest or repayment of debt to shareholders.<sup>78</sup>
  - (ii) Valuation implied PdL's insolvency in the '*but-for*' scenario: In the '*but-for*' scenario, Claimant's experts assumed that all additional revenues generated in that scenario were allocated to the payment of dividends to shareholders. This necessarily implied that PdL's liabilities remained unpaid in the period for which damages were estimated, thus implying that PdL remained insolvent in contradiction to the Tribunal's directions in the Decision to assume no insolvency.<sup>79</sup>

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<sup>78</sup> Messrs.Sandleris and Schargrodsky's 30 November 2015 Comment, paras. 3-6, 9-10.

<sup>79</sup> Messrs.Sandleris and Schargrodsky's 30 November 2015 Comment, para. 12.

(iii) Valuation sought to restore compensation for Claimant’s creditor’s claims: The new method included PdL’s debts in full as damages, including PdL’s debt to Claimant already found to be inadmissible by the Tribunal, and debts to third parties and the Argentine State, thus implicitly also compensating Claimant for debts owed by PdL to third parties.<sup>80</sup>

80. Respondent’s experts also commented on certain other issues reflected in the spreadsheets produced by Compass Lexecon:

(i) Worksheet VI.1 ‘But-for’ Financing: The Respondent’s experts pointed out that Claimant’s experts had reduced the average interest to 11.44% for the period of 2003 to 2014 and ultimately to 8.57% in 2014. This was, it was argued, without justification, and below the 15% interest rate at which shareholders had granted loans to PdL between 2001 and 2005.<sup>81</sup> Messrs. Sandleris and Schargrotsky asserted that if the 15% rate agreed in the inter-company loans had been maintained, “CLEX’s model would throw [*sic. Sc, ‘show’*]. The Spanish text says “... el propio modelo de CLEX estimaría un nivel de deuda...”] a remaining debt of USD 12 million for 2014. In other words, there would be no dividends to be distributed to shareholders in the *but-for* scenario in any year, not even in 2014, so that there would be no possibility of claiming damages.”<sup>82</sup>

(ii) Worksheet VI.2 ‘But-for’ Cash Flows 03-13: Claimant’s experts determined an amount of income tax for the *‘but-for’* free cash flow to PdL which was different from that estimated for the damage valuation. This amounted to employing different income tax amounts for the same scenario and Dr. Abdala offered no explanation to justify such difference.<sup>83</sup>

(iii) Worksheet IV.3 ‘But-for’ Financial Aid Agreement: Both interest and principal for Financial Aid were paid out of the *‘but-for’* revenues obtained by PdL. However,

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<sup>80</sup> Messrs.Sandleris and Schargrotsky’s 30 November 2015 Comment, paras. 7 and 13.

<sup>81</sup> Messrs.Sandleris and Schargrotsky’s 30 November 2015 Comment, paras. 17-21.

<sup>82</sup> Messrs.Sandleris and Schargrotsky’s 30 November 2015 Comment, para. 21.

<sup>83</sup> Messrs.Sandleris and Schargrotsky’s 30 November 2015 Comment, paras. 22.

the ‘*but-for*’ revenues set out in sheet “I.1 Toll Rate Pesification” for the purposes of damage valuation did not decrease as a result of such payment. The Respondent’s experts asserted that this made it clear that Claimant’s experts did not consider the debts undertaken by PdL in their damage valuation.<sup>84</sup>

81. The Tribunal agrees generally with the main points made by Respondent’s experts. The Decision treated the investment as having been made by a consortium, with Claimant’s rights not being extinguished by PdL’s rights.<sup>85</sup> It follows that Claimant’s investment and rights consisted in the revenues that it expected to get out of the consortium, for which PdL was the vehicle. Further, the Decision referred to Claimant’s share of the value *of* PdL, not (as Claimant says – for example, in its Supplemental Submission dated 10 August 2015) of the value *to* PdL.<sup>86</sup>
82. In the Tribunal’s view, the problem with Compass Lexecon’s analysis is that although it calculated the repayment of PdL’s debts over a period of some 10 years, it did not take the next crucial step of integrating that into the ‘*but-for*’ cash flows to the shareholders. Reference to Compass Lexecon’s worksheets shows that the ‘*but-for*’ value estimation of “Free cash flows to PdL” as at 2014 was calculated by taking the ‘*but-for*’ toll revenues and subtracting operating expenses to arrive at EBITDA, then subtracting depreciation and amortizations to arrive at EBIT, then subtracting income taxes, CAPEX and changes in working capital. There is no mention of repayment of debt. Similarly, for the so-called “Toll Pesification Damages”, Compass Lexecon simply took the ‘*but-for*’ revenues in USD, subtracted the actual revenues in USD, applied income tax and a tax loss carry forward, to arrive at a “Revenue Differential (post-tax)” 26% of which was then attributed to Hochtief as the “Revenue Differential to Hochtief (Post-Tax) as of Dec-14” of some US\$ 28,771,753. Again, there is no mention of PdL paying its creditors out of any revenues surplus to operating needs.

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<sup>84</sup> Messrs.Sandleris and Schargrotsky’s 30 November 2015 Comment, paras. 23-25.

<sup>85</sup> Decision, paras. 158-169.

<sup>86</sup> Decision, paras. 315, 325; Claimant’s Supplemental Submission (10 August 2015), para. 23.

83. The Tribunal has checked the results of this approach against LECG’s Expert Report of 29 April 2010.<sup>87</sup> It is useful to compare LECG’s initial estimate of Hochtief’s lost dividends estimated in the first report to that now estimated as the “Revenue Differential to Hochtief (Post-Tax) as of Dec-14”.
84. It warrants noting in this regard that the 2010 estimate was based on the assumption that the Tribunal would accept Hochtief’s case in its entirety *including its claim for losses suffered in connection with its having lent sums to PdL by means of inter-company loans*, a claim that the Tribunal did not accept. Having rejected that claim, the Tribunal held that the debt owed by PdL to all lenders must be assumed to have been repaid to the lenders without any reduction and on the basis that no insolvency proceedings (which reduced the debts owing in the actual scenario) took place. In simple terms, the debt actually owing to Hochtief and others had to be assumed to be paid off before any funds could be freed up for dividends to the shareholders. It is obvious that the repayment of the large inter-company debt incurred by PdL would mean that the anticipated dividend stream to the shareholders would be delayed as compared to the ‘*but-for*’ scenario as originally conceived by Claimant’s experts. This was to be expected given the overall macroeconomic conditions in which the project was executed and PdL’s failure to conclude the IDB loan.
85. LECG’s report stated at paragraph 77 as follows:

“As a condition to the disbursements of the IDB loan, Hochtief, as well as other shareholders, would have been required to make additional equity contributions in 2002. For Hochtief, this contribution would have been US\$ 4.0 million, making Hochtief’s total equity contribution add up to US\$ 15.3 million. We also find that starting in 2007, Hochtief would have been earning dividends and that as of end of 2009 it would have obtained a historical return of US\$ 2.3 million on its equity investments as of December 31, 2009 (net of the US\$ 4.0 million additional contribution of 2002 required by the IDB loan). Furthermore, we estimate that from 2010 onwards Hochtief would have expected to receive additional dividends, or other forms of equity distributions, worth US\$ 18.1 million in US\$ of December 31, 2009. The implicit Internal Rate of Return (IRR) on Hochtief’s equity investment would have been 11.7%.”  
(footnotes omitted)

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<sup>87</sup> LECG LLP later became part of Compass Lexecon and all subsequent reports are authored by Messrs. Spiller and Abdala or by Dr. Abdala alone as Compass Lexecon reports.



**Table VII. DCF Approach: Losses to Claimant**

	But-For	Actual	Losses
In US\$ MM of Dec 31, 2009			
<b>Equity Value to Hochtief</b>	<b>20.4</b>	<b>-</b>	<b>20.4</b>
Historical Returns (prior to 2010)	2.3	-	
Expected Dividends (2010-2023)	18.1	-	
<b>Debt Value to Hochtief</b>	<b>-</b>	<b>(54.2)</b>	<b>54.2</b>
I/C Debt Contributions	-	(62.9)	
Expected I/C Debt Recovery	-	8.7	
<b>Losses to Hochtief</b>			<b>74.6</b>

Source: Own Production.

86. LECG thus estimated that Hochtief would recover US\$54.2 million in damages for the loan claim and that PdL would have begun to declare dividends in 2007, with the result that the equity value to Hochtief as of 31 December 2009, for the entire period of the Concession Contract’s life to expiry in 2023, would amount to US\$20.4 million.
87. The Tribunal has already referred to footnote 18 of Compass Lexecon’s Post-Liability Decision Report, where Dr. Abdala noted that he had checked the *but-for* scenario as of 26 August 2014, and had found that PdL would have already paid all of its debts, including all of the loans. The Tribunal does not see how the worksheets in CLEX-042 comport with the “Free cash flows to PdL” calculated in June 2015. The Tribunal agrees with Messrs. Sandleris and Schargrodsky’s characterization of the Compass Lexecon 17 June 2015 analysis as being “at odds with the ruling made by the Tribunal in its Decision” with the effect that “damages are artificially overstated due to the failure to deduct from ‘*but-for*’ revenues the ‘*but-for*’ debt payments which should have been included pursuant to the Decision on Liability”.<sup>88</sup>

<sup>88</sup> Messrs. Sandleris and Schargrodsky’s 30 November 2015 Comment, para. 2.

88. That said, the key point for present purposes is that Dr. Abdala recognised that (contrary to the assumed state of affairs in the initial LECG Report) dividends would not start flowing to PdL’s shareholders in 2007 in the ‘*but-for*’ world, but rather that it would take quite a bit longer –on his worksheets later produced to the Tribunal on 15 October 2015– *some six years more*, for the company’s liabilities to third parties, including Hochtief, to be paid off. The Tribunal recalls that by 2 May 2007, in the actual scenario PdL’s debt to Hochtief already amounted to US\$ 43.3 million.<sup>89</sup> (This was not the only inter-company debt owed; the other major foreign shareholder, Impregilo, made similar loans to PdL.) Thus, it was inevitable that when the loans were held not to be recoverable in these proceedings, they would form part of the company’s liabilities that had to be paid off before dividends could be paid.
89. The Tribunal further agrees with Messrs. Sandleris and Schargrodsky that had Compass Lexecon correctly linked the ‘*but-for*’ debt repayment to the ‘*but-for*’ revenues, Compass Lexecon’s own model would show no damages to Hochtief before 2014. It follows that free cash flows to equity would be generated only from 2013 (at the earliest), which of course dramatically reduces the claimable damages in this case. This was illustrated in a table included in Messrs. Sandleris and Schargrodsky’s 30 November 2015 Comment:<sup>90</sup>

Analysis of CLEX's model (CLEX's model rate)	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Free cash flow to PdL	(15,2)	(28,7)	14,4	14,8	18,3	19,0	15,9	16,1	17,0	17,0	15,8	13,3
(-) Debt (year start)	30,6	52,3	88,7	87,3	81,8	72,0	60,1	49,9	38,5	25,1	10,4	-
(-) Financial Aid Agreement Interest	1,9	1,7	0,7	-	-	-	-	-	-	-	-	-
(-) Intercompany Loan Interest	4,6	6,1	12,2	9,4	8,4	7,1	5,7	4,7	3,5	2,2	0,9	-
Debt (year end)	52,3	88,7	87,3	81,8	72,0	60,1	49,9	38,5	25,1	10,4	-	-
PdL equity valuation	-	-	-	-	-	-	-	-	-	-	4,5	13,3
Value to Hochtief AG (26%)	-	-	-	-	-	-	-	-	-	-	1,2	3,5
Updating factor	1,2	1,2	1,2	1,1	1,1	1,0	1,0	1,0	1,0	1,0	1,0	1,0

Damages to Hochtief: USD 4.7 M

On this analysis, Messrs. Sandleris and Schargrodsky pointed out that the maximum recoverable damages as of the date of the Decision on Liability would be US\$4.7 million.<sup>91</sup> However, they went further and asserted that in arriving at that figure one would have to

<sup>89</sup> LECG Expert Report of 29 April 2010, para. 39.

<sup>90</sup> Messrs.Sandleris and Schargrodsky’s 30 November 2015 Comment, p.10.

<sup>91</sup> Messrs.Sandleris and Schargrodsky’s 30 November 2015 Comment, para. 26.

overlook the fact that Compass Lexecon adjusted certain interest rates for monies owing in what they had labelled as “Junior Debt”, noting in this regard that if the 15% interest rate that was set in the Hochtief and Impregilo inter-company loans was employed, the damage valuation would be *zero* because PdL would still have been paying off debt as of the date of the Decision on Liability.<sup>92</sup> They also asserted that the income tax rate was adjusted as well in order to achieve the results.<sup>93</sup> This was also presented in the form of another table:<sup>94</sup>

Analysis of CLEX's model (15% rate)	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Free cash flow to PdL	(15,2)	(28,7)	14,4	14,8	18,3	19,6	18,5	18,5	18,7	18,6	17,3	13,3
(-) Debt (year start)	30,6	52,3	88,7	87,3	85,6	80,1	72,5	64,9	56,1	45,9	34,2	22,0
(-) Financial Aid Agreement Interest	1,9	1,7	0,7	-	-	-	-	-	-	-	-	-
(-) Intercompany Loan Interest	4,6	6,1	12,2	13,1	12,8	12,0	10,9	9,7	8,4	6,9	5,1	3,3
Debt (year end)	52,3	88,7	87,3	85,6	80,1	72,5	64,9	56,1	45,9	34,2	22,0	12,0
PdL equity valuation	-	-	-	-	-	-	-	-	-	-	-	-
Value to Hochtief AG (26%)	-	-	-	-	-	-	-	-	-	-	-	-
Updating factor	1,2	1,2	1,2	1,1	1,1	1,0	1,0	1,0	1,0	1,0	1,0	1,0

Damages to Hochtief: USD 0

90. The Tribunal has examined LECG’s and Compass Lexecon’s treatment of the interest rate charged in the inter-company loans made by Hochtief. In the reports prepared prior to the Decision on Liability, the experts uniformly used the loan rate stipulated in the loan agreements themselves, *i.e.*, 15%.<sup>95</sup>
91. Yet, as Messrs. Sandleris and Schargrotsky correctly point out, this changes in CLEX-042. In barely readable grey font Compass Lexecon added:

<sup>92</sup> The Tribunal recalls the evidence of Mr Roberto Lamdany, Head of the Transportation Technical Team from the Unit of Renegotiation and Analysis of Public Utility Contracts (UNIREN): “The company’s Financial Statements as of 31 December 2001 show paid-up capital in the amount of ARS 43,650,000 and shareholders’ loans for ARS 15,030,466 at an annual rate of 15%. Irrespective of the exorbitant rate accepted for an inter-company loan in US dollars (Libor rate as of 29 December 2000 ranged from 6,6325% to 5,9646% for a term of 30 and 360 days), it was clear that the shareholders were not willing to pay up capital for ARS 59,039,000, as announced in the Financial Statements for the prior year. Consequently the company recorded financial losses, which then resulted in difficulties for the renegotiation process.” [Lamdany Witness Statement, 7 March 2012, para. 29].

<sup>93</sup> Messrs. Sandleris and Schargrotsky’s 30 November 2015 Comment, para. 28: it is observed that the calculations performed in the two tables displayed above did not correct an income tax calculation “inconsistency” found in Sheet “IV. 2. But-For Cash Flows 03-13” and discussed at para. 22 of the same Comment.

<sup>94</sup> Messrs. Sandleris and Schargrotsky’s 30 November 2015 Comment, p. 11.

<sup>95</sup> See the LECG Report of 29 April 2010, at paras. 65 and 136 and footnotes 38, 42, 53, and 105, and the Compass Lexecon Report of 5 June 2012, at paras. 62-66 and 105.

Note: After 2005, once senior debt (FAA) is fully repaid, PdL's loan rate on junior debt equals benchmark corporate bonds in local market  
 2006-2009: CLEX-001, sheet "WACC"  
 2014: CLEX-042, sheet "II.3. WACC"

92. Put in larger clearer font, this states: “Note: after 2005, once senior debt (FAA) is fully paid, PdL’s loan rate on junior debt equals benchmark corporate bonds in local market 2006-2009; CLEX-001, sheet ‘WACC’, 2014: CLEX-042, sheet ‘II.3, WACC’”.

93. Indeed, the interest rates for inter-company debt drop in Compass Lexecon’s 17 June 2015 Report from 15% starting in the year 2006 (10.72%) and continue a downward trend culminating in a rate of 8.76% in 2013:

10.72%      10.30%      9.83%      9.55%      9.35%      9.16%      8.96%      8.76%      8.57%

94. This is at odds with Compass Lexecon’s prior work. In its report filed with the Reply Compass Lexecon’s Table IV consistently listed the inter-company loan rates through to 2010 (listed under the heading “Subordinated”) at 15% as follows:

**Table IV. Cost of Debt: Compass Lexecon v. Sandleris & Schargrodsky, 2002-2010**

Concept	2002	2003	2004	2005	2006	2007	2008	2009	2010	Avg. 2002-10
<b>Cost of Debt</b>										
Compass Lexecon - Unsubordinated	11.3%	10.8%	11.1%	10.9%	11.0%	10.6%	10.1%	9.8%	9.0%	10.5%
Compass Lexecon - Subordinated	15.0%	15.0%	15.0%	15.0%	15.0%	15.0%	15.0%	15.0%	15.0%	15.0%
Sandleris & Schargrodsky - Subordinated	19.4%	17.2%	16.1%	18.6%	18.1%	18.6%	22.1%	21.5%	20.7%	19.1%

Source: Compass Lexecon based on Sandleris & Schargrodsky’s Valuation Model.

95. The Tribunal does not accept the shift in the approach taken respecting the loan rate. The effect can only be to reduce the amount of debt payments outstanding at the end of each year such that the worksheets would show that PdL repaid its debt in the ‘but-for’ world in 2013 and would eke out a small dividend distribution to Hochtief of US\$1.2 million and

US\$3.5 million in 2013 and 2014, respectively.<sup>96</sup>

96. The Tribunal is inclined to accept Messrs. Sandleris and Schargrodsky's view that had the proper interest rates been employed by Compass Lexecon, the resulting analysis would show that—leaving aside the discounted value of any losses arising after 26 August 2014, which are considered below—no damages were suffered by Hochtief up to the Concession Contract's termination.
97. LECG's original estimate of the equity value of Hochtief's shareholding as of 31 December 2009 provides another check on the expert analysis done after the Decision on Liability. It will be recalled from paragraph 77 of the LECG Report quoted above at paragraph 85, that LECG estimated Hochtief's total loss in the value of its equity, projected to the end of the Concession, as being US\$20.4 million. But that estimate assumed that Hochtief would also receive compensation for losses associated with the loans. Since that has not occurred and it has taken some seven years longer to pay off the loans in the '*but-for*' scenario, with nine years remaining before expiry, it might be expected that the net present value of the dividend stream would be somewhat smaller than LECG's estimated US\$18.1 million for a 13-year period running from 2009 (brought forward with interest). Yet Dr. Abdala has estimated the *but-for* value of Hochtief's interest in PdL to be US\$20.2 million for a 9-year period as of August 2014.<sup>97</sup>
98. However, this is not the end of the matter, for the reasons previously explained above, because even on Messrs. Sandleris and Schargrodsky's analysis, by the end of 2014 PdL would have been cash flow positive and able to pay dividends to its shareholders. This was made clear in their report of 2 May 2016 which, among other things, computed PdL's value from 27 August 2014 to 14 September 2023.

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<sup>96</sup> LECG Report of 29 April 2010, footnote 38: "The loans granted by Hochtief to PdL were denominated in US Dollars and accrued interest at a nominal interest rate of 15% per year. The I/C loans granted by Hochtief in 2001 had a 1-year renewable term. Hochtief's I/C loans granted since 2002 had an average maturity date of 1.3 years, and were also renewable. Both principal and interests were due at maturity."

<sup>97</sup> Compass Lexecon's Report dated 17 June 2015, Table 1.

99. While Messrs. Sandleris and Schargrodsky still adhered to their position that using a properly dollarized ‘*but-for*’ analysis there would be no damages for renegotiation delays up to 26 August 2014, and that the claimed US\$4 million for Resolution 14 damages was not made out, they agreed that PdL had a positive value for the balance of the Concession Contract’s life.<sup>98</sup> In their view, Claimant’s 26% interest in PdL as of 29 December 2014 amounted to US\$8.94 million.
100. The Tribunal has studied the submissions of the Parties and their experts, and considers that the most reasonable estimate of Claimant’s loss is higher than that accepted by Respondent’s experts but some way short of the US\$20.2 million estimated by Claimant. Having regard to the expert evidence, the Tribunal finds that Claimant is entitled to an award of US\$13.41 million for the diminution in the value of its shareholding in PdL caused by Respondent’s breach of the Treaty.
101. There is one remaining head of damages claimed, the losses said to be associated with the Resolution 14 breach. In the Tribunal’s view, just as the financial damages caused by non-attributable factors are addressed by the Tribunal’s instructions in its Decision, any alleged damage said to flow from Resolution 14 would be subsumed in the analysis dictated by the Decision’s general requirement that all revenues, costs and liabilities be dollarized. That is, in the ‘*but-for*’ scenario posited by the Tribunal, the operation and maintenance costs would never have been pesified in the first place and since they are assumed to be in dollars, the Concession would, in this respect, operate as per the Concession Contract. Therefore, the claim for US\$4 million is rejected.
102. In these circumstances, the Tribunal decides that Respondent must pay Claimant USD US\$13.41 million, plus interest running from 29 December 2014 at the rate for one-year US Treasury Bills.

## **VI. COSTS**

103. The Tribunal has considered the question of the allocation of the costs arising from this phase of the proceedings. The costs in this phase arose initially from the inability of the

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<sup>98</sup> Sandleris and Schargrodsky Updated Damages Mode, 2 May 2016, paras. 33-36.

Parties to agree upon the precise amount of compensation due in accordance with the instructions of the Tribunal in its Decision on Liability dated 29 December 2014, and from the investigation of the implications in this context of the termination of the Concession Contract on 26 August 2014, which neither Party had brought to the attention of the Tribunal before it delivered its Decision on Liability. Additional work was also required as a result of the departures by Claimant's expert, noted above, from the instructions issued by the Tribunal. The Tribunal decides that in these circumstances it is appropriate that Claimant should contribute US\$200,000 towards Respondent's costs arising from this phase of the proceedings. The order for costs arising from earlier phases of these proceedings, set out in paragraph 336.i of the Decision on Liability dated 29 December 2014, stands and is not affected by this decision.

## **VII. AWARD**

104. For the foregoing reasons, and the reasons stated in its Decision on Jurisdiction dated 24 October 2011 and the Separate and Dissenting Opinion of Mr. J. Christopher Thomas, Q.C., also dated 24 October 2011, and in its Decision on Liability dated 29 December 2014, the Tribunal DECIDES as follows:

(1) The Tribunal's Decision on Jurisdiction dated 24 October 2011 and the Separate and Dissenting Opinion of Mr. J. Christopher Thomas, Q.C., also dated 24 October 2011, and the Tribunal's Decision on Liability dated 29 December 2014 are deemed to be an integral part of this Award.

(2) The decisions set out in paragraph 125 of the Decision on Jurisdiction dated 24 October 2011 and in paragraph 336 of the Decision on Liability dated 29 December 2014 are reaffirmed.

(3) The Respondent must pay the Claimant US\$13.41 million, plus interest running from 29 December 2014 until effective payment thereof at the rate for one-year US Treasury Bills, as compensation for the losses caused by the Respondent's breach of its obligations under the Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments dated 9 April 1991.

(4) The Claimant must pay Respondent US\$200,000 costs arising from this phase of the proceedings, plus interest on such amount running from the date of notification of this Award to the Parties and until effective payment thereof at the rate for one year US Treasury Bills.

Made in Washington, D.C., in English and in Spanish, both versions being equally authentic.



*Charles N. Brower*

Honorable Charles N. Brower

Arbitrator

Date: 16 November 2016

*J. Christopher Thomas*

Mr. J. Christopher Thomas, Q.C.

Arbitrator

Date: 21 November 2016

*Vaughan Lowe*

Professor Vaughan Lowe

President of the Tribunal

Date: 21 December 2016

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES  
WASHINGTON, D.C.**

**IN THE PROCEEDING BETWEEN**

**Hochtief AG  
(CLAIMANT)**

**and**

**The Argentine Republic  
(RESPONDENT)**

(ICSID Case No. ARB/07/31)

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**DECISION ON JURISDICTION**

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*Members of the Tribunal*

Professor Vaughan Lowe Q.C, President  
Judge Charles N. Brower, Arbitrator  
Mr. J. Christopher Thomas, Q.C., Arbitrator

*Secretary of the Tribunal*

Mrs. Mercedes Cordido-Freytes de Kurowski

*Representing the Claimant*

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c/o Dra. Angelina María Esther Abbona  
Procuradora del Tesoro de la Nación  
Procuración del Tesoro de la  
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**Date of Decision: October 24, 2011**

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1. This claim is brought by Hochtief Aktiengesellschaft, a company incorporated in the Federal Republic of Germany (“**Hochtief**”), against the Argentine Republic (“**Argentina**”), under the Treaty between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments, dated 9 April 1991 (“**the BIT**”).
2. Hochtief and Argentina, the parties to the dispute and to this case, are referred to in this Decision as the (lower-case) ‘parties’. Argentina and Germany, as the States Parties to the BIT, are referred to as the (capitalized) ‘Parties’.
3. The authentic German and Spanish texts of the BIT, together with the English translation published in the *United Nations Treaty Series*<sup>1</sup>, are set out in Appendix I to this Decision. This Decision will refer to the English-language translation. The Tribunal has, however, taken full account of the fact that the authentic languages of the BIT are German and Spanish, and as will be seen it has at various stages reverted to the authentic texts where the translation is unsatisfactory.
4. The claim arises from a dispute concerning a 25-year concession awarded to Hochtief and a consortium of construction companies in 1997 for the construction, maintenance and operation of a toll road and several bridges in Argentina between the cities of Rosario and Victoria. Hochtief and other members of the consortium incorporated a company, Puentes del Litoral SA (“**PdL**”), in Argentina in order to implement the concession. Hochtief owns 26% of the shares in PdL. Hochtief claims that it was injured by actions taken by Argentina in breach of its obligations under the BIT and under customary international law.
5. The claim was initiated by the Request for Arbitration dated 5 November 2007, addressed by the Claimant to the Secretary-General of ICSID (“**the Centre**”). The Claimant appointed the Hon. Charles Brower, and the Respondent appointed J Christopher Thomas QC, to the Tribunal. Judge Brower and Mr Thomas agreed to invite Professor Vaughan Lowe QC to chair the Tribunal. The Tribunal was constituted on 30 April 2009.

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<sup>1</sup> UNTS Vol. 1910, 171 (1996).

6. By agreement of the parties the First Procedural Meeting of the Tribunal, held by telephone conference, was begun on 19 June 2009, and resumed on 16 April 2010 at the seat of ICSID in Washington, D.C. with the President of the Tribunal, prevented from flying by a volcanic ash cloud, participating by video link.
7. The Claimant's Memorial on the Merits was submitted on 29 April 2010, and the Respondent submitted its Memorial on Objections to the Jurisdiction of the Centre and the Competence of the Tribunal (including, as agreed, a brief outline of its defences on the merits) on 30 July 2010. The Claimant's Counter-Memorial on Objections to Jurisdiction was submitted on 15 October 2010, and the Respondent's Reply and Claimant's Rejoinder on 22 December 2010 and 10 February 2011 respectively.
8. The hearing on Jurisdiction was held at the World Bank's premises in Paris on 4-5 March 2011. The Claimant was represented by Mr Paul F Doyle, Mr Philip D Robben, Ms Mellisa E Byroade, and Ms Julia A Garza Benítez of Kelley Drye & Warren LLP; and the Respondent was represented by Dr Angelina Abbona, Dr Gabriel Bottini, Dr Romina de los Ángeles Mercado, Dr Verónica Lavista, Dr Matías Osvaldo Bietti, Dr Ariel Martins, and Mr Julián Santiago Negro, of the Procuración del Tesoro de la Nación. Ms Mercedes Cordido-Freytes de Kurowski acted as the Secretary of the Tribunal.

## **I The Parties' Submissions**

9. The submissions of the parties are set out in detail in their written pleadings and were developed in their oral submissions at the hearing, a verbatim record of which was kept and made available to the parties and the Tribunal shortly after the end of the hearing on Jurisdiction. All of these submissions were taken into account, and the main points are summarized here in so far as is necessary for the purposes of this Decision.
10. The Respondent raises two main objections to jurisdiction. The First Objection is that the Claimant has failed to meet the requirements set forth in Article 10 of the BIT, and that the Tribunal is consequently without jurisdiction in this case. The Second

Objection is that Hochtief is attempting in this case to bring a claim to enforce the rights of another person and has no legal standing to do so.

11. It is well established that the Tribunal has the competence to decide upon challenges to its jurisdiction. If it finds that it has jurisdiction, the position is unproblematic. If it finds that it lacks jurisdiction, a pedant might object that it had no right to determine even that question; but the Law has chosen to side with pragmatism rather than pedantry and *Kompetenz-Kompetenz* is a firmly established principle, adopted in Article 41(1) of the ICSID Convention. The Tribunal proceeds accordingly.

## II The First Objection: BIT Article 10

12. In translation, Article 10 of the BIT reads as follows:

"Article 10

(1) Disputes concerning investments within the meaning of this Treaty between one of the Contracting Parties and a national or company of the other Contracting Party shall as far as possible be settled amicably between the parties to the dispute.

(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties concerned gave notice of the dispute, it shall, at the request of either party, be submitted to the competent courts of the Contracting Party in whose territory the investment was made.

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

(a) At the request of one of the parties to the dispute where, after a period of 18 months has elapsed from the moment when the judicial process provided for by paragraph 2 of this article was initiated, no final decision has been given or where a decision has been made but the Parties are still in dispute;

(b) Where both parties to the dispute have so agreed.

(4) In the cases provided for by paragraph 3 above, disputes between the Parties within the meaning of this article shall be referred by mutual agreement, when the parties to the dispute have not agreed otherwise, either to arbitral proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 or to an *ad hoc* arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If there is no agreement after a period of three months has elapsed from the moment when one of the Parties requested the initiation of the arbitration procedures, the dispute shall be submitted to arbitration procedures under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 provided that both Contracting Parties are parties to the said Convention. Otherwise, the dispute shall be submitted to the above-mentioned *ad hoc* arbitral tribunal.

(5) The arbitral tribunal shall issue its ruling in accordance with the provisions of this Treaty, with those of other treaties existing between the Parties, with the laws in force in the Contracting Party in which the investments were made, including its rules of private international law, and with the general principles of international law.

(6) The arbitration decision shall be binding and both Parties shall implement it in accordance with their legislation.”

13. The Respondent says that paragraphs 10(2) and 10(3)(a) of Article 10 impose a mandatory period of 18 months, for the duration of which the dispute must be submitted to the Respondent’s courts, before the Claimant is entitled to submit the dispute to arbitration. It says that Article 10 thus establishes a mandatory condition upon which the jurisdiction of the Tribunal depends, and that the Claimant has not fulfilled that condition.
14. The Respondent makes no jurisdictional challenge based upon the requirement in Article 10(2) that six months must elapse after notice of the dispute is given, before the dispute may be submitted to the courts at the instance of either party.
15. The Claimant, for its part, invokes Article 3 of the BIT, which reads as follows:<sup>2</sup>

*“Article 3*

(1) Neither Contracting Party shall subject investments in its territory by or with the participation of nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.

(2) Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.

(3) Such treatment shall not include privileges which may be extended by either Contracting Party to nationals or companies of third States on account of its membership in a customs or economic union, common market or free trade area.

(4) The treatment under this article shall not extend to privileges accorded by a Contracting Party to nationals or companies of a third State by virtue of an agreement for the avoidance of double taxation or other tax agreements.”

16. Article 3 must be read together with the Protocol to the BIT, which reads in material part as follows:

“With the signing of the Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments, the undersigned plenipotentiaries have agreed on the following provisions, which shall be regarded as an integral part of the said Treaty:

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<sup>2</sup> See paragraphs 63 ff and 104 ff below for certain problems with this translation.

.....

(2) *Ad article 3:*

(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of article 3, paragraph 2: the management, utilization, use and enjoyment of an investment. The following shall more particularly, though not exclusively, be deemed "treatment less favourable" within the meaning of article 3: less favourable measures that affect the purchase of raw materials and other inputs, energy or fuel, or means of production or operation of any kind or the marketing of products inside or outside the country. Measures that are adopted for reasons of internal or external security or public order, public health or morality shall not be deemed "treatment less favourable" within the meaning of article 3.

(b) The provisions of article 3 do not obligate a Contracting Party to extend tax privileges, exemptions and relief accorded only to natural persons and companies resident in its territory," in accordance with its tax laws, to natural persons and companies resident in the territory of the other Contracting Party.

(c) The Contracting Parties shall within the framework of their national legislation give favourable consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with an investment; the same shall apply to nationals of either Contracting Party who, in connection with an investment, wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Applications for work permits shall also be given favourable consideration."

17. The Claimant submits that the effect of this MFN provision is to permit it to rely upon what it says is the more favourable provision in Article 10 of the Argentina-Chile Bilateral Investment Treaty dated 2 August 1991. That treaty, in its authentic language and in the English translation submitted in these proceedings, is set out in Appendix II.

18. Article 10 of the Argentina-Chile BIT reads as follows:

**“ARTICLE 10 Settlement of disputes regarding investments**

1. Any dispute related to the investments under this Treaty, between a Party and a national or company of the other Party shall, as far as possible, be settled by friendly negotiations between the two parties to the dispute.

2. If the dispute shall not have been settled within the term of six months as from the time it has been raised by either party, it may be submitted upon request of the national or company:

- to the national jurisdictions of the Party involved in the dispute;
- or to international arbitration in the conditions described in paragraph (3).

Once a national or company has submitted the dispute to the jurisdiction of the Party involved or to international arbitration, the election of either procedure shall be final.

3. In case of election of international arbitration, the dispute may be submitted, at the election of the national or company, to one of the arbitration entities mentioned below:



To the International Center (*sic*) for the Settlement of Investment Disputes (ICSID) created under the "Convention on the Settlement of Investment Disputes between States and Nationals of other States", opened to the signature in Washington on March 18, 1965, when each Member State which is a party to this Agreement has signed the said Convention. While this condition is not met, each Party may give its consent for the dispute to be submitted to arbitration pursuant to the Rules of the supplementary Mechanism of ICSID for the management of conciliation, arbitration or investigation proceedings;

To an "ad hoc" arbitration panel organized pursuant to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

4. The arbitration panel shall render an award on the basis of this Treaty, the right of the Party that is a party to the dispute, including the rules regarding conflicts of laws and the terms and conditions of occasional private agreements reached in connection with the investment and also the principles of international law in that respect.

5. Arbitration awards shall be final and binding upon the parties to the dispute.

6. The Parties shall refrain from trying, through the diplomatic channels, arguments regarding arbitration or a judicial proceeding already pending until the relevant proceedings shall have been completed, unless the parties to the dispute shall have not discharged the arbitration award or the judgment rendered by the common court, pursuant to the terms for the discharge laid down in the award or the judgment.”

19. The important point in the Argentina-Chile BIT is that it permits unilateral reference of a dispute to arbitration six months after the dispute has been raised. There is no equivalent of the ‘18-month litigation period’ in Article 10(3) of the Argentina-Germany BIT.
20. The Respondent submits that the MFN provision in Article 3 of the Argentina-Germany BIT applies only to substantive protections under the BIT, which do not include the clauses on dispute resolution in Article 10.
21. Each party referred to principles of treaty interpretation, decisions of other arbitral tribunals, and the writings of jurists in support of its position.

### **III The Tribunal’s analysis**

22. The Tribunal’s jurisdiction depends upon the existence of an agreement between the two parties to the dispute – Hochtief and the Republic of Argentina. That agreement is not contained in a single document. The agreement of Argentina to accept the jurisdiction of the arbitral Tribunal in respect of a certain category of disputes is contained in the Argentina-Germany BIT. Article 10 of the BIT is, in effect, an offer to submit disputes to arbitration, which investors may accept.

23. Hochtief considers that its agreement is contained in the Request for Arbitration which is intended, in effect, to be an acceptance of Argentina's offer contained in Article 10 and Article 3 of the Argentina-Germany BIT.
24. The question is whether the 'offer' and the 'acceptance' have resulted in an agreement which provides the basis for the jurisdiction of the Tribunal.
25. Both parties approached this question on the basis that is necessary to establish a consensus: i.e., that it is necessary to demonstrate that Hochtief's Request for Arbitration was an acceptance of the offer to arbitrate on the terms on which the offer was made, and not a counter-offer on different terms. The Tribunal shares this view.
26. The offer to arbitrate being contained in a treaty, it follows that the interpretation and analysis of its terms must be conducted in accordance with the law of treaties. The exercise is, accordingly, to be performed according to the principles set out in the Vienna Convention on the Law of Treaties ('VCLT'), to which both Argentina and Germany are Parties (and to which Article 11 of the BIT refers), and in particular in Articles 31-33 of the VCLT, which are familiar to all involved in investment arbitration.
27. The 'acceptance' is contained in the Request for Arbitration. There is no doubt as to the interpretation of the 'acceptance': it purports to accept the offer to arbitrate made in the BIT.

#### **IV The interpretation of BIT Article 10**

28. The task of interpreting the BIT must be approached initially by giving the terms of the treaty their ordinary meaning in their context and in the light of the BIT's object and purpose. On this basis it is apparent that Article 10 of the BIT provides for a number of possible steps and for alternative procedures in the event of a dispute arising.
29. Article 10(1) provides that disputes shall as far as possible be settled amicably between the parties to the dispute. There is no suggestion by the Respondent of any failure by the Claimant to comply with Article 10(1), which could affect the

jurisdiction of the Tribunal; and the Tribunal sees no reason to suppose that the obligation imposed by Article 10(1) has not been fulfilled.

30. Paragraph (2) of Article 10 entitles either party – here, either Hochtief or Argentina – to require the submission of the dispute to the host State’s courts:

“If a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties concerned gave notice of the dispute, it shall, at the request of either party, be submitted to the competent courts of the Contracting Party in whose territory the investment was made.”

Paragraph (2) refers to a ‘request’, but the request triggers an obligation (‘shall ... be submitted’) to submit the dispute to the courts.

31. Neither party takes any point concerning the six-month period to which Article 10(2) refers, and the Tribunal sees no reason to suppose that this obligation imposed by Article 10(2) has not been fulfilled.
32. The words “shall ... be submitted” are the only words in Article 10 paragraph 2 that are capable of imposing a legal obligation. The precise nature of the obligation set out in paragraph (2) is obscured by the phrasing of the provision. Instead of stipulating that ‘one or other party shall submit the dispute’ to the courts, it sets out the stipulation in the passive voice: the dispute shall be submitted to the courts.
33. The Respondent reads Article 10(2) as saying that in every case one or other party must submit the dispute to the domestic courts.<sup>3</sup> The Respondent submits that “the verbal expression ‘shall be submitted’ [makes] clear that it is an order”<sup>4</sup>, so that one of the parties must submit the dispute to the domestic courts.<sup>5</sup>
34. The Claimant, on the other hand, reads Article 10(2) as giving to each party a right to have recourse to the courts, but not as imposing upon either party a duty to do so.
35. It was not suggested that either party had made a request under Article 10(2) for the reference of the dispute to the courts in Argentina. This is a matter of some

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<sup>3</sup> Memorial, paragraph 25.

<sup>4</sup> Memorial, paragraph 24.

<sup>5</sup> Memorial, paragraph 25.

significance. The Respondent could have insisted upon the reference of the dispute to its courts under Article 10(2), but it did not do so.

36. Article 10(2) says that the dispute “shall, at the request of either party, be submitted” to the national courts. Article 10(2) thus obliges party B to submit to the jurisdiction of the courts if party A requests that the dispute be referred to the courts. The provision does not, however, explicitly impose a duty on either party A or party B to refer the case to the courts.<sup>6</sup> Nor, in the view of the Tribunal, does Article 10(2) implicitly impose such a duty. Article 10(2) makes good sense interpreted without any such duty to refer implied into it. Recourse to the national courts is an important option. As far as investors are concerned, access to the host State’s courts is a right that must surely be regarded as such an elementary part of the concept of legal protection that the right of access has little need of explicit statement. But under Article 10(2) it is not only the investor but also the host State that has the right to refer disputes to court.
37. The Respondent could, if it had wished, have requested that the dispute be referred to its courts; and under Article 10(2) the Claimant would have been obliged to pursue the case in the national courts. The Respondent did not do so. Nor did the Claimant refer the dispute to the courts. The Respondent argues that in the absence of any reference of the dispute to the courts there can, under the scheme set out in Article 10, be no unilateral reference of the dispute to arbitration.
38. Article 10(3) provides that “The dispute may be submitted to an international arbitral tribunal in any of the following circumstances”. There are two such circumstances.
39. One, in Article 10(3)(b), is “Where both parties to the dispute have so agreed.” There is no suggestion that there is any such agreement in this case apart from the agreement said to result from the offer in the BIT and the acceptance in the Request for Arbitration. No more need be said about specific agreements as a route to arbitration under the BIT, although the terms of the offer in the BIT and of the Request for Arbitration are, of course, central to the questions in this case.

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<sup>6</sup> The parties to the dispute will always be a Contracting Party to the treaty and a national or company of the other contracting party: Article 10(1).

40. The other circumstance, in Article 10(3)(a), is where “[a]t the request of one of the parties to the dispute ..., after a period of 18 months has elapsed from the moment when the judicial process provided for by paragraph 2 of this Article was initiated, no final decision has been given or where a decision has been made but the Parties are still in dispute.”
41. Four points are to be noted about Article 10(3)(a). First, as in Article 10(2), it creates a right that may be exercised unilaterally: either the Claimant or the Respondent may refer the dispute to arbitration.
42. Second, reference to the courts does not entail a choice under a ‘fork in the road’ provision (and no such fork is created elsewhere in the BIT). Reference to the courts can be followed by a unilateral reference of the dispute to arbitration.
43. Third, neither party is obliged to continue to submit to the jurisdiction of the courts for more than 18 months, whether or not the courts have reached a final – or any – decision in the case.
44. Fourth, the provision does not oblige either party to accept a decision of the court as the resolution of the dispute: either party may take the position that the parties are “still in dispute” despite any court decision.
45. Respondent submits that the effect of Article 10(3) is that unless (i) there has been a reference to the courts under Article 10(2) and (ii) 18 months have elapsed since that reference, the circumstances envisaged in Article 10(3)(a) cannot arise and there can be no unilateral reference to arbitration. Claimant submits that the 18-month period is applicable only if there has in fact been a reference to the courts under Article 10(2), and that the provision has no application in circumstances where no such reference was made.
46. Because neither party is actually obliged to submit the dispute to the courts under Article 10(2), it cannot be supposed that every dispute not resolved by discussions will in fact be submitted to the courts. The question is in effect, therefore, whether the possibility of unilateral recourse to arbitration is altogether excluded in cases where there is no such reference to the courts.

47. The interpretation of Article 10(3) so as to require reference to the local courts as a precondition to recourse to arbitration in every case would, as the Respondent pointed out, have some features in common with a requirement to exhaust local remedies.<sup>7</sup> Indeed, under Article 26 of the ICSID Convention the Respondent could have required the exhaustion of local remedies as a condition of its consent to arbitration under that Convention; but it did not do so.
48. In some ways, however, the effect of Article 10(3) as interpreted by the Respondent would be radically different from that of a duty to exhaust local remedies. There is no obligation under Article 10(3) to exhaust the remedies, or even to see a first-instance case through to its conclusion if that takes longer than 18 months. There would be no question under Article 10(3) of the effectiveness of the available remedies: recourse would be obligatory even in cases where it was perfectly clear that the courts could provide no remedy – for example, in cases where legislation has effectively left the court with no option except to decide the dispute against the Claimant.
49. If Article 10(3) were indeed interpreted so as to require in each and every case 18 months of litigation before any unilateral reference to arbitration, the effect of the resultant pattern of obligations would be as follows. A claimant might decide initially not to refer the dispute to the courts. The respondent might also decide not to ‘request’ (i.e., insist) that the dispute be referred to its courts under Article 10(2); and it might also decline to agree to a consensual reference to arbitration under Article 10(3)(b). A claimant could then refer the dispute to arbitration only if it first submitted the dispute to the courts. If the Claimant did indeed then proceed to submit the case to the courts, neither the Claimant nor the Respondent would be obliged by the BIT to accept any decision rendered by the court. (We put to one side the question whether such a decision could have effect as *res judicata* in any respect.) Equally, either party could simply abandon the litigation after 18 months. After 18 months had elapsed, either party could unilaterally submit the dispute to arbitration.
50. It is no doubt arguable that there is a duty on both parties to the dispute to act in good faith during the pursuit of a settlement of the dispute, so that that there is an obligation to enter into the litigation during the 18-month period in a manner that might lead to a

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<sup>7</sup> As the Respondent noted: Memorial, paragraph 17.

resolution of the dispute by the courts. It is certainly valuable for each party (and perhaps particularly for the Respondent) that it has the right to insist upon reference of the dispute to the host State courts. It is also understandable that a six-month window for negotiations prior to any reference to the courts should be secured, as Article 10(2) does on one reading. But it is difficult to see the rationale for imposing, in the terms used in Article 10(3)(a), a duty to spend a period of 18 months with the dispute listed on the docket of domestic courts as a precondition for the reference to arbitration.

51. To oblige the parties to spend 18 months in litigation, where one or other (or both) of them might have decided in advance to reject any decision that might emerge from the courts, appears pointless. While the possibility of a requirement for pointless litigation may not be a decisive indication that this interpretation of the BIT is wrong, it must surely move some weight in that direction.
52. The problem does not arise from uncertainty as to the meaning of Article 10(3)(a) itself. Its meaning is clear. Article 10(3) supplements and follows on from Article 10(2). If either party requests that the dispute be submitted to the courts, it must be submitted to the courts. The dispute must then stay in the courts until either (i) a final decision is rendered by the courts or (ii) 18 months have elapsed from the initiation of the judicial process (Article 10(3)(a)), unless (iii) both parties agree before then to go to arbitration (Article 10(3)(b)).
53. The problem arises from the fact that there is no duty under Article 10(2) to refer the dispute to the courts, and that there is no provision in Article 10 that explicitly permits unilateral references to arbitration, except in circumstances where the dispute has in fact been referred to the courts. The only provision in Article 10 that clearly permits a reference to arbitration without prior litigation is Article 10(3)(b), which requires the agreement of both parties. Unless an additional implied right to have unilateral recourse to arbitration can be found, the result would be that litigation is always an essential precondition to the reference of a dispute to arbitration by one party acting unilaterally, but is not an essential precondition to a reference to arbitration agreed by both parties
54. Viewed in the light of the many provisions in other BITs that permit unilateral references to arbitration that result might be thought unusual; but it is not impossible,

or wholly impracticable, or wholly unreasonable. The Tribunal is, however, not convinced that it is correct to interpret the BIT to mean that litigation is always an essential precondition to unilateral reference of a dispute to arbitration, and does not decide the point or rest its decision upon the rejection of this interpretation and the existence of an implied right of unilateral reference to arbitration. The Tribunal does not need to decide the point, because the Claimant has raised another argument, based on the MFN provision in BIT Article 3. That argument was the main focus of the parties' pleadings, and is a sufficient basis for the Tribunal's decision.

55. The Tribunal thus proceeds on the assumption, and without deciding the point, that Article 10 of the Argentina-Germany BIT imposes a mandatory 18-month submission to the national courts as a precondition of unilateral recourse to arbitration under the BIT.

## **V The MFN provision**

56. The Claimant considers that the MFN provision in Article 3 of the BIT entitles it to rely upon the more liberal provisions on dispute settlement in the Argentina-Chile BIT. The Respondent, in contrast, considers that the Article 3 MFN provision applies only to 'substantive' rights, which in its view do not include the dispute settlement provisions, under the BIT.
57. The parties referred extensively to the jurisprudence and to writings of scholars on the effect of MFN clauses in BITs. The apparent inconsistencies in the case-law of arbitration tribunals on the question of the applicability of MFN clauses to dispute settlement provisions afforded each party the possibility of supporting its position by reference to earlier awards.
58. The Tribunal has given very careful consideration to this jurisprudence, and is conscious of the advantages of consistency in the approaches of different tribunals to similar questions. It is also aware of the significance that other tribunals have attached to differences between the formulations of MFN provisions in various treaties. That said, it is the responsibility of this Tribunal to interpret to the best of its ability the specific provisions of the particular treaties that are applicable in this case, and not to



choose between broad doctrines or schools of thought, or to conduct a head-count of arbitral awards taking various positions and to fall in behind the numerical majority.

## **VI Does the MFN provision apply to dispute settlement?**

59. The first question for the Tribunal is whether the MFN provision in BIT Article 3 is in principle capable of applying to dispute settlement provisions so as to modify BIT Article 10.
60. Article 3 contains provisions extending MFN treatment both to investments (Article 3(1)), and to investors (Article 3(2)). The obligation is the same in each case.<sup>8</sup> The entitlement is to treatment that is not less favourable than the State accords to its own nationals or companies or to investments of nationals or companies of any third State. In the present case it is the entitlement of the investor that is relevant, because it is the treatment of the investor as a disputing party that is in issue.
61. Article 3(2) does not provide that once one becomes an ‘investor’ under the Argentina-Germany BIT one has an entitlement to MFN or national treatment in every aspect of one’s life, whether or not related to the investment. It does not, for example, give a right to join the ‘nationals only’ queue at immigration desks. Rather, Article 3(2) stipulates that the entitlement to demand MFN or national treatment from the State applies to investors “as regards their activity in connection with investments in its territory.”
62. Is dispute settlement an ‘activity in connection with the investment’? The Respondent argues that *ad Article 3* in the Protocol to the BIT indicates that it is not. *Ad Article 3* provides that

“(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of article 3, paragraph 2: the management, utilization, use and enjoyment of an investment. The following shall more particularly, though not exclusively, be deemed "treatment less favourable" within the meaning of article 3: less favourable measures that affect the purchase of raw materials and other inputs, energy or fuel, or means of production or operation of any kind or the marketing of products inside or outside the country. Measures that are adopted for reasons of internal or external security or public order, public health or morality shall not be deemed "treatment less favourable" within the meaning of article 3.”

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<sup>8</sup> As is clear in the authentic German and Spanish texts but not in the UN’s English translation.

63. In this English translation the opening phrase is unclear. It might be read as meaning that the listed examples (i) are deemed to be ‘activities’ but (ii) are not exclusively to be characterised as ‘activities’ and may also have another character. Alternatively, it might be read as meaning (i) that the following examples are deemed to be ‘activities’ but (ii) that the list is not exhaustive and there may be other examples of ‘activities’.
64. In the authentic Spanish and German texts of the BIT the opening phrase is “Por ‘actividades’ en el sentido del apartado 2 del artículo 3 se considerarán, en especial pero no exclusivamente ...” and “Als ‘Betätigung’ im Sinne des Artikels 3 Absatz 2 ist insbesondere, aber nicht ausschließlich...” It is therefore clear that *ad Article 3* is setting out a non-exhaustive list of examples of ‘activities’ within the meaning of BIT Article 3.
65. It is suggested that the phrase “the management, utilization, use and enjoyment of an investment” should be read as an indication that the reference is to a range of activities concerned with the commercial operation of the investment, and that this does not include the pursuit of dispute settlement under BIT Article 10.
66. The Tribunal considers that the phrase “the management, utilization, use and enjoyment of an investment” does include recourse to dispute settlement, as an aspect of the management of the investment. Indeed, the (‘procedural’) right to enforce another (‘substantive’) right is one component of the bundles of rights and duties that make up the legal concept of what property is.
67. This is clear if one considers the case of a claim to money or to performance having an economic value, both of which are stipulated by Article 1(c) of the Argentina-Germany BIT to be within the definition of an ‘investment, or of intellectual property rights, addressed in Article 1(d). The argument that although a State could not cancel such claims or intellectual property rights without violating the BIT, it could cancel the right to pursue the claims or enforce the intellectual property rights through litigation or arbitration without violating the BIT is nonsensical. It is nonsensical because the right to enforcement is an essential component of the property rights themselves, and not a wholly distinct right.

68. This is a perfectly reasonable interpretation of the BIT. The BIT is an agreement both for the promotion and for the reciprocal protection of investments. It is an agreement between two States, which no doubt is intended to operate to the benefit of both States but which plainly confers benefits directly upon investors. The Tribunal considers that the provisions of Article 10, which on any interpretation confer upon investors the possibility of recourse to arbitration in addition to the right to have recourse to national courts, are a form of protection that is enjoyed within the scope of “the management, utilization, use and enjoyment of an investment”. Unlike the inter-State dispute settlement provisions in Article 9, which safeguard the interests of the States parties in the event of a dispute regarding the interpretation or application of the BIT, Article 10 is a benefit conferred on investors and designed to protect their interests and the interests of a State Party in its capacity as a host State party to a dispute with an investor: it is a protective right that sits alongside the guarantees against arbitrary and discriminatory measures, expropriation, and so on.
69. If the investor submitted a dispute with a third party to the national courts in order to protect its legal interests – a simple claim for contractual payments from a customer would be an adequate example – it is difficult to see any reason why that litigation should not be regarded as a management activity to which the Article 3 MFN provision is applicable so as to supplement the entitlement to juridical security under Article 4 of the BIT.
70. A court fee or bond requirement imposed on litigants who are nationals of State A but not on nationals of State B, for example, would appear to be caught by the MFN provision. So, too, would a requirement under national law to submit to conciliation prior to litigation, imposed upon nationals of A but not nationals of B.
71. The Tribunal sees no good reason to treat disputes between the investor and the State any differently from litigation between the investor and another private party, or to distinguish between the pursuit of remedies in the courts and their pursuit in arbitration, both of which are contemplated in Article 10 of the BIT.
72. Accordingly, the Tribunal is satisfied that the MFN provision is in principle applicable to the pursuit of dispute settlement procedures.

73. If there should be any doubt as to whether the pursuit of dispute settlement procedures falls within the scope of ‘management’, the Tribunal considers that there can be no doubt that the settlement of disputes is an “activity in connection with investments”, to use the language of BIT Article 3 itself rather than the non-exhaustive phraseology of *ad Article 3*.
74. The fact that BIT Article 4(4) stipulates expressly that nationals or companies of either Contracting party are entitled to MFN treatment “in respect of the matters provided for in this Article”, but that there is no express MFN stipulation in BIT Article 10 itself, does not change the position.<sup>9</sup> There is similarly no express statement on MFN treatment in BIT Article 2 or BIT Article 5: but to the extent that those Articles are concerned with the treatment of “investments” or of “nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory”, Article 3 paragraphs (1) and (2) make clear that the MFN provision is applicable. Moreover, Article 3 paragraphs (3) and (4) explicitly exclude certain matters from the scope of the MFN clause, but dispute settlement is not among them.
75. The Tribunal is accordingly satisfied that the MFN provision in Article 3 of the Argentina-Germany BIT applies to dispute settlement under Article 10 of that BIT.
76. At this stage in the argument two further questions arise: (i) what effect does the entitlement to ‘most favourable’ treatment have upon the jurisdiction of a tribunal constituted in pursuance of the provisions of BIT Article 10? and (ii), is the requirement of 18 months prior litigation ‘less favourable’?

## **VII MFN and jurisdictional limits**

77. It is well understood that MFN clauses are subject to implicit limitations. An example was given by the International Law Commission in its Commentary on its draft Articles on Most-Favoured-Nation clauses. It said that an MFN clause in a commercial treaty between State A and State B would not entitle State A to claim the

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<sup>9</sup> It is also arguable that the application of the MFN provision to dispute settlement procedures is an aspect of the enjoyment of full legal protection and security that is guaranteed by Article 4(1). The Tribunal takes no position on this point.

extradition of a criminal from State B on the ground that State B has agreed to extradite such criminals to State C or voluntarily does so. The reason, it said, “is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.”<sup>10</sup>

78. That proposition cannot seriously be challenged, and the principle is applicable to the present case. Having decided that the MFN provision is in principle applicable to the dispute settlement provisions of Article 10 of the BIT, it focuses attention on the need to ask precisely what rights are covered by the MFN obligation.
79. In the present case, it might be argued that the MFN clause requires that investors under the Argentina-Germany BIT be given MFN treatment during the conduct of an arbitration but that the MFN clause cannot create a right to go to arbitration where none otherwise exists under the BIT. The argument can be put more generally: the MFN clause stipulates how investors must be treated when they are exercising the rights given to them under the BIT but does not purport to give them any further rights in addition to those given to them under the BIT.
80. The question is, does the MFN clause in question here create new rights where none previously existed? and if not, is the right to have unilateral recourse to arbitration without the 18-month litigation period a distinct, new right or is it rather a matter of the manner in which those who already have a right to arbitrate are treated?
81. In the view of the Tribunal, it cannot be assumed that Argentina and German intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties. Non-statutory concessions to third party investors could, in principle, form the basis of a complaint that the MFN obligation has not been secured. In contrast (to take an example comparable to the ILC example concerning commercial treaties and extradition), rights of visa-free entry for the purposes of study, given to nationals of a third State, could not form the basis of such a complaint under the BIT. The MFN

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<sup>10</sup> Sir Arthur Watts, *The International Law Commission 1949-1998*, (Oxford, 1999), vol. III, p. 1821.

clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.

82. The Tribunal thus considers that the critical question is whether the absence of the 18-month litigation period in the dispute settlement provision of the Argentina-Chile BIT is a distinct right (in which case it would not be brought into the Argentina-Germany BIT by the operation of the MFN clause) or is a provision that concerns the treatment of investors in relation to the exercise of an existing right to arbitrate (in which case the MFN clause in the Argentina-Germany BIT could operate to disapply the 18 month litigation period in Article 10(3)(a)).
83. There is no established criterion to distinguish for this purpose between a ‘right’ and ‘treatment in relation to the exercise of a right’. But there are several indications that the 18-month pre-arbitration litigation requirement should be regarded as a matter of the treatment of investors in exercising their rights in relation to dispute settlement and not as the subject of a distinct right.
84. On any interpretation of Article 10 of the Argentina-Germany BIT, an investor can ultimately exercise its rights so as to submit the dispute unilaterally to arbitration, without the need for the further specific consent of the State party to the dispute to proceed to arbitration. At worst, the investor (or indeed the State) could request the submission of the dispute to the courts under BIT Article 10(2) and then proceed 18 months later to arbitration under Article 10(3)(a). There is, therefore, a right under the Argentina-Germany BIT to submit an investment dispute to arbitration and to do so without the consent of the other party to the dispute.
85. Reliance on the Argentina-Chile BIT via the MFN clause would not give Hochtief a right to reach a position that it could not reach under the Argentina-Germany BIT: it would enable it only to reach the same position as it could reach, by its own unilateral choice and actions, under the Argentina-Germany BIT, but to do so more quickly and more cheaply, without first pursuing litigation in the courts of Argentina for 18 months.

86. Secondly, the avoidance of the 18-month period in the Argentina-Germany BIT by reliance on the MFN clause would have no impact upon the scope of the jurisdiction of the Tribunal. It would not result in any case falling within its jurisdiction that could not eventually be brought before the Tribunal by the Claimant acting alone under Article 10 of the Argentina-Germany BIT. Nor would it remove the right of the Respondent to invoke Article 10(2) of the BIT in any dispute, and to require its submission to the national courts.
87. Third, the 18-month litigation period gives no inherent benefit, other than the interposition of a period in which the parties may refine and reflect upon their respective positions, to the other party. Neither party is bound to continue the litigation for more than 18 months, whether or not the litigation has reached a conclusion. Neither party is bound to accept that the dispute has been resolved by any final court decision that is rendered within the 18 month period. Either party may, under BIT Article 10 paragraphs (3) and (4) bring the dispute before ICSID. That is very clear from Article 10 itself.
88. While it is true that, as the Respondent noted,<sup>11</sup> the 18-month period gives the courts the opportunity to resolve the dispute, the arbitrary limit upon the time allowed for litigation and the express removal of any duty to accept any judgment makes that opportunity, unlike a true duty to exhaust local remedies, to some extent perfunctory and insubstantial. There is no certain benefit of which the other party is deprived by allowing the MFN provision to render the 18-month period inapplicable. While not logically or legally decisive, the fact that adherence to the 18-month rule would bring no necessary benefit, and no necessary result other than the delay of the arbitration proceedings, is a fact from which the Tribunal derives some encouragement to believe that its decision is correct.
89. The Tribunal also notes that, to the extent that recourse to national courts is indeed considered to be a benefit to either party, each party has the right under BIT Article 10(2) to insist, unilaterally, that the dispute be referred to national courts. Indeed, from one perspective the question under consideration here is whether the Respondent, having chosen not to require a reference to the national courts under

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<sup>11</sup> Transcript, Day 1, p. 4.

Article 10(2) may now raise the fact that there was no such reference as a bar to the arbitration of the dispute of which the Tribunal is seised.

90. The Tribunal observes that this approach to distinguishing between what is a new, independent, right to arbitrate and what is simply a manner in which an existing right to arbitrate must be exercised reflects the distinction between questions of jurisdiction and questions of admissibility. Jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal. A distinction may also be drawn between questions of admissibility and questions of receivability. A tribunal might decide that a claim of which it is seised and which is within its jurisdiction is inadmissible (for example, on the ground of *lis alibi pendens* or *forum non conveniens*); or it might refuse even to receive and become seised of a claim that is within its jurisdiction because of some fundamental defect in the manner in which the claim is put forward.
91. In broad terms, the Tribunal considers that the question in this case is not whether the MFN clause can alter the jurisdiction of tribunals established under the BIT but whether it can affect the prescribed procedures for accessing that jurisdiction. The reason can be expressed in terms of the distinction between rights and the manner in which rights are required to be exercised.
92. The reason might also be based upon the fact that the Contracting Parties to the BIT (Argentina, Germany) are not the same as the parties to the dispute (Argentina, Hochtief). If a tribunal is established by or under a treaty made by States, its jurisdiction is fixed by that treaty. Its jurisdiction can be altered by the agreement of the States Parties to treaty; but it cannot be altered by the parties to disputes who present themselves to the tribunal. So, for example, the ICJ could not hear a claim from an individual claimant against a State, even if the 'Respondent' State agreed to appear before the Court and defend the claim. If the Court purported to hear the case, it would not be functioning as 'the ICJ' under the ICJ Statute.
93. Similarly, if this Tribunal were asked by both parties to the present dispute to decide upon, say, a dispute which arose before the treaty entered into force, and were to accede to that request, it would not be functioning as an Article 10 tribunal under the Argentina-Germany BIT. Argentina and Germany agreed, in Protocol *ad Article 8*,



that the Treaty shall in no case apply to disputes which arose before it entered into force. Argentina and Hochtief cannot by agreement between themselves vary the terms of that agreement between Argentina and Germany. In such a hypothetical case it may be that, because the disputing parties had consented to put the matter to this tribunal, the tribunal would have the legal competence to hear and decide the pre-existent complaint case: but if it did hear and decide the case it would be functioning as an *ad hoc* tribunal, and not as an Argentina-Germany BIT tribunal.

94. Questions of admissibility, on the other hand, are different from questions of jurisdiction. The disputing parties are entitled to raise objections based upon questions of admissibility, but they are not bound to do so; and if they do not raise those objections, they will have acquiesced in any breach of the requirements of admissibility and that acquiescence will ‘cure’ the breach. The tribunal, if it has jurisdiction, will proceed to hear the case.
95. In the ICJ, for example, rules on admissibility include such matters as the rules on the nationality of claims and the exhaustion of local remedies. The ICJ may have jurisdiction to decide whether State A had injured corporation B in violation of international law; but it may be that the claim actually filed is inadmissible because it has been brought by the wrong State,<sup>12</sup> or because local remedies have not yet been exhausted.<sup>13</sup> But if no objection is raised on such grounds, the Court will not raise the matter *proprio motu*.<sup>14</sup> If, on the other hand, the objection based upon admissibility is raised and upheld, the very same claim (*mutatis mutandis*) could be brought by another State or brought after the exhaustion of local remedies (to pursue the examples used above), because the Court has jurisdiction in respect of the claim. Defects in admissibility can be waived or cured by acquiescence: defects in jurisdiction cannot.

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<sup>12</sup> *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, Feb. 5, 1970, ICJ Reports 1970, p. 3.

<sup>13</sup> *Interhandel Case (Switzerland v. United States)*, Judgment of March 21, 1959, ICJ Reports 1959, p. 6.

<sup>14</sup> See *Case concerning the Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, July 20, 1989, ICJ Reports 1989, p. 15.

96. Viewed from this perspective the question in the present case is whether the 18-month period is a requirement of the kind in respect to which the Respondent could accept or acquiesce in non-compliance, and whether it has done so. The Tribunal considers that the Respondent can indeed accept or acquiesce in such non-compliance and that the jurisdiction of the Tribunal remains unaffected by it. It regards the 18-month period as a condition relating to the manner in which the right to have recourse to arbitration must be exercised – as a provision going to the admissibility of the claim rather than the jurisdiction of the Tribunal.
97. In this case there are two sets of conditions for access to arbitration: those in the Argentina-Germany BIT and those in the Argentina-Chile BIT. As explained above, the Tribunal considers that those sets of conditions are provisions relating to the protection of investors and to the management, utilization, use and enjoyment of an investment, and accordingly covered by the Article 3 MFN provision.
98. The MFN provision does not permit the selective picking of components from each set of conditions, so as to manufacture a synthetic set of conditions to which no State's nationals would be entitled. The Claimant in this case cannot rely upon the lack of an 18-month litigation period in the Argentina-Chile BIT and ignore the fact that Article 10(2) of the Argentina-Chile BIT imposes a 'fork in the road' provision: it must rely upon the whole scheme as set out in either Article 10 of the Argentina-Chile BIT or Article 10 of the Argentina-Germany BIT. In this case it has chosen to rely upon Article 10 of the Argentina-Chile BIT.
99. The resulting position should be spelled out, as should the scope of the Tribunal's decision. The Tribunal notes the limits of its jurisdiction as set by the Argentina-Germany BIT. It accepts that the procedures relating to the bringing of a dispute to the Tribunal are covered by Article 3 of the Argentina-Germany BIT. And it accepts that the Claimant can therefore rely upon the procedures set out in Article 10 of the Argentina-Chile BIT (including the 'fork in the road' provision). The MFN provision thus operates in this case within the jurisdiction of the Tribunal as set by the Argentina-Germany BIT, and operates so as to modify the procedures applicable to the seising of the Tribunal. It is not necessary to decide what the position would have been if the Argentina-Chile BIT had established a wider jurisdiction for tribunals than

is established in the Argentina-Germany BIT, and the Tribunal takes no position on this question.

### **VIII Is Article 10(3) ‘less favourable’?**

100. It is sometimes suggested that it is wrong to presuppose that, for example, litigation in national courts is any less favourable than arbitration, or that a right to arbitrate after 18-months of litigation in national courts is less favourable than a right to arbitrate immediately. The Tribunal does not share that view. It considers that whatever the substantive merits of litigation and of arbitration, it is always more favourable to have the choice as to which to employ than it is not to have that choice.<sup>15</sup> This implies no criticism whatever of the national courts.

### **IX Other issues: the location of the ‘treatment’**

101. It was argued by the Respondent, on the basis of the wording of BIT Article 3, that the MFN provision applied only to treatment that is meted out in the territory of the State, and that its application in these proceedings was not treatment within the territory of the State. Further, it was said that because the practice in investment arbitrations is for the tribunal not to sit in the host State, this was a further indication that Article 3 is inapplicable to the Article 10 procedures.<sup>16</sup>

102. The consequence of this argument, if correct, is said to be that the duty to accord MFN treatment was not engaged in this case, so that the Claimant cannot rely upon the MFN obligation in order to establish the jurisdiction of the Tribunal.

103. Article 3(1) and (2) of the BIT as it is translated in the *United Nations Treaty Series* read as follows:

“(1) Neither Contracting Party shall subject investments in its territory by or with the participation of nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.

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<sup>15</sup> There are, no doubt, value judgments concerning the desirability of choice and the existence of free will presupposed in that proposition. The Tribunal is, however, content to accept it as a premise.

<sup>16</sup> Transcript, day 1, pp. 26 – 33.

(2) Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.”

104. The phrase translated as ‘in its territory’ is placed differently in the corresponding and authentic German and Spanish texts, which read as follows:

“(1) Jede Vertragspartei behandelt Kapitalanlagen von Staatsangehörigen oder Gesellschaften der anderen Vertragspartei oder Kapitalanlagen, an denen Staatsangehörige oder Gesellschaften der anderen Vertragspartei beteiligt sind, in ihrem Hoheitsgebiet nicht weniger günstig als Kapitalanlagen der eigenen Staatsangehörigen und Gesellschaften oder Kapitalanlagen von Staatsangehörigen und Gesellschaften dritter Staaten.

(2) Jede Vertragspartei behandelt Staatsangehörige oder Gesellschaften der anderen Vertragspartei hinsichtlich ihrer Betätigung im Zusammenhang mit Kapitalanlagen in ihrem Hoheitsgebiet nicht weniger günstig als ihre eigenen Staatsangehörigen und Gesellschaften oder Staatsangehörige und Gesellschaften dritter Staaten.”

“(1) Ninguna de las Partes Contratantes someterá en su territorio a las inversiones de nacionales o sociedades de la otra Parte Contratante o a las inversiones en las que mantengan participaciones los nacionales o sociedades de la otra Parte Contratante, a un trato menos favorable que el que se conceda a las inversiones de los propios nacionales y sociedades o a las inversiones de nacionales y sociedades de terceros Estados.

(2) Ninguna de las Partes Contratantes someterá en su territorio a los nacionales o sociedades de la otra Parte Contratante, en cuanto se refiere a sus actividades relacionadas con las inversiones, a un trato menos favorable que a sus propios nacionales y sociedades o a los nacionales y sociedades de terceros Estados.”

105. The phrase ‘in its territory’ appears to be linked to the treatment, rather than to the investment; and the material words would be more precisely translated as “... shall subject in its territory investments ...” or “... shall in its territory subject investments ...”. The result would be that the subjection of investments or investors to treatment outside Argentina could not engage liability under Article 3 of the BIT.

106. Giving this phrase its full weight and assuming, *arguendo*, that actions of the Respondent outside Argentina with respect to investments made by a claimant would not covered by the BIT, the question would be whether the invocation of the 18-month period under Article 10(3) in this case is treatment ‘outside the territory’ of the State. The Tribunal does not consider that it is.

107. The investment was made in Argentina. The Respondent’s decision to invoke the challenge based upon Article 10(3) of the BIT is an act which was located in the seat of the Respondent’s Government, and which would be implemented in Argentina by

requiring the Claimant to engage in litigation before the courts in Argentina. Thus far, no extraterritorial element is evident.

108. The only extraterritorial elements appear to be that the jurisdiction challenge is raised in a session held outside Argentina by a Tribunal that is characterised by the Respondent as having an institutionally extraterritorial nature because it is an international tribunal expected to sit outside the Respondent State.<sup>17</sup>
109. The critical question is, what is the ‘treatment’ to which the MFN obligation applies. The relevant treatment in this case is not constituted by the act of the reading or hearing by the Tribunal of the Respondent’s challenge based upon BIT Article 10(3). The place where that happens is not the location of the treatment: it is the location of the consequences or the effects of the treatment (and, furthermore, the actual location of the reading or hearing is purely contingent, and may differ as between members of the Tribunal). The treatment of which the Claimant complains is the Respondent’s insistence upon the ‘18-month’ requirement and insistence by way of a jurisdictional challenge upon the pursuit of litigation in the courts in Argentina.
110. The ‘international’ nature of this Tribunal does not alter the position. It does not deprive the conduct of the Respondent of its intra-territorial character.
111. In the view of the Tribunal, the relevant treatment is the reliance by the Respondent, not having invoked Article 10(2), upon Article 10(3) and the refusal of the Respondent to submit to immediate arbitration as the Claimant wishes. That conduct cannot be said to be conduct outside the territory of the Respondent for the purposes of Article 3 of the BIT.

## **X The Second Objection: Hochtief’s Standing**

112. The second objection is that Hochtief lacks the standing to present this claim because the rights belong to a different juridical person. The argument is in essence that because Hochtief operated through a locally-incorporated subsidiary, PdL, and that subsidiary is the party that was allegedly injured, Hochtief has no right to bring this claim.

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<sup>17</sup> Transcript, Day 1, p. 33; and Day 1, p. 4.

113. The Respondent referred to Article 25(2)(b) of the ICSID Convention in this connection and argued that its effect was that PdL should have brought the claim, and that for it to be entitled to do so it would have to show that Argentina had agreed to accord PdL the same rights as a foreign investor and that PdL was in fact under foreign control.<sup>18</sup> It argued that claims by shareholders (‘derivative claims’) are only allowed where they are specifically provided for in the BIT, and it contrasted the Argentina-Germany BIT with the Argentina-US BIT in this respect.<sup>19</sup>
114. The Respondent pointed out that *ad Article 4* in the Protocol to the BIT provided for compensation “also” in the event of the taking of measures “against the company in which the investment is made” (i.e., the locally-incorporated subsidiary; in this case, PdL), drawing the inference that in other cases no action lies in respect of injury to the company in which the investment is made.
115. Whatever the thinking behind the drafting of *ad Article 4* might have been, Article 1(1)(b) of the BIT is unequivocal in stipulating that an investment includes “shares, stocks in companies, and other forms of participation in companies.” The States Parties to the BIT could, had they wished, have limited the scope of the term ‘investment’ to cases where the foreign investor holds a controlling shareholding or even a 100% shareholding in a locally-incorporated subsidiary in the host State. They did not do so.
116. Hochtief owns 26% of the shares in PdL, to which it has contributed capital and made loans totalling over USD 34 million.<sup>20</sup> Given the scale of what would be regarded in any commercial context as an investment, and given the likelihood of consortium funding for large-scale projects, it is not surprising that the States Parties to the BIT agreed upon a definition of ‘investment’ that includes configurations such as those in the present case. Moreover, the terms of the tender document under which Hochtief bid for the right to engage in this project stipulated that the successful bidder would have to operate through a company incorporated in Argentina.

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<sup>18</sup> Transcript, Day 1, pp. 43-44.

<sup>19</sup> Transcript, Day 1, pp. 45-46.

<sup>20</sup> Request for Arbitration, paragraphs 4, 100. The total contribution including interest up to May 2007 is said to be almost USD 50 million: *ibid.*, paragraph 102.

117. The fact that Hochtief agreed, under Article 5 of the Concession contract, to assign all of its rights and obligations to PdL does not alter the position. Indeed, it confirms that Hochtief's investment consisted precisely in its shares in PdL and other forms of investment recognized in BIT Article 1(1).<sup>21</sup>
118. Similarly, the fact that there are jurisdictional clauses relating to disputes under the concession contract, providing for litigation or arbitration in Argentina,<sup>22</sup> does not alter the position. Those provisions govern the manner in which PdL must pursue dispute settlement; but they do not alter the character of Hochtief's participation in PdL as an investment.
119. The Tribunal has no doubt that Hochtief has made an investment in Argentina, in PdL, and that it is an investor under the BIT.

## **XI Jurisdiction of the Centre**

120. The Respondent sought a declaration that the dispute was not only outside the jurisdiction of the Tribunal but also outside the jurisdiction of the Centre. The Tribunal does not accept that this is so. The dispute plainly concerns a dispute between a State Party to the BIT and an investor of the other State Party, both States being Contracting Parties to the ICSID Convention. The dispute arises out of an investment; and the parties to the dispute have, as explained above, consented to submit it to arbitration. The Tribunal accordingly considers that the requirements of the ICSID Convention and in particular Article 25 thereof, are met.

## **XII The contract claims and double recovery**

121. The Respondent argued that Hochtief's claim overlapped with contractual claims being pursued in the courts in Argentina, and that Respondent was being put at risk of having to pay twice for the same alleged injury.

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<sup>21</sup> Transcript, Day 1, pp. 55-56.

<sup>22</sup> See Transcript, Day 1, p. 59.

122. The Tribunal is aware of this risk, but does not consider that it is a matter that goes to the question of jurisdiction. It will, if necessary, be addressed at a later stage in these proceedings.

### **XIII Costs**

123. The Respondent requested an order that costs and fees be taxed against the Claimant. The Tribunal reserves this question for decision along with the merits of this dispute.

### **XIV Conclusion**

124. The Tribunal has reached this Decision on Jurisdiction by a majority. It has done so after a great deal of thought and detailed discussion, reflecting the difficulty of the question. It is right to record the seriousness of those discussions, and the openness with which differing views have been considered, and the high regard of those in the majority for the carefully reasoned arguments of their co-arbitrator.

125. Accordingly, for the reasons set out above, the Tribunal *decides*:

(i) to reject the Respondent's submission that the Centre has no jurisdiction and the Tribunal has no competence over this case;

(ii) to assert that the Centre has jurisdiction and the Tribunal has competence over this case; and

(iii) to decide upon the question of costs and fees at a later stage, along with the merits of the dispute.



*Charles N. Brower*

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Honorable Charles N. Brower  
Arbitrator

*J. Christopher Thomas*

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Mr. J. Christopher Thomas, Q.C.  
Arbitrator

*Vaughan Lowe*

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Professor Vaughan Lowe  
President of the Tribunal

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## NOTE BY THE SECRETARIAT

Under Article 102 of the Charter of the United Nations every treaty and every international agreement entered into by any Member of the United Nations after the coming into force of the Charter shall, as soon as possible, be registered with the Secretariat and published by it. Furthermore, no party to a treaty or international agreement subject to registration which has not been registered may invoke that treaty or agreement before any organ of the United Nations. The General Assembly, by resolution 97 (I), established regulations to give effect to Article 102 of the Charter (see text of the regulations, vol. 859, p. VIII).

The terms "treaty" and "international agreement" have not been defined either in the Charter or in the regulations, and the Secretariat follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration that so far as that party is concerned the instrument is a treaty or an international agreement within the meaning of Article 102. Registration of an instrument submitted by a Member State, therefore, does not imply a judgement by the Secretariat on the nature of the instrument, the status of a party or any similar question. It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status and does not confer on a party a status which it would not otherwise have.

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Unless otherwise indicated, the translations of the original texts of treaties, etc., published in this *Series* have been made by the Secretariat of the United Nations.

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## NOTE DU SECRÉTARIAT

Aux termes de l'Article 102 de la Charte des Nations Unies, tout traité ou accord international conclu par un Membre des Nations Unies après l'entrée en vigueur de la Charte sera, le plus tôt possible, enregistré au Secrétariat et publié par lui. De plus, aucune partie à un traité ou accord international qui aurait dû être enregistré mais ne l'a pas été ne pourra invoquer ledit traité ou accord devant un organe des Nations Unies. Par sa résolution 97 (I), l'Assemblée générale a adopté un règlement destiné à mettre en application l'Article 102 de la Charte (voir texte du règlement, vol. 859, p. IX).

Le terme « traité » et l'expression « accord international » n'ont été définis ni dans la Charte ni dans le règlement, et le Secrétariat a pris comme principe de s'en tenir à la position adoptée à cet égard par l'Etat Membre qui a présenté l'instrument à l'enregistrement, à savoir que pour autant qu'il s'agit de cet Etat comme partie contractante l'instrument constitue un traité ou un accord international au sens de l'Article 102. Il s'ensuit que l'enregistrement d'un instrument présenté par un Etat Membre n'implique, de la part du Secrétariat, aucun jugement sur la nature de l'instrument, le statut d'une partie ou toute autre question similaire. Le Secrétariat considère donc que les actes qu'il pourrait être amené à accomplir ne confèrent pas à un instrument la qualité de « traité » ou d'« accord international » si cet instrument n'a pas déjà cette qualité, et qu'ils ne confèrent pas à une partie un statut que, par ailleurs, elle ne posséderait pas.

\*  
\* \*

Sauf indication contraire, les traductions des textes originaux des traités, etc., publiés dans ce *Recueil* ont été établies par le Secrétariat de l'Organisation des Nations Unies.

I

*Treaties and international agreements*

*registered*

*on 8 February 1996*

*Nos. 32532 to 32544*

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*Traités et accords internationaux*

*enregistrés*

*le 8 février 1996*

*N<sup>os</sup> 32532 à 32544*





**No. 32538**

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**GERMANY  
and  
ARGENTINA**

**Treaty on the encouragement and reciprocal protection of  
investments (with protocol and exchanges of notes).  
Signed at Bonn on 9 April 1991**

*Authentic texts: German and Spanish.*

*Registered by Germany on 8 February 1996.*

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**ALLEMAGNE  
et  
ARGENTINE**

**Traité relatif à la promotion et à la protection réciproque des  
investissements (avec protocole et échanges de notes).  
Signé à Bonn le 9 avril 1991**

*Textes authentiques : allemand et espagnol.*

*Enregistré par l'Allemagne le 8 février 1996.*



[GERMAN TEXT — TEXTE ALLEMAND]

VERTRAG ZWISCHEN DER BUNDESREPUBLIK DEUTSCHLAND  
UND DER ARGENTINISCHEN REPUBLIK ÜBER DIE FÖRDE-  
RUNG UND DEN GEGENSEITIGEN SCHUTZ VON KAPITAL-  
ANLAGEN

Die Bundesrepublik Deutschland

und

die Argentinische Republik –

in dem Wunsch, die wirtschaftliche Zusammenarbeit zwischen beiden Staaten zu vertiefen,

in dem Bestreben, günstige Bedingungen für Kapitalanlagen von Staatsangehörigen oder Gesellschaften des einen Staates im Hoheitsgebiet des anderen Staates zu schaffen,

in der Erkenntnis, daß eine Förderung und ein vertraglicher Schutz dieser Kapitalanlagen geeignet sind, die private wirtschaftliche Initiative zu beleben und den Wohlstand beider Völker zu mehren –

haben folgendes vereinbart:

**Artikel 1**

Für die Zwecke dieses Vertrags

1. umfaßt der Begriff „Kapitalanlagen“ alle Arten von Vermögenswerten gemäß der Gesetzgebung der Vertragspartei, in deren Hoheitsgebiet die Kapitalanlage in Übereinstimmung mit diesem Vertrag vorgenommen wird, insbesondere, aber nicht ausschließlich
  - a) Eigentum an beweglichen und unbeweglichen Sachen sowie sonstige dingliche Rechte wie Hypotheken und Pfandrechte;
  - b) Aktien, Anteilsrechte an Gesellschaften und andere Arten von Beteiligungen an Gesellschaften;
  - c) Ansprüche auf Geld, das verwendet wurde, um einen wirtschaftlichen Wert zu schaffen, oder Ansprüche auf Leistungen, die einen wirtschaftlichen Wert haben;

- d) Rechte des geistigen Eigentums wie insbesondere Urheberrechte, Patente, Gebrauchsmuster, gewerbliche Muster und Modelle, Marken, Handelsnamen, Betriebs- und Geschäftsgeheimnisse, technische Verfahren, Know-how und Goodwill;
  - e) öffentlich-rechtliche Konzessionen einschließlich Aufsuchungs- und Gewinnungskonzessionen;
2. bezeichnet der Begriff „Erträge“ diejenigen Beträge, die auf eine Kapitalanlage entfallen, wie Gewinnanteile, Dividenden, Zinsen, Lizenz- oder andere Entgelte;
3. bezeichnet der Begriff „Staatsangehörige“
- a) in bezug auf die Bundesrepublik Deutschland:  
Deutsche im Sinne des Grundgesetzes für die Bundesrepublik Deutschland.
  - b) in bezug auf die Argentinische Republik:  
Argentinier im Sinne der argentinischen Rechtsvorschriften;
4. bezeichnet der Begriff „Gesellschaften“ juristische Personen sowie Handelsgesellschaften oder sonstige Gesellschaften oder Vereinigungen mit oder ohne Rechtspersönlichkeit, die ihren Sitz im Hoheitsgebiet einer der Vertragsparteien haben, gleichviel, ob ihre Tätigkeit auf Gewinn gerichtet ist oder nicht.

## Artikel 2

(1) Jede Vertragspartei wird in ihrem Hoheitsgebiet Kapitalanlagen von Staatsangehörigen oder Gesellschaften der anderen Vertragspartei fördern und diese Kapitalanlagen in Übereinstimmung mit ihren Rechtsvorschriften zulassen. Sie wird Kapitalanlagen in jedem Fall gerecht und billig behandeln.

(2) Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei, die im Hoheitsgebiet der anderen Vertragspartei gemäß deren Gesetzgebung vorgenommen worden sind, genießen den vollen Schutz dieses Vertrags.

(3) Eine Vertragspartei wird die Verwaltung, die Verwendung, den Gebrauch oder die Nutzung der Kapitalanlagen von Staatsangehörigen oder Gesellschaften der anderen Vertragspartei in ihrem Hoheitsgebiet in keiner Weise durch willkürliche oder diskriminierende Maßnahmen beeinträchtigen.

## Artikel 3

(1) Jede Vertragspartei behandelt Kapitalanlagen von Staatsangehörigen oder Gesellschaften der anderen Vertragspartei

oder Kapitalanlagen, an denen Staatsangehörige oder Gesellschaften der anderen Vertragspartei beteiligt sind, in ihrem Hoheitsgebiet nicht weniger günstig als Kapitalanlagen der eigenen Staatsangehörigen und Gesellschaften oder Kapitalanlagen von Staatsangehörigen und Gesellschaften dritter Staaten.

(2) Jede Vertragspartei behandelt Staatsangehörige oder Gesellschaften der anderen Vertragspartei hinsichtlich ihrer Betätigung im Zusammenhang mit Kapitalanlagen in ihrem Hoheitsgebiet nicht weniger günstig als ihre eigenen Staatsangehörigen und Gesellschaften oder Staatsangehörige und Gesellschaften dritter Staaten.

(3) Diese Behandlung bezieht sich nicht auf Vorrechte, die eine Vertragspartei den Staatsangehörigen oder Gesellschaften dritter Staaten wegen ihrer Mitgliedschaft in einer Zoll- oder Wirtschaftsunion, einem gemeinsamen Markt oder einer Freihandelszone einräumt.

(4) Die in diesem Artikel gewährte Behandlung bezieht sich nicht auf Vergünstigungen, die eine Vertragspartei den Staatsangehörigen oder Gesellschaften dritter Staaten aufgrund eines Doppelbesteuerungsabkommens oder sonstiger Vereinbarungen über Steuerfragen gewährt.

#### Artikel 4

(1) Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei genießen im Hoheitsgebiet der anderen Vertragspartei vollen rechtlichen Schutz und volle rechtliche Sicherheit.

(2) Kapitalanlagen von Staatsangehörigen oder Gesellschaften einer Vertragspartei dürfen im Hoheitsgebiet der anderen Vertragspartei nur zum allgemeinen Wohl und gegen Entschädigung enteignet, verstaatlicht oder anderen Maßnahmen unterworfen werden, die in ihren Auswirkungen einer Enteignung oder Verstaatlichung gleichkommen. Die Entschädigung muß dem Wert der enteigneten Kapitalanlage unmittelbar vor dem Zeitpunkt entsprechen, in dem die tatsächliche oder drohende Enteignung, Verstaatlichung oder vergleichbare Maßnahme öffentlich bekannt wurde. Die Entschädigung muß unverzüglich geleistet werden und ist bis zum Zeitpunkt der Zahlung mit dem üblichen bankmäßigen Zinssatz zu verzinsen; sie muß tatsächlich verwertbar und frei transferierbar sein. Die Rechtmäßigkeit der Enteignung, Verstaatlichung oder vergleichbaren Maßnahme und die Höhe der Entschädigung müssen in einem ordentlichen Rechtsverfahren nachgeprüft werden können.

(3) Staatsangehörige oder Gesellschaften einer Vertragspartei, die durch Krieg oder sonstige bewaffnete Auseinandersetzungen,

Revolution, Staatsnotstand oder Aufruhr im Hoheitsgebiet der anderen Vertragspartei Verluste an Kapitalanlagen erleiden, werden von dieser Vertragspartei hinsichtlich der Rückerstattungen, Abfindungen, Entschädigungen oder sonstigen Gegenleistungen nicht weniger günstig behandelt als ihre eigenen Staatsangehörigen oder Gesellschaften. Solche Zahlungen müssen frei transferierbar sein.

(4) Hinsichtlich der in diesem Artikel geregelten Angelegenheiten genießen die Staatsangehörigen oder Gesellschaften einer Vertragspartei im Hoheitsgebiet der anderen Vertragspartei Meistbegünstigung.

#### Artikel 5

(1) Jede Vertragspartei gewährleistet den Staatsangehörigen oder Gesellschaften der anderen Vertragspartei den freien Transfer, der im Zusammenhang mit einer Kapitalanlage stehenden Zahlungen, insbesondere

- a) des Kapitals und zusätzlicher Beträge zur Aufrechterhaltung oder Ausweitung der Kapitalanlage;
- b) der Erträge;
- c) zur Rückzahlung der in Artikel 1, Absatz 1 Buchstabe c genannten Darlehen;
- d) des Erlöses im Fall vollständiger oder teilweiser Liquidation oder Veräußerung der Kapitalanlage;
- e) der Entschädigungen nach Artikel 4.

(2) Der Transfer erfolgt unverzüglich entsprechend den im Hoheitsgebiet der jeweiligen Vertragsparteien geltenden Verfahren und zu dem jeweils gültigen Kurs. Dieser Kurs darf nicht wesentlich von dem Kreuzkurs (cross rate) abweichen, der sich aus denjenigen Umrechnungskursen ergibt, die der Internationale Währungsfonds zum Zeitpunkt der Zahlung Umrechnungen der betreffenden Währungen in Sonderziehungsrechte zugrunde legen würde.

#### Artikel 6

Leistet eine Vertragspartei ihren Staatsangehörigen oder Gesellschaften Zahlungen aufgrund einer Gewährleistung für eine Kapitalanlage im Hoheitsgebiet der anderen Vertragspartei, so erkennt diese andere Vertragspartei, unbeschadet der Rechte der erstgenannten Vertragspartei aus Artikel 9, die Übertragung aller Rechte und Ansprüche dieser Staatsangehörigen oder Gesellschaften kraft Gesetzes oder aufgrund Rechtsgeschäfts auf

die erstgenannte Vertragspartei an. Die andere Vertragspartei erkennt auch den Eintritt der erstgenannten Vertragspartei in diese Rechte und Ansprüche des Rechtsvorgängers nach Grund und Höhe an. Für den Transfer von Zahlungen aufgrund der übertragenen Rechte und Ansprüche gilt Artikel 5 entsprechend.

#### Artikel 7

(1) Ergibt sich aus den Rechtsvorschriften einer Vertragspartei oder aus völkerrechtlichen Verpflichtungen, die neben diesem Vertrag zwischen den Vertragsparteien bestehen oder in Zukunft begründet werden, eine allgemeine oder besondere Regelung, durch die den Kapitalanlagen der Staatsangehörigen oder Gesellschaften der anderen Vertragspartei eine günstigere Behandlung als nach diesem Vertrag zu gewähren ist, so geht diese Regelung dem vorliegenden Vertrag insoweit vor, als sie günstiger ist.

(2) Jede Vertragspartei wird jede andere Verpflichtung einhalten, die sie in bezug auf Kapitalanlagen von Staatsangehörigen oder Gesellschaften der anderen Vertragspartei in ihrem Hoheitsgebiet übernommen hat.

#### Artikel 8

Dieser Vertrag gilt auch für Angelegenheiten, die sich nach Inkrafttreten dieses Vertrags in bezug auf Kapitalanlagen ergeben, die Staatsangehörige oder Gesellschaften der einen Vertragspartei im Hoheitsgebiet der anderen Vertragspartei gemäß deren Rechtsvorschriften vor Inkrafttreten dieses Vertrags vorgenommen haben.

#### Artikel 9

(1) Meinungsverschiedenheiten zwischen den Vertragsparteien über die Auslegung oder Anwendung dieses Vertrags sollen, soweit möglich, durch die Regierungen der beiden Vertragsparteien beigelegt werden.

(2) Kann eine Meinungsverschiedenheit auf diese Weise nicht beigelegt werden, so ist sie auf Verlangen einer der beiden Vertragsparteien einem Schiedsgericht zu unterbreiten.

(3) Das Schiedsgericht wird von Fall zu Fall gebildet, indem jede Vertragspartei ein Mitglied bestellt und beide Mitglieder sich auf den Angehörigen eines dritten Staates als Obmann einigen, der von den Regierungen der beiden Vertragsparteien zu bestellen ist. Die Mitglieder sind innerhalb von zwei Monaten, der Obmann innerhalb von drei Monaten zu bestellen, nachdem die eine Vertragspartei der anderen mitgeteilt hat, daß sie die Meinungsverschiedenheiten einem Schiedsgericht unterbreiten will.

(4) Werden die in Absatz 3 genannten Fristen nicht eingehalten, so kann in Ermangelung einer anderen Vereinbarung jede Vertragspartei den Präsidenten des Internationalen Gerichtshofs bitten, die erforderlichen Ernennungen vorzunehmen. Besitzt der Präsident die Staatsangehörigkeit einer der beiden Vertragsparteien oder ist er aus einem anderen Grund verhindert, so soll der Vizepräsident die Ernennungen vornehmen. Besitzt auch der Vizepräsident die Staatsangehörigkeit einer der beiden Vertragsparteien oder ist auch er verhindert, so soll das im Rang nächstfolgende Mitglied des Gerichtshofs, das nicht die Staatsangehörigkeit einer der beiden Vertragsparteien besitzt, die Ernennungen vornehmen.

(5) Das Schiedsgericht entscheidet mit Stimmenmehrheit. Seine Entscheidungen sind bindend. Jede Vertragspartei trägt die Kosten ihres Mitglieds sowie ihrer Vertretung in dem Verfahren vor dem Schiedsgericht; die Kosten des Obmanns sowie die sonstigen Kosten werden von den beiden Vertragsparteien zu gleichen Teilen getragen. Im übrigen regelt das Schiedsgericht sein Verfahren selbst.

(6) Sind beide Vertragsparteien auch Vertragsstaaten des Übereinkommens vom 18. März 1965 zur Beilegung von Investitionsstreitigkeiten zwischen Staaten und Angehörigen anderer Staaten, so kann mit Rücksicht auf die Regelung in Artikel 27 Absatz 1 dieses Übereinkommens das vorstehend vorgesehene Schiedsgericht insoweit nicht angerufen werden, als zwischen dem Staatsangehörigen oder der Gesellschaft einer Vertragspartei und der anderen Vertragspartei eine Vereinbarung nach Maßgabe des Artikels 25 des Übereinkommens zustande gekommen ist. Die Möglichkeit, das vorstehend vorgesehene Schiedsgericht im Fall der Nichtbeachtung einer Entscheidung des Schiedsgerichts des genannten Übereinkommens (Artikel 27) anzurufen, bleibt unberührt.

#### Artikel 10

(1) Meinungsverschiedenheiten in bezug auf Investitionen im Sinne dieses Vertrags zwischen einer der Vertragsparteien und einem Staatsangehörigen oder einer Gesellschaft der anderen Vertragspartei sollen, soweit möglich, zwischen den Streitparteien gütlich beigelegt werden.

(2) Kann eine Meinungsverschiedenheit im Sinne von Absatz 1 nicht innerhalb einer Frist von sechs Monaten ab dem Zeitpunkt ihrer Geltendmachung durch eine der beiden Streitparteien beigelegt werden, so ist sie auf Verlangen einer der beiden Streitparteien den zuständigen Gerichten der Vertragspartei, in deren Hoheitsgebiet die Investition getätigt wurde, zu unterbreiten.

(3) Unter jeder der nachstehend genannten Voraussetzungen kann die Meinungsverschiedenheit einem internationalen Schiedsgericht unterbreitet werden:

- a) auf Verlangen einer Streitpartei, wenn binnen 18 Monaten seit Einleitung des gerichtlichen Verfahrens gemäß Absatz 2 eine Sachentscheidung des angerufenen Gerichts nicht vorliegt oder wenn eine derartige Entscheidung vorliegt, die Meinungsverschiedenheit zwischen den Streitparteien aber fortbesteht;
- b) wenn beide Streitparteien sich darauf geeinigt haben.

(4) Sofern die Streitparteien nichts anderes vereinbart haben, werden Meinungsverschiedenheiten zwischen den Streitparteien in den Fällen von Absatz 3 dieses Artikels entweder einem Schiedsverfahren im Rahmen des Übereinkommens vom 18. März 1965 zur Beilegung von Investitionsstreitigkeiten zwischen den Staaten und Angehörigen anderer Staaten oder einem Ad hoc-Schiedsgericht nach den UNCITRAL-Schiedsregeln einvernehmlich unterworfen.

Kommt binnen drei Monaten, nachdem eine Streitpartei die Einleitung eines Schiedsverfahrens verlangt hat, keine Einigung zustande, so wird die Meinungsverschiedenheit – sofern beide Vertragsparteien Vertragsstaaten des Übereinkommens vom 18. März 1965 zur Beilegung von Investitionsstreitigkeiten zwischen Staaten und Angehörigen anderer Staaten sind – einem Schiedsverfahren im Rahmen des vorgenannten Übereinkommens unterworfen. Anderenfalls wird die Meinungsverschiedenheit dem vorgenannten Ad hoc-Schiedsgericht unterworfen.

(5) Das Schiedsgericht trifft seine Entscheidungen auf der Grundlage dieses Vertrags und gegebenenfalls anderer zwischen den Vertragsparteien geltender Übereinkünfte, des nationalen Rechts der Vertragspartei, in deren Hoheitsgebiet die Investition belegen ist – einschließlich der Regeln des Internationalen Privatrechts – und der allgemeinen Rechtsgrundsätze des Völkerrechts.

(6) Der Schiedsspruch ist bindend und wird gemäß innerstaatlichem Recht vollstreckt.

#### Artikel 11

Die Bestimmungen dieses Vertrags gelten auch in den in Artikel 63 des Wiener Übereinkommens vom 23. Mai 1969 über das Recht der Verträge genannten Fällen uneingeschränkt fort.

### Artikel 12

(1) Dieser Vertrag bedarf der Ratifikation; die Ratifikationsurkunden werden so bald wie möglich in Buenos Aires ausgetauscht.

(2) Dieser Vertrag tritt einen Monat nach Austausch der Ratifikationsurkunden in Kraft. Er bleibt zehn Jahre lang in Kraft; nach deren Ablauf verlängert sich die Geltungsdauer auf unbegrenzte Zeit, sofern nicht eine der beiden Vertragsparteien den Vertrag mit einer Frist von zwölf Monaten vor Ablauf schriftlich kündigt. Nach Ablauf von zehn Jahren kann der Vertrag jederzeit mit einer Frist von zwölf Monaten gekündigt werden.

(3) Für Kapitalanlagen, die bis zum Zeitpunkt des Außerkrafttretens dieses Vertrags vorgenommen worden sind, gelten die Artikel 1 bis 11 noch für weitere fünfzehn Jahre vom Tag des Außerkrafttretens des Vertrags an.

Geschehen zu Bonn am 9. April 1991 in zwei Urschriften, jede in deutscher und spanischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist.

Für die Bundesrepublik  
Deutschland:  
GENSCHER

Für die Argentinische  
Republik:  
GUIDO DI TELLA



## PROTOKOLL

Bei der Unterzeichnung des Vertrags zwischen der Bundesrepublik Deutschland und der Argentinischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen haben die unterzeichneten Bevollmächtigten außerdem folgende Bestimmungen vereinbart, die als Bestandteile des Vertrags gelten:

## (1) Zu Artikel 1

- a) Artikel 1 Nummer 1 des Vertrags findet keine Anwendung auf Kapitalanlagen in der Argentinischen Republik von natürlichen Personen, die Staatsangehörige der anderen Vertragspartei sind, wenn die betreffenden Personen zur Zeit der Vornahme ihrer ursprünglichen Investition bereits mehr als zwei Jahre ihren Wohnsitz in der Argentinischen Republik hatten, es sei denn, daß ihre Kapitalanlage nachweislich aus dem Ausland eingebracht wurde.
- b) Erträge aus der Kapitalanlage und im Fall ihrer Wiederanlage auch deren Erträge genießen den gleichen Schutz wie die Kapitalanlage.
- c) Als „andere Arten von Beteiligungen“ im Sinne von Artikel 1 Nummer 1 Buchstabe b werden vor allem solche Kapitalanlagen angesehen, die ihrem Inhaber keine Stimm- oder Kontrollrechte vermitteln.
- d) Die in Nummer 1 Buchstabe c genannten Ansprüche auf Geld umfassen Ansprüche aus Darlehen, die im Zusammenhang mit einer Beteiligung stehen und nach Zweck und Umfang den Charakter einer Beteiligung haben (beteiligungähnliche Darlehen). Hierunter fallen nicht Kredite von dritter Seite, z. B. Bankkredite zu kommerziellen Bedingungen.
- e) Unbeschadet anderer Verfahren zur Feststellung der Staatsangehörigkeit gilt insbesondere als Staatsangehöriger einer Vertragspartei jede Person, die einen von den zuständigen Behörden der betreffenden Vertragspartei ausgestellten nationalen Reisepaß besitzt. Der Vertrag findet keine Anwendung auf Investoren, die Staatsangehörige beider Vertragsparteien sind.
- f) Für die Feststellung, ob der Begriff „Gesellschaft“ nach Artikel 1 Nummer 4 anwendbar ist, wird auf ihren Sitz abgestellt, wobei hierunter der Ort zu verstehen ist, an dem die Gesellschaft ihre Hauptverwaltung hat.

- g) Der Vertrag gilt auch in den Gebieten der ausschließlichen Wirtschaftszone und des Festlandssockels, soweit das Völkerrecht der jeweiligen Vertragspartei die Ausübung von souveränen Rechten oder Hoheitsbefugnissen in diesen Gebieten erlaubt.

(2) Zu Artikel 3

- a) Als „Betätigung“ im Sinne des Artikels 3 Absatz 2 ist insbesondere, aber nicht ausschließlich, die Verwaltung, die Verwendung, der Gebrauch und die Nutzung einer Kapitalanlage anzusehen. Als eine „weniger günstige“ Behandlung im Sinne des Artikels 3 sind insbesondere, aber nicht ausschließlich anzusehen: weniger günstige Bedingungen beim Bezug von Rohstoffen und anderen Zulieferungen, Energie und Brennstoffen sowie Produktions- und Betriebsmitteln aller Art und beim Absatz von Erzeugnissen im In- und Ausland. Maßnahmen, die aus Gründen der inneren und äußeren Sicherheit und öffentlichen Ordnung, der Volksgesundheit oder Sittlichkeit zu treffen sind, gelten nicht als „weniger günstige“ Behandlung im Sinne des Artikels 3.
- b) Die Bestimmungen des Artikels 3 verpflichten eine Vertragspartei nicht, steuerliche Vergünstigungen, Befreiungen und Ermäßigungen, welche gemäß den Steuergesetzen nur den in ihrem Hoheitsgebiet ansässigen natürlichen Personen und Gesellschaften gewährt werden, auf im Hoheitsgebiet der anderen Vertragspartei ansässige natürliche Personen und Gesellschaften auszudehnen.
- c) Die Vertragsparteien werden im Rahmen ihrer innerstaatlichen Rechtsvorschriften Anträge auf die Einreise und den Aufenthalt von Personen der einen Vertragspartei, die im Zusammenhang mit einer Kapitalanlage in das Hoheitsgebiet der anderen Vertragspartei einreisen und sich aufhalten wollen, wohlwollend prüfen; das gleiche gilt für Arbeitnehmer der einen Vertragspartei, die im Zusammenhang mit einer Kapitalanlage in das Hoheitsgebiet der anderen Vertragspartei einreisen und sich dort aufhalten wollen, um eine Tätigkeit als Arbeitnehmer auszuüben. Auch Anträge auf Erteilung der Arbeitslaubnis werden wohlwollend geprüft.

(3) Zu Artikel 4

Ein Anspruch auf Entschädigung besteht auch dann, wenn durch in Artikel 4 genannte Maßnahmen in das Unternehmen, in dem die Kapitalanlage angelegt ist, eingegriffen und dadurch die Kapitalanlage erheblich beeinträchtigt wird.

## (4) Zu Artikel 5

Als „unverzüglich“ durchgeführt im Sinne des Artikels 5 Absatz 2 gilt ein Transfer, der innerhalb einer Frist erfolgt, die normalerweise zur Beachtung der Transferförmlichkeiten erforderlich ist. Die Frist beginnt mit der Einreichung eines formgerechten und vollständigen Antrags und darf unter keinen Umständen zwei Monate überschreiten.

## (5) Zu Artikel 8

Der Vertrag gilt jedoch in keinem Fall für Meinungsverschiedenheiten und Streitfälle, die vor seinem Inkrafttreten entstanden sind.

## (6) Bei Beförderungen von Gütern und Personen, die im Zusammenhang mit einer Kapitalanlage stehen, wird eine Vertragspartei die Transportunternehmen der anderen Vertragspartei, vorbehaltlich der zwischen beiden Vertragsparteien bestehenden internationalen Übereinkünfte, weder ausschalten noch behindern und, soweit erforderlich, Genehmigungen zur Durchführung der Transporte erteilen.

Geschehen zu Bonn am 9. April 1991 in zwei Urschriften, jede in deutscher und spanischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist.

Für die Bundesrepublik  
Deutschland:

GENSCHER

Für die Argentinische  
Republik:

GUIDO DI TELLA

[SPANISH TEXT — TEXTE ESPAGNOL]

TRATADO ENTRE LA REPÚBLICA FEDERAL DE ALEMANIA Y  
LA REPÚBLICA ARGENTINA SOBRE PROMOCIÓN Y PROTECCIÓN  
RECÍPROCA DE INVERSIONES

El Gobierno de la República Federal de Alemania

y

el Gobierno de la República Argentina,

con el deseo de intensificar la cooperación económica entre  
ambos Estados,

con el propósito de crear condiciones favorables para las  
inversiones de los nacionales o sociedades de uno de los dos  
Estados en el territorio del otro Estado,

reconociendo que la promoción y la protección de esas inver-  
siones mediante un tratado pueden servir para estimular la inicia-  
tiva económica privada e incrementar el bienestar de ambos  
pueblos,

han convenido lo siguiente:

**Artículo 1**

A los fines del presente Tratado

- (1) El concepto de «inversiones» designa todo tipo de activo  
definido de acuerdo con las leyes y reglamentaciones de la  
Parte Contratante en cuyo territorio la inversión se realizó de  
conformidad con este Tratado; en particular, pero no exclusi-  
vamente, esto incluye:
- a) la propiedad de bienes muebles e inmuebles y demás  
derechos reales, tales como hipotecas y derechos de  
prenda;
  - b) las acciones, derechos de participación en sociedades y  
otros tipos de participaciones en sociedades;
  - c) los derechos a fondos empleados para crear un valor  
económico o a prestaciones que tengan un valor econó-  
mico;
  - d) los derechos de propiedad intelectual, tales como los  
derechos de autor, patentes, modelos de utilidad, dise-  
ños y modelos industriales y comerciales, marcas, nom-

- bres comerciales, secretos industriales y comerciales, procedimientos tecnológicos, know how y valor llave;
- e) las concesiones otorgadas por entidades de derecho público, incluidas las concesiones de prospección y explotación.
- (2) El concepto de «ganancias» designa las sumas obtenidas de una inversión, tales como las participaciones en los beneficios, los dividendos, los intereses, los derechos de licencia y otras remuneraciones.
- (3) El concepto de «nacionales» designa:
- a) con referencia a la República Federal de Alemania:  
los alemanes en el sentido de la Ley Fundamental de la República Federal de Alemania;
- b) con referencia a la República Argentina:  
los argentinos en el sentido de las disposiciones legales vigentes en Argentina.
- (4) El concepto de «sociedades» designa todas las personas jurídicas, así como todas las sociedades comerciales y demás sociedades o asociaciones con o sin personería jurídica que tengan su sede en el territorio de una de las Partes Contratantes, independientemente de que su actividad tenga o no fines de lucro.

### Artículo 2

(1) Cada una de las Partes Contratantes promoverá las inversiones dentro de su territorio de nacionales o sociedades de la otra Parte Contratante y las admitirá de conformidad con sus leyes y reglamentaciones. En todo caso tratará las inversiones justa y equitativamente.

(2) Las inversiones realizadas por nacionales o sociedades de una de las Partes Contratantes en el territorio de la otra Parte Contratante de acuerdo con las leyes y reglamentaciones de esta última gozarán de la plena protección de este Tratado.

(3) Ninguna de las Partes Contratantes perjudicará en su territorio la administración, la utilización, el uso o el goce de las inversiones de nacionales o sociedades de la otra Parte Contratante a través de medidas arbitrarias o discriminatorias.

### Artículo 3

(1) Ninguna de las Partes Contratantes someterá en su territorio a las inversiones de nacionales o sociedades de la otra Parte Contratante o a las inversiones en las que mantengan participa-

ciones los nacionales o sociedades de la otra Parte Contratante, a un trato menos favorable que el que se conceda a las inversiones de los propios nacionales y sociedades o a las inversiones de nacionales y sociedades de terceros Estados.

(2) Ninguna de las Partes Contratantes someterá en su territorio a los nacionales o sociedades de la otra Parte Contratante, en cuanto se refiere a sus actividades relacionadas con las inversiones, a un trato menos favorable que a sus propios nacionales y sociedades o a los nacionales y sociedades de terceros Estados.

(3) Dicho trato no se extenderá a los privilegios que una de las Partes Contratantes conceda a los nacionales y sociedades de terceros Estados por formar parte de una unión aduanera o económica, un mercado común o una zona de libre comercio.

(4) El trato acordado por el presente artículo no se extenderá a las ventajas que una de las Partes Contratantes conceda a los nacionales o sociedades de terceros Estados como consecuencia de un acuerdo para evitar la doble imposición o de otros acuerdos en materia impositiva.

#### Artículo 4

(1) Las inversiones de nacionales o sociedades de una de las Partes Contratantes gozarán de plena protección y seguridad jurídica en el territorio de la otra Parte Contratante.

(2) Las inversiones de nacionales o sociedades de una de las Partes Contratantes no podrán, en el territorio de la otra Parte Contratante, ser expropiadas, nacionalizadas, o sometidas a otras medidas que en sus efectos equivalgan a expropiación o nacionalización, salvo por causas de utilidad pública, y deberán en tal caso ser indemnizadas. La indemnización deberá corresponder al valor de la inversión expropiada inmediatamente antes de la fecha de hacerse pública la expropiación efectiva o inminente, la nacionalización o la medida equivalente. La indemnización deberá abonarse sin demora y devengará intereses hasta la fecha de su pago según el tipo usual de interés bancario; deberá ser efectivamente realizable y libremente transferible. La legalidad de la expropiación, nacionalización o medida equiparable, y el monto de la indemnización, deberán ser revisables en procedimiento judicial ordinario.

(3) Los nacionales o sociedades de una de las Partes Contratantes que sufran pérdidas en sus inversiones por efecto de guerra u otro conflicto armado, revolución, estado de emergencia nacional o insurrección en el territorio de la otra Parte Contratante, no serán tratados por ésta menos favorablemente que sus propios nacionales o sociedades en lo referente a restituciones.

compensaciones, indemnizaciones u otros resarcimientos. Estos pagos deberán ser libremente transferibles.

(4) En lo concerniente a las materias regidas por el presente artículo, los nacionales o sociedades de una de las Partes Contratantes gozarán en el territorio de la otra Parte Contratante del trato de la nación más favorecida.

#### Artículo 5

(1) Cada Parte Contratante garantizará a los nacionales o sociedades de la otra Parte Contratante la libre transferencia de los pagos relacionados con una inversión, especialmente:

- a) del capital y de las sumas adicionales para el mantenimiento o ampliación de la inversión de capital;
- b) de las ganancias;
- c) de la amortización de los préstamos definidos en el inciso c) del apartado 1 del artículo 1;
- d) del producto de la venta o liquidación total o parcial de la inversión;
- e) de las indemnizaciones previstas en el artículo 4.

(2) La transferencia se efectuará sin demora de acuerdo a los procedimientos establecidos en el territorio de cada Parte Contratante y al tipo de cambio aplicable en cada caso. Dicho tipo de cambio no deberá diferir sustancialmente del tipo cruzado (cross rate) resultante de los tipos de cambio que el Fondo Monetario Internacional aplicaría si en la fecha del pago cambiaran las monedas de los países interesados en derechos especiales de giro.

#### Artículo 6

Si una Parte Contratante realiza pagos a sus nacionales o sociedades en virtud de una garantía otorgada por una inversión en el territorio de la otra Parte Contratante, esta última, sin perjuicio de los derechos que en virtud del artículo 9 corresponden a la primera Parte Contratante, reconocerá el traspaso de todos los derechos de aquellos nacionales o sociedades a la primera Parte Contratante, bien sea por disposición legal o por acto jurídico. Asimismo, la otra Parte Contratante reconocerá la causa y el alcance de la subrogación de la primera Parte Contratante en todos estos derechos del titular anterior. Para la transferencia de los pagos en virtud de los derechos transferidos regirá *mutatis mutandis* el artículo 5.

### Artículo 7

(1) Si de las disposiciones legales de una de las Partes Contratantes o de las obligaciones emanadas del derecho internacional no contempladas en el presente Tratado, actuales o futuras, entre las Partes Contratantes, resultare una reglamentación general o especial en virtud de la cual deba concederse a las inversiones de los nacionales o sociedades de la otra Parte Contratante un trato más favorable que el previsto en el presente Tratado, dicha reglamentación prevalecerá sobre el presente Tratado, en cuanto sea más favorable.

(2) Cada Parte Contratante cumplirá cualquier otro compromiso que haya contraído con relación a las inversiones de nacionales o sociedades de la otra Parte Contratante en su territorio.

### Artículo 8

El presente Tratado se aplicará también a los asuntos surgidos después de su entrada en vigor en relación a las inversiones efectuadas por los nacionales o sociedades de una Parte Contratante conforme a las leyes y reglamentaciones de la otra Parte Contratante en el territorio de esta última antes de la entrada en vigor del mismo.

### Artículo 9

(1) Las controversias que surgieren entre las Partes Contratantes sobre la interpretación o aplicación del presente Tratado deberán, en lo posible, ser dirimidas por los Gobiernos de ambas Partes Contratantes.

(2) Si una controversia no pudiere ser dirimida de esa manera, será sometida a un tribunal arbitral a petición de una de las Partes Contratantes.

(3) El tribunal arbitral será constituido ad hoc; cada Parte Contratante nombrará un miembro, y los dos miembros se pondrán de acuerdo para elegir como presidente a un nacional de un tercer Estado que será nombrado por los Gobiernos de ambas Partes Contratantes. Los miembros serán nombrados dentro de un plazo de dos meses, el Presidente dentro de un plazo de tres meses, después de que una de las Partes Contratantes haya comunicado a la otra que desea someter la controversia a un tribunal arbitral.

(4) Si los plazos previstos en el párrafo 3 no fueren observados, y a falta de otro arreglo, cada Parte Contratante podrá invitar al Presidente de la Corte Internacional de Justicia a proceder a los nombramientos necesarios. En caso de que el presidente sea nacional de una de las Partes Contratantes o se halle impedido por otra causa, corresponderá al Vicepresidente efectuar los



nombramientos. Si el Vicepresidente también fuere nacional de una de las dos Partes Contratantes o si se hallare también impedido, corresponderá al miembro de la Corte que siga inmediatamente en el orden jerárquico y no sea nacional de una de las Partes Contratantes, efectuar los nombramientos.

(5) El tribunal arbitral tomará sus decisiones por mayoría de votos. Sus decisiones serán obligatorias. Cada Parte Contratante sufragará los gastos ocasionados por la actividad de su árbitro, así como los gastos de su representación en el procedimiento arbitral; los gastos del presidente, así como los demás gastos, serán sufragados por partes iguales por las dos Partes Contratantes. Por lo demás, el tribunal arbitral determinará su propio procedimiento.

(6) Si ambas Partes Contratantes fueren también Estados Contratantes del Convenio sobre arreglo de diferencias relativas a inversiones entre Estados y nacionales de otros Estados del 18 de marzo de 1965, no se podrá, en atención a la disposición del párrafo 1 del artículo 27 de dicho Convenio, acudir al tribunal arbitral arriba previsto cuando el nacional o la sociedad de una Parte Contratante y la otra Parte Contratante hayan llegado a un acuerdo conforme al artículo 25 del Convenio. No quedará afectada la posibilidad de acudir al tribunal arbitral arriba previsto en el caso de que no se respete una decisión del Tribunal de Arbitraje del mencionado Convenio (artículo 27).

### Artículo 10

(1) Las controversias que surgieren entre una de las Partes Contratantes y un nacional o una sociedad de la otra Parte Contratante en relación con las inversiones en el sentido del presente Tratado deberán, en lo posible, ser amigablemente dirimidas entre las partes en la controversia.

(2) Si una controversia en el sentido del párrafo 1 no pudiera ser dirimida dentro del plazo de seis meses, contado desde la fecha en que una de las partes en la controversia la haya promovido, será sometida a petición de una de ellas a los tribunales competentes de la Parte Contratante en cuyo territorio se realizó la inversión.

(3) La controversia podrá ser sometida a un tribunal arbitral internacional en cualquiera de las circunstancias siguientes:

- a) a petición de una de las partes en la controversia, cuando no exista una decisión sobre el fondo después de transcurridos dieciocho meses contados a partir de la iniciación del proceso judicial previsto por el apartado 2 de este artículo, o cuando exista tal decisión pero la controversia subsista entre las partes;

b) cuando ambas partes en la controversia así lo hayan convenido.

(4) En los casos previstos por el párrafo 3 anterior, las controversias entre las partes, en el sentido de este artículo, se someterán de común acuerdo, cuando las partes en la controversia no hubiesen acordado otra cosa, sea a un procedimiento arbitral en el marco del «Convenio sobre Arreglo de Diferencias relativas a las inversiones entre Estados y nacionales de otros Estados», del 18 de marzo de 1965 o a un tribunal arbitral ad hoc establecido de conformidad con las reglas de la Comisión de Naciones Unidas para el Derecho Mercantil Internacional (C.N.U.D.M.I.).

Si después de un período de tres meses a partir de que una de las partes hubiere solicitado el comienzo del procedimiento arbitral no se hubiese llegado a un acuerdo, la controversia será sometida a un procedimiento arbitral en el marco del «Convenio sobre Arreglo de Diferencias relativas a las inversiones entre Estados y nacionales de otros Estados», del 18 de marzo de 1965, siempre y cuando ambas Partes Contratantes sean partes de dicho Convenio. En caso contrario la controversia será sometida al tribunal arbitral ad hoc antes citado.

(5) El Tribunal arbitral decidirá sobre la base del presente Tratado y, en su caso, sobre la base de otros tratados vigentes entre las Partes, del derecho interno de la Parte Contratante — en cuyo territorio se realizó la inversión, incluyendo sus normas de derecho internacional privado, y de los principios generales del derecho internacional.

(6) La sentencia arbitral será obligatoria y cada Parte la ejecutará de acuerdo con su legislación.

#### **Artículo 11**

Las disposiciones del presente Tratado continuarán siendo plenamente aplicables aún en los casos previstos por el artículo 63 de la Convención de Viena sobre el derecho de los Tratados del 23 de mayo de 1969.

#### **Artículo 12**

(1) El presente Tratado será ratificado; los instrumentos de ratificación serán canjeados a la mayor brevedad posible en Buenos Aires.

(2) El presente Tratado entrará en vigor un mes después de la fecha en que se haya efectuado el canje de los instrumentos de ratificación. Su validez será de diez años y se prolongará después por tiempo indefinido, a menos que una de las Partes Contratantes comunicara por escrito a la otra su intención de darlo por

terminado doce meses antes de su expiración. Transcurridos diez años, el Tratado podrá denunciarse en cualquier momento, con un preaviso de doce meses.

(3) Para inversiones realizadas antes de la fecha de terminación del presente Tratado, las disposiciones de los artículos 1 a 11 seguirán rigiendo durante los quince años subsiguientes a dicha fecha.

Hecho en Bonn el día 9 de Abril de 1991 en dos originales, en idiomas alemán y español, siendo ambos textos igualmente auténticos.

Por la República  
Federal de Alemania:

GENSCHER

Por la República  
Argentina:

GUIDO DI TELLA

## PROTOCOLO

En el acto de la firma del Tratado entre la República Federal de Alemania y la República Argentina sobre promoción y protección recíproca de inversiones, los plenipotenciarios abajo firmantes han adoptado las siguientes disposiciones, que se consideran como parte integrante del Tratado:

## (1) Ad artículo 1

- a) En lo que concierne al artículo 1, apartado 1, este Tratado no se aplicará a las inversiones realizadas en la República Argentina por personas físicas que sean nacionales de la otra Parte Contratante si tales personas, a la fecha de la inversión original, han estado domiciliadas desde hace más de dos años en la República Argentina, salvo cuando se pruebe que las inversiones provienen del extranjero.
- b) Las ganancias derivadas de inversiones y, en el caso que sean revertidas, las ganancias derivadas de éstas, gozarán de la misma protección que la inversión original.
- c) Por "otros tipos de participaciones", según el apartado 1 inciso b) del artículo 1, se entenderán en particular aquellas inversiones de capital que no otorgan a su titular derechos de voto o control.
- d) Los derechos a fondos mencionados en el apartado 1 inciso c) del artículo 1 comprenden derechos de préstamos relacionados con una participación y que tengan por su causa y cuantía el carácter de una participación (préstamos cuasi participativos). Sin embargo, no comprenden créditos de terceros, como por ejemplo créditos bancarios con condiciones comerciales.
- e) Sin perjuicio de otros procedimientos para determinar la nacionalidad, se considerará en especial como nacional de una Parte Contratante a toda persona que posea un pasaporte nacional extendido por las autoridades competentes de la respectiva Parte Contratante. Este Tratado no se aplicará a los inversores que sean nacionales de ambas Partes Contratantes.
- f) Para determinar si el concepto de "sociedades" de acuerdo a lo dispuesto en el apartado 4 del artículo 1 es aplicable, se atenderá a su sede, la cual se entenderá como lugar en el que la sociedad tenga su administración principal.

- g) El Tratado se aplicará también a las áreas de la Zona Económica Exclusiva y de la Plataforma Continental sobre las cuales el Derecho Internacional conceda a la Parte Contratante correspondiente derechos de soberanía o jurisdicción.

(2) Ad artículo 3

- a) Por «actividades» en el sentido del apartado 2 del artículo 3 se considerarán en especial pero no exclusivamente, la administración, la utilización, el uso y el aprovechamiento de una inversión. Se considerarán en especial pero no exclusivamente como «trato menos favorable» en el sentido del artículo 3 a las medidas menos favorables que afecten la adquisición de materias primas y otros insumos, energía y combustibles, así como medios de producción y de explotación de toda clase o la venta de productos en el interior del país y en el extranjero. No se considerarán como «trato menos favorable» en el sentido del artículo 3 las medidas que se adopten por razones de seguridad interna o externa y orden público, sanidad pública o moralidad.
- b) Las disposiciones del artículo 3 no obligan a una Parte Contratante a extender las ventajas, exenciones y reducciones fiscales que, según las leyes tributarias sólo se conceden a las personas naturales y sociedades residentes en su territorio, a las personas naturales y sociedades residentes en el territorio de la otra Parte Contratante.
- c) Las Partes Contratantes, de acuerdo con sus disposiciones legales internas, tramitarán con benevolencia las solicitudes de inmigración y residencia de personas de una de las Partes Contratantes que, en relación con una inversión, quieran entrar en el territorio de la otra Parte Contratante; la misma actitud deberá ser observada con respecto a los asalariados de una Parte Contratante que, en relación con una inversión, quieran entrar y residir en el territorio de la otra Parte Contratante para ejercer su actividad como asalariados. Igualmente se tramitarán con benevolencia las solicitudes de permiso de trabajo.

(3) Ad artículo 4

El derecho a indemnización existirá asimismo en el caso de que se adopte alguna de las medidas definidas en el artículo 4 respecto de la empresa donde se halla situada la inversión y se produzca como consecuencia de aquélla un severo perjuicio para la inversión.

(4) Ad artículo 5

Una transferencia se considera realizada «sin demora» en el sentido del apartado 2 del artículo 5 cuando se ha efectuado dentro del plazo normalmente necesario para el cumplimiento de las formalidades de transferencia. El plazo, que en ningún caso podrá exceder de dos meses, comenzará a correr en el momento de presentación de la correspondiente solicitud formalmente completa.

(5) Ad artículo 8

El presente Tratado en ningún caso se aplicará a las reclamaciones o litigios surgidos antes de su vigencia.

(6) Respecto de los transportes de mercancías y personas en relación con inversiones, ninguna de las Partes Contratantes excluirá ni pondrá trabas a las empresas de transporte de la otra Parte Contratante y, en caso necesario, concederá autorizaciones para la realización de los transportes condicionados a las normas de los acuerdos internacionales vigentes entre las Partes Contratantes.

Hecho en Bonn el día 9 de Abril de 1991 en dos ejemplares, en lengua alemana y española, siendo ambos textos igualmente auténticos.

Por la República  
Federal de Alemania:

GENSCHER

Por la República  
Argentina:

GUIDO DI TELLA

## EXCHANGES OF NOTES — ÉCHANGES DE NOTES

[SPANISH TEXT — TEXTE ESPAGNOL]

1 a

## EMBAJADA DE LA REPÚBLICA ARGENTINA

Señor Ministro,

Con motivo de la firma del Tratado sobre la Promoción y Protección Recíproca de Inversiones del 9 de Abril de 1991, el Gobierno de la República Argentina tiene el honor de comunicarle al Gobierno de la República Federal de Alemania lo siguiente:

En base al Tratado de Amistad y Cooperación de 1988, o bien, al Tratado para el Establecimiento de una Relación Asociativa Particular de 1987 respectivamente, el Reino de España y la República Italiana otorgan a la República Argentina líneas de crédito concesionales con el objeto de financiar inversiones para la ejecución de inversiones, especialmente con el fin de crear joint ventures en el sector de la pequeña y mediana empresa.

Las solicitudes de financiación para cada proyecto deben ser autorizadas de conformidad con regulaciones argentinas especiales y posteriormente acordadas con la contraparte española o italiana, según el caso.

Como contrapartida la República Argentina se ha comprometido a:

- otorgar la exención arancelaria e impositiva para las importaciones de bienes destinados a inversiones que se financian con los créditos concesionales previstos por los respectivos Tratados.
- no adoptar ninguna medida que impida la repatriación del capital invertido o la libre transferencia de ganancias a partir de inversiones de riesgo para aquellos proyectos que hayan sido financiados según las disposiciones de los citados Tratados.

Estas condiciones especiales se otorgan con el objeto de posibilitar nuevas inversiones para el desarrollo económico de la Argentina en ámbitos cuya promoción es especialmente necesaria.

Las Partes Contratantes interpretan el artículo 3 del Tratado sobre la Promoción y Protección Recíproca de Inversiones de forma tal que la cláusula de la nación más favorecida no se refiere a las condiciones y los privilegios especiales que la República Argentina otorga a inversores extranjeros para los proyectos arriba mencionados.

La República Argentina procurará que aquellos inversores alemanes y sus inversiones, que no están sujetos a las condiciones especiales arriba mencionadas, no resulten afectados substancialmente en su capacidad competitiva.

Reciba Ud., Sr. Ministro, las seguridades de mi más alta y distinguida consideración.

Bonn, 9 de Abril de 1991

GUIDO DI TELLA  
Ministro de Relaciones Exteriores y Culto

Sr. Ministro de Asuntos Exteriores  
de la República Federal de Alemania  
Hans D. Genscher  
Bonn

## [GERMAN TEXT — TEXTE ALLEMAND]

## II a

## DER BUNDESMINISTER DES AUSWÄRTIGEN

Bonn, den 9. April 1991

422-413.35 ARG

Herr Minister,

ich beehre mich, den Empfang der Note der Regierung der Argentinischen Republik vom 9. April 1991 mit folgendem Inhalt zu bestätigen:

„Das Königreich Spanien und die Italienische Republik gewähren aufgrund des Freundschafts- und Kooperationsabkommens von 1988 bzw. des Abkommens zur Herstellung einer besonderen Assoziationsbeziehung von 1987 der Argentinischen Republik zur Durchführung gewerblicher Kapitalanlagen insbesondere zwecks Gründung von Gemeinschaftsunternehmen mit klein- und mittelständischen Unternehmen konzessionäre Kreditlinien für die Finanzierung solcher Investitionen.

Die Finanzierungsanträge für jedes Projekt müssen in Übereinstimmung mit besonderen argentinischen Vorschriften genehmigt und anschließend mit den zuständigen italienischen und spanischen Behörden abgestimmt werden.

Im Gegenzug hat sich die Argentinische Republik zu folgendem verpflichtet:

- Sie gewährt Zoll- und Steuerfreiheit für die Einfuhr von Gütern für Kapitalanlagen, die mit den in den jeweiligen Verträgen vorgesehenen konzessionären Krediten finanziert werden;
- es werden keine Maßnahmen ergriffen, die die Repatriierung des eingesetzten Kapitals oder den freien Transfer der Erträge aus Risikoinvestitionen für jene Projekte behindern, die gemäß den Bestimmungen dieser Verträge finanziert wurden.

Diese besonderen Bedingungen werden mit dem Ziel gewährt, neue Kapitalanlagen für die wirtschaftliche Entwicklung Argentiniens in besonders förderungsbedürftigen Bereichen zu ermöglichen.

Die Vertragsparteien legen Artikel 3 des Vertrags über die Förderung und den gegenseitigen Schutz von Kapitalanlagen dahingehend aus, daß die Verpflichtung zur Meistbegünstigung sich nicht auf die besonderen Bedingungen und Vorrechte bezieht, die die Argentinische Republik ausländischen Kapitalanlegern für die zuvor genannten Projekte gewährt.

Die Argentinische Republik wird dafür sorgen, daß deutsche Investoren und ihre Kapitalanlagen, die den oben genannten besonderen Bedingungen nicht unterliegen, in ihrer Wettbewerbsfähigkeit nicht wesentlich beeinträchtigt werden.“

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichneten Hochachtung.

GENSCHER

Seiner Exzellenz  
dem Minister für Auswärtige Beziehungen und Kultus  
der Argentinischen Republik  
Herrn Guido di Tella



[GERMAN TEXT — TEXTE ALLEMAND]

*I b*

DER BUNDESMINISTER DES AUSWÄRTIGEN

Bonn, den 9. April 1991

422-413.35 ARG

Herr Minister,

ich beehre mich, Ihnen unter Bezugnahme auf den heute zwischen der Bundesrepublik Deutschland und der Argentinischen Republik geschlossenen Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen folgendes mitzuteilen:

Nach Inkrafttreten des Vertrags über die Förderung und den gegenseitigen Schutz von Kapitalanlagen zwischen unseren beiden Staaten und unter Berücksichtigung des in Artikel 5 dieses Vertrags niedergelegten Prinzips des freien Transfers von Kapital und Erträgen, haben die deutschen Behörden die Möglichkeit, aufgrund eines Antrags potentieller Investoren für deutsche Investitionen in der Argentinischen Republik in vollem Umfange Kapitalanlagegarantien gemäß unseren jeweils geltenden Richtlinien und Allgemeinen Bedingungen zu gewähren. Vom Inkrafttreten des Vertrags an sind zusätzlich zu den bisher bereits gewährten Garantien auch solche Beträge Gegenstand der Garantien, die für einen bestimmten Zeitraum auf Kapitalanlagen entfallen, wie z. B. Gewinnanteile, Dividenden und Zinsen.

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichneten Hochachtung.

GENSCHER

Seiner Exzellenz  
dem Minister für Auswärtige Beziehungen und Kultus  
der Argentinischen Republik  
Herrn Guido di Tella

[SPANISH TEXT — TEXTE ESPAGNOL]

II b

MINISTRO DE RELACIONES EXTERIORES Y CULTO

Señor Ministro,

Tengo el honor de acusar recibo de la nota del Gobierno de la República Federal de Alemania, de fecha 9 de abril de 1991, cuyo contenido es el siguiente:

«Con motivo del Tratado sobre Promoción y Protección Recíproca de Inversiones suscrito entre nuestros dos países con fecha 9 de abril de 1991, tengo el honor de comunicarle a Usted lo siguiente:

A partir de la entrada en vigor de dicho Tratado y teniendo en cuenta el principio establecido en su Artículo 5 sobre la libre transferencia de capital y ganancias, las autoridades alemanas cuentan con la posibilidad, después de la presentación por parte de los inversores interesados de una solicitud para garantizar una inversión en Argentina, de otorgar la cobertura total de tales inversiones de acuerdo con las directivas y condiciones generales vigentes. Por lo tanto, a partir de la entrada en vigor de este Tratado dichas autoridades podrán, en adición a las actualmente disponibles, otorgar garantías respecto de las sumas obtenidas de una inversión durante un período determinado, tales como las participaciones en los beneficios, los dividendos y los intereses.

Permitame, Señor Ministro, hacerle llegar las seguridades de mi más alta consideración.»

Reitero a Usted, Señor Ministro, las seguridades de mi mayor consideración.

Bonn, 9 de abril de 1991

GUIDO DI TELLA  
Ministro de Relaciones Exteriores y Culto

Sr. Ministro de Asuntos Exteriores  
de la República Federal de Alemania  
Hans D. Genscher  
Bonn

## [TRANSLATION — TRADUCTION]

TREATY<sup>1</sup> BETWEEN THE FEDERAL REPUBLIC OF GERMANY  
AND THE ARGENTINE REPUBLIC ON THE ENCOURAGEMENT  
AND RECIPROCAL PROTECTION OF INVESTMENTS

The Government of the Federal Republic of Germany and the Government of the Argentine Republic,

Desiring to intensify economic cooperation between both States,

Intending to create favourable conditions for investments by nationals and companies of either State in the territory of the other State,

Recognizing that the encouragement and contractual protection of such investment are apt to stimulate private business initiative and to increase the prosperity of both nations,

Have agreed as follows:

*Article 1*

For the purposes of this Treaty,

(1) The term “investments” shall apply to assets of any category defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Treaty and particularly, but not exclusively, to:

(a) Movable and immovable property as well as any other rights *in rem*, such as mortgages, liens and pledges;

(b) Shares, stocks in companies and other forms of participation in companies;

(c) Claims to money which has been used to create an economic value or claims to any performance having an economic value;

(d) Intellectual property rights, such as copyrights, patents, utility models, industrial and commercial designs and models, trade marks and trade names, industrial and commercial secrets, technical processes, know-how and goodwill;

(e) Business concessions under public law, including concessions to search for, extract and exploit natural resources.

(2) The term “returns” shall mean the amounts yielded by an investment such as profits, dividends, interest, licence fees and other remuneration.

(3) The term “nationals” shall mean:

(a) In respect of the Federal Republic of Germany: Germans within the meaning of the Basic Law of the Federal Republic of Germany;

(b) In respect of the Argentine Republic: Argentines within the meaning of the legal provisions in force in Argentina.

<sup>1</sup> Came into force on 8 November 1993, i.e., one month after the exchange of the instruments of ratification, which took place at Buenos Aires on 8 October 1993, in accordance with article 12 (2).

(4) The term “companies” shall mean any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of either Contracting Party whether or not its activities are directed at profit.

#### *Article 2*

(1) Each Contracting Party shall encourage investments by nationals or companies of the other Contracting Party in its territory and shall admit such investments in accordance with its laws and regulations. In any case each Party shall accord fair and equitable treatment to investments.

(2) Investments made by nationals or companies of either Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Party shall enjoy full protection under this Treaty.

(3) Neither Contracting Party shall subject the management, utilization, use or enjoyment of investments of nationals or companies of the other Contracting Party in its territory to arbitrary or discriminatory measures.

#### *Article 3*

(1) Neither Contracting Party shall subject investments in its territory by or with the participation of nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.

(2) Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.

(3) Such treatment shall not include privileges which may be extended by either Contracting Party to nationals or companies of third States on account of its membership in a customs or economic union, common market or free trade area.

(4) The treatment under this article shall not extend to privileges accorded by a Contracting Party to nationals or companies of a third State by virtue of an agreement for the avoidance of double taxation or other tax agreements.

#### *Article 4*

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection as well as juridical security in the territory of the other Contracting Party.

(2) Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subject to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party, except for reasons of public interest and against compensation. Such compensation shall be equivalent to the value of the investment expropriated immediately before the effective or impending expropriation, nationalization or equivalent measure became public knowledge. The compensation shall be paid without delay and shall carry the usual bank interest until the date of payment; it shall be readily convertible and freely transferable. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law.

(3) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency or insurrection shall be accorded by the latter Contracting Party treatment which is no less favourable than that accorded to its own nationals or companies, as regards restitution, compensation, indemnification or other valuable consideration. Such payments shall be freely transferable.

(4) Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this article.

#### Article 5

(1) Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of payments in connection with an investment, including:

- (a) The capital and additional amounts to maintain or increase the investments;
- (b) The returns;
- (c) Repayment of loans defined in article 1, paragraph 1 (c);
- (d) The proceeds from the sale of the whole or any part of the investment;
- (e) The compensation provided for by article 4.

(2) The transfer shall be effected without delay at the rate of exchange applicable in each case and in accordance with the procedures established in the territory of each Contracting Party. Such exchange rate shall not differ substantially from the cross rate resulting from the exchange rate that the International Monetary Fund would apply if the currencies of the countries concerned were converted to special drawing rights on the date of payment.

#### Article 6

If either Contracting Party makes payments to its nationals or companies under a guarantee it has assumed in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under article 9, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim from such national or company to the former Contracting Party. The latter Contracting Party shall also recognize the reasons for and extent of the subrogation of the former Contracting Party to any such right or claim which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments by virtue of such assignment, article 5 shall apply *mutatis mutandis*.

#### Article 7

(1) If the legislation of either Contracting Party or obligations under international law existing at present or established hereinafter between the Contracting Parties in addition to this Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by this Treaty, such regulation shall, to the extent that it is more favourable, take precedence over this Treaty.

(2) Each Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by nationals or companies of the other Contracting Party.

#### Article 8

This Treaty shall also apply to matters arising after its entry into force in connection with investments by nationals or companies of either Contracting Party consistent with the laws and regulations of the other Contracting Party in the territory of the latter prior to the entry into force of the Treaty.

#### Article 9

(1) Disputes between the Contracting Parties relating to the interpretation or application of this Treaty shall, as far as possible, be settled by negotiations between the Governments of both Contracting Parties.

(2) If a dispute cannot be thus settled, it shall, at the request of either Contracting Party, be submitted to an arbitral tribunal.

(3) The arbitral tribunal shall be established on an *ad hoc* basis. Each Contracting Party shall appoint one member and these two members shall, by agreement, designate a national of a third State as chairman who shall be appointed by the Governments of the two Contracting Parties. The members shall be appointed within two months and the chairman within three months after either Contracting Party informed the other Party of its intention to submit the dispute to an arbitral tribunal.

(4) If the time-limits provided for under paragraph 3 are not met, and in the absence of any other agreement, either Contracting Party may request the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or is otherwise prevented from discharging the said function, the appointments shall be made by the Vice-President. If the Vice-President is also a national of either Contracting Party or is also prevented from discharging the said function, the appointments shall be made by the member of the Court next in seniority who is not a national of either Contracting Party.

(5) The arbitral tribunal shall take its decisions by a majority of votes. Its decisions shall be binding. Each Contracting Party shall defray the costs of the arbitrator it has appointed and of its representation in the arbitral proceedings. The costs of the chairman and the remaining costs shall be defrayed in equal parts by the two Contracting Parties. In all other respects, the tribunal shall determine its own procedure.

(6) If both Contracting Parties are also parties to the Convention on the settlement of investment disputes between States and nationals of other States of 18 March 1965,<sup>1</sup> the arbitral tribunal provided for above may, in consideration of the provisions of article 27, paragraph 1, of the said Convention, not be appealed to insofar as agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under article 25 of the Convention. This shall not affect the possibility of appealing to such arbitral tribunal in the

<sup>1</sup> United Nations, *Treaty Series*, vol. 575, p. 159.

event that a decision of the arbitral tribunal established under the said Convention (article 27) is not complied with.

#### Article 10

(1) Disputes concerning investments within the meaning of this Treaty between one of the Contracting Parties and a national or company of the other Contracting Party shall as far as possible be settled amicably between the parties to the dispute.

(2) If a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties concerned gave notice of the dispute, it shall, at the request of either party, be submitted to the competent courts of the Contracting Party in whose territory the investment was made.

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

(a) At the request of one of the parties to the dispute where, after a period of 18 months has elapsed from the moment when the judicial process provided for by paragraph 2 of this article was initiated, no final decision has been given or where a decision has been made but the Parties are still in dispute;

(b) Where both parties to the dispute have so agreed.

(4) In the cases provided for by paragraph 3 above, disputes between the Parties within the meaning of this article shall be referred by mutual agreement, when the parties to the dispute have not agreed otherwise, either to arbitral proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 or to an *ad hoc* arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If there is no agreement after a period of three months has elapsed from the moment when one of the Parties requested the initiation of the arbitration procedures, the dispute shall be submitted to arbitration procedures under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 provided that both Contracting Parties are parties to the said Convention. Otherwise, the dispute shall be submitted to the above-mentioned *ad hoc* arbitral tribunal.

(5) The arbitral tribunal shall issue its ruling in accordance with the provisions of this Treaty, with those of other treaties existing between the Parties, with the laws in force in the Contracting Party in which the investments were made, including its rules of private international law, and with the general principles of international law.

(6) The arbitration decision shall be binding and both Parties shall implement it in accordance with their legislation.

#### Article 11

The provisions of this Treaty shall remain fully in force even in the cases provided for by article 63 of the Vienna Convention on the law of treaties of 23 May 1969.<sup>1</sup>

<sup>1</sup> United Nations, *Treaty Series*, vol. 1155, p. 331.

*Article 12*

(1) This Treaty shall be ratified; the instruments of ratification shall be exchanged as soon as possible in Buenos Aires.

(2) This Treaty shall enter into force one month after the date of the exchange of instruments of ratification. It shall remain in force for a period of 10 years and shall be extended thereafter for an unlimited period unless either Contracting Party gives written notification to the other of its intention to terminate the Treaty 12 months before its expiration. After 10 years, the Treaty may be denounced at any time by giving 12 months' notice.

(3) Investments made prior to the date of termination of this Treaty shall continue to be protected by the provisions of articles 1 to 11 for an additional period of 15 years from such date.

DONE at Bonn on 9 April 1991 in two originals in the German and Spanish languages, both texts being equally authentic.

For the Federal Republic  
of Germany:

GENSCHER

For the Argentine  
Republic:

GUIDO DI TELLA



## PROTOCOL

With the signing of the Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments, the undersigned plenipotentiaries have agreed on the following provisions, which shall be regarded as an integral part of the said Treaty:

(1) *Ad* article 1:

(a) As far as article 1, paragraph 1 is concerned, this Treaty shall not apply to investments in the Argentine Republic by individuals who are nationals of the other Contracting Party if such individuals, on the date of the original investment, have been domiciled for more than two years in the Argentine Republic, unless it is proved that such investments originate from abroad.

(b) Returns from an investment and, in the event of their re-investment, the returns therefrom shall enjoy the same protection as the original investment.

(c) The other forms of participation mentioned in article 1, paragraph 1 (b), shall refer in particular to those capital investments which do not confer voting or controlling rights on their holder.

(d) The claims to money referred to in article 1, paragraph 1 (c), include claims arising from loans relating to an investment that, by virtue of its purpose and amounts, has the nature of a participation (quasi-participatory loans). However, they shall not include third-party loans such as bank loans at market rates.

(e) Without prejudice to any other methods of determining nationality, in particular, any person in possession of a national passport issued by the competent authorities of the Contracting Party concerned shall be deemed to be a national of that Party. This Treaty shall not apply to investors who are nationals of both Contracting Parties.

(f) In order to determine whether the term “companies” is applicable in accordance with the provisions of article 1, paragraph 4, account shall be taken of the seat of such companies, which shall mean the place where the company has its main place of management.

(g) The Treaty shall also apply to areas of the exclusive economic zone and continental shelf over which international law grants to the Contracting Party concerned rights of sovereignty or jurisdiction.

(2) *Ad* article 3:

(a) The following shall more particularly, though not exclusively, be deemed “activity” within the meaning of article 3, paragraph 2: the management, utilization, use and enjoyment of an investment. The following shall more particularly, though not exclusively, be deemed “treatment less favourable” within the meaning of article 3: less favourable measures that affect the purchase of raw materials and other inputs, energy or fuel, or means of production or operation of any kind or the marketing of products inside or outside the country. Measures that are adopted for reasons of internal or external security or public order, public health or morality shall not be deemed “treatment less favourable” within the meaning of article 3.

(b) The provisions of article 3 do not obligate a Contracting Party to extend tax privileges, exemptions and relief accorded only to natural persons and companies

resident in its territory, in accordance with its tax laws, to natural persons and companies resident in the territory of the other Contracting Party.

(c) The Contracting Parties shall within the framework of their national legislation give favourable consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with an investment; the same shall apply to nationals of either Contracting Party who, in connection with an investment, wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Applications for work permits shall also be given favourable consideration.

(3) *Ad article 4:*

A claim to compensation shall also exist when, as a result of the adoption of any one of the measures referred to in article 4 against the company in which the investment is made, such investment is severely impaired.

(4) *Ad article 5:*

A transfer shall be deemed to have been made “without delay” within the meaning of article 5, paragraph 2, if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been formally submitted and may on no account exceed two months.

(5) *Ad article 8:*

This Treaty shall in no case apply to complaints or litigation which arose before it entered into force.

(6) Whenever goods or persons connected with an investment are to be transported, neither Contracting Party shall exclude or hinder transport companies of the other Contracting Party. Permits to carry out such transport in accordance with the rules of international agreements in force between the two Contracting Parties shall be issued as required.

DONE at Bonn on 9 April 1991, in duplicate in the German and Spanish languages, both texts being equally authentic.

For the Federal Republic  
of Germany:

GENSCHER

For the Argentine  
Republic:

GUIDO DI TELLA

[TRANSLATION — TRADUCTION]

EXCHANGES OF NOTES

I a

EMBASSY OF THE ARGENTINE REPUBLIC

Bonn, 9 April 1991

Sir,

With the signing of the Treaty on the Encouragement and Reciprocal Protection of Investments of 9 April 1991, the Government of the Argentine Republic has the honour to inform the Government of the Federal Republic of Germany of the following:

Under the General Treaty of cooperation and friendship of 1988<sup>1</sup> and the Treaty for the establishment of a special associative relationship of 1987,<sup>2</sup> respectively, the Kingdom of Spain and the Italian Republic grant to the Argentine Republic concessional lines of credit for financing investments, especially for the purpose of creating joint ventures in the small and medium-size business sector.

Financing applications for each project shall be authorized in accordance with special Argentine regulations and shall later be decided with the Spanish or Italian counterpart, as the case may be.

In return, the Argentine Republic has undertaken:

- To grant customs and tax exemptions for imports of goods for investment financed with concessional lines of credit provided for by the respective Treaties.
- Not to take any measures to prevent the repatriation of invested capital or the free transfer of returns from venture capital for any projects financed in accordance with the provisions of the aforementioned Treaties.

These special conditions are granted for the purpose of facilitating new investments for Argentina's economic development in areas which it is deemed especially vital to promote.

The Contracting Parties shall interpret article 3 of the Treaty on the Encouragement and Reciprocal Protection of Investments to mean that the most-favoured-nation clause shall not refer to the special conditions and privileges that the Argentine Republic grants to foreign investors in respect of the aforementioned projects.

The Argentine Republic shall ensure that the competitiveness of those German investors and their investments that are not subject to the aforementioned special conditions is not substantially affected.

<sup>1</sup> United Nations, *Treaty Series*, vol. 1546, p. 3.

<sup>2</sup> *Ibid.*, vol. 1537, p. 307.

Accept, Sir, etc.

GUIDO DI TELLA  
Minister for Foreign Affairs and Worship

His Excellency  
Mr. Hans D. Genscher  
Minister for Foreign Affairs  
Federal Republic of Germany  
Bonn

## II a

Bonn, 9 April 1991

## THE MINISTER FOR FOREIGN AFFAIRS

422-413.35 ARG

Sir,

I have the honour to acknowledge receipt of the note dated 9 April 1991 from the Argentine Government, which reads as follows:

[*See note I a*]

Accept, Sir, etc.

GENSCHER

His Excellency

The Minister for Foreign Affairs and Worship  
Mr. Guido di Tella

*I b*

THE MINISTER FOR FOREIGN AFFAIRS

Bonn, 9 April 1991

422-413.35 ARG

Sir,

With the signing of the Treaty on the Encouragement and Reciprocal Protection of Investments between our two countries dated 9 April 1991, I have the honour to inform you of the following:

Following the entry into force of the aforementioned Treaty and taking into account the principle established in article 5 thereof on the free transfer of capital and returns, the German authorities have the option, upon the submission by interested investors of a request for guaranteeing an investment in Argentina, of providing full coverage for such investments in accordance with the prevailing guidelines and general conditions. Therefore, starting from the entry into force of this Treaty, such authorities may, in addition to the guarantees already available, grant guarantees with respect to the sums derived from investments during a given period such as shares in profits, dividends and interests.

Accept, Sir, etc.

GENSCHER

His Excellency  
The Minister for Foreign Affairs and Worship  
of the Argentine Republic  
Mr. Guido di Tella

*II b*

## MINISTER FOR FOREIGN AFFAIRS AND WORSHIP

Bonn, 9 April 1991

Sir,

I have the honour to acknowledge receipt of the note of the Government of the Federal Republic of Germany dated 9 April 1991, the text of which reads as follows:

[*See note I b*]

Accept, Sir, etc.

GUIDO DI TELLA  
Minister for Foreign Affairs and Worship

His Excellency  
Mr. Hans D. Genscher  
Minister for Foreign Affairs  
of the Federal Republic of Germany  
Bonn

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[TRADUCTION — TRANSLATION]

TRAITÉ<sup>1</sup> ENTE LA RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE ET  
LA RÉPUBLIQUE ARGENTINE RELATIF À LA PROMOTION  
ET À LA PROTECTION RÉCIPROQUE DES INVESTISSEMENTS

La République fédérale d'Allemagne et la République argentine,

Désireuses d'intensifier la coopération économique entre les deux Etats,

Entendant créer des conditions favorables aux investissements des nationaux et des sociétés de chacun deux sur le territoire de l'autre,

Reconnaissant que la promotion et la protection de ces investissements par voie de traité sont de nature à stimuler l'initiative économique privée et à accroître la prospérité des deux peuples,

Sont convenues de ce qui suit :

*Article 1<sup>er</sup>*

Aux fins du présent Traité :

1. Le terme « investissements » désigne tout type d'activité défini en accord avec les lois et réglementations de la Partie contractante sur le territoire de laquelle l'investissement a été réalisé conformément au présent Traité; en particulier sont compris, non limitativement

a) La propriété des biens meubles et immeubles, ainsi que tous autres droits réels tels qu'hypothèques et gages;

b) Les actions, droits de participation à des sociétés et autres formes de participation à des sociétés;

c) Les créances portant sur des sommes d'argent servant à créer une valeur économique ou portant sur toute prestation à valeur économique;

d) Les droits de la propriété intellectuelle, en particulier les droits d'auteur, les brevets, les modèles d'utilité, les dessins et modèles industriels et commerciaux, les marques, les noms commerciaux, les secrets industriels et commerciaux, les procédés techniques, les savoir-faire et la survaleur incorporelle (« goodwill »);

e) Les concessions accordées par des entités de droit public, y compris les concessions de prospection et d'exploitation.

2. Le terme « revenus » désigne les sommes rapportées par un investissement, en particulier participations aux bénéfices, dividendes, intérêts, droits de licence et autres rémunérations.

3. Le terme « nationaux » désigne :

a) En ce qui concerne la République fédérale d'Allemagne : les Allemands aux sens de la Loi fondamentale de la République fédérale d'Allemagne;

<sup>1</sup> Entré en vigueur le 8 novembre 1993, soit un mois après l'échange des instruments de ratification, qui a eu lieu à Buenos Aires le 8 octobre 1993, conformément au paragraphe 2 de l'article 2.



b) En ce qui concerne la République argentine : les Argentins au sens des dispositions légales en vigueur en Argentine.

4. Le terme « sociétés » désigne toutes les personnes morales ainsi que toutes les sociétés commerciales et autres sociétés ou associations dotées ou non de la personnalité juridique dont le siège est situé sur le territoire de l'une des Parties contractantes, que leur activité soit lucrative ou non.

#### *Article 2*

1) Chacune des Parties contractantes encouragera les investissements sur son territoire par des nationaux ou des sociétés de l'autre Partie contractante et les admettra conformément à ses lois et réglementations. En tout état de cause, elle traitera les investissements de manière juste et équitable.

2) Les investissements effectués par des nationaux ou des sociétés de l'une des Parties contractantes sur le territoire de l'autre Partie contractante en accord avec les lois et réglementations de cette dernière bénéficieront de la pleine protection du présent Traité.

3) Aucune des Parties contractantes ne préjudiciera sur son territoire, par des mesures arbitraires ou discriminatoires, à l'administration, à l'utilisation, à l'usage ou à la jouissance des investissements de nationaux ou sociétés de l'autre Partie contractante.

#### *Article 3*

1) Aucune des Parties contractantes ne soumettra sur son territoire les investissements des nationaux ou sociétés de l'autre Partie contractante ou les investissements auxquels ceux-ci participent à un traitement moins favorable que celui consenti aux investissements de ses propres nationaux et sociétés ou de ceux d'Etats tiers.

2) Aucune des Parties contractantes ne soumettra sur son territoire les investissements des nationaux ou sociétés de l'autre Partie contractante, s'agissant de leurs activités liées aux investissements, à un traitement moins favorable que celui accordé à ses propres nationaux et sociétés ou aux nationaux et sociétés d'Etats tiers.

3) Ce traitement ne couvrira pas les avantages ou privilèges qu'une Partie contractante accorde aux nationaux ou aux sociétés d'Etats tiers en raison de leur appartenance à une union douanière ou économique, à un marché commun ou à une zone de libre-échange.

4) Le traitement prévu dans le présent article ne s'appliquera pas aux avantages que l'une des Parties contractantes accorde aux nationaux et sociétés d'Etats tiers en conséquence d'un accord visant à éviter la double imposition ou autre accord fiscal.

#### *Article 4*

1) Les investissements des nationaux ou sociétés de chacune des Parties contractantes bénéficieront d'une pleine protection et d'une pleine sécurité juridique sur le territoire de l'autre Partie contractante.

2) Les investissements de nationaux ou sociétés d'une Partie contractante ne pourront pas, sur le territoire de l'autre Partie contractante, être expropriés ou natio-

nalisés, ou faire l'objet d'autres mesures dont les effets équivaldraient à une expropriation ou à une nationalisation, sauf pour cause d'utilité publique, et alors avec indemnisation. L'indemnisation devra correspondre à la valeur de l'investissement exproprié immédiatement avant la date de l'annonce publique de l'expropriation « effective ou imminente », de la nationalisation ou de la mesure équivalente. L'indemnité devra être versée sans retard et portera intérêts jusqu'à la date du paiement au taux d'intérêt bancaire usuel; elle devra être effectivement réalisable et librement transférable. La légalité de l'expropriation, de la nationalisation ou autre mesure équivalente, ainsi que le montant de l'indemnisation, devront pouvoir être revues dans le cadre des procédures judiciaires ordinaires.

3) Les nationaux ou sociétés d'une Partie contractante dont les investissements subissent des pertes à cause d'une guerre ou autre conflit armé, d'une révolution, d'un état d'urgence nationale ou d'une insurrection qui se produit sur le territoire de l'autre Partie contractante ne seront pas traités par celle-ci moins favorablement que ses propres nationaux ou sociétés quant à la restitution, à la compensation, à l'indemnisation ou autre forme de dédommagement. Les versements correspondants devront être librement transférables.

4) S'agissant des questions régies par le présent article, les nationaux ou sociétés de chacune des Parties contractantes bénéficieront sur le territoire de l'autre du traitement de la nation la plus favorisée.

#### *Article 5*

1) Chaque Partie contractante garantira aux nationaux ou sociétés de l'autre Partie contractante le libre transfert des paiements liés à un investissement, s'agissant en particulier :

- a) Du capital et des fonds additionnels nécessaires au maintien ou à l'augmentation de l'investissement;
- b) Des revenus;
- c) De l'amortissement des prêts définis à l'alinéa c du paragraphe 1<sup>er</sup> de l'article 1<sup>er</sup>;
- d) Du produit de la vente ou liquidation totale ou partielle de l'investissement;
- e) Des indemnités visées à l'article 4.

2) Le transfert s'effectuera sans retard en accord avec les procédures établies sur le territoire de chaque Partie contractante et selon les modalités de change applicables dans chaque cas. Ces modalités de change ne devront pas différer substantiellement du taux de change croisé (cross rate) résultant des modalités de change qu'appliquerait le Fonds monétaire international si, à la date du paiement considéré, il était amené à convertir en droits de tirage spéciaux des sommes libellées dans la monnaie des pays intéressés.

#### *Article 6*

Si l'une des Parties contractantes fait des paiements au bénéfice de ses nationaux ou de ses sociétés en vertu d'une garantie accordée pour un investissement effectué sur le territoire de l'autre Partie contractante, celle-ci, sans préjudice des droits conférés à la première Partie contractante par l'article 9 du présent Traité, reconnaîtra la cession de tous les droits ou créances de ces nationaux ou sociétés à la première Partie contractante, par voie soit de disposition légale, soit d'acte juri-

dique. De même, l'autre Partie contractante reconnaîtra, en substance et en portée, la subrogation de la première Partie contractante dans tous les droits du précédent titulaire. S'agissant de transfert des paiements au titre de droits transférés, l'article 5 s'appliquera *mutatis mutandis*.

#### Article 7

1) Si les dispositions légales de l'une ou l'autre Partie contractante ou des obligations résultant du droit international et non envisagées dans le présent Traité, actuelles ou futures, entre les Parties contractantes, conduisent à une réglementation générale ou spéciale imposant d'accorder aux investissements des nationaux ou sociétés de l'autre Partie contractante un traitement plus favorable que celui prévu dans le présent Traité, cette réglementation prévaudra sur le présent Traité pour autant qu'elle soit plus favorable.

2) Chacune des Parties contractantes s'acquittera de tout autre engagement qu'elle aura éventuellement contracté en rapport avec les investissements de nationaux ou sociétés de l'autre Partie contractante sur son territoire.

#### Article 8

Le présent Traité s'appliquera également aux questions qui pourraient se poser après son entrée en vigueur en rapport avec des investissements effectués par les nationaux ou sociétés d'une des Parties contractantes conformément aux lois et règlements de l'autre Partie contractante sur le territoire de cette dernière avant l'entrée en vigueur du Traité.

#### Article 9

1) Les différends éventuels entre les Parties contractantes concernant l'interprétation ou l'application du présent Traité devront, dans la mesure du possible, être réglés par les gouvernements des deux Parties contractantes.

2) A supposer qu'un différend entre les Parties contractantes ne puisse pas être réglé de cette manière, il sera soumis à un tribunal arbitral sur demande de l'une des Parties contractantes.

3) Le tribunal arbitral sera constitué sur une base *ad hoc* : chaque Partie contractante nommera un membre du tribunal, et les deux membres ainsi nommés choisiront d'un commun accord comme président un national d'un Etat tiers qui sera nommé par les gouvernements des deux Parties contractantes. Les membres seront nommés dans le délai de deux mois et le président dans le délai de trois mois après que l'une des Parties contractantes aura communiqué à l'autre son désir de soumettre le différend à un tribunal arbitral.

4) Si les délais spécifiés au paragraphe 3 n'ont pas été observés et faute d'autre arrangement, chacune des Parties contractantes pourra inviter le Président de la Cour internationale de Justice à procéder aux nominations nécessaires. Au cas où le Président serait un national de l'une des Parties contractantes ou s'il était empêché pour une autre raison de s'acquitter de cette fonction, il reviendrait au Vice-Président de la Cour de procéder aux nominations. Si ce dernier lui-même est un national de l'une des Parties contractantes ou s'il est empêché, il reviendra au membre de la Cour venant immédiatement à la suite dans l'ordre hiérarchique et qui n'est pas un national de l'une des deux Parties contractantes de procéder aux nominations.

5) Le tribunal arbitral prendra ses décisions à la majorité des voix. Les décisions seront obligatoires. Chaque Partie contractante prendra à sa charge les frais découlant des activités de son arbitre, ainsi que les frais de sa représentation dans la procédure arbitrale; les frais du président et les autres frais seront pris en charge à parts égales par les Parties contractantes. Pour le reste, le tribunal arbitral arrêtera sa propre procédure.

6) Si les deux Parties contractantes ont en outre la qualité d'Etat contractant par rapport à la Convention du 18 mars 1965<sup>1</sup> pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats<sup>1</sup>, il ne pourra, eu égard au paragraphe 1 de l'article 27 de cette Convention, être recouru au tribunal arbitral visé plus haut quand le national ou la société d'une Partie contractante et l'autre Partie contractante seraient arrivés à un accord conformément à l'article 25 de la Convention. Il ne sera affecté la possibilité de recourir au tribunal arbitral visé plus haut au cas où une décision du Tribunal arbitral institué par ladite Convention (article 27) ne serait pas respectée.

#### Article 10

1) Les différends qui pourraient surgir entre une Partie contractante et un national ou une société de l'autre Partie contractante en rapport avec les investissements au sens du présent Traité devront, autant que possible, être réglés à l'amiable par les parties au différend.

2) Si un différend au sens du paragraphe 1 ne peut être réglé dans le délai de six mois à compter de la date à laquelle une des parties au différend l'a soulevé, il sera soumis à la demande de l'une des parties aux tribunaux compétents de la Partie contractante sur le territoire de laquelle l'investissement a été effectué.

3) Le différend pourra être soumis à un tribunal arbitral international dans l'un quelconque des cas suivants :

a) A la demande de l'une des parties au différend, en l'absence d'une décision au fond dans le délai de dix-huit mois à compter de la mise en route de la procédure judiciaire visée au paragraphe 2 du présent article, ou bien lorsqu'une décision a été rendue mais que le différend persiste entre les parties;

b) Lorsque les deux parties au différend en ont ainsi convenu.

4) Dans les cas prévus au paragraphe 3 du présent article, les différends entre les parties, au sens du présent article, seront soumis d'un commun accord, sauf convention contraire entre les parties au différend, soit à une procédure arbitrale dans le cadre de la Convention du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, soit à un tribunal *ad hoc* institué conformément aux règles de la Commission des Nations Unies pour le droit commercial international (CNUDCI).

Si, dans le délai de trois mois à compter du moment où l'une des parties a demandé la mise en route de la procédure arbitrale, un accord n'est pas intervenu, le différend sera soumis à une procédure arbitrale dans le cadre de ladite Convention du 18 mars 1965 pour autant que les deux Parties contractantes soient également parties à cette convention. Dans l'hypothèse contraire, le différend sera soumis au tribunal arbitral visé plus haut.

<sup>1</sup> Nations Unies, *Recueil des Traités*, vol. 575, p. 159.

5) Le tribunal arbitral rendra sa décision sur la base du présent Traité et, le cas échéant, sur la base des autres traités en vigueur entre les Parties contractantes, du droit interne de la Partie contractante sur le territoire de laquelle l'investissement a été effectué, y compris ses normes de droit international privé, et des principes généraux du droit international.

6) La sentence arbitrale sera obligatoire et chaque Partie l'exécutera conformément à sa législation.

#### *Article 11*

Les dispositions du présent Traité resteront pleinement applicables y compris dans les cas prévus à l'article 63 de la Convention de Vienne sur le droit des traités en date du 23 mai 1969<sup>1</sup>.

#### *Article 12*

1) Le présent Traité sera ratifié; les instruments de ratification en seront échangés dès que possible à Buenos Aires.

2) Le présent Traité entrera en vigueur un mois après la date à laquelle il aura été procédé à l'échange des instruments de ratification. La durée de sa validité sera de dix ans et il sera ensuite indéfiniment prorogé, sauf notification écrite adressée par une Partie contractante à l'autre Partie contractante de son intention d'y mettre fin, effectuée douze mois avant la date d'expiration. Au bout de dix ans, le Traité pourra être dénoncé à tout moment sur préavis de douze mois.

3) Pour ce qui est des investissements effectués avant la date de l'abrogation du présent Traité, les dispositions des articles 1<sup>er</sup> à 11 leur resteront applicables pendant les quinze années suivant cette date.

FAIT à Bonn le 9 avril 1991 en deux originaux, en langues allemande et espagnole, les deux textes faisant également foi.

Pour le Gouvernement  
de la République fédérale d'Allemagne :

GENSCHER

Pour le Gouvernement  
de la République argentine :

GUIDO DI TELLA

<sup>1</sup> Nations Unies, *Recueil des Traités*, vol. 1155, p. 331.

## PROTOCOLE

Au moment de signer le Traité entre la République fédérale d'Allemagne et la République argentine relatif à la promotion et à la protection réciproque des investissements, les plénipotentiaires soussignés ont adopté les dispositions ci-après, considérées comme faisant partie intégrante du Traité.

1) *Ad* article premier :

a) En ce qui concerne le paragraphe 1 dudit article, le présent Traité ne s'appliquera pas aux investissements réalisés en République argentine par des personnes physiques ayant la qualité de national de l'autre Partie contractante si les intéressés étaient, à la date de l'investissement originel, domiciliés depuis plus de deux ans en République argentine, sauf à prouver que l'investissement provient de l'étranger.

b) Les revenus des investissements et, le cas échéant, du réinvestissement de ces revenus bénéficieront de la même protection que l'investissement initial.

c) Par « autres formes de participation », au sens de l'alinéa b du paragraphe 1 de l'article 1<sup>er</sup>, seront entendus en particulier les apports de capitaux qui ne confèrent aux intéressés ni droit de vote, ni contrôle.

d) Les créances sur les sommes visées à l'alinéa c du paragraphe 1 de l'article 1<sup>er</sup> couvrent les créances au titre de prêts liés à une participation et qui, par leur cause et leur montant, ont le caractère d'une participation (prêts quasi participatifs). Elles ne s'entendent pas toutefois des crédits accordés par des tiers (par exemple, des crédits bancaires à clauses commerciales).

e) Sans préjudice des autres modes de détermination de la nationalité, sera notamment considérée national d'une Partie contractante toute personne détentrice d'un passeport national délivré par les autorités compétentes de ladite Partie contractante. Le présent Traité ne s'appliquera pas aux investisseurs qui ont la nationalité des deux Parties contractantes.

f) Pour déterminer si la notion de « société » au sens des dispositions du paragraphe 4 de l'article 1<sup>er</sup> est applicable, il sera tenu compte du siège, à savoir le lieu où se trouve l'administration principale de la société.

g) Le Traité s'appliquera également aux secteurs de la zone économique exclusive et du plateau continental sur lesquelles le droit international confère à la Partie contractante concernée des droits de souveraineté ou de juridiction.

2) *Ad* article 3 :

a) Par « activités » au sens du paragraphe 2 de l'article 3, sont notamment, mais non limitativement, entendus l'administration, l'utilisation, l'usage et la jouissance d'un investissement. Sera notamment, mais non limitativement, considérée « traitement moins favorable » au sens de l'article 3 une mesure moins favorable affectant l'acquisition de matières premières et d'autres facteurs de production, d'énergie ou de combustibles, ainsi que les moyens de production ou d'exploitation de toute catégorie ou la vente de produits dans le pays même et à l'étranger. Ne seront pas considérées « traitement moins favorable » au sens de l'article 3 les mesures prises pour des motifs de sécurité intérieure ou extérieure et d'ordre public, de santé publique ou de moralité.

b) Les dispositions de l'article 3 ne font pas obligation à une Partie contractante d'accorder aux personnes physiques et aux sociétés résidant sur le territoire

de l'autre Partie contractante les avantages, exemptions et abattements fiscaux qui, en vertu du droit fiscal, sont accordés aux seules personnes physiques et sociétés résidant sur le territoire de la première Partie contractante.

c) Les Parties contractantes, en se conformant à leurs dispositions légales, instruiront avec bienveillance les demandes de permis d'entrée et de séjour sur leur territoire présentées par des ressortissants de l'une des Parties contractantes qui, en rapport avec un investissement, souhaitent entrer sur leur territoire; il sera procédé de même pour les salariés ressortissants d'une Partie contractante qui, en rapport avec un investissement, souhaitent entrer et séjourner sur le territoire de l'autre Partie contractante pour y exercer leur activité salariée. De même, les demandes de permis de travail seront instruites avec bienveillance.

3) *Ad* article 4 :

Il y aura également droit à indemnisation au cas où serait prise une quelconque mesure visée à l'article 4 à l'égard de l'entreprise dans laquelle l'investissement est situé et si l'investissement subit un préjudice grave en conséquence de cette mesure.

4) *Ad* article 5 :

Le transfert est tenu pour réalisé « sans retard » au sens du paragraphe 2 de l'article 5 quand il a eu lieu dans le temps normalement requis pour accomplir les formalités de transfert. Le délai, qui ne pourra en aucun cas excéder deux mois, courra à partir du moment de la présentation de la demande officiellement complète.

5) *Ad* article 8 :

Le Traité ne s'appliquera en aucun cas aux réclamations et litiges survenus avant son entrée en vigueur.

6) S'agissant des transports de marchandises et de personnes liés à des investissements, les Parties contractantes n'excluront pas et ne gêneront pas leurs entreprises de transport respectives et, en cas de besoin, elles délivreront les autorisations requises pour effectuer les transports dans des conditions répondant aux normes des accords internationaux en vigueur entre elles.

FAIT à Bonn le 9 avril 1991 en deux exemplaires en langues allemande et espagnole, les deux textes faisant également foi.

Pour le Gouvernement  
de la République fédérale d'Allemagne :

GENSCHER

Pour le Gouvernement  
de la République argentine :

GUIDO DI TELLA

## ÉCHANGES DE NOTES

I a

AMBASSADE DE LA RÉPUBLIQUE ARGENTINE

Bonn, le 9 avril 1991

Monsieur le Ministre,

A l'occasion de la signature du Traité du 9 avril 1991 relatif à la promotion et à la protection réciproque des investissements, le Gouvernement de la République argentine a l'honneur de communiquer ce qui suit au Gouvernement de la République fédérale d'Allemagne :

Sur la base, respectivement, du Traité d'amitié et de coopération de 1988<sup>1</sup> et du Traité de 1987 relatif à l'établissement de relations de collaboration particulières<sup>2</sup>, le Royaume d'Espagne et la République italienne accordent à la République argentine des lignes de crédit concessionnel dont l'objet est de financer les investissements tendant à la réalisation d'investissements, plus particulièrement en vue de créer des coentreprises dans le secteur de la petite et moyenne entreprise.

Les demandes de financement de chaque projet considéré doivent être autorisées conformément aux réglementations argentines spéciales et sont ensuite convenues avec la partie espagnole ou, le cas échéant, italienne.

En contrepartie, la République argentine s'est engagée :

- A exempter des droits de douane et de l'impôt les importations de biens destinées à des investissements financés au moyen des crédits concessionnels prévus dans les traités correspondants;
- A n'adopter aucune mesure propre à gêner le rapatriement du capital investi ou le libre transfert des revenus d'investissements à risque s'agissant des projets financés conformément aux dispositions desdits traités

Ce régime spécial vise à rendre possibles de nouveaux investissements tendant au développement économique de l'Argentine dans des domaines dont la promotion est particulièrement nécessaire.

Les Parties contractantes interprètent l'article 3 du Traité relatif à la promotion et à la protection réciproque des investissements dans le sens que la clause de la nation la plus favorisée ne couvre pas les conditions et privilèges spéciaux que la République argentine accorde aux investisseurs étrangers aux fins des projets susmentionnés.

La République argentine fera en sorte que les investisseurs et les investissements allemands qui ne relèvent pas des conditions spéciales dont il vient d'être question ne soient pas substantiellement affectés sur le plan concurrentiel.

<sup>1</sup> Nations Unies, *Recueil des Traités*, vol. 1546, p. 3.

<sup>2</sup> *Ibid.*, vol. 1537, p. 307.



Je saisis cette occasion, etc.

Le Ministre des relations extérieures  
et du culte,

GUIDO DI TELLA

Son Excellence  
Monsieur Hans D. Genscher  
Ministre des affaires étrangères  
de la République fédérale d'Allemagne  
Bonn

## II a

## LE MINISTRE DES AFFAIRES ÉTRANGÈRES

Bonn, le 9 avril 1991

422-413.35 ARG

Monsieur le Ministre,

J'ai l'honneur d'accuser réception de la note du Gouvernement de la République argentine en date du 9 avril 1991 qui se lit ainsi :

[*Voir note I a*]

Je saisis cette occasion, etc.

GENSCHER

Son Excellence  
Monsieur Guido di Tella  
Ministre des relations extérieures et du culte  
de la République argentine

## II b

## LE MINISTRE DES AFFAIRES ÉTRANGÈRES

Bonn, le 9 avril 1991

422-413.35 ARG

Monsieur le Ministre,

A l'occasion du Traité relatif à la promotion et à la protection réciproque des investissements signé ce jour entre nos deux pays, j'ai l'honneur de vous communiquer ce qui suit :

A partir de l'entrée en vigueur dudit Traité et compte tenu du principe établi par son article 5 au sujet du libre transfert des capitaux et des revenus, les autorités allemandes envisagent la possibilité, sur présentation de la part des investisseurs concernés d'une demande de garantie d'investissement en Argentine, de couvrir en totalité ces investissements conformément aux directives et conditions générales en vigueur. Cela étant, à partir de l'entrée en vigueur du Traité, ces autorités pourront, outre les garanties actuellement possibles, accorder des garanties couvrant les sommes résultant d'un investissement pendant une durée déterminée, en particulier les participations aux bénéficiaires, les dividendes et les intérêts.

Je saisis cette occasion, etc.

GENSCHER

Son Excellence

Monsieur Guido di Tella  
Ministre des relations extérieures et du culte  
de la République argentine

## - II b

## MINISTÈRE DES RELATIONS EXTÉRIEURES ET DU CULTTE

Bonn, le 9 avril 1991

Monsieur le Ministre,

J'ai l'honneur d'accuser réception de la note du Gouvernement de la République fédérale d'Allemagne en date du 9 avril 1991 qui se lit ainsi :

[Voir note I b]

Je saisis cette occasion, etc.

Le Ministre des relations extérieures  
et du cultte,  
GUIDO DI TELLA

Son Excellence  
Monsieur Hans D. Genscher  
Ministre des affaires étrangères  
de la République fédérale d'Allemagne  
Bonn

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## Appendix II

## **TRATADOS**

### **Ley 24.342**

**Apruébase el tratado sobre Promoción y Protección Recíprocas de Inversiones suscrito con la República de Chile y el Acuerdo por Canje de Notas Modificatorio.**

**Sancionada: Junio 9 de 1994.**

**Promulgada: Julio 4 de 1994.**

**B.O.: 11/07/97**

El Senado y Cámara de Diputados de la Nación Argentina reunidos en Congreso, etc. sancionan con fuerza de Ley:

**ARTICULO 1º -Apruébase el TRATADO ENTRE LA REPUBLICA ARGENTINA Y LA REPUBLICA DE CHILE SOBRE PROMOCION Y PROTECCION RECIPROCAS DE INVERSIONES, suscrito en Buenos Aires el 2 de agosto de 1991, que consta de once (11) artículos y un (1) Protocolo, y el ACUERDO POR CANJE DE NOTAS MODIFICATORIO DEL TRATADO ENTRE LA REPUBLICA ARGENTINA Y LA REPUBLICA DE CHILE SOBRE PROMOCION Y PROTECCION RECIPROCA DE INVERSIONES, suscrito en Buenos Aires el 13 de julio de 1992, cuyas fotocopias autenticadas forman parte de la presente ley.**

**ARTICULO 2º -Comuníquese al Poder Ejecutivo Nacional.-ALBERTO R. PIERRI.- FAUSTINO MAZZUCCO.- Esther H. Pereyra Arandia de Pérez Pardo. - Juan J. Canals**

**DADA EN LA SALA DE SESIONES DEL CONGRESO ARGENTINO, EN BUENOS AIRES, A LOS NUEVE DIAS DEL MES DE JUNIO DEL AÑO MIL NOVECIENTOS NOVENTA Y CUATRO.**

**TRATADO ENTRE**

**LA REPUBLICA ARGENTINA**

**Y**

**LA REPUBLICA DE CHILE**

**SOBREPROMOCION Y PROTECCION RECIPROCA DE INVERSIONES**

**La República Argentina y la República de Chile, denominadas en adelante "las Partes Contratantes";**

**Animadas del deseo de intensificar la colaboración económica entre ambos Estados,**

**Con el propósito de crear condiciones favorables para las inversiones de los nacionales o sociedades de uno de los dos estados en el territorio del otro Estado, que impliquen transferencias de capitales,**

**Reconocimiento que la promoción y la protección de esas inversiones mediante un tratado pueden servir para estimular la iniciativa económica privada e incrementar el bienestar de ambos pueblos,**

Han convenido lo siguiente:

## ARTICULO 1

### Definiciones

Para los fines del presente Tratado:

(1) El concepto "inversiones" designa, de conformidad con el ordenamiento jurídico del país receptor, todo tipo de bienes que el inversor de una Parte Contratante invierte en el territorio de la otra Parte Contratante de acuerdo con la legislación de ésta, en particular, pero no exclusivamente:

a) la propiedad de bienes muebles e inmuebles y demás derechos reales, como hipotecas y derechos de prenda;

b) acciones, derechos de participación en sociedades y otros tipos de participaciones en sociedades, como también la capitalización de utilidades con derecho a ser transferidas al exterior;

c) obligaciones o créditos directamente vinculados a una inversión, regularmente contraídos y documentados según las disposiciones vigentes en el país donde esa inversión sea realizada;

d) derechos de propiedad intelectual como, en especial, derechos de autor, patentes, diseños y modelos industriales y comerciales, procedimientos tecnológicos, know how y valor llave;

e) concesiones otorgadas por entidades de derecho público, incluidas las concesiones de prospección y explotación.

Ninguna modificación de la forma jurídica según la cual los activos y capitales hayan sido invertidos o reinvertidos afectará su calificación de inversiones de acuerdo con el presente Tratado.

2. El concepto "ganancias o rentas" designa las sumas obtenidas de una inversión en un período determinado, tales como las participaciones en los beneficios, los dividendos, los intereses, los derechos de licencia u otras remuneraciones.

3. El concepto "nacionales" designa:

a) con referencia a la República de Chile:

los chilenos en el sentido de la Constitución Política de la República de Chile;

b) con referencia a la República Argentina:

los argentinos en el sentido de las disposiciones legales vigentes en la Argentina.

4. El concepto "sociedades" designa todas las personas jurídicas, constituidas conforme con la legislación de una Parte Contratante y que tengan su sede en el territorio de dicha Parte Contratante, independientemente de que su actividad tenga o no fines de lucro.

5. No obstante lo establecido en el apartado 3 de este artículo, las disposiciones de este Tratado solamente se aplicarán a los nacionales de una Parte Contratante que no estén



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domiciliados por más de dos años en el territorio de la Parte Contratante donde la inversión se realizó y que prueben que las inversiones provienen del extranjero.

6. El término "territorio" designa, además de las áreas enmarcadas en los límites terrestres y marítimos, las zonas marinas y submarinas, en las cuales las Partes Contratantes ejercen derechos soberanos y jurisdicción conforme a sus respectivas legislaciones y al derecho internacional.

## ARTICULO 2

### Promoción y Protección de las inversiones

1. Cada una de las Partes Contratantes promoverá las inversiones dentro de su territorio de nacionales o sociedades de la otra Parte Contratante y las admitirá de conformidad con sus disposiciones legales vigentes. En todo caso tratará las inversiones justa y equitativamente.

2. Gozarán de la plena protección del Tratado las inversiones que, de acuerdo con las disposiciones legales de una de las Partes Contratantes, hayan sido realizadas en el ámbito de la ley de esta Parte Contratante por nacionales o sociedades de la otra Parte Contratante.

3. Ninguna de las Partes Contratantes perjudicará en su territorio la administración, la utilización, el uso o el goce de las inversiones de nacionales o sociedades de la otra Parte Contratante a través de medidas arbitrarias o discriminatorias.

## ARTICULO 3

### Trato nacional y cláusula de la Nación más favorecida

1. Ninguna de las Partes Contratantes someterá en su territorio a las inversiones de nacionales o sociedades de la otra Parte Contratante o a las inversiones en las que mantengan participaciones los nacionales o sociedades de la otra Parte Contratante, a un trato menos favorable que el que se conceda a las inversiones de los propios nacionales y sociedades o a las inversiones de nacionales y sociedades de terceros Estados.

2. Ninguna de las Partes Contratantes someterá en su territorio a los nacionales o sociedades de la otra Parte Contratante, en cuanto se refiere a sus actividades relacionadas con las inversiones, a un trato menos favorable que a sus propios nacionales y sociedades o a los nacionales y sociedades de terceros Estados.

3. Dicho trato no se refiere a los privilegios que una de las Partes Contratantes conceda a los nacionales y sociedades de terceros Estados por formar parte de una unión aduanera o económica, un mercado común o una zona de libre comercio, o a causa de su asociación con tales agrupaciones.

Dicho trato no se refiere tampoco a los privilegios acordados por una Parte Contratante a los nacionales o sociedades de un tercer Estado por una inversión realizada en el marco de un financiamiento concesional previsto por un tratado bilateral entre dicha Parte Contratante y el país al que pertenecen los citados inversores.

4. El trato acordado por el presente artículo no se refiere a las ventajas que una de las Partes Contratantes conceda a los nacionales o sociedades de terceros Estados como

consecuencia de un acuerdo para evitar la doble imposición o de otros acuerdos sobre asuntos tributarios.

#### ARTICULO 4

##### Expropiación, Nacionalización y situaciones extraordinarias

1. Las inversiones de nacionales o sociedades de una de las Partes Contratantes gozarán de plena protección y seguridad jurídica en el territorio de la otra Parte Contratante.

2. Las inversiones de nacionales o sociedades de una de las Partes Contratantes no podrán, en el territorio de la otra Parte Contratante, ser expropiadas, nacionalizadas, o sometidas a otras medidas que en sus efectos equivalgan a expropiación o nacionalización, salvo por ley fundada en causas de utilidad pública o de bien común, y deberán en tal caso ser previamente indemnizadas. La indemnización deberá corresponder al valor de la inversión expropiada inmediatamente antes de la fecha de hacerse pública la expropiación efectiva o inminente, la nacionalización o la medida equivalente.

La indemnización deberá ser efectivamente realizable y libremente transferible. La legalidad de la expropiación, nacionalización o medida equivalente, y el monto de la indemnización, deberán ser revisables en procedimiento judicial ordinario.

3. Los nacionales o sociedades de una de las Partes Contratantes que sufran pérdidas en sus inversiones por efecto de guerra u otro conflicto armado, revolución, estado de emergencia nacional o motín en el territorio de la otra Parte Contratante, no serán tratados por ésta menos favorablemente que sus propios nacionales o sociedades en lo referente a restituciones, compensaciones, indemnizaciones u otros resarcimientos. Estos pagos deberán ser libremente transferibles.

#### ARTICULO 5

##### Transferencias

1. Cada Parte Contratante garantizará a los nacionales o sociedades de la otra Parte Contratante la libre transferencia de los pagos relacionados con una inversión en particular:

- a) del capital y de las sumas adicionales para el mantenimiento o ampliación de la inversión de capital;
- b) de las ganancias o rentas;
- c) de la amortización de los préstamos definidos en el inciso c) del párrafo 1 del artículo 1;
- d) del producto de la venta o liquidación total o parcial de la inversión;
- e) de las indemnizaciones previstas en el artículo 4.

2. La transferencia se efectuará sin demora de acuerdo a los procedimientos establecidos en el territorio de cada parte Contratante, en moneda de libre convertibilidad y a la cotización vigente en cada caso, que deberá ser equivalente al tipo de cambio más favorable.

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3. Una transferencia se considera realizada sin demora cuando se ha efectuado dentro del plazo normalmente necesario para el cumplimiento de las formalidades de transferencia. El plazo, que en ningún caso podrá exceder de dos meses, comenzará a correr en el momento de entrega de la correspondiente solicitud, debidamente presentada.

## ARTICULO 6

### Subrogación

1. En el caso de que una Parte Contratante o una de sus instituciones hubiera concedido una garantía contra riesgos no comerciales por inversiones efectuadas por uno de sus nacionales o sociedades en el territorio de la otra Parte Contratante y haya efectuado pagos a base de la garantía otorgada, dicha Parte Contratante o la institución será reconocida subrogada de derecho en la misma posición de crédito del inversor cubierto por la garantía. Para los pagos a realizarse en beneficio de la Parte Contratante o de su institución a base de dicha subrogación, se aplicarán respectivamente los artículos 4 y 5 del presente Tratado.

2. Los nacionales o sociedades tendrán derecho a demandar o hacerse parte en las acciones ya iniciadas, en orden a proteger los restantes derechos que puedan reclamar y que no hayan sido subrogados. De esta forma, habiéndose reclamado, se aplicará el procedimiento establecido en el Art. 10.

## ARTICULO 7

### Aplicación de otras normas más favorables

1. Si de las disposiciones legales de una de las Partes Contratantes o de las obligaciones emanadas del derecho internacional: no contempladas en el presente Tratado, actuales o futuras, entre las Partes Contratantes, resultare una reglamentación general o especial en virtud de la cual deba concederse a las inversiones de los nacionales o sociedades de la otra Parte Contratante un trato más favorable que el previsto en el presente Tratado, dicha reglamentación prevalecerá sobre el presente Tratado, en cuanto sea más favorable.

2. Cada Parte Contratante cumplirá cualquier otro compromiso que haya contraído con relación a las inversiones de nacionales o sociedades de la otra Parte Contratante en su territorio.

## ARTICULO 8

### Ambito de aplicación

1. El presente Tratado se aplicará a las inversiones que se realicen a partir de su entrada en vigor por nacionales o sociedades de una Parte Contratante en el territorio de la otra. No obstante, también beneficiará a las inversiones realizadas con anterioridad a su vigencia y que, según la legislación de la respectiva Parte Contratante, estuvieren registradas como inversión extranjera.

2. No se aplicará, sin embargo, a las controversias o reclamaciones surgidas o resueltas con anterioridad a su entrada en vigor, o relacionadas con hechos acaecidos con anterioridad a su vigencia o referidas a la mera permanencia de tales situaciones preexistentes.

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## ARTICULO 9

### Solución de controversias entre Estados

1. Las controversias que surgieren entre las Partes Contratantes sobre la interpretación o aplicación del presente Tratado deberán, en lo posible, ser dirimidas amigablemente por los Gobiernos de ambas Partes Contratantes.
2. Si una controversia no pudiere ser dirimida de esa manera, será sometida a un tribunal arbitral a petición de una de las Partes Contratantes.
3. El tribunal arbitral será constituido ad-hoc; cada Parte Contratante nombrará un miembro, y los dos miembros se pondrán de acuerdo para elegir como presidente a un nacional de un tercer Estado que será nombrado por los Gobiernos de ambas Partes Contratantes. Los miembros serán nombrados dentro de un plazo de dos meses, el Presidente dentro de un plazo de tres meses, después de que una de las Partes Contratantes haya comunicado a la otra que desea someter la controversia a una tribunal arbitral.
4. Si los plazos previstos en el párrafo 3 no fueren observados, y a falta de otro acuerdo, cada Parte Contratante podrá invitar al Presidente de la Corte Internacional de Justicia a proceder a los nombramientos necesarios. En caso de que el presidente sea nacional de una de las Partes Contratantes o se halle impedido por otra causa, corresponderá al vicepresidente efectuar los nombramientos. Si el Vicepresidente también fuere nacional de una de las dos Partes Contratantes o si se hallara también impedido, corresponderá al miembro de la Corte que siga inmediatamente en el orden jerárquico y no sea nacional de una de las Partes Contratantes, efectuar los nombramientos.
5. El tribunal arbitral tomará sus decisiones por mayoría de votos. Sus decisiones son obligatorias. Cada Parte Contratante sufragará los gastos ocasionados por la actividad de su árbitro, así como los gastos de su representación en el procedimiento arbitral; los gastos del presidente, así como los demás gastos, serán sufragados por partes iguales por las dos Partes Contratantes.

Por lo demás, el tribunal arbitral determinará su propio procedimiento.

6. Si ambas Partes Contratantes fueren también Estados Contratantes del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados del 18 de marzo de 1965, no se podrá, en atención a la disposición del párrafo 1 del artículo 27 de dicho Convenio, acudir al tribunal arbitral arriba previsto cuando el nacional o la sociedad de una Parte Contratante y la otra Parte Contratante hayan llegado a un acuerdo conforme al artículo 25 del Convenio. No quedará afectada la posibilidad de acudir al tribunal arbitral arriba previsto en el caso de que no se respete una decisión del Tribunal de Arbitraje del mencionado Convenio (artículo 27), o en el caso de subrogación conforme a lo establecido en el artículo 6 del presente Tratado.

## ARTICULO 10

### Solución de controversias relativas a inversiones

1. Toda controversia relativa a las inversiones, en el sentido del presente Tratado, entre una Parte Contratante y un nacional o sociedad de la otra Parte Contratante será, en la

medida de lo posible, solucionada por consultas amistosas entre las dos partes en la controversia.

2. Si la controversia no hubiera podido ser solucionada en el término de seis meses a partir del momento en que hubiera sido planteada por una u otra de las partes, será sometida, a pedido del nacional o sociedad.

- o bien a las jurisdicciones nacionales de la Parte Contratante implicada en la controversia;

- o bien al arbitraje internacional en las condiciones descriptas en el párrafo 3.

Una vez que un nacional o sociedad haya sometido la controversia a las jurisdicciones de la Parte Contratante implicada o al arbitraje internacional, la elección de uno u otro de esos procedimientos será definitiva.

3. En caso de recurso al arbitraje internacional la controversia podrá ser llevada ante uno de los órganos de arbitraje designados a continuación a elección del nacional o sociedad:

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

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

4. El órgano arbitral decidirá en base a las disposiciones del presente Tratado, al derecho de la Parte Contratante que sea parte en la controversia -incluidas las normas relativas a conflictos de leyes- y a los términos de eventuales acuerdos particulares concluidos con relación a la inversión como así también a los principios del derecho internacional en la materia.

5. Las sentencias arbitrales serán definitivas y obligatorias para las partes en la controversia.

6. Las Partes Contratantes se abstendrán de tratar, a través de los canales diplomáticos, argumentos concernientes al arbitraje o a un proceso judicial ya en marcha hasta que los procedimientos correspondientes hubieren sido concluidos, salvo que las partes en la controversia no hubieren cumplido el laudo del tribunal arbitral o la sentencia del tribunal ordinario, según los términos de cumplimiento establecidos en el laudo o en la sentencia.

## ARTICULO 11

### Entrada en vigor, Duración y Vencimiento

1. El presente Tratado será ratificado; los instrumentos de ratificación serán canjeados lo antes posible en Santiago, Chile.

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2. El presente Tratado entrará en vigor un mes después de la fecha en que se haya efectuado el canje de los instrumentos de ratificación. Su vigencia será de diez años y se prolongará después por tiempo indefinido, a menos que fuera denunciado por escrito por una de las Partes Contratantes doce meses antes de su expiración. Transcurridos diez años, el Tratado podrá denunciarse en cualquier

momento, con un preaviso de doce meses.

3. Las disposiciones del presente Tratado continuarán siendo plenamente aplicables aun en los casos previstos por el artículo 63 de la Convención de Viena sobre el Derecho de los Tratados del 23 de mayo de 1969.

4. Para las inversiones realizadas antes de la fecha de terminación del presente Tratado, las disposiciones de los artículos 1 a 10 seguirán rigiendo durante los quince años subsiguientes a la fecha de su terminación.

Hecho en Buenos Aires, el dos de agosto de mil novecientos noventa y uno en dos ejemplares originales, siendo ambos igualmente auténticos.

POR EL GOBIERNO DE LA REPUBLICA ARGENTINA

GÚIDO DI TELLA

DOMINGO F. CAVALLO

POR EL GOBIERNO DE LA RREPUBLOCA DE CHILE

ENRIQUE SILVA CIMMA

CARLOS OMINAMI

PROTOCOLO

En el acto de la firma del Tratado entre la República Argentina y la República de Chile sobre Promoción y Protección Recíprocas de Inversiones, los Plenipotenciarios han adoptado además las siguientes disposiciones, que se considerarán parte integrante del Tratado:

1) Ad Artículo 3, punto 3

En el caso que una de las Partes celebrare en el futuro un Acuerdo de asociación con una unión aduanera o económica, un mercado común o una Zona de Libre Comercio, se convendrá la introducción de una modificación a la excepción del artículo 3, punto 3, párrafo 1.

2) Ad Artículo 4

Para los efectos de las causas en que se puede fundar la ley que afecte la propiedad, las Partes entienden que el concepto de bien común comprende las causales previstas en sus respectivos ordenamientos jurídicos vigentes.

3) Ad Artículo 5

No obstante las disposiciones del artículo 5, la República de Chile garantizará el derecho de repatriación del capital invertido por inversionistas argentinos, después de

transcurrido el plazo de tres años, desde su internación, previsto en el Decreto Ley N° 600 de 1974.

Lo dispuesto en el inciso anterior estará vigente mientras lo esté el plazo previsto en el referido Decreto Ley.

Buenos Aires, 2 de agosto de 1991.

POR LA REPUBLICA ARGENTINA

GUIDO DI TELLA

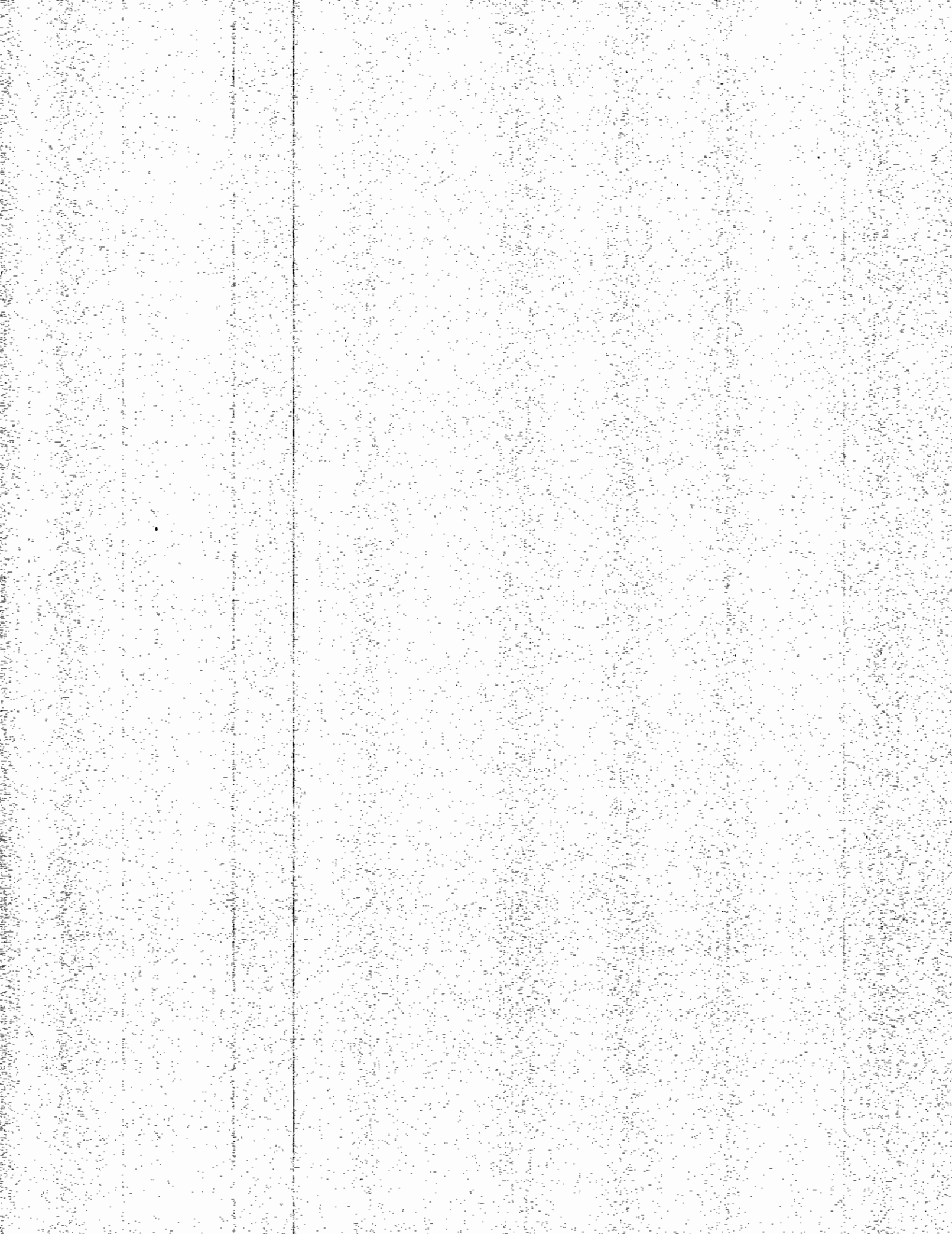
DOMINGO F. CAVALLO

POR LA REPUBLICA DE CHILE

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CARLOS OMINIMI

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TRADUCCIÓN PÚBLICA / CERTIFIED TRANSLATION.....

AGREEMENTS.....

Law 24,342 .....

An Agreement for the Reciprocal Promotion and Protection of Investments, entered into with the Republic of Chile and a Note Exchange Agreement are hereby approved.....

Enacted: June 9, 1994. ....

Promulgated: July 4, 1994. ....

Official Gazette: 07/11/97.....

The Senate and the House of Representatives of the Republic of Argentina, assembled in Congress, etc., enact as a Law: .....

ARTICLE I — The AGREEMENT BETWEEN THE REPUBLIC OF ARGENTINA AND THE REPUBLIC OF CHILE FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS, entered into in Buenos Aires on August 2, 1991, comprising eleven (11) articles and one (1) Protocol, and the NOTE EXCHANGE AGREEMENT, amending the AGREEMENT BETWEEN THE REPUBLIC OF ARGENTINA AND THE REPUBLIC OF CHILE FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS, entered into in Buenos Aires, on July 13, 1992, are hereby approved, authenticated copies of which are an integral part of this law. ....

ARTICLE 2 — Be it communicated to the National Executive Branch – ALBERTO R. PIERRI.- FAUSTINO MAZZUCCO.- Esther H. Percyra Arandia de Pérez Pardo.- Juan J. Canals.....

GIVEN AT THE SESSION ROOM OF THE ARGENTINE CONGRESS, IN BUENOS AIRES, ON THIS JUNE 9, 1994. ....

TREATY BETWEEN THE REPUBLIC OF ARGENTINA AND THE REPUBLIC OF CHILE ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS.....

The Republic of Argentina and the Republic of Chile, hereinafter referred to as the "Parties";.....

Willing to strengthen the economic cooperation between both States; .....

With the purpose of creating favorable conditions for the investments of the nationals or companies of one the two States in the territory of the other State, that may imply transfers of capitals; .....

Acknowledging that the promotion and protection of the said investments under an agreement can contribute to the encouragement of private economic initiative and increase in the welfare of both States. ....

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OWA PUBLIC  
S.A. T. X. P. 447  
E-INC. 3128

Have agreed as follows: .....

ARTICLE 1 Definitions.....

Under this Treaty: .....

(1) "Investments": means, under the laws of the receiving party, any kind of assets that the investor of one Party may invest in the territory of the other Party, pursuant to the laws of the latter, including but not limited to:.....

a) the ownership of real and personal property and further real rights, such as mortgages and pledges; .....

b) shares, corporate participation rights and other kinds of corporate interests, and also the capitalization of profits qualifying to be transferred abroad;.....

c) obligations or credits directly related to an investments, regularly assumed or taken and documented pursuant to the provisions in force in the country where the relevant investment is made;.....

d) intellectual property rights such as copyright, patents, industrial and commercial designs and models, know-how and goodwill;.....

e) economic concessions conferred by public law entities, including the concessions for the prospecting and exploitation;.....

No amendment to the legal manner under which the assets and capitals have been invested or reinvested shall affect their eligibility as investments under this Treaty. ....

2. "Income or profit": means all the amounts resulting from an investment within a certain period, such as profit sharing, dividends, interest, license fees or other compensation.....

3. "Nationals": means: .....

a) with reference to the Republic of Chile: .....

Chileans as the said word is defined under the Political Constitution of the Republic of Chile; with reference to the Republic of Argentina:.....

b) Argentines as defined by the legal provisions in force in the Republic of Argentina.....

4. "Companies": means any legal entity, organized under the laws of a Party and having its place of business in the territory of the said Party, whether its business is for profit or not.....

5. The provisions of subparagraph 3 of this article notwithstanding, the provisions of this Treaty shall only apply to the nationals of one Party who are not domiciled over two years in the territory

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of the Party where the investment was made and who may prove that the investments originate abroad.....

6. "Territory": means, in addition to the areas falling under the land and maritime boundaries, the maritime and submarine zones, where the Parties may exercise, under their respective laws and the International Law, sovereign or jurisdictional rights.....

**ARTICLE 2 Promotion and Protection of Investments.....**

1. Each Party shall promote in its territory the investments of the nationals or companies of the other Party, and shall admit the said investments pursuant to its laws and regulations. Each Party shall at any time treat investments fairly and equitably. ....

2. Those investments which, under the legal provisions of one Party, shall have been made under the law of that Party by nationals or companies of the other Party shall be fully protected under this Treaty. ....

3. No Party shall impair in its territory the management, use, utilization or enjoyment of the investments of nationals or companies of the other Party through arbitrary or discriminatory measures.....

**ARTICLE 3 National treaty and most favored nation provision.....**

1. Neither Party shall treat in its territory the investments of the nationals or companies of the other Party or the investments in which the nationals or companies of the other Party may have interests, less favorably than the investments of its own nationals and companies or the investments of nationals and companies of third States.....

2. Neither Party shall in its territory treat the nationals or companies of the other Party, as regards their activities related to the investments, less favorably than its own nationals and companies or the nationals and companies of third States.....

3. The said treatment does not refer to the privileges that one of the Parties may grant to the nationals and companies of third States because they are party to a customs or economic union, or a common market or a free trade area, or because of their association with the said groups.....

The said treatment does not refer either to the privileges granted by a Party to the nationals or companies of a third State because of an investment made in under a concessional financing laid down in a bilateral treaty between the said Party and the country to which the investors belong to.  
.....

4. The treatment given under this article does not refer to the advantages that one of the Parties may grant to the nationals or companies of third States by virtue of an agreement to avoid double taxation or other tax-related agreements.....

**ARTICLE 4 Expropriation, nationalization and extraordinary situations.....**

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1. The investments of nationals or companies of one Party shall enjoy full protection and legal safety in the territory of the other Party. ....

2. The investments of nationals or companies of one Party may not, in the territory of the other Party, be expropriated, nationalized, or submitted to other measures whose effects are equivalent to expropriation or nationalization, save in case of a law founded on public good or common welfare, and must in that case be previously compensated. The compensation must match the value of the expropriated investment immediately before the date the public expropriation is made effective or the nationalization or the equivalent measure becomes imminent. ....

The compensation must be actually practical and freely transferable. The legality of the expropriation, nationalization or equivalent measure, and the amount of the compensation must subject to review in an ordinary judicial proceeding. ....

3. The nationals or companies of one Party whose investments may sustain losses as result of war or other armed conflict, revolution, national emergency or riot in the territory of the other Party, shall not be treated by the latter less favorably than its own nationals or companies as regards refunds, compensation, indemnification or any other redress. These payments must be made freely transferable. ....

ARTICLE 5 Transfers.....

1. Each Party shall guarantee the nationals or companies of the other Party the unrestricted transfer of the payments related to an investment, including but not limited to:.....

a) the capital and the additional amounts necessary for the maintenance and expansion of the capital investment; .....

b) the income or profits;.....

c) the repayment of the loans defined in Article 1, subparagraph c); .....

d) the proceeds derived from the sale or total or partial liquidation of an investment; .....

e) the compensation set forth in Article 4;.....

2. The transfer shall be made forthwith following the procedures set in the territory of each Party, in freely convertible currency and at the prevailing rate of exchange on a case by case basis, which must be equivalent to the most favorable rate of exchange. ....

3. A transfer shall be considered to have been made forthwith when it has been made within the time frame normally required for the compliance with the transfer formalities. The time frame, which in no case may exceed two months, shall begin upon delivery of the duly submitted relevant application.....

ARTICLE 6 Subrogation.....

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1. If one Party or one of its entities shall have granted a guaranty against non-business risks for investments made by one of its nationals or companies in the territory of the other Party and shall have made payments on the basis of the guaranty granted, the said Party or entity shall be admitted as a law subrogate ranking for claim purposes in the same position as the investor covered by the guaranty. For payments to be made for the benefit of the Party or its entity on the basis of the said subrogation, articles 4 and 5 of this Treaty shall be respectively applied. ....

2. The nationals or companies shall be entitled to sue or become a party to the actions already filed, so as to protect the remaining rights that they may claim and that have not been subrogated. In this case, if claims have been filed, the procedure set forth in article 10 shall be followed. ....

**ARTICLE 7 Application of other most favorable rules.....**

1. If under the provisions of the laws of one Party or the obligations of both Parties arising from International Law that are not provided by this Treaty, now existing or that may be adopted in future, there arises a general or special regulation by virtue of which the investments of the nationals or companies of the other Party must be given a treatment more favorable than the one set forth in this Treaty, the said regulation shall prevail on this Treaty, to the extent it is more favorable. ....

**ARTICLE 8 Application .....**

1. This Treaty shall apply to the investments made as from its effective date by nationals or companies of one Party in the territory of the other Party. However, it shall also benefit those investments made prior to its effective date and which, under the laws of the respective Party, may be registered as foreign investment.....

2. It shall not apply, however, to the disputes or claims arising or settled prior to its effective date, or related to events occurred prior to its effective date or related to the mere continuation of such preexisting situations. ....

**ARTICLE 9 Settlement of disputes between States .....**

1. Any dispute that may arise between the Parties regarding the interpretation or application of this Treaty shall, as far as practical, be settled in a friendly manner by the Governments of both Parties.

2. If a dispute may not be settled as mentioned above, it shall be submitted, upon the request of one Party, to an arbitration panel.....

3. The said arbitration panel shall be organized ad hoc; each Party shall appoint one member, and the two members shall, upon mutual agreement, appoint a national of a third State, to be appointed by the governments of both Parties, as chairman. The members shall be appointed within a period of two months; the chairman, within a period of three months, following notice from one Party to the other of its decision to submit the dispute to an arbitration panel. ....

4. If the time periods laid down in paragraph 3 above are not met, and in the absence of any other agreement, each Party may invite the President of the International Court of Justice to proceed with

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the necessary appointments. If the President were a national of one of the Parties or when, he is otherwise prevented from serving as such, the Vice President shall be invited to proceed with the necessary appointments. If the Vice President were also a national of any of the Parties, or if he were also prevented from serving as such, the member of the International Court of Justice that ranks immediately junior to him and is not a national of any of the Parties, shall be invited to proceed with the necessary appointments.....

5. The arbitration panel shall adopt its decisions by majority of votes. Its decision shall be binding upon both Parties. Each Party shall pay the expenses arising from the performance of its arbitrator, as well as the expenses of its representation in the arbitration. The expenses of the Chairman, and the other expenses shall be paid in principle in equal shares by both Parties. In other respects, the arbitration panel shall determine its own procedure. ....

6. If both Parties were also Member States under the Agreement on the Settlement of Differences related to investments between States and Nationals of other States dated March 18, 1965, it shall not be possible, by virtue of the provisions of paragraph 1, article 27 of the said Agreement, to resort to the arbitration mentioned above when the national or the company of a Party and the other Party shall have reached an agreement under article 25 of the Agreement. The possibility to resort to the arbitration panel provided above shall not be impaired if a decision of the Arbitration Panel under the aforementioned Agreement (article 27) is not observed, or in the case of subrogation pursuant to the provisions of article 6 of this Treaty. ....

ARTICLE 10 Settlement of disputes regarding investments.....

1. Any dispute related to the investments under this Treaty, between a Party and a national or company of the other Party shall, as far as possible, be settled by friendly negotiations between the two parties to the dispute. ....

2. If the dispute shall not have been settled within the term of six months as from the time it has been raised by either party, it may be submitted upon request of the national or company: .....

- to the national jurisdictions of the Party involved in the dispute; .....

- or to international arbitration in the conditions described in paragraph (3). ....

Once a national or company has submitted the dispute to the jurisdiction of the Party involved or to international arbitration, the election of either procedure shall be final. ....

3. In case of election of international arbitration, the dispute may be submitted, at the election of the national or company, to one of the arbitration entities mentioned below:.....

To the International Center for the Settlement of Investment Disputes (I.C.S.I.D.) created under the "Convention on the Settlement of Investment Disputes between States and Nationals of other States", opened to the signature in Washington on March 18, 1965, when each Member State which is a party to this Agreement has signed the said Convention. While this condition is not met, each Party may give its consent for the dispute to be submitted to arbitration pursuant to the Rules of the

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supplementary Mechanism of I.C.S.I.D. for the management of conciliation, arbitration or investigation proceedings; .....

To an "ad hoc" arbitration panel organized pursuant to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).....

4. The arbitration panel shall render an award on the basis of this Treaty, the right of the Party that is a party to the dispute, including the rules regarding conflicts of laws and the terms and conditions of occasional private agreements reached in connection with the investment and also the principles of international law in that respect. ....

5. Arbitration awards shall be final and binding upon the parties to the dispute. ....

6. The Parties shall refrain from trying, through the diplomatic channels, arguments regarding arbitration or a judicial proceeding already pending until the relevant proceedings shall have been completed, unless the parties to the dispute shall have not discharged the arbitration award or the judgment rendered by the common court, pursuant to the terms for the discharge laid down in the award or the judgment. ....

ARTICLE 11 Effective date, duration and termination.....

1. This Treaty shall be ratified; the ratification documents shall be exchanged as soon as possible in Santiago, Chile. ....

2. This Treaty shall become in full force and effect one month after the date on which the exchange of the ratification instruments has been completed. It shall be in full force and effect during ten years and shall be renewed indefinitely, unless it is waived by either Party twelve months before its expiration. After the lapse of ten years, the Treaty may be waived at any time, upon twelve month notice. ....

3. The provisions of this Treaty shall continue to be applicable even in the cases set forth in article 63 of the Vienna Convention on the Law of Treaties dated May 23, 1969. ....

4. In connection with those investments made prior to the termination date of this Treaty, the provisions of Articles 1 to 10 shall continue in full force and effect during a period of 15 years following its termination date. ....

Granted in Buenos Aires, on the 2nd day of August, 1991, in two originals counterparts, both of them authentic. ....

ON BEHALF OF THE REPUBLIC OF ARGENTINA.....  
Guido Di Tella .....  
Domingo F. Cavallo.....

ON BEHALF OF THE REPUBLIC OF CHILE.....  
Enrique Silva Cimma.....  
Carlos Ominami.....

BUENOS AIRES  
A. PÚBLICA  
A INGLÉS  
T° X F° 457  
S.C. 3125

PROTOCOL .....

Upon the execution of the Treaty between the Republic of Argentina and the Republic of Chile on Reciprocal Promotion and Protection of Investments, the plenipotentiaries have further adopted the following provisions, which are an integral part of this Treaty:.....

1) In Article 3, item 3. ....

If either Party enters into in the future an Association Agreement with a customs or economic union, a common market or a Free Trade Zone, the introduction of an amendment to the exception set forth in article 3 item 3, paragraph 1 shall be agreed. ....

2) In article 4.....

For purposes of the cases to support the law that may affect property, the Parties understand that the concept of common welfare comprises the grounds set forth in their respective legal systems. ....

3) In article 5.....

The provisions of article 5 notwithstanding, the Republic of Chile shall guarantee the right of repatriation of the capital invested by Argentine investors, after the lapse of three years, following entrance, set forth in Decree Law No. 600 dated 1974.....

The provisions of the foregoing subparagraph shall be in full force and effect during the period laid down in the aforementioned Decree-Law.....

Buenos Aires, August 2, 1991 .....

ON BEHALF OF THE REPUBLIC OF ARGENTINA.....

Guido Di Tella .....

Domingo F. Cavallo.....

ON BEHALF OF THE REPUBLIC OF CHILE.....

Enrique Silva Cimma.....

Carlos Ominimi.....

THIS IS A TRUE TRANSLATION into English in 8 pages of the original document in Spanish language which I have had before and attach hereto, in Buenos Aires, on this July 21, 2004.....

ES TRADUCCIÓN FIEL al idioma inglés en 8 fojas del documento original en castellano que tuve ante mí y adjunto a la presente, en Buenos Aires, a los 21 días del mes de julio de 2004.....

COLEGIO DE TRADUCTORES PUBLICOS  
DE LA CIUDAD DE BUENOS AIRES  
Corresponde a la Legalización  
Nº 22.1624/040  
MAXIMILIANO DAMIAN VARGAS

*[Handwritten Signature]*  
MARCELA ALLIANDRA I. VARGAS  
TRADUCTORA PÚBLICA  
EN IDIOMA INGLÉS  
C.T.P.C.B.A. T° X F° 457  
° DE INSC. 3125





N° 00742144

**COLEGIO DE TRADUCTORES PÚBLICOS  
DE LA CIUDAD DE BUENOS AIRES**

REPÚBLICA ARGENTINA  
LEY 20.305

**LEGALIZACIÓN**



Por la presente, el COLEGIO DE TRADUCTORES PÚBLICOS DE LA CIUDAD DE BUENOS AIRES, en virtud de la facultad que le confiere el artículo 10, inc. d) de la Ley 20.305, certifica únicamente que la firma y el sello que aparecen en la traducción adjunta, concuerdan con los correspondientes

al Traductor Público **VARELA, MARCELA ALEJANDRA IRENE**

que obran en los registros de esta institución en el folio \_\_\_\_\_ tomo \_\_\_\_\_

**INGLES** **457** **10**

Buenos Aires, Legalización Número: 16124 / 2004 / T2

Fecha: 21/07/2004



**MARCELO F. SIGALOFF**  
Encargado Dto. de Legalizaciones  
Colegio de Traductores Públicos  
de la Ciudad de Buenos Aires

ESTA LEGALIZACIÓN NO SE CONSIDERARÁ VÁLIDA SIN EL CORRESPONDIENTE  
TIMBRADO EN LA ÚLTIMA HOJA DE LA TRADUCCIÓN ADJUNTA

Pursuant to Section 10, Paragraph D of Act 20.305, the *COLEGIO DE TRADUCTORES PÚBLICOS DE LA CIUDAD DE BUENOS AIRES* (Sworn Translators Association of the City of Buenos Aires) hereby certifies that the signature and seal affixed hereto appear to match the specimen signature and seal of the *Traductor Público* (Sworn Translator) whose name is subscribed to the attached translation, as such specimen signature and seal are kept on file in our office.

**THIS CERTIFICATION IS NOT VALID WITHOUT THE STAMP ON THE LAST PAGE OF THE ATTACHED TRANSLATION.**

Vu par le *COLEGIO DE TRADUCTORES PÚBLICOS DE LA CIUDAD DE BUENOS AIRES* (Ordre de Traducteurs Officiels de la ville de Buenos Aires), en vertu des attributions qui lui ont été accordées par l'article 10, alinéa d) de la Loi n° 20.305, pour la seule légalisation matérielle de la signature et du sceau du *Traductor Público* (Traducteur Officiel) apposés sur la traduction du document ci-joint, qui sont conformes à ceux déposés aux archives de cette Institution.

**LE TIMBRE APPOSÉ SUR LA DERNIÈRE PAGE DE LA TRADUCTION FERA PREUVE DE LA VALIDITÉ DE LA LÉGALISATION.**

Con la presente il *COLEGIO DE TRADUCTORES PÚBLICOS DE LA CIUDAD DE BUENOS AIRES* (Collegio dei Traduttori Giurati della Città di Buenos Aires) al sensi della facoltà conferitagli dall'articolo 10, comma d), della Legge 20.305, CERTIFICA, esclusivamente, la firma ed il timbro del *Traductor Público* (Traduttore Giurato), apposti in calce alla qui unita traduzione, in conformità alla firma ed al timbro depositati nei propri registri.

**LA PRESENTE LEGALIZZAZIONE SARÀ PRIVA DI VALIDITÀ OVE NON VENGA TIMBRATA NELL'ULTIMO FOGLIO DELLA TRADUZIONE.**

Através da presente o *COLEGIO DE TRADUCTORES PÚBLICOS DE LA CIUDAD DE BUENOS AIRES* (Colégio de Tradutores Públicos da Cidade de Buenos Aires), em virtude das atribuições conferidas pelo art. 10 inc. d) da Lei 20.305, certifica unicamente que a assinatura e o carimbo do *Traductor Público* (Tradutor Público) que subscreve a tradução adjunta conferem com a assinatura e o carimbo arquivados nos registros desta instituição.

**A PRESENTE LEGALIZAÇÃO SÓ SERÁ CONSIDERADA VÁLIDA COM A CORRESPONDENTE CHANCELA MECÂNICA APOSTA NA ÚLTIMA FOLHA DA TRADUÇÃO.**

Kraft der Befugnis, die ihr durch Art. 10, Abs. d) im Gesetz 20.305 verliehen wird, bestätigt hiermit der *COLEGIO DE TRADUCTORES PÚBLICOS DE LA CIUDAD DE BUENOS AIRES* (Kammer der Vereidigten Übersetzer der Stadt Buenos Aires) lediglich, dass Unterschrift und Siegel, des *Traductor Público* (Vereidigten Übersetzers), mit denen die beigelegte Übersetzung versehen ist, mit den entsprechenden Registereintragungen dieser Institution übereinstimmen.

**VORLIEGENDE BEGLAUBIGUNG IST UNGÜLTIG OHNE DEN ENTSPRECHENDEN GEBÜHRENSTEMPEL AUF DEM LETZTEN BLATT DER BEIGESCHLOSSENEN ÜBERSETZUNG.**

**In the Proceeding between**  
**Hochtief AG (Claimant)**  
**and**  
**The Argentine Republic (Respondent)**

**ICSID Case No. ARB/07/31**

**Separate and Dissenting Opinion of J. Christopher Thomas, Q.C.**

**Introduction**

1. After exchanging views with my distinguished colleagues in the manner described at paragraph 124 of the Decision on Jurisdiction, I have found that I do not agree with their interpretation of the Treaty. There are many points made in the Decision with which I agree, and other points with which I would have agreed had I concurred with their interpretation, but in the end I have a different view. I do however subscribe to the Decision's dispositions of the Second Objection, the rejection of the declaration sought in respect of the Centre's jurisdiction and the deferral of the consideration of the "contract claims and double recovery" issue.<sup>1</sup>
2. I can readily see how my colleagues have formed a different view on the MFN issue. The reason why the MFN clause has been invoked of course is that the Respondent has agreed to different investment protection treaties with different arbitral regimes. Had it maintained a single treaty model, the MFN issue would not arise in the first place. Thus, when, as here, the basic treaty requires a claimant to submit the dispute to the respondent's local courts for a period of time while another treaty concluded by the respondent does not contain the requirement, it is not difficult to conclude that many, if not all, putative claimants would prefer the latter. Some tribunals, including the present one, have agreed, emphasizing the value of such a choice from the claimant's perspective.<sup>2</sup>
3. There is also the pragmatic concern that when an objection such as the instant one is heard, the tribunal has been constituted, at least some pleadings on the merits have been filed, and often, as here, there is a substantial dispute between the parties. In the circumstances it could be seen as a waste of time and money to insist on compliance with the treaty's conditions on access to international jurisdiction.<sup>3</sup> Accordingly, some tribunals have applied the relevant MFN clause

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<sup>1</sup> See Sections X to XII of the Decision on Jurisdiction.

<sup>2</sup> Decision on Jurisdiction, paragraph 100.

<sup>3</sup> This sentiment is expressed in the Decision at the end of paragraph 88 where the majority considers that: "While not logically or legally decisive, the fact that adherence to the 18-month rule would bring no necessary benefit, and no necessary result other than the delay of the arbitration proceedings, is a fact from which the Tribunal derives some encouragement to believe that its decision is correct."

and have concluded that their jurisdiction has been established, even though the claimant has not met the conditions stipulated in the treaty's arbitration clause. I fully appreciate this reasoning and can see the attractiveness of the result, but there are other issues that need to be considered.

4. It is also the case that when MFN clauses have been invoked by claimants seeking to be relieved of compliance with the basic treaty's conditions for gaining access to international jurisdiction, tribunals have tended to form judgements about the merits of different treaty structures. The requirements of the basic treaty have sometimes been seen as unduly burdensome to would-be claimants.
5. This has been reflected in the majority's characterizing the 'prior recourse' step between consultations and international arbitration as "pointless", "to some extent perfunctory and insubstantial", the 18-month limit for litigation as "arbitrary", and the regime's giving "no certain benefit".<sup>4</sup>
6. One can wonder why the Contracting Parties decided to require the prior submission of a legal dispute to the courts of a Party for a period of 18 months before granting the investor/claimant an unconditional right of direct access to international jurisdiction. At first glance it seems odd that the requirement can be satisfied by the simple effluxion of time without its requiring a decision of at least a court of first instance before the dispute can be elevated to the international level. It is possible that a claim submitted to the local courts might never get to the merits, let alone result in a judgment, during the 18-month period. This would imply no apparent benefit from the prior submission of the dispute to the local courts and an attendant loss of time and expense. The Claimant has argued forcefully that this is the effect of Article 10(3)(a) and the majority accepts this to be the case.<sup>5</sup>
7. The 18-month period is plainly a product of compromise between the States Parties. Bearing in mind that under Article 26, second sentence, of the ICSID Convention a Contracting State can require the exhaustion of local remedies as a condition of its consent to arbitration under the Convention, it is open to two States to agree to a limited recourse to local remedies as a condition of their consent to arbitration under their bilateral treaty. Their having made such a choice, the period selected had to be of sufficient time to permit a Contracting Party's legal system to at least have an opportunity to address the dispute. A prior recourse provision of say, 6 months would hardly permit any real opportunity for the parties to frame the issues, let alone permit a court to consider the dispute. On the other hand, from a claimant's perspective, a limited period of time is preferable to a requirement of full exhaustion of local remedies (and 18 months would be seen as preferable to 36 months or more).
8. Moreover, there are reasons why a "prior recourse" stage in the dispute settlement process can contribute to a resolution of a dispute, or at least to a narrowing of the issues in dispute. One cannot rule out the possibility that the local court could uphold the investor's claim that the measures complained of violate municipal law or that a contested legal right claimed to exist

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<sup>4</sup> Decision on Jurisdiction, paragraphs 51, 87-88.

<sup>5</sup> Decision on Jurisdiction, paragraph 88.

under that law does in fact exist.<sup>6</sup> Even if such findings did not lead to a settlement, they would enhance the prospects of success in any subsequent international claim.<sup>7</sup> On the other hand, the local courts might find the measures at issue to be lawful. While this would not bind a subsequent international tribunal applying an international treaty, it might lead it to find that there has been no breach of the treaty. It might alternatively lead to a finding that the respondent's courts have compounded a treaty breach. There are many such examples in the cases.

9. The majority acknowledges the possible *res judicata* effect of a local court decision on a subsequent international proceeding but puts that to one side.<sup>8</sup> This is an important issue that underlies the interaction between a 'prior recourse' proceeding and a subsequent international claim and helps to explain its rationale. The late Keith Hight's dissent in *Waste Management Inc. v. Mexico* set out how, through the application of *res judicata*, the decisions of the local courts can alter the scope of a subsequent international proceeding through the expansion or reduction of the international claim, depending upon how the local courts treat the investor's local law claim.<sup>9</sup> In many investment treaty cases, prior proceedings between the disputing parties have been given *res judicata* effect by international tribunals.<sup>10</sup> Thus, an invocation of prior remedies as contemplated in Article 10 can have significant constructive juridical effects for a subsequent international claim or may obviate the need for such a claim.
10. It is one thing to determine, based on evidence, that the submission of a particular dispute to the local courts would be futile (an exercise that the Tribunal has not engaged in, although evidence on this point was led by both parties). It is, in my view, quite another thing to make a rather

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<sup>6</sup> Campbell McLachlan QC, Laurence Shore and Mathew Weiniger, International Investment Arbitration: Substantive Principles, (Oxford University Press 2007), p. 257: "It would be invidious for international tribunals to be finding ... that host State adjudication of treaty rights was necessarily inferior to international arbitration." One can agree with this assertion about the general utility of local court proceedings even while acknowledging that there will be cases where the local courts cannot adequately adjudicate the dispute. The point is made by the majority in *Renta 4 S.V.S. A. et al v. Russian Federation*, SCC Arbitration V (024/2007), that: "History is replete with examples of investment disputes which have overwhelmed the capacity of national institutions – in countries of all stages of development – for dispassionate judgment." (Award on Preliminary Objections, paragraph 100.)

<sup>7</sup> A claimant that enjoyed some success in the local courts would surely advert to that fact in support of any claimed breach of the treaty. Likewise, if the respondent demonstrated an obstructionist defensive posture in the local proceedings, that too would figure in the way in which a subsequent claim was formulated. It might lead to an additional cause of action.

<sup>8</sup> Decision on Jurisdiction, paragraph 49.

<sup>9</sup> *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Hight of June 2, 2000, paragraphs 50-51. This analysis was based on a different regime for the initiation of an international claim. The analysis remains on point for the purposes of the current discussion.

<sup>10</sup> See, for example, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award of July 3, 2008, paragraphs 123-125, 143; *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award of February 7, 2011, paragraph 103.

sweeping judgement as to a treaty provision's utility based on a "worst-case" scenario of an assumed useless and expensive recourse to the local courts. It is not the place of international tribunals to second-guess the choices of the States Parties even when one can envisage instances where such choices might lead to inefficiency and additional cost to a would-be claimant. One cannot avoid the fact that the Federal Republic of Germany and the Argentine Republic were satisfied with the inclusion of this provision in their Treaty. Hence, I believe that the majority's characterization of the prior recourse requirement devalues the States Parties' policy choice manifested in the Treaty.

11. One other point warrants mention at the outset. I agree with the prevailing view that the Treaty's dispute settlement provisions are to be interpreted neither broadly nor restrictively. As the *Amco Asia et al. v. Indonesia* Decision on Jurisdiction observed, a

... convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common to, indeed, to all systems of internal law and to international law.

Moreover, - and this is again a general principle of law - any convention, including conventions to arbitrate, should be construed in good faith, that is to say by *taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged*.<sup>11</sup> [Emphasis in first paragraph in original; emphasis in second paragraph added.]

12. While the first paragraph of the *Amco Asia* tribunal's approach is often quoted with approval by investment tribunals, the second paragraph, which is equally relevant, tends not to be cited as frequently. The tribunal postulated a general approach to interpretation not confined to the interpretation of agreements to arbitrate. The Argentina-Germany Treaty's MFN clause likewise must be construed neither broadly nor restrictively and its interpretation should also take into account the commitments that the parties may be considered as having reasonably and legitimately envisaged.
13. With these introductory points in mind, I turn to the main issues raised in the First Objection.

### **The need for an agreement to arbitrate**

14. Before examining the Treaty, I wish to note an important issue on which we are all agreed. At paragraph 22, the Decision correctly notes that the "Tribunal's jurisdiction depends upon the existence of an agreement between the two parties to the dispute - Hochtief and the Republic of Argentina." It is only if such agreement exists that the Tribunal is then vested with jurisdiction to apply the Treaty.

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<sup>11</sup> *Amco Asia et al. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction of September 25, 1983, paragraph 14(i).

15. It is helpful to conceive of the issue in the terms put by the tribunal in *RosinvestCo UK Ltd. v. Russian Federation*, namely, “Is there a binding consent to arbitration with the effect that a prospective party to the arbitration proceedings does not need the agreement of the other prospective party to start arbitration proceedings?”<sup>12</sup>
16. As discussed below, two avenues to international arbitration are specified under Article 10(3) of the Treaty: (i) by agreement between the disputing parties (whereby the respondent’s consent obviates the need for prior recourse to the local courts and the dispute can proceed directly to international arbitration); or (ii) by a party’s submitting a claim to an international tribunal after having submitted the dispute to the local courts for 18 months. Absent the respondent’s agreement to proceed directly to arbitration, unconditional access to international arbitration is permitted only after compliance with the 18 month prior recourse condition. To revert to *RosInvestCo*, at that point and only at that point, under this Treaty, the initiation of the arbitration proceedings depends “solely on the unilateral decision by either party and ... the other party does not have to agree again in order to permit the arbitration to start.”<sup>13</sup>
17. It is common ground between the parties, agreed by all members of the Tribunal, and well accepted in investment treaty arbitration that the State’s prior treaty-based offer must be accepted by the claimant. The Decision correctly observes that, “The question is whether the ‘offer’ and the ‘acceptance’ have resulted in an agreement which provides the basis for the jurisdiction of the Tribunal.”<sup>14</sup>
18. With no contemporaneous meeting of the minds, the existence of the agreement to arbitrate is determined by examining the two consents. Campbell McLachlan, QC observed in this respect:

... Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration.<sup>15</sup>
19. Many tribunals have examined the consent given in a claimant’s request for arbitration in light of the State’s prior treaty-based offer to consent to arbitration and have had little difficulty concluding that the two consents matched and an agreement to arbitrate was formed. The

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<sup>12</sup> *RosinvestCo UK Ltd. v. Russian Federation*, SCC Arbitration V 079/2005, Award on Jurisdiction, paragraph 71(1). At paragraph 84 of the Decision, the majority asserts that on “any interpretation of Article 10 of the Argentina/Germany BIT, an investor can ultimately exercise its rights so as to submit the dispute unilaterally to arbitration, without the need for the further specific consent of the State party to the dispute.” This is only partly true in my view. It is correct that the investor/claimant can do so after having submitted the dispute to the local courts for a period of 18 months. On a plain reading of Article 10(3), however, it cannot do so before then, absent securing the agreement of the other party. This bears on my view of the majority’s acquiescence point, discussed below.

<sup>13</sup> *Id.*, paragraph 72.

<sup>14</sup> Decision on Jurisdiction, paragraph 24.

<sup>15</sup> McLachlan, Shore and Weiniger, *supra* note 6, p. 257.

difficult issue arises when, as here, a claimant disavows the conditions attached to the respondent's offer expressed in the basic treaty and seeks to change or eliminate them by invoking the treaty's MFN clause.<sup>16</sup>

20. In the pre-*Maffezini* days, it was clear that the offer and the acceptance must match. In the 2001 edition of his treatise, Prof. Schreuer commented that:

Where ICSID's jurisdiction is based on an offer made by one party, subsequently accepted by the other, the parties' consent exists only to the extent that offer and acceptance coincide... It is evident that the investor's acceptance may not validly go beyond the limits of the host State's offer. Therefore, any limitations contained in the ... treaty would apply irrespective of the terms of the investor's acceptance. If the terms of acceptance do not coincide with the terms of the offer there is no perfected consent.<sup>17</sup>

21. In my view, the need for matching consents, once clear under the ICSID Convention, remains the case.

### **The situation in the case before the Tribunal**

22. In the case before us the disputing parties' consents do not match. The conditions stipulated in the offer to arbitrate expressed in Article 10 have not been met by the Claimant. Hochtief consented to arbitration under the Argentina-Germany Treaty yet simultaneously sought to vary the conditions attached to Argentina's consent by invoking the Treaty's MFN clause to bring into play the Argentina-Chile Treaty's access to arbitration provisions so as to "displace" the conditions stipulated in the basic treaty.<sup>18</sup>
23. The majority has characterized the Claimant's position as being that "its agreement is contained in the Request for Arbitration which is intended, in effect, to be an acceptance of Argentina's offer contained in Article 10 *and* Article 3 of the Argentina-Germany BIT."<sup>19</sup> [Emphasis added.] That is, they find the State's offer to arbitrate to lie in two articles (one which establishes the investor-State arbitration mechanism and the other being the MFN article).

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<sup>16</sup> Although one tends to focus upon a specific respondent's consent once a dispute arises, it is axiomatic that in an investment treaty context based upon reciprocity and equality of obligations undertaken by both States Parties, the conditions on consent stipulated in the treaty apply to either State Party.

<sup>17</sup> Christoph Schreuer, *The ICSID Convention: A Commentary*, (Cambridge University Press, 2001), para. 356, p. 238. The need for matching consents in order to form the arbitration agreement was also noted by Paul Szasz in an early article on the ICSID Convention entitled, "The Investment Disputes Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)." In a section of the article entitled, "Cautions" the author noted: "The related point to be observed when consent is expressed in diverse instruments, is the extent to which these overlap – for it is only in the area of coincidence that the consent is both effective and irrevocable."

<sup>18</sup> Hochtief's Rejoinder on Objections to Jurisdiction, paragraph 68.

<sup>19</sup> Decision on Jurisdiction, paragraph 23.



24. I have some difficulty in describing the MFN article as part of the offer to arbitrate under the Treaty. The offer to arbitrate set out in Article 10, it seems to me, expresses the entirety of the Treaty's investor-State arbitral mechanism.
25. At paragraph 25 of the Decision, the majority correctly records its agreement with both parties that "it is necessary to establish a consensus: i.e., that it is necessary to demonstrate that Hochtief's Request for Arbitration was an acceptance of the offer to arbitrate on the terms on which the offer was made, and not a counter-offer on different terms."
26. I find it difficult to see that the Claimant's invocation of a dispute settlement mechanism found in another treaty in order to vary the terms of the present Treaty is "an acceptance of the offer to arbitrate on the terms on which the offer was made." If Hochtief accepted Argentina's prior offer in its terms by complying with Article 10(3)(a), the two consents would match, the prior offer would be accepted, and the agreement to arbitrate would thereby be established. But that is not what occurred. In my view, regardless of how one puts it, e.g., as the Argentina-Chile Treaty's "displacing" Article 10(3) (as the Claimant puts it) or as the Claimant's having accepted an offer contained in Articles 10 and 3 (as the majority puts it), there has been no true meeting of the minds in the sense of matching consents.
27. It appears to me that when a claimant seeks to change or eliminate the conditions attaching to the respondent's consent, the requisite mutuality of an offer and matching acceptance thereof is not present and, to use Prof. Schreuer's words, "there is no perfected consent".<sup>20</sup> Rather, the Claimant has made a "counter-offer on different terms." The only possible way out of this conundrum is to find (as the majority has found) that the MFN clause varied the terms of the offer, which revised terms were then accepted by Hochtief. But for that to occur, the Tribunal must necessarily apply Article 3, not in the sense of conducting an appraisal of whether the Claimant has the requisite standing to bring a claim that *prima facie* appears to fall within the scope of the Treaty, but rather to establish the very jurisdiction that is at issue.

### **The principal points of my disagreement with the majority**

28. The principal basis for my separate opinion is that I do not share the view that the MFN obligation stated in Article 3(2), as further elaborated by *Ad Article 3* of the Protocol, interpreted in accordance with the rules of treaty interpretation, reaches the conditions attached to a State Party's consent to arbitration expressed in Article 10. I will go through the Treaty in some detail in order to develop the point.

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<sup>20</sup> In this respect, the legal issue raised in the instant case differs from that at issue in *RosInvestCo* and *Renta 4*, where the tribunals grappled with the impact of an MFN clause on an established jurisdiction. In the former case, the tribunal plainly had jurisdiction to determine the level of compensation for an expropriation and used the MFN clause to enlarge that established jurisdiction. In the latter, the tribunal found that the inclusion of the word "due" in the relevant treaty text permitted it to consider whether the predicate to an expropriation had been made out. In the instant case, I believe that the issue differs; lacking jurisdiction conferred by two matching consents, the Tribunal is using the MFN clause to create the agreement to arbitrate and thereby establish its jurisdiction.

29. As a subsidiary point, I also have reservations about what the Tribunal is actually doing when it gives effect to the MFN clause in this case. I accept that upon the Treaty's entry into force, unless otherwise indicated in its text, all of its provisions enter into force at the same time. The question in a jurisdictional challenge such as the present one is not whether some or all of the treaty's provisions are in force<sup>21</sup>, but rather whether in the specific case arising under this Treaty the Tribunal has been seised with jurisdiction. That requires the Tribunal to satisfy itself of the existence of an arbitration agreement and to do so it must see how such an agreement is formed under the Treaty's arbitration clause.
30. There is no doubt that, as observed in paragraph 11 of the Decision, when considering an objection to its competence, a tribunal plainly has the power to interpret the treaty as a whole in order to determine whether it is properly seised with jurisdiction. However, I do not believe that the *Kompetenz-Kompetenz* power can be used to create the Tribunal's jurisdiction. In my respectful view the approach taken seems to elide the question of competence and the application of the provisions of the Treaty.
31. The disagreement manifests itself in another difference in view. The majority does not see Hochtief's noncompliance with Article 10 as going to the Tribunal's jurisdiction, but rather to the claim's admissibility.<sup>22</sup> I disagree and prefer the view expressed by other tribunals, namely, that the prior recourse provision is both mandatory and is jurisdictional in nature.
32. I will address these reservations in turn, beginning with an examination and discussion of the relevant provisions of the Treaty.

## **The terms of the Treaty**

### **Article 10**

33. One simple point can be made at the outset: Article 10 does not contain an MFN obligation within the article itself that would have made it perfectly clear that if one of the Contracting Parties agreed to a treaty containing more favourable conditions for access to international jurisdiction, those conditions would enure to the benefit of an investor bringing a claim under the Argentina-Germany Treaty. The absence of an explicit MFN undertaking in Article 10 of course is not dispositive of the interpretative issue, but it warrants noting as a point of departure. There are four additional inter-related points.
34. First, Article 10 contemplates a three step process. In respect of the first two steps, the article is stated in mandatory terms, using the word "shall" rather than "should," "may" or some other formulation of words that would suggest that the submission of the dispute to the local courts is

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<sup>21</sup> I am not to be taken as arguing that the Tribunal has the power to interpret only Article 10 at this stage of the proceedings.

<sup>22</sup> Decision on Jurisdiction, paragraph 96.

anything other than obligatory if a party wishes to be in a position ultimately to proceed to international jurisdiction.<sup>23</sup>

35. The most recent discussion of the characterization of this type of provision (albeit worded slightly differently) is found in *Impregilo S.p.A. v. Argentine Republic*.<sup>24</sup> That tribunal reviewed the analogous dispute settlement provision of the Argentina-Italy Treaty, concluding that the prior recourse provision was a “general condition that must be complied with by the investor who wishes to submit the dispute to international arbitration.”<sup>25</sup>
36. The tribunal described Article 8(3) of that treaty as a “mandatory – but limited in time – jurisdictional requirement before a right to bring a case to ICSID can be exercised...” [Emphasis added.] It found support for its conclusion in the decisions of the *Maffezini* and *Wintershall* tribunals.<sup>26</sup> At the end of its analysis of the dispute settlement clause, the tribunal concluded that: “In sum, Article 8(3) contains a jurisdictional requirement that has to be fulfilled *before an ICSID tribunal can assert jurisdiction*” (my emphasis), observing further that this conclusion found support in the *Wintershall* award which found that “Article 10(2) contains a time-bound prior-recourse-to local-courts-clause, which *mandates* (not merely permits) litigation by the investor (for a definite period) in the domestic forum”<sup>27</sup> ( Emphasis added). After reciting that passage from *Wintershall*, the *Impregilo* tribunal added that this mandatory clause applies “*before the right to ICSID can even materialize.*”<sup>28</sup> [Emphasis added.]
37. The majority in *Impregilo* went on to hold that the MFN clause applied so as to relieve the claimant of having to comply with this mandatory jurisdictional requirement. For present purposes, I refer to the award because its characterization of the prior recourse provision as “mandatory” and “jurisdictional” in nature accords with my understanding of Article 10(3)(a) of

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<sup>23</sup> While expressing some doubt about the structure of Article 10 and whether it actually requires prior submission in order to permit a claimant to proceed to international arbitration, the Decision, at paragraph 55, proceeds on the assumption, and without deciding the point, that Article 10 imposes a mandatory 18-month submission to the national courts as a precondition of unilateral recourse to arbitration under the BIT.

<sup>24</sup> Since *Impregilo*, the Decision on Jurisdiction in *Abaclat and others (Case formerly known as Giovanna Beccara and others) v. The Argentine Republic*, ICSID Case No. ARB/07/5 has been released. The majority of that tribunal did not find it necessary to address the characterization of Article 8 of the Argentina-Italy treaty and whether the Treaty’s MFN clause entitled the claimants to rely on the allegedly more favourable dispute resolution clause in the Argentina-Chile BIT. (Decision on Jurisdiction of August 4, 2011, paragraph 589.) The dissenting opinion, which was said to be forthcoming, has not yet been published, so the views of the dissenting arbitrator cannot be ascertained.

<sup>25</sup> *Impregilo S.p.A. v. Argentina Republic*, ICSID Case No. ARB/07/17, Award of June 21, 2011, paragraph 90.

<sup>26</sup> *Id.*, paragraphs 91-94.

<sup>27</sup> *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of December 8, 2008, paragraph 118.

<sup>28</sup> *Impregilo*, paragraph 94.

the present Treaty. I also find its comment that compliance with the clause is required before the right to ICSID can even materialize to be correct. This is relevant to my analysis because it goes to the question of what the Tribunal can do when determining its competence.

38. To revert to Article 10 of the Argentina-Germany Treaty, as noted previously, Article 10(3)(a)'s application can be avoided only by agreement of the two parties. This is an important point to bear in mind when considering the majority's admissibility analysis. At paragraph 94, they note in respect of questions of admissibility, that "disputing parties are entitled to raise objections based upon questions of admissibility, but they are not bound to do so; and if they do not raise those objections, they will have acquiesced in any breach of the requirements of admissibility and that acquiescence will 'cure' the breach." The critical point is the next one: "The tribunal, *if it has jurisdiction*, will proceed to hear the case." [Emphasis added.]
39. The majority considers that the Tribunal has such jurisdiction by virtue of the MFN clause's disapplication of Article 10; I see the Tribunal as having the jurisdiction to determine its jurisdiction, but not as empowered to apply the Treaty's substantive terms (including the MFN clause) so as to *create* its jurisdiction. That drives the analysis back to whether the Claimant has met the mandatory conditions for establishing such jurisdiction, because as *Impregilo* notes, compliance with such conditions must occur before the right to ICSID (arbitration) can materialize.
40. The Tribunal's acquiescence analysis would moreover be more persuasive, in my respectful view, if Article 10(3)(b) was not present in the Treaty. By including the possibility for a respondent State to agree to waive the prior recourse requirement, the drafters have explicitly addressed the acquiescence point in the text. Why read in a power to acquiesce into the conditions stipulated in Article 10(3)(a) when the respondent's power to agree to proceed immediately to international arbitration is explicitly recognized in Article 10(3)(b)? I would have thought that the latter's presence in the Treaty should lead to the opposite conclusion, namely, that if the power to waive the requirement is expressed in one sub-paragraph, it ought not to be read into the other.
41. If both paragraphs are given effect, the logical conclusion would be that absent the Respondent's agreement, under the framework of this Treaty the 18 month prior recourse period is mandatory and jurisdiction cannot vest in the Tribunal until there is compliance therewith.
42. On this approach, as held in *Impregilo*, *Maffezini* and *Wintershall*, non-compliance with the mandatory terms of subparagraph 3(a) goes to jurisdiction rather than to admissibility and the Respondent's insistence on the Claimant's compliance with the condition expressed in the Respondent's offer is properly characterized as an objection to jurisdiction, not to admissibility.
43. The third and related interpretative point about Article 10 is that unlike some investment protection treaties where the States Parties unconditionally submit to investor-State arbitration, Article 10 is worded conditionally. That is, absent compliance with the 18-month recourse

requirement, the claimant has no *unconditional* right to proceed to arbitration.<sup>29</sup> Absent the respondent's waiving prior recourse, it is only when prior recourse has occurred that there is, to revert to *RosInvestCo*, a binding consent to arbitration with the effect that a prospective party to the arbitration proceedings does not need the agreement of the other prospective party to start arbitration proceedings.<sup>30</sup>

44. Finally, Article 10 stands in contrast to the Treaty's other dispute settlement mechanism, Article 9. That is, while Article 10(3)(a) stipulates a condition that must be met before the claim can be elevated to the international level, Article 9 gives the Contracting Parties direct and immediate access to international arbitration to settle disputes arising between them (in providing that if a dispute cannot be settled amicably, "it *will* be submitted to an arbitral tribunal upon the request of either Contracting Party"). [Emphasis added.] In such a case, there is no question as to the Contracting Parties' unconditional consent to State-to-State arbitration and any tribunal created under Article 9 is vested with jurisdiction to claims related to the interpretation and application of the Treaty.

### **Article 3**

45. Article 3 will be reviewed in detail because it contains a number of phrases which taken collectively lead me to conclude that it does not apply to Article 10.
46. Paragraph 1 deals with "investments of nationals or companies of the other Contracting Party, or the investments in which the nationals or companies of the other Contracting Party have interests." Paragraph 2 addresses "nationals or companies of the other Contracting Party, as regards its activities related to investments." The paragraphs thus differentiate between the investor and its investment.
47. Paragraphs 3 and 4 then set out two types of treatment that are not considered to be "treatment" at all within the meaning of Article 3. "Treatment", as understood in paragraphs 1 and 2, "shall not include privileges which may be extended by either Contracting Party to nationals or companies of third States on account of" preferential trade agreements, nor shall it "extend to privileges accorded by a Contracting Party to nationals or companies of a third State by virtue of an agreement for the avoidance of double taxation or other tax agreements." In other words, paragraphs 3 and 4 deem two types of treatment that could otherwise be seen to be as less favourable as not even being "treatment" as that term is understood by the Contracting Parties.

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<sup>29</sup> Obviously, proceeding directly to international arbitration pursuant to Article 10(3)(b) after having obtained the respondent's consent cannot be considered an unconditional right to arbitration. It arises from a specific consent from the respondent which is otherwise entitled to insist on compliance with the Treaty's mandatory terms.

<sup>30</sup> For that reason, I do not share the majority's view that the "jurisdiction of the Tribunal remains unaffected by" the Respondent's acquiescing in the Claimant's non-compliance with the 18-month period. (Decision on Jurisdiction, paragraph 96.)

### **Article 3(2) in particular**

48. Paragraphs 1 and 2 of Article 3 do not have the same coverage. Paragraph 1 applies to any less favourable treatment accorded to the investment without any specification of the universe of activities in which the investment might engage. Paragraph 2, in contrast, does not purport to capture any less favourable treatment accorded to the investor, but rather less favourable treatment “as regards their activity in connection with investments in [the State’s] territory.” It is necessary to refer to the Protocol to gain further insight into the meaning of the word “activity” as used in Article 3(2). I will revert to this below.

### **What Article 3(2) does not contain**

49. It is useful at this point to consider what Article 3(2) does not contain. Three points come to mind.
50. First, Article 3(2) does not refer to Article 10, nor does it expressly include dispute settlement activities within its scope. (This stands in contrast to the United Kingdom’s Model BIT which confirms that its MFN clause does apply to dispute settlement.)
51. It is equally true that dispute settlement under the Treaty has not been expressly “carved out” of Article 3(2)’s coverage. The majority (in line with some other tribunals) has noted this.<sup>31</sup> It is used to support the inference that dispute settlement is therefore covered (on the basis that the drafters knew how to exclude something from the Article’s coverage and therefore anything not excluded must have been intended to be included).
52. This does not necessarily follow. In addition to examining Article 3 and other articles of the Treaty, I examine the Treaty’s structure and the grouping of provisions within it because this can provide interpretative clues as to the meaning of particular provisions. If, as I conclude, the Contracting Parties conceived of Articles 8-12 as institutional provisions relating to the Treaty’s application generally, there would have been no need to expressly list any of the matters addressed in those articles as matters to be carved out from Article 3’s coverage. The Decision correctly observes at paragraph 77 that it is well understood that MFN clauses are subject to implicit limitations.
53. Moreover, it is entirely plausible that the Contracting Parties did not specifically exclude the conditions for gaining access to dispute settlement under Article 10 from Article 3’s application because it did not occur to them that the MFN clause could be used to modify Article 10’s stipulations.<sup>32</sup> Prior to *Maffezini*, that was not only a reasonable and legitimate view, it was the

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<sup>31</sup> Decision on Jurisdiction, paragraph 74.

<sup>32</sup> Zachary Douglas observes that “across hundreds of years of activity of international courts and tribunals” until *Maffezini* there “has only been judicial pronouncements against such a device...” (i.e., using the MFN clause to override the State’s conditions of consent). He notes further that prior to *Maffezini*, “there does not appear to be any support in the writings of publicists for the extension of the MFN clause to jurisdictional matters.” Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, *Journal of International Dispute Settlement*, Vol. 2, No. 1 (2011), pp. 97-113, at 101. If this was the case, the drafters would see no need to

orthodox view<sup>33</sup> (buttressed in the ICSID context by the commonly held view as expressed by Professor Schreuer that the consents of the two disputing parties under a treaty must coincide).<sup>34</sup>

54. Drafters need not exclude matters addressed in another article of a treaty from the MFN obligation if they do not think that there is a relationship between the two articles. To revert to the words of *Amco Asia* quoted earlier, we are to take into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.
55. Second, it warrants noting that when Article 3(2) is compared to the other substantive obligations of treatment there is nothing in its formulation that suggests that it is any different from any of the other obligations in terms of its application. That is, Article 3 is like every other provision, to be applied by a tribunal, but only once it is properly seised with jurisdiction.
56. Third, this Treaty does not contain the “all matters” language that some tribunals have found to be highly relevant to their decision that the relevant MFN clause applies to access to international jurisdiction.<sup>35</sup>
57. I readily acknowledge the majority’s point that if one focuses on the word “activity,” one can say that an investor’s commencing a lawsuit or an arbitration in relation to its investment is an activity.<sup>36</sup> I also accept that the word “treatment” in and of itself is capable of a broad meaning. But the interpretative exercise does not end with a consideration of the words “activity” and “treatment” in isolation of the rest of the Treaty and of general international law. Plainly, as the majority observes at paragraphs 61-70, an investor might engage in the activity of bringing a lawsuit in relation to its investment, but it does not necessarily follow that an international claim regulated by the terms of Article 10 is also an “activity” within the meaning of Article 3, as further interpreted by *Ad Article 3* and when considered in light of the overall context of the Treaty and general international law.

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exclude something from the MFN clause’s reach because they would not consider it to be related to MFN in the first place. The clause would not be operating in regard to the subject-matter of Article 10.

<sup>33</sup> An indication of the surprise with which *Maffezini* was received in many quarters is reflected by a distinguished tribunal’s comment in *Salini v. Jordan* where, after reviewing *Maffezini*’s analysis, the tribunal commented that: “The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case.” *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 29, 2004, paragraph 115.

<sup>34</sup> See paragraph 20 *supra*.

<sup>35</sup> In *Impregilo*, the majority observed at paragraph 104 of the Award that: “The Arbitral Tribunal further notes that there is a massive volume of case-law which indicates that, at least when there is an MFN clause applying to “all matters” regulated in the BIT, more favorable dispute settlement clauses in other BITs will be incorporated. Relevant cases are *Maffezini*, *Gas Natural*, *Suez*, *Suez* and *Camuzzi*.” [Footnotes omitted.] The dissenting arbitrator, Prof. Brigitte Stern, rejected the view that the “all matters” formulation reaches dispute settlement.

<sup>36</sup> Decision on Jurisdiction, paragraphs 66-72.

### ***Ad Article 3***

58. Article 3 is supplemented by *Ad Article 3* in the Protocol which forms an integral part of the Treaty. I believe that the Protocol's interpretation of Article 3(2) lends support to my analysis.
59. The Protocol clarifies the meaning of the word "activity" as used in Article 3(2). It defines "activity" (labelled as "activities" in the plural) through a non-exhaustive, but illustrative, list.<sup>37</sup>
60. The use of the phrasing "in particular but not exclusively" creates a focus in identifying what is covered by "activities." The phrase "[i]t will be considered in particular but not exclusively..." signals to the interpreter that the drafters were concerned with some *genus* of activities as opposed to activities writ large. Otherwise, why include the "will be considered in particular" phrase in *Ad Article 3* at all?<sup>38</sup> If the meaning of "activities" was intended to capture all possible activities of the investor in relation to its investment, there would have been no reason to employ this phrasing. There must be a relationship between the particular types of activities expressly listed and those not expressly listed.
61. It also warrants noting that while Article 3 simply used the general word "activity", the range of activities specified by the Protocol is narrower than that used in many other treaties. The Protocol does not, as many investment treaties do, apply the MFN obligation to the full range of an investor's activities from pre-establishment to the disposition of an investment. Rather, it focuses more on the day-to-day management and operation of the investment (its "management, the exploitation, the use and the enjoyment...").
62. Having regard to Article 3(2)'s scope, therefore, the Protocol's drafting technique tends to narrow the range of an investor's activities related to its investment. But this too does not dispose of the interpretative issue.
63. The most important clue lies in the next part of the Protocol: Article 3's purpose is to protect investors or their investments, as the case may be, from less favourable treatment than that accorded to investors or investments of third States.<sup>39</sup> It is of seminal importance that when taking the opportunity to give interpretative guidance as to what actually constitutes "less favourable treatment" within the meaning of Article 3(2), the examples used by the States Parties were far removed from the conditions of access to international jurisdiction stipulated in Article 10 of the Treaty.

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<sup>37</sup> There seems to be a slight drafting error here since Article 3 uses the phrasing "their activity" in the singular while *Ad Article 3* uses "activities" in the plural. Nothing appears to turn on this.

<sup>38</sup> The majority and I differ on this point. Decision on Jurisdiction, paragraphs 65-66.

<sup>39</sup> It warrants noting parenthetically that in the last sentence of *Ad Article 3* the Parties introduced an entirely new *genus* of measures that were not to be considered "treatment less favourable" within the meaning of Article 3. These sorts of measures (adopted for reasons of internal or external security or public order, public health or morality") were not even mentioned in Article 3 itself.



64. Once again, the Protocol's drafters used the "in particular but not exclusively" drafting technique. The "in particular" examples of less favourable treatment given by the Parties ("measures affecting the acquisition of raw materials and further supplies, energy and fuels as well as means of production and of exploitation of any kind or the sale of products inside the country or abroad") all fall within a *genus* of less favourable treatments that are directly related to the management, the exploitation, the use and enjoyment of the investment in the host State's territory.
65. It warrants emphasizing that *all* of the listed types of measures are concerned with access to materials, the production and sales processes, and measures of governments that can adversely affect the competitiveness of investments, e.g. access to inputs within the host State as well as access to the internal and export markets. They are closely related types of less favourable treatment and they must provide a sense of what sort of "activities" the Contracting Parties had in mind, since logically there must be a connection between the investor's activities and the types of treatment that the Contracting Parties agreed would put it at a disadvantage *vis-à-vis* investors of the host State and investors of third States.
66. To be sure, the list is not exhaustive, but even considering the penumbra of less favourable treatments that are not specified "in particular", the Treaty's stipulation of the conditions for gaining access to international arbitral jurisdiction seems to me to be distant from the listed types of less favourable treatments.<sup>40</sup>
67. Since the Protocol's drafters were seeking to give the interpreter a better sense of the Parties' shared intent in respect of the kind of less favourable treatment covered by Article 3(2), Article 3, as clarified and elaborated by the Protocol (which forms an integral part of the Treaty), does not reach the Treaty's conditions applicable to an investor seeking access to international jurisdiction.

#### Article 4

68. I will refer to Article 4 only in passing. It is not insignificant in my view that when it comes to "full legal protection and security", protection against expropriation, compensation for losses due to war or other armed conflict, etc. the drafters inserted an article-specific MFN clause. This too

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<sup>40</sup> I leave aside the question of whether a respondent's seeking to have the claimant comply with the Treaty's conditions for initiating arbitration thereunder even constitutes a "measure" that could give rise to less favourable treatment in the first place. See *Pope & Talbot Inc. and Government of Canada*, UNCITRAL, Award by Arbitral Tribunal in relation to Preliminary Motion by Government of Canada to Dismiss Claim Because it Falls Outside the Scope and Coverage of NAFTA Chapter Eleven "measure relating to investment" Motion, 26 January 2000, paragraphs 36-37, for a NAFTA tribunal's differentiation between an international agreement between Canada and the United States, which did not constitute a "measure" within the tribunal's jurisdiction and the Canada's measures implementing that agreement that were being challenged in that case, which were held to be measures capable of falling within NAFTA Chapter Eleven.

is not dispositive of the overall interpretative result, but the Parties' insertion of such an MFN clause for three types of State action lends weight to the idea that the MFN clause in Article 3 is concerned only with a specific *genus* of less favourable treatments and in relation to a specific *genus* of investor activities.<sup>41</sup>

69. I now turn to consider the broader context of the Treaty.

### **The general structure of the Treaty**

70. The foregoing interpretation of Articles 3, 4, 9 and 10 should be grounded not only having regard to the ordinary meaning of a word or words, but to the words in their context which, under Article 31(2) of the Vienna Convention on the Law of Treaties, includes the entire text of the Treaty. This leads me to consider the Treaty's general structure.

71. Like many BITs, the Argentina-Germany Treaty is short, comprising a preamble, followed by twelve articles and a protocol. It does not employ article titles, nor is it divided into sections. However, a structure can be discerned from reviewing the Treaty as a whole.<sup>42</sup>

Preamble

Article 1 [Definitions]

Article 2 [Encouragement and admission of investments in the territories of the Contracting Parties]

Article 3 [National treatment and MFN treatment]

Article 4 [Full legal protection, prohibition against uncompensated expropriation, and disciplines for losses suffered through armed conflict, revolution, *etc.*]

Article 5 [Transfers]

Article 6 [Subrogation]

Article 7 [Extension of more favourable treatment under domestic law or from obligations under international law not included in the Treaty and fulfillment of commitments made]

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<sup>41</sup> Given the inclusion of two MFN clauses in Articles 3 and 4, one can ask why the drafters did not include an MFN clause in Article 10 itself if they intended to permit the terms of access in other treaties to flow through to claimants under this Treaty. Given the drafting technique used in this Treaty, that would be the logical place to put it.

<sup>42</sup> For purposes of illustrating its structure given the absence of article titles, I have inserted a description of each provision.

Article 8 [Application of the Treaty to matters arising under it but relating to pre-existing investments by nationals or companies of the other Contracting Party]

Article 9 [Disputes between the Contracting Parties]

Article 10 [Disputes between an investor of one Contracting Party and the other Contracting Party]

Article 11 [Application of the Treaty in cases provided by Article 63 of the Vienna Convention on the Law of Treaties]

Article 12 [Ratification, entry into force, and survival of Articles 1-11 for fifteen years after termination]

72. A perusal of the Treaty suggests three subject-matter groupings: (i) Article 1, definitions; (ii) Articles 2-7, substantive obligations undertaken by the Contracting Parties and enjoyed by Argentinean and German investors, as the case may be, in the territories of the relevant Party; and (iii) Articles 8-12, institutional features of the Treaty (i.e., provisions addressing the Treaty's application to pre-existing investments, the creation of two dispute settlement mechanisms, the impact of the severing of diplomatic or consular relations on the Treaty, its entry into force and the basis for its termination together with the survival of rights for a certain time).
73. In my opinion, Article 10, when viewed in the context of the Treaty as a whole, is not *ejusdem generis* to the Treaty's substantive obligations of treatment of investors and/or their investments, including Article 3.

### **Summary**

74. In sum:
- Article 10 sets out a staged dispute settlement regime. Compliance with Article 10(3)(a) is as other tribunals have recognized mandatory and is a matter going to the Tribunal's jurisdiction.
  - Article 10 does not contain an MFN clause stating that more favourable treatment accorded by either Contracting Party to investors of a third State will flow through and apply to disputes brought under that article.
  - Article 3 does not expressly refer to Article 10, nor does it expressly include the subject matter of dispute settlement under the Treaty within its scope. Nothing in Article 3 explicitly states that the Contracting Parties intended it to apply to the procedures for the submission of disputes prescribed by Article 10.
  - Article 3(2) does not even specify that the MFN obligations apply to "all matters subject to this Agreement" as was the case in the treaty considered by, for example, the *Maffezini*

and *Impregilo* tribunals. It uses the bare words “activity” in relation to the investor and “treatment” in relation to the measures of the State.

- Of seminal importance, the Protocol’s elaboration of what sorts of treatment considered by the Contracting Parties to be “less favourable” addresses State conduct that is entirely different in nature from the conditions governing access to international jurisdiction prescribed in the Treaty. While the less favourable measures are not listed exhaustively, those not covered under the “particularly but not exclusively” phrasing must logically be related to those which are expressly listed. Access to international jurisdiction regulated under Article 10 is simply not *ejusdem generis* to restrictions on availability of natural resources, the sale of products inside the country or abroad, etc.
- The fact that Article 3 is silent in terms of whether it applies to dispute settlement, yet its paragraphs 3 and 4 contain matters (benefits accruing from preferential trade agreements and double taxation treaties<sup>43</sup>), which are explicitly carved out from being considered to be “treatment”, does not inexorably support the argument that dispute settlement must therefore fall within its terms because the Parties knew how to exclude such matters as from Article 3’s coverage. As noted, if one considers the orthodox view prior to *Maffezini* was that the MFN clause did not override the State’s conditions of consent, it seems difficult to conceive that dislodging Article 10(3)(a) was a consequence of Article 3 which the Contracting Parties may be considered as having reasonably and legitimately envisaged.
- Finally, nothing in Article 3 or in *Ad Article 3* confers any special temporal quality upon the MFN obligation; there is no indication that the MFN obligation, uniquely amongst the other standards of treatment contained in the Treaty, is to be given any kind of “pre agreement to arbitrate” status that would authorize a tribunal to use it to create an agreement to arbitrate.

### **International law’s distinction between substantive obligations and jurisdiction-conferring provisions**

75. Under the general rule of interpretation set forth in Article 31 of the Vienna Convention, the interpreter is mandated to examine the treaty in light of various elements which are, to use the International Law Commission’s words, “thrown into the crucible” and from their interaction “would give the legally relevant interpretation.”<sup>44</sup> The text of the Treaty is to be considered not simply in its own terms, but also having regard to other elements.<sup>45</sup> Paragraph 3 of Article 31 adds that there should also be taken into account together with the context “any relevant rules of international law applicable in the relations between the parties.” As Sir Ian Sinclair noted in his

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<sup>43</sup> As well as the exclusions from “less favourable treatment” set out in *Ad Article 3(b)* and (c).

<sup>44</sup> A/CONF.39/11/Add.2, 39, paragraph 8.

<sup>45</sup> *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, ICJ Reports 1991, 53.

commentary on the Vienna Convention, “Every treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary.”<sup>46</sup> The Vienna Convention’s preamble itself specifies that: “disputes concerning treaties, like other international disputes, should be settled ... in conformity with the principles of justice and international law.”

76. At paragraphs 35-37, I expressed agreement with the prior tribunals that have characterized the “prior recourse” provision as being jurisdictional in nature. This leads me to consider the Treaty in light of the distinction between substantive obligations and jurisdictional provisions of treaties. In a number of cases where an objection has been taken against its jurisdiction to hear claims of alleged breach of treaties, the ICJ has considered that there is a clear distinction between a treaty’s substantive obligations and its conferral of adjudicative jurisdiction.<sup>47</sup>
77. This has been reaffirmed as recently as April of 2011, when the ICJ found that the preconditions established in Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination “establish preconditions before the seisin of the Court.”<sup>48</sup>
78. Professor Campbell McLachlan QC, among others, has adverted to this general distinction in his treatise co-authored by Shore and Weiniger:

... As the ICJ pointed out in *East Timor (Portugal) v. Australia*, the scope of application of a substantive obligation is an entirely separate question to

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<sup>46</sup> Ian Sinclair, The Vienna Convention on the Law of Treaties, (Manchester University Press) (2<sup>nd</sup> ed.) p. 139.

<sup>47</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*, Judgment of February 3, 2006, ICJ Reports 2006, 6, paras. 64-65, where the Court noted that it had previously emphasized that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. See also the *Case Concerning East Timor (Portugal v. Australia)*, Judgment of June 30, 1995, ICJ Reports 1995, p. 90, where the Court stated:

“26. The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the Judgment given by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* and confirmed in several of its subsequent decisions (see *Continental Shelf (Libyan Arab Jarnahiryu/Malta)*, *Application for Permission to Intervene, Judgment*, I. C. J. Reports 1984, p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, I. C. J. Reports 1984, p. 431, para. 88 ; *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, I. C. J. Reports 1986, p. 579, para. 49; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *Application to Intervene, Judgment*, I. C. J. Reports 1990, pp. 114-1 16, paras. 54-56, and p. 112, para. 73; and *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, I. C. J. Reports 1992, pp. 259-262, paras. 50-55).”

<sup>48</sup> Article 22 of the Convention states: “Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.” Case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment of 1 April 2011. The Court makes the point about seisin at paragraph 141.

the conferral of jurisdiction upon an international tribunal, Jurisdiction in international law depends solely upon consent.<sup>49</sup>

79. Thus, to treat the Treaty's dispute settlement provisions as being the same as the substantive obligations that precede it seems to be at variance with how general international law and practice has distinguished between the two.

### **The sequential issue**

80. I have already alluded to my concern about the majority's application of the MFN clause in its interpretation of the Treaty pursuant to the *Kompetenz-Kompetenz* power. It seems to me that consistent with the approach articulated by the ICJ, just noted, there is a sequential issue in the establishment of a tribunal's jurisdiction under an investment treaty. During the hearing I asked both parties to comment on this issue because it seems to me to be bound up in the analysis of how the specific MFN clause at issue in this case can relate to the investor-State arbitration mechanism.<sup>50</sup>
81. The sequential element comes into play as follows: to avoid Article 10's effects, the Claimant invokes an obligation contained in the Treaty to "displace" the Treaty's requirements for initiating an international claim.<sup>51</sup> Seeking the application of a particular rule of treatment in the Treaty in order to create jurisdiction seems to me to be putting the cart before the horse.<sup>52</sup>

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<sup>49</sup> McLachlan, Shore and Weiniger, *supra* note 6, p. 257. See also Douglas, *supra* note 32, at p. 103.

<sup>50</sup> Transcript, Day 2, pp. 24-31, pp. 91-94.

<sup>51</sup> Hochtief's Rejoinder on Objections to Jurisdiction, paragraph 68.

<sup>52</sup> Rather than using the "substantive/jurisdictional" or "substantive/procedural" distinctions found in the literature, in her recent dissenting and concurring opinion in *Impregilo*, Professor Brigitte Stern distinguishes between "rights and ... fundamental conditions for access to the rights". This accords with my understanding of the distinction between a treaty's protections and the means for enforcing such protections but I have used the term "substantive" to refer to obligations of treatment such as the duty not to expropriate except in accordance with the treaty's terms, the fair and equitable treatment standard, etc.

82. If one were to consider any other substantive provision of an investment treaty, such as the protection against an uncompensated expropriation, were a claimant to file a claim asserting that an expropriation had been effected in breach of a treaty without the claimant's having first consented to the arbitration in the manner specified by the treaty, the tribunal's response would be that absent an agreement to arbitrate it was without jurisdiction to entertain the claim. A tribunal cannot adjudicate someone's rights if they have not met the threshold jurisdictional requirements to be able to claim such rights. Yet the Decision on Jurisdiction is plainly applying this treatment clause in order to dis-apply the 18 month litigation period in Article 10(3)(a).<sup>53</sup>
83. For the foregoing reasons I cannot fully subscribe to the Decision. That said, I accept my colleagues' decision and agree that the objection has illustrated the difficulty of the question. As noted in paragraph 1, I do subscribe to the balance of the Tribunal's disposition of Argentina's objections.



J. Christopher Thomas, Q.C.

Date: 7/10/2011

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<sup>53</sup> Decision on Jurisdiction, paragraph 82. The Treaty between Argentina and Germany has not been amended by the treaty between Argentina and Chile. Douglas makes the point in similar terms: "The claimant must assert a right to more favourable treatment by claiming through the MFN clause in the basic treaty. It can only do so by instituting arbitration proceedings and thus by accepting the terms of the standing offer of arbitration in the basic treaty. At that point an arbitration agreement between the claimant and the host state comes into existence. And the existence of that arbitration agreement is critical to the viability of the arbitration regime envisaged by the investment treaty..." *supra*, note 32, pp. 106-107. Correctly, in my view, Douglas argues that MFN clause does not automatically incorporate the terms of a third treaty into the basic treaty and for this reason HOCHTIEF's submission that the Argentina-Chile Treaty "displaces" Article 10 of the Argentina-Germany Treaty is misplaced.

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

In the arbitration proceeding between

**HOCHTIEF AG**

Claimant

and

**ARGENTINE REPUBLIC**

Respondent

(ICSID Case No. ARB/07/31)

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**DECISION ON LIABILITY**

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*Members of the Tribunal*

Professor Vaughan Lowe Q.C, President  
Judge Charles N. Brower, Arbitrator  
Mr. J. Christopher Thomas, Q.C., Arbitrator

*Secretary of the Tribunal*

Mrs. Mercedes Cordido-Freytes de Kurowski

*Date:* December 29, 2014



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Representing Hochtief

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Representing the Argentine Republic

Dra. Angelina María Esther Abbona  
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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT or the Treaty	Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments dated 9 April 1991, that came into force on 8 November 1993.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
E [CE] [RE]	Exhibit [Claimant] [Respondent]
LA [CLA] [RLA]	Legal Authority [Claimant] [Respondent]
Mem. [Cl. Mem.] [Resp. Mem. Jur.]	Memorial [Claimant on the merits] [Respondent on jurisdiction]
C-Mem. [Resp. C-Mem.] [Cl. C-Mem. Jur.]	Counter-Memorial [Respondent's on the merits] [Claimant's on jurisdiction]
Rep. [Cl. Rep.] [Resp. Rep. Jur.]	Reply [Claimant's on the merits] [Respondent's on jurisdiction]
Rej. [Resp. Rej.] [Cl. Rej. Jur.]	Rejoinder [Respondent's on the merits] [Claimant's on jurisdiction]
Tr. [J.] [Merits] [page:line]	Transcript of the hearing on jurisdiction/ on the merits

## **I. INTRODUCTION AND PARTIES**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Treaty between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments dated 9 April 1991 which entered into force on 8 November 1993. The dispute concerns a concession for the construction of toll highway and a bridge between cities of Rosario and Victoria and Argentina’s alleged breaches of Claimant’s rights under the BIT.
2. Claimant is Hochtief Aktiengesellschaft and is hereinafter referred to as “Hochtief” or “Claimant.”
3. Claimant is a company incorporated under the laws of the Federal Republic of Germany.
4. Respondent is the Argentine Republic and is hereinafter referred to as “Argentina” or “Respondent.”
5. Claimant and Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (i).

## **II. PROCEDURAL HISTORY**

6. On 7 November 2007, ICSID received a request for arbitration dated 5 November 2007 from Hochtief against Argentina (the “Request” or “RFA”).
7. On 18 December 2007, the Acting Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
8. By letter dated 19 February 2008, Claimant elected to submit the arbitration to a Tribunal constituted of three arbitrators, as provided in Article 37(2)(b) of the ICSID Convention.

9. On 23 April 2008, Claimant appointed Judge Charles N. Brower, a national of the United States of America, as arbitrator. On 2 May 2008, Respondent appointed Mr. J. Christopher Thomas, Q.C., a Canadian national, as arbitrator.
10. By letter dated 24 April 2009, the Centre informed the Parties that in accordance with the method agreed by the Parties, Judge Charles N. Brower and Mr. J. Christopher Thomas, Q.C. had agreed on the appointment of Professor Vaughan Lowe, a national of the United Kingdom, as the third arbitrator and President of the Tribunal.
11. On 30 April 2009, the Acting Secretary-General of the Centre, in accordance with Rule 6(1) of the ICSID Arbitration Rules notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Sergio Puig, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
12. On 19 June 2009, the Tribunal held a procedural session with the Parties by telephone conference and, pursuant to the Parties' agreement, on 16 April 2010, the Tribunal held a first session with the Parties at the seat of the Centre in Washington, D.C. The Parties confirmed that the Tribunal had been properly constituted and reached agreements on several procedural matters, inter alia, that the applicable Arbitration Rules would be those in force since 10 April 2006, and that the procedural languages would be English and Spanish.
13. During the First Session, the Parties further agreed that Claimant would file a memorial on the merits on 29 April 2010, and that Respondent would file a memorial on jurisdiction within 120 days from its receipt of Claimant's memorial on the merits. It was also agreed that the Tribunal would promptly instruct the Parties on the timetable for the further submissions. The Minutes were signed by the President of the Tribunal and Mr. Gonzalo Flores on behalf of the ICSID Secretariat, and circulated to the Parties.
14. Claimant's Memorial on the Merits was submitted on 29 April 2010, and Respondent submitted its Memorial on Objections to the Jurisdiction of the Centre and the

Competence of the Tribunal on 30 July 2010. Claimant's Counter-Memorial on Objections to Jurisdiction was submitted on 15 October 2010.

15. On 25 June 2010, Respondent submitted a request for production of documents, followed by Claimant's observations on Respondent's request, on 21 July 2010.
16. On 2 November 2010, after having considered the views of the Parties, the Tribunal decided, to deal with the objections to jurisdiction as a preliminary question, and decided on Respondent's request for production of documents.
17. On 10 November 2010, the Centre informed the Tribunal and the Parties that Ms. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, would replace Mr. Sergio Puig as Secretary of the Tribunal.
18. On 22 December 2010, Respondent filed its Reply on Jurisdiction, and on 10 February 2011, Claimant filed its Rejoinder on Jurisdiction.
19. A hearing on Jurisdiction took place at the World Bank's Conference Centre in Paris on 4-5 March 2011. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For Claimant

Mr. Paul F. Doyle	<i>Kelley Drye &amp; Warren LLP</i>
Mr. Philip D. Robben	<i>Kelley Drye &amp; Warren LLP</i>
Ms. Mellisa E Byroade	<i>Kelley Drye &amp; Warren LLP</i>
Ms. Julia A. Garza Benítez	<i>Kelley Drye &amp; Warren LLP</i>

For Respondent

Ms. Angelina Abbona	<i>Procuradora del Tesoro de la Nación</i>
Mr. Gabriel Bottini	<i>Procuración del Tesoro de la Nación</i>
Ms. Romina de los Ángeles Mercado	<i>Procuración del Tesoro de la Nación</i>
Ms. Verónica Lavista	<i>Procuración del Tesoro de la Nación</i>
Mr Matías Osvaldo Bietti	<i>Procuración del Tesoro de la Nación</i>
Mr. Ariel Martins	<i>Procuración del Tesoro de la Nación</i>
Mr. Julián Santiago Negro	<i>Procuración del Tesoro de la Nación</i>

20. The following persons were examined during the hearing:

On behalf of Claimant

Mr. Martin Lommatzsch  
Mr. Héctor A. Mairal

Witness  
Expert witness

On behalf of Respondent

Mr. Ismael Mata

Expert witness (via video conference  
from Buenos Aires)

21. On 24 October 2011, the Tribunal issued its Decision on Jurisdiction. Attached to the Decision was a dissenting opinion by arbitrator Mr. J. Christopher Thomas, Q.C. The Tribunal, by majority, rejected Respondent's submission that the Centre had no jurisdiction and the Tribunal had no competence over this case; asserted that the Centre had jurisdiction and the Tribunal had competence over this case; and indicated that it would decide upon the question of costs and fees at a later stage, along with the merits of the dispute.
22. On 30 December 2011, Respondent renewed its request of 25 June 2010 for the Tribunal to decide on production of documents, and filed a response to Claimant's observations of 21 July 2010. On 12 January 2012, Claimant submitted a response to Respondent's observations of 30 December 2011. On 18 January 2012, the Tribunal decided on production of documents.
23. On 31 January 2012, Respondent supplemented its renewed request of 30 December 2011 for the Tribunal to decide on production of documents. This was followed by Claimant's observations on 8 February 2011. On 10 February 2011, Respondent further supplemented its request for production of documents, and on 15 February 2012, Claimant submitted its observations on Respondent's request. On 22 February 2012, the Tribunal decided on production of documents.
24. Respondent's Counter-Memorial on the Merits was filed on 7 March 2012, and Claimant submitted its Reply on the Merits on 5 June 2012.



25. On 20 July 2012, Respondent filed a further request for the Tribunal to decide on production of documents. This was followed by Claimant's observations on 27 July 2012, and the Tribunal's decision on 31 July 2012.
26. On 17 August 2012, Respondent submitted a further request for the Tribunal to decide on production of documents. This was followed by Claimant's observations on 21 August 2012, and by a further document production request from Respondent of 27 August 2012. On 30 August 2012, Claimant also submitted a request for the Tribunal to decide on production of documents. On 3 September 2012, Claimant submitted observations on Respondent's further request of 27 August 2012.
27. On 3 September 2012, Respondent submitted its Rejoinder on the Merits.
28. On 4 September 2012, the Tribunal decided on Respondent's requests for production of documents of 17 and 27 August 2012.
29. Also on 4 September 2012, Respondent filed observations on Claimant's document production request of 30 August 2012, and the Tribunal decided on Claimant's request on 7 September 2012.
30. The Tribunal held a two-week hearing on the merits in Paris. The first week was held on 19-23 September 2012 at the International Chamber of Commerce, and the second week was held on 22-26 October 2012 at the World Bank Paris Conference Center.
31. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present during the first week of the hearing were:

For Claimant:

Mr. Paul F. Doyle  
Mr. Philip D. Robben  
Ms. Mellisa E. Byroade  
Ms. Julia A. Garza Benítez  
Ms. Ana Correa  
Ms. Tanya Green  
Ms. Cynthia Inés Graf Caride

*Kelley Drye & Warren LLP*  
*Kelley Drye & Warren LLP*  
*Kelley Drye & Warren LLP*  
*Kelley Drye & Warren LLP*  
*Kelley Drye & Warren LLP*  
*Kelley Drye & Warren LLP*  
*Leonhardt, Dietl, Graf & Von Der Fecht*

Mr. Hartmut Paulsen  
Mr. Georg von Bronk  
Mr. Christoph Boeninger

*Hochtief Aktiengesellschaft*  
*Hochtief Aktiengesellschaft*  
*Hochtief Aktiengesellschaft*

For Respondent:

Ms. Angelina Abbona  
Mr. Gabriel Bottini  
Mr. Javier Pargament

*Procuración del Tesoro de la Nación*  
*Procuración del Tesoro de la Nación*  
*Director, Procuración del Tesoro de la Nación*

Mr. Carlos Mihanovich

*Subdirector, Procuración del Tesoro de la Nación*

Mr. Horacio Seillant  
Ms. Verónica Lavista  
Mr. Julián Negro  
Mr. Manuel Domínguez Delucchi  
Mr. Leandro Fernández  
Mr. Luis Rivarola  
Ms. Mariana Lozza  
Ms. Magdalena Gasparini  
Ms. Adriana Cusmano

*Procuración del Tesoro de la Nación*  
*Procuración del Tesoro de la Nación*  
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*Procuración del Tesoro de la Nación*  
*Procuración del Tesoro de la Nación*

32. The following persons were examined during the first week of the hearing:

On behalf of Claimant:

Mr. Martin Lommatzsch  
Mr. Hartmut Veigele  
Mr. Björn König  
Mr. Héctor A. Mairal

Witness  
Witness  
Witness  
Expert witness

On behalf of Respondent:

Mr. Eduardo Ratti  
Mr. Alfredo Villaggi  
Mr. Sergio Cipolla  
Mr. Roberto Lamdany  
Mr. Andrés Aner

Witness  
Witness  
Witness  
Witness  
Witness

33. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present during the second week of the hearing that took place on 22-27 October 2012, were:

For Claimant:

Mr. Paul Doyle

*Kelley Drye & Warren LLP*

Mr. Philip Robben  
Ms. Melissa Byroade  
Ms. Ana Correa  
Mr. Levi Downing  
Ms. Tanya Green  
Ms. Cynthia Inés Graf Caride

*Kelley Drye & Warren LLP*  
*Kelley Drye & Warren LLP*  
*Kelley Drye & Warren LLP*  
*Kelley Drye & Warren LLP*  
*Kelley Drye & Warren LLP*  
*Leonhardt, Dietl, Graf & Von Der*  
*Fecht*  
*Hochtief Aktiengesellschaft*  
*Hochtief Aktiengesellschaft*  
*Hochtief Aktiengesellschaft*

For Respondent:

Ms. Angelina Abbona  
Mr. Horacio Diez

*Procuradora del Tesoro de la Nación*  
*SubProcurador, Procuración del Tesoro de la*  
*Nación*

Mr. Gabriel Bottini  
Mr. Javier Pargament  
Mr. Carlos Mihanovich

*Director, Procuración del Tesoro de la Nación*  
*Director, Procuración del Tesoro de la Nación*  
*Subdirector, Procuración del Tesoro de la*  
*Nación*

Mr. Horacio Seillant  
Ms. Magdalena Gasparini  
Mr. Luis Rivarola  
Mr. Agustín Tupac Cifré Puig  
Ms. Verónica Lavista  
Ms. Mariana Lozza  
Ms. Alejandra Mackluf  
Mr. Nicolás Grosse  
Ms. Adriana Cusmano  
Mr. Julián Negro  
Mr. Manuel Domínguez Delucchi

*Procuración del Tesoro de la Nación*  
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*Procuración del Tesoro de la Nación*  
*Procuración del Tesoro de la Nación*

34. The following persons were examined during the second week of the hearing:

On behalf of Claimant:

Dr. Manuel A Abdala  
Mr. Marcelo Schoeters  
Mr. Gustavo de Marco  
Mr. Federico Villar  
Mr. Philip Bates  
Dr. Sergio Berensztein  
Dr. Sebastian Edwards  
Dr. W. Michael Reisman

Expert Witness  
Expert Witness  
Expert Witness  
Expert Witness  
Expert Witness  
Expert Witness  
Expert Witness  
Expert Witness

On behalf of Respondent:

Mr. Martín Bes	Witness
Mr. Ismael Mata	Expert Witness
Mr. Benedict Kingsbury	Expert Witness

Mr. Barry Eichengreen	Expert Witness
Mr. Alberto Müller	Expert Witness
Mr. Guido Sandleris	Expert Witness
Mr. Ernesto Schargrodsky	Expert Witness
Mr. Bernardo Kliksberg	Expert Witness
Mr. Lucas Bertinatto	Expert Witness
Ms. Camila Rodríguez Bedoya	Expert Witness

35. On 12 November 2012, the Tribunal issued a procedural order concerning production of documents and the procedural calendar.
36. On 30 November 2012, Respondent filed a request for the Tribunal to decide on production of documents. This was followed by Claimant’s observations on 14 December 2012. On 7 January 2013, the Tribunal decided on production of documents and issued directions to the Parties concerning additional expert opinions to be submitted by the Parties on certain corporate governance issues under Argentine Law.
37. On 17 January 2013, Claimant submitted a request for the Tribunal to reconsider its decision of 7 January 2013, and on 29 January 2013, Respondent submitted observations on Claimant’s request of 17 January 2013.
38. On 1 February 2013, each Party submitted additional expert opinions in accordance with the Tribunal’s directions of 7 January 2013. On 12 February 2013, Claimant ratified its request of 17 January 2013. On 19 February 2013, the Tribunal decided on production of documents, and ordered Claimant to produce the Puentes del Litoral S.A. (“PdL”) shareholders’ agreement. The Tribunal also decided on the procedural calendar and posed questions to the Parties.
39. On 27 February 2013, Claimant produced the PdL’s Shareholders’ Agreement, which had previously been provided to the Tribunal on 22 February 2013.

40. On 28 February 2013, the Tribunal invited each Party to submit simultaneous comments on the PdL Shareholders' Agreement within 14 days, with replies to be submitted seven days after the comments.
41. On 6 March 2013, Claimant submitted a request for the Tribunal to decide on confidentiality of documents. On 11 March 2013, the Tribunal issued a procedural order concerning confidentiality of documents, and invited each Party to comment upon and propose any amendment to the wording of that order by 18 March 2013.
42. On 14 March 2013, Claimant submitted observations on the relevance of PdL's Shareholders' Agreement, and Respondent filed a request for the Tribunal to order Claimant to provide certain information, noting that it would submit its comments on PdL's Shareholders' Agreement in its Post-Hearing Brief.
43. On 18 March 2013, each Party submitted observations as requested by the Tribunal in its Procedural Order of 11 March 2013.
44. On 21 March 2013, the Parties replied to each other's communications of 14 March 2013.
45. On 28 March 2013, each Party submitted a Post-Hearing Brief.
46. On 11 April 2013, Respondent filed a request for the exclusion of evidence. This was followed by Claimant's observations on 23 April 2013. On 25 April 2013, the Tribunal decided not to grant Respondent's request.
47. On 29 April 2013, the Tribunal informed the Parties that it was ready to issue a confidentiality order, but thought it preferable that the Parties should agree upon one between themselves. The Parties were invited to state their views on this matter.
48. On 6 May 2013, Claimant informed the Tribunal that the Parties had been unable to agree on a proposed order, and submitted its proposed procedural order. On 7 May 2013, the Tribunal invited the Parties to submit any final comments on Claimant's proposed order by 10 May 2013. Also on 7 May 2013, Respondent submitted its proposed procedural order. On 10 May 2013, Claimant submitted its final comments on this matter. No further observations were received from Respondent.

49. On 23 May 2013, the Tribunal issued a Procedural Order concerning confidentiality of documents.
50. The Parties filed their submissions on costs on 30 September 2013.
51. The Members of the Tribunal have deliberated by various means of communication and have taken into consideration the Parties' entire submissions filed during this arbitration proceeding.

### **III. FACTUAL BACKGROUND**

#### **(A) Preliminary Observations**

52. The facts summarized hereafter are those considered and debated in the Parties' written pleadings and oral arguments.

#### **(B) Argentina's Privatization Program**

##### **a) Background**

53. During the 1980s, Argentina experienced widespread economic instability and a number of economic crises, large foreign debt, and hyperinflation. A number of governmental regulations were in place that restrained or prohibited foreign investments in Argentina.<sup>1</sup>

##### **b) The Convertibility Regime and overview of the legal framework**

54. Beginning in 1991, the Government of Argentina ("the Government"), enacted a variety of economic reforms to change its policy toward foreign investors, took steps to privatize many of its services, and created laws to encourage foreign investment.<sup>2</sup>
55. Law 23,928, known as the "Convertibility Law", became effective on 1 April 1991, and pegged the Argentine peso to the US dollar by providing that the Argentine peso was convertible by law at a rate of US\$ 1:AR \$ 1, and that the Argentine Central Bank was

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<sup>1</sup> Cl. Mem. ¶¶ 65-66, Cl. Rep. ¶ 36, Claimant's Post-Hearing Brief ("Cl. PHB") ¶ 19.

<sup>2</sup> Cl. Mem. ¶ 67, Cl. PHB ¶ 19.

obliged to sell dollars at that rate of exchange. The Convertibility Law also provided that contracts could be denominated and legally enforced in Argentina in US dollars.<sup>3</sup>

56. According to Claimant, Argentina promoted its reforms to potential foreign investors. It created an Undersecretariat of Investment as part of its Ministry of Economy and Public Works and Services to facilitate the entry of foreign investment, which prepared and distributed a publication in English entitled “Argentina, a Growing Country, A Compendium for Foreign Investors,” dated November 1993. Claimant further asserts that in this Compendium Argentina made several representations, amongst them, that the Convertibility Law, which was described in the Compendium as the “cornerstone of a very strict stabilization plan” had “virtually removed currency risk”,<sup>4</sup> and that, under Argentine law, “[c]ontracts can be denominated and legally enforced in foreign currencies.”<sup>5</sup> According to Hochtief, it relied upon the representations contained therein in making its decision to invest.<sup>6</sup>

57. On 9 April 1991, Argentina and Germany signed the Treaty. It entered into force on 8 November 1993. The Preamble of the Treaty provides that it is intended “to create favourable conditions for investments” and that it recognizes “that the encouragement and contractual protection of such investments are apt to stimulate private business initiative...”<sup>7</sup> Claimant cites the Executive Letter, dated 9 January 1992, through which Argentina sought legislative approval of the Treaty, which stated that “under the said agreements, the States undertake to maintain unchanged during the life thereof some rules on treatment of investments, with which they hope to establish an atmosphere of stability and trust to attract investments”.<sup>8</sup>

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<sup>3</sup> Cl. Mem. ¶ 68, Cl. Rep. ¶ 37, Cl. PHB ¶ 21. Convertibility Law, Art. 7 (Exh. CX-9).

<sup>4</sup> *Argentine Investment Compendium*, at 8-9 (Exh. CX-20).

<sup>5</sup> *Ibid.*, at 8 (emphasis added). See also Argentine Investment Update, at 1 (“Contracts may also be denominated and enforced in foreign exchange.”)(Exh. CX-22).

<sup>6</sup> Cl. Mem. ¶ 75.

<sup>7</sup> Cl. PHB ¶ 22. CLA 179, UNTS German – Argentine BIT.

<sup>8</sup> Cl. Mem. ¶ 90-93. Cl. PHB ¶¶ 22-23. Letter from Guido Di Tella, León C. Arslanián and Domingo F. Cavallo to the Honorable Congress of Argentina, 9 January 1992 (hereinafter the “Executive Letter”), at 2 – 4 (Exh. CX-12).

58. According to Claimant, highly placed Argentine officials, including Presidents, represented to Hochtief and other prospective investors that the Convertibility Law was permanent, and had also highlighted the protections afforded to investors by the German-Argentine BIT.<sup>9</sup>
59. On 21 May 1991, Argentina signed the ICSID Convention. The ICSID Convention entered into force in Argentina on 18 November 1994.<sup>10</sup>
60. In 1993, Argentina enacted a “Foreign Investment Act”.<sup>11</sup> This law permitted foreign investors to repatriate capital and remit earnings abroad at any time, and to invest in Argentina without registration or prior governmental approval, on the same terms as investors domiciled in Argentina. Investors were free to invest in Argentina through merger, acquisition or joint venture.<sup>12</sup>

(C) The Project, the Bidding Process and the Concession Contract

a) The Project and the Bidding Process

61. Bidding for the Project opened on 15 July 1997. The object of the concession was to construct, maintain, and operate a 608-meter long, four lane, cable-stayed bridge, 12 smaller bridges and embankments, and a toll road linking the cities of Rosario, in Santa Fe province, and Victoria, in Entre Ríos province, through a crossing over the Paraná river (the “Project”). This entailed the construction of 59.4 kilometers of roads.<sup>13</sup>

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<sup>9</sup> Cl. Mem. ¶ 78-86. Cl. PHB ¶ 20. Lommatzsch Stmt. ¶¶ 13-20. Saúl Carlos Menem, *Última Oportunidad para la Grandeza*, Actualidad Energética, Edición Latinoamérica, 27 November 1990 (Exh. CX-7).

<sup>10</sup> Cl. Mem. ¶ 103. Cl. PHB ¶ 24.

<sup>11</sup> Cl. Mem. ¶ 73, Cl. PHB ¶ 29. Ministry of Economy, *Argentine Investment Update*, Vol. 1, No. 1, at 8 – 9 (setting forth the Argentine Foreign Investment Act, as codified on 8 September 1993 by Executive Order 1852) (Exh. CX-22).

<sup>12</sup> Cl. Mem. ¶ 73, Cl. PHB ¶ 29. *Argentine Investment Update*, 8 (Exh. CX-22).

<sup>13</sup> Cl. Mem. ¶ 115, Cl. PHB ¶ 35. Lommatzsch Stmt. ¶ 29; National Executive Order No. 650/97 (Exh. CX-28). Resp. C-Mem. ¶ 90.



62. Argentina published the terms of the concession and solicited bids through the *Pliego de Bases y Condiciones del Concurso y sus Circulares* [Bidding Terms and Conditions, and Related Circular Letters] (the “Bidding Terms”).<sup>14</sup>
63. This was a subsidized concession, meaning that a substantial portion of the construction would be funded by State subsidies.<sup>15</sup> The Concession would be awarded to the project requesting the smallest total subsidy.<sup>16</sup>
64. Hochtief formed a Consortium together with Impregilo S.p.A., Techint Compañía Técnica Internacional S.A.C. I., Benito Roggio e Hijos S.A., and Iglys S.A. to bid for the Project (together “the Consortium”).<sup>17</sup>
65. There were several bidding processes. Argentina noted that because there was a technical tie in the second call for bids, the bidders were invited to improve their offers, and that the best bid would be the one requesting the lowest subsidy.<sup>18</sup>
66. The Consortium was the Successful Bidder, as indicated in Resolution MEyOSP No. 1039, dated 13 November 1997.<sup>19</sup>

b) The Concession Contract

67. The Concession Contract was signed on 28 January 1998<sup>20</sup>, and was ratified by Argentina by Decree No. 581/1998 of 14 May 1998.<sup>21</sup>

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<sup>14</sup> Cl. Rep. ¶ 27. Bidding Terms (Exh. CX-31).

<sup>15</sup> Cl. Mem.¶ 116. Resp. C-Mem. ¶ 91

<sup>16</sup> Resp. C-Mem. ¶ 91

<sup>17</sup> Cl. Mem.¶ 119. Resp. C-Mem. ¶ 102.

<sup>18</sup> Resp. C-Mem. ¶ 106.

<sup>19</sup> Cl. Mem.¶ 121. Resp. C-Mem. ¶ 108. Resp. PHB¶ 42. Resolution MEOySP No. 1039, 13 November 1997, Art. 2 (Exh. RA 121).

<sup>20</sup> Resp. C-Mem. ¶ 108.

<sup>21</sup> Cl. Mem.¶ 12. Cl. PHB ¶ 46. Ministry of Economy Resolution No. 581/98, 14 May 1998 (Exh. CX-35). Resp. C-Mem. ¶ 110. Decree No. 581/1998 dated 14 May 1998, section 1 (Exh. RA 124). Concession Contract (Exh. RA 12).

68. As required by Article 5 of the Concession Contract, the Consortium formed Puentes del Litoral S.A. (“PdL” or “the Concessionaire”), a local corporation with the sole purpose of performing under the Concession Contract, incorporated on 1 April 1998.<sup>22</sup>
69. The current members of the Consortium are the sole current shareholders of PdL. Hochtief is the largest shareholder of PdL, holding 26% of its shares. Impregilo is the second largest shareholder, holding 22% of shares in PdL directly and 4% through Iglys S.A., which it wholly controls. It is followed by Benito Roggio e Hijos S.A. (20%), Sideco Americana S.A. (19%), Iecsa S.A. (1%) and Techint Cía Técnica Internacional S.A. (8%). Sideco and Iecsa were not part of the original Consortium.<sup>23</sup>
70. On 17 June 1998, the Consortium members assigned all of their rights and obligations under the Concession Contract to PdL.<sup>24</sup> The legal consequences in the context of this claim of this assignment is a matter of dispute between the Parties.
71. On 14 September 1998, the Concessionaire signed the *Acta de Toma de Posesión*, and took possession of the Project site.<sup>25</sup>
72. The term of the Concession would be 25 years as from Taking of Possession.<sup>26</sup> The Concessionaire was to build, operate and maintain the road and bridges, and the rights and responsibilities would be transferred to Argentina at the end of the Concession.<sup>27</sup>
73. Respondent notes that in order to obtain the promised financing from the Republic of Argentina the Concessionaire had to comply with two duties within 90 days from the

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<sup>22</sup> Cl. Rep. ¶ 28, Respondent’s PHB. ¶ 43. Deed of Incorporation: Puentes del Litoral S.A., 1 April 1998 (Exh. RA 122).

<sup>23</sup> Cl. Mem.¶ 133. Lommatzsch Stmt. ¶ 47.

<sup>24</sup> Cl. Mem.¶ 131, Cl. Rep. ¶ 28, Cl. PHB ¶¶ 42, 51. FLT, § 5.2 (Exh. CX-32). *Acta Cesión*, 17 June 1998 (translation by counsel) (Exh. CX-36); *see also* Lommatzsch Stmt., ¶¶ 45, 46. Resp. C-Mem. ¶ 111; Resp. PHB ¶ 43. Rights and Duties Transfer Deed: —Impregilo S.p.A. and others to —Puentes del Litoral S.A., dated 17 June 1998 (Exh. RA 126). Decision on Jurisdiction ¶ 117.

<sup>25</sup> Cl. Mem. ¶ 145, Lommatzsch Stmt., ¶ 56, Resp. C-Mem. ¶ 113, Resp. PHB ¶ 44. Certificate of 14 September 1998 (Exh. RA 131).

<sup>26</sup> Resp. C-M ¶ 129. Concession Contract, section 4 (the date of taking of possession was 14 September 1998 (Record dated 14 September 1998, Record of Taking of Possession) (Exh. RA 131).

<sup>27</sup> Cl. Mem.¶ 125. Cl. PHB ¶ 47

execution of the Contract by Argentina: (i) the filing of Firm and Irrevocable Financing Agreements (“AFFIs” or “FIFAs”) to evidence the availability to the Concessionaire of the funds required to comply with its duties under the Concession Contract; and (ii) the filing of a stand-by letter of credit issued by a banking institution to secure that the amount indicated in sections 8.2 and 22.1.b of the Concession Contract (i.e., the difference between the projected total construction costs and the subsidy requested from the State, plus 20%) would be immediately transferred to the Government of Argentina on the demand so that the Government might, either directly or through third parties, complete the works.<sup>28</sup>

74. On 30 October 1998, the shareholders of PdL posted a standby letter of credit dated 15 October 1998 (the “Letter of Credit”) in favour of Argentina in the amount of US \$143.1 million (ARS 143,102,193) to guarantee PdL’s performance and financing for the Project. Hochtief’s share amounted to 26% or US \$37 million (ARS 37,206,570).<sup>29</sup>
75. Once construction was completed, the Concessionaire would be entitled to collect toll revenue, which would be the sole source of revenue for the Concessionaire under the Concession<sup>30</sup>. The basic toll rate would be equal to the peso equivalent of US\$ 7.40 for a 2-axle vehicle<sup>31</sup>. For other vehicles, the toll would be calculated as a multiple of this rate.<sup>32</sup> The toll was to be denominated in US dollars and adjusted periodically for inflation pursuant to the US Consumer Price Index.<sup>33</sup> In accordance with Law No. 23,696, which amended Law No. 17,520, the toll amount “was required to comply with two restrictions: (i) not to exceed the average economic value of the service rendered; and (ii) profitability was not to exceed a reasonable relation between the investments actually made by the concessionaire and the net profits obtained through the concession.”<sup>34</sup>

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<sup>28</sup> Resp. C-Mem. ¶ 141.

<sup>29</sup> Cl. Mem. ¶ 144, Cl. Rep. ¶ 50, Cl. PHB ¶ 55, Resp. C-Mem. ¶ 146.

<sup>30</sup> Cl. Mem. ¶ 125, Cl. PHB ¶ 39.

<sup>31</sup> Cl. Rep. ¶ 31.

<sup>32</sup> Cl. Mem. ¶¶ 126-127, Cl. PHB ¶¶ 47-48.

<sup>33</sup> Cl. Mem. ¶ 127, Cl. PHB ¶¶ 47-48.

<sup>34</sup> Resp. C-M ¶ 122.

76. The estimated volume of traffic was not guaranteed by Argentina. In accordance with Decree 650/97, “there will be no guaranteed minimum revenues or traffic volume. The concession will be for all purposes a risk contract, except for the subsidy to be granted to the Concessionaire.”<sup>35</sup>
77. The toll rate was calculated in US dollars, to be collected from users paying in Argentine pesos, and would be adjusted monthly based on the average buyer-seller exchange rate between dollars and pesos of the Banco de la Nación Argentina. Claimant expected that the exchange rate would generally be US \$1 to AR \$1.<sup>36</sup>

c) Capital Contributions and Project Funding

78. Under the terms of the Concession Contract, the funding of the Project was to come from three sources: (a) Argentina was to provide a subsidy (the “Subsidy”), which was the initial source of funding for the construction, to be paid in monthly tranches.<sup>37</sup> According to Respondent, the amount of the Subsidy accounted for more than 60% of the Project;<sup>38</sup> (b) PdL was to provide US\$ 30 million of its own capital (shareholders’ equity); and (c) the balance was to come from funds borrowed by PdL.<sup>39</sup> According to the Claimant, after several revisions, the final funding plan provided for approximately US \$234 million<sup>40</sup> of Subsidy, approximately US \$59 million of equity, and a loan from the Inter-American Development Bank (the “IDB”) in the amount of approximately US \$74 million.<sup>41</sup>
79. The Concession Contract also contemplated that the first funds to finance the Project would be those provided by Argentina through the Subsidy, and that once the Subsidy

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<sup>35</sup> Cl. PHB ¶ 53. Resp. C-M. ¶ 125. Decree No. 855/95 issued by the Argentine Executive, section 3, as amended by Decree No. 650/97 (Exh. RA 97); Villagi Stmt. ¶ 16.

<sup>36</sup> Cl. Mem. ¶ 127, Cl. PHB ¶ 48.

<sup>37</sup> Resp. PHB ¶ 58. Final Technical Document, Sec. 36.2 (Exh. CX-33).

<sup>38</sup> Resp. PHB ¶ 58.

<sup>39</sup> Cl. Mem. ¶¶ 137-138, Cl. PHB ¶¶ 52-54.

<sup>40</sup> Cl. Mem. ¶ 137.

<sup>41</sup> *Ibid.*, ¶ 137. CL. Rep. ¶ 55. Cl. PHB ¶¶ 52, 54.

was depleted, Concessionaire should continue the Project with its own funds (including third-party loans).<sup>42</sup>

80. According to Claimant, Hochtief made capital contributions to PdL, consistent with the requirements of the Concession Contract, of US \$594,930 in May 1998 and US \$1,355,070 in August 1998, for a total of US\$ 1,950,000, or 26% of the US \$ 7.5 million capital that PdL was required to have in place upon the start of the Project.<sup>43</sup> Hochtief made further contributions to PdL of US \$1,638,000 in March 2000 and US \$4,212,000 in July 2000, amounting to a total of US\$ 5,850,000, or 26% of the remaining balance of US \$22,500,000 in capital that PdL was required to raise. The other shareholders made similar equity contributions in proportion to their shareholdings. Also, in addition to the initial contribution of US \$30 million made by the PdL shareholders, in January 2001 PdL's shareholders made an additional equity investment of US \$13.65 million. Hochtief's 26% share of this additional equity was US \$3.549 million.<sup>44</sup>
81. On 31 July 2000, PdL entered into a loan agreement with the Inter-American Development Bank (the "IDB") in the amount of US \$73,751,000 (the "IDB loan").<sup>45</sup> However, disbursements were never made under this agreement. The reasons for that are disputed between the Parties.
82. According to Claimant, during the entire construction phase of the Project, Argentina was in default of its legal and contractual obligation to pay the Subsidy<sup>46</sup> in a timely manner, and those delays impacted the financing of the Project.<sup>47</sup> Claimant asserts that under the Concession Contract, PdL was to access third-party funding for the Project only after the Subsidy was paid, and that a condition precedent to the first disbursement of the IDB

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<sup>42</sup> Cl. Mem. ¶ 138. FTD at ¶ 36.2 (Exh. CX-33).

<sup>43</sup> Cl. Mem. ¶ 135. Lommatzsch Stmt. ¶ 50.

<sup>44</sup> Cl. Mem. ¶¶ 135-136, Cl. Rep. ¶ 34, Cl. PHB ¶ 50.

<sup>45</sup> Cl. Mem. ¶ 142. CL. Rep. ¶ 58. IDB Loan Agreement (Exh. CX-46).

<sup>46</sup> Cl. Mem. ¶¶ 150, Cl. PHB ¶ 59.

<sup>47</sup> Cl. PHB ¶ 59.

loan, scheduled for 1 March 2001, was that Argentina had paid no less than 90% of the Subsidy.<sup>48</sup>

83. Respondent, on the other hand, asserts that because the Concessionaire had failed to show the AFFIs, as an assurance that the Project would be carried out<sup>49</sup>, the Respondent temporarily suspended<sup>50</sup> the payment of the Subsidies until the AFFIs were presented.<sup>51</sup> Respondent further asserts that Argentina resumed payment of the Subsidy in September 2000.<sup>52</sup> The Parties dispute whether or not the IDB loan constitutes an AFFI.
84. According to Claimant, another of the conditions precedent to the disbursement of the IDB loan in March 2001 was the injection into PdL as equity of 40% of any loan disbursement until the total paid-in capital amounted to US\$ 59,039,000.<sup>53</sup> Claimant asserts that because Argentina had failed to pay the Subsidy in a timely manner, PdL's shareholders, including Hochtief, were forced to inject equity into PdL in January 2001, two months before it was scheduled.<sup>54</sup>
85. With regard to the IDB agreement, Respondent notes that it had been negotiated since May 1998 for a higher amount, but that it had been reduced twice because, among other factors, the IDB considered the Project "*extremely risky*" and a capital increase of PdL, that was required, never took place.<sup>55</sup>
86. On 20 October 2000, PdL and Argentina entered into an agreement, titled *Acta Acuerdo*, (the "October 20 Agreement"). This Agreement provided renegotiated deadlines for payment of the Subsidy, with the last payment due on 28 February 2001. According to

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<sup>48</sup> Cl. Mem. ¶¶ 152-153. Cl. Rep. ¶ 59. Cl. PHB ¶ 61.

<sup>49</sup> Resp. PHB ¶ 58. Final Technical Document, Sec. 22.1.b (Exh. CX-33).

<sup>50</sup> Resp. PHB ¶ 59, fn 77. Letter Secretariat of Public Works (SOP) 1020, 1 September 2000 (Exh. RA 149). Letter SOP 723/2000, 4 July 2000, p. 2 (Exh. RA 148).

<sup>51</sup> Resp. C-M ¶ 160. Respondent's PHB ¶ 59.

<sup>52</sup> Resp. C-M ¶ 162. Letter SOP No. 1020/2000 dated 1 September 2000 (Exh. RA 149).

<sup>53</sup> Cl. Mem. ¶ 154.

<sup>54</sup> *Ibid.*, ¶ 154.

<sup>55</sup> Resp. PHB ¶¶ 62-64. Memorandum from PdL to the Secretariat of Public Works, 13 April 1999, p. 1 (Exh. RA 139). Letter from IDB to PdL, 17 October 2001 (Exh. RA 286). Shareholders' Agreement, 11 April 2002 (Exh. RA 502). Letter from PdL to the Chief of the Cabinet of Ministers, 25 July 2001, p. 2 (Exh. RA 162).

the Claimant, compliance with this agreement would have permitted the first disbursement of the IDB loan scheduled for 1 March 2001.<sup>56</sup>

87. By letter of 26 February 2001, PdL asked the IDB for a six-month extension of the deadline<sup>57</sup>. Respondent's witness asserted that the IDB did not deny the extension.<sup>58</sup>
88. By letter of 14 May 2001, PdL notified the IDB that over 90% of the Subsidy had already been paid<sup>59</sup>.
89. On 27 August 2001, shortly before the six-month extension was to expire, PdL made a disbursement request to the IDB.<sup>60</sup>
90. By letter of 28 February 2002, the IDB informed PdL that there were various issues that prevented the disbursement.<sup>61</sup>
91. According to Respondent, the disbursements under the IDB loan were never made because there were many major conditions set forth in the IDB Agreement— which had nothing to do with the Subsidy— that remained unfulfilled until at least February 2002.<sup>62</sup> Respondent further asserts that PdL's impossibility of obtaining financing to complete the Project was prior to the economic emergency declared in January 2002.<sup>63</sup>
92. According to Respondent, the Project was essentially financed with funds provided by Argentina (the Subsidy), noting that the Argentine State also provided financial aid in order to finish the work.<sup>64</sup>

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<sup>56</sup> Cl. Mem. ¶ 156. Cl. Rep. ¶¶ 52-53. Cl. PHB ¶ 62. *Acta Acuerdo*, 20 October 2000, Agreement between PdL and Argentina resolving financial disputes (Exh. CX-137).

<sup>57</sup> Cl. PHB ¶ 63. Letter from PdL to the Inter-American Development Bank, 26 February 2001 (Exh. CX-166); Transcript Vol. 2, 454:3 – 455:10 (translated on the record).

<sup>58</sup> Tr. Hear. Merits, day 11, 2700:21-2701:3(Bes) (Spanish version).

<sup>59</sup> Resp. Rej. ¶ 95. Letter from PdL to the IDB, 14 May 2001 (Exh. RA 279). Resp. PHB. ¶ 68.

<sup>60</sup> Resp. PHB ¶ 67.

<sup>61</sup> Resp. PHB. ¶ 72. Letter from IDB to PdL, 28 February 2002 (Exh. CX-70).

<sup>62</sup> Resp. PHB ¶ 66. Tr. Hear. Merits, day 11, 2734:4-2737:11 (Bes) (Spanish version). Letter from PdL to the IDB, 25 October 2001 (Exh. RA 287).

<sup>63</sup> Resp. C-M ¶ 180. Aner Stmt. ¶ 6.

<sup>64</sup> Resp. PHB. ¶ 8. Resp. C-M ¶¶ 132-136 and 179-191 and Resp. Rej. ¶¶ 53-61, 113-118 and 122-145.

(D) The Argentine Crisis

93. The Respondent argues that since mid-1998, Argentina underwent a recession period and decrease of its domestic product that triggered an economic, financial, institutional, political and social crisis, which reached its peak in December 2001.<sup>65</sup> Respondent asserts that the crisis also had an impact on the provinces of Santa Fe and Entre Ríos.<sup>66</sup> The impact, duration and legal significance of that recession period is a matter of dispute between the Parties.
94. The Tribunal heard evidence from Dr. Bernardo Kliksberg, Professor Barry Eichengreen, Dr. Sebastian Edwards, as well as from the witnesses Ratti, Cipolla, Lamdany and Llorens, on various aspects of these issues. Dr. Kliksberg referred to the origins and social consequences of the crisis, how the crisis evolved, and the possible scenarios that could have unfolded if the measures subject matter of these proceeding had not been taken<sup>67</sup>. Professor Eichengreen expressed that the crisis was the result of a series of external factors that were difficult to predict.<sup>68</sup> Professor Nouriel Roubini, who was not cross-examined during the hearing, had referred in his report to the external shocks affecting the Argentine Republic since 1998, which caused exchange parity to become increasingly difficult to sustain. Dr. Edwards expressed his disagreement with Prof. Eichengreen and Prof. Roubini with respect to the impact of external shocks, and asserted that the analysis that both have provided “is incomplete and thus incorrect.”<sup>69</sup> According to Dr. Edwards, “there [were] a number of ways of dealing with [the crisis], .that did not require pesification”<sup>70</sup>. Dr. Edwards asserts that “Argentina contributed significantly to the crisis by these mistakes of omission [...]”<sup>71</sup>.

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<sup>65</sup> Cl. Mem. ¶¶ 16-73. See in general Tr. Merits, Day 10, 2193:15-2235:3 (English version).

<sup>66</sup> Resp. C-M. ¶¶ 74-85.

<sup>67</sup> Resp. Rej. ¶ 295. Kliksberg Report, 6 March 2012, and Supplementary Report, 3 September 2012.

<sup>68</sup> Tr. Merits, Day 9, 2067:16-2070:09 (English version). In general, Eichengreen Report, 3 September 2012.

<sup>69</sup> Tr. Merits, Day 6, 1280:4-6 (English version).

<sup>70</sup> Tr. Merits, Day 6, 1284:7-8 (Lamdany) (English version).

<sup>71</sup> Tr. Merits, Day 6, 1279:19-20 (English version).



(E) The Law 25,561 and its effects

95. On 6 January 2002, Argentina passed Law 25,561, the Public Emergency and Foreign Exchange System Reform Law (“the Emergency Law” or “Law 25,561”).<sup>72</sup>
96. The Emergency Law abrogated several provisions of the Convertibility Law.<sup>73</sup>
97. Respondent asserts that Argentina had to adopt certain measures in order to attempt to remedy the worst economic, social and institutional crisis in the history of the country.<sup>74</sup>
98. The Emergency Law a) set forth the conversion into Argentine pesos of all obligations expressed in foreign currency that were connected with the financial system; b) abrogated adjustment clauses in US dollars or other foreign currencies and indexation clauses based on price indexes of other countries, as well as any other indexation mechanism provided for in the contracts entered into by the Government under public law; c) with regard to contracts between private persons not related to the financial system, it provided that—all considerations [would] be paid in Argentine pesos at an exchange rate of ONE ARGENTINE PESO (ARS 1) = ONE US DOLLAR (USD 1), as payment for the amount to be ultimately agreed upon by the parties, or such amount as might be determined through court proceedings if the parties failed to reach an agreement. The Emergency Law additionally provided for the renegotiation of both private and public contracts in order to adapt them to the new foreign exchange system.<sup>75</sup>
99. Days later, by Decree No. 214/02, Argentina additionally ordered the conversion into Argentine pesos of—all the obligations to pay a sum of money, whatever their cause or origin—whether arising from court proceedings or otherwise—expressed in US dollars or other foreign currencies, existing when the Emergency Law was enacted and which have not yet been converted into Argentine pesos.<sup>76</sup>

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<sup>72</sup> Cl. Mem. ¶¶ 27, 185. Law 25,561, 6 January 2002 (“Emergency Law”) (Exh. CX-63).

<sup>73</sup> Cl. Mem. ¶¶ 28, 189. Cl. Rep. ¶ 43. Resp. C-Mem. ¶ 25.

<sup>74</sup> Resp. C-Mem. ¶1.

<sup>75</sup> *Ibid.*, ¶ 28. Cl. Mem. ¶¶ 189, 191. Emergency Law, at 3-4 (Exh. CX-63).

<sup>76</sup> Resp. C-Mem. ¶ 29. Decree No. 214/02, 3 February 2002 (Exh. RA 194).

100. As a result, PdL's contractual rights to set the basic toll rate in US dollars for its 25-year Concession and to have the rate adjusted for inflation pursuant to the U.S. Consumer Price Index, were eliminated.<sup>77</sup>
101. According to the Claimant, because of the impact of the Emergency Law on the toll revenues under the Concession Contract, the Project was no longer viable and IDB refused to continue to negotiate the loan. By letter of 28 February 2002, the IDB informed PdL of its decision to cease discussion concerning the loan.<sup>78</sup>
- (F) Suspension of Constructions, Project Delay and Additional Capital Infusions by Hochtief ("inter-company loans") (2002), Argentina Provides Financing (February 2003 Loan)
102. According to Claimant, at the time the Emergency Law was enacted, the Project was approximately 93% complete, but the bridge could not be left incomplete and the work suspended until the structure was complete, because it could collapse. Hochtief and Impregilo had therefore to inject additional funds, into PdL by means of inter-company loans. Hochtief's one-half share of these loans was US\$ 5.4 million in 2002. The bridge span was closed on 5 February 2002.<sup>79</sup>
103. On 18 January 2002, PdL requested that in light of the impact of the Emergency Law on the Project, Argentina provide PdL with an advance on compensation. Since there was no response from Argentina, in early March 2002, PdL's Board decided to suspend construction on the Project.<sup>80</sup>
104. On 22 March 2002, PdL again sought assistance from Argentina in financing the Project because, according to Claimant, the Emergency Law had made the Project unviable and eliminated PdL's ability to obtain third-party financing.<sup>81</sup>

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<sup>77</sup> Cl. Mem. ¶ 192, 202.

<sup>78</sup> Cl. Mem. ¶ 204. Lommatzsch Stmt. ¶ 88, n. 4; 28 February 2002 letter IDB (Exh. CX-70).

<sup>79</sup> Cl. Mem. ¶¶ 205-207.

<sup>80</sup> *Ibid.*, ¶¶ 209-211.

<sup>81</sup> *Ibid.*, ¶ 214. Lommatzsch Stmt. ¶ 100; PdL's 22 March 2002 letter (Exh. CX-72).

105. On 22 October 2002, the Argentine Republic and the Provinces of Santa Fe and Entre Ríos entered into an Agreement as an effort to complete the Project. It was agreed that the Argentine Ministry of Economy was to provide the funds required to such effect.<sup>82</sup>
106. By letter No. 962/2002, dated 26 November 2002, the Secretariat of Public Works pledged to provide PdL with assistance in funding for the completion of the Project, in the form of an advance against future compensation due to PdL because of the pesification of the US dollar toll provided for in the Contract.<sup>83</sup>
107. The text of the Financial Aid Agreement was approved by Decree No. 172 dated 3 February 2003, in the amount of AR \$51,648,352, granted by the Road Infrastructure Fund.<sup>84</sup> Claimant asserts that this was just enough to complete construction and open the Project to traffic.<sup>85</sup> According to Claimant, PdL was advised that if it did not agree to the terms of the “Financial Aid” Loan, Argentina would declare PdL to be in default, cancel the Concession resulting in a drawdown of the Letter of Credit in place.<sup>86</sup>
108. On 21 February 2003, the Argentine Ministry of Economy and PdL signed the “Financial Aid” Loan (the “February 21 Agreement” or “Financial Aid Agreement”). Under Section 3 of the February 21 Agreement, PdL agreed to secure repayment of the amount of the financial aid, by assigning its toll collection rights to the *Fondo Fiduciario de Infraestructura Vial*, from the date of commercial operation until the entire amount has been repaid, including financial expenses, net of the Concession’s operation and maintenance expenses.<sup>87</sup> Respondent notes that the assignment of the toll collection rights was contemplated by section 33 of the Concession Contract.<sup>88</sup> Respondent asserts that the

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<sup>82</sup> Resp. C-M ¶ 182. Agreement executed by and between the Argentine State and the Provinces of Entre Ríos and Santa Fe, 22 October 2002 (Exh. RA 213).

<sup>83</sup> Cl. Mem. ¶ 218. Secretariat of Public Works’ 26 November 2002 letter (Exh. CX-76).

<sup>84</sup> Resp. C-M ¶ 185.

<sup>85</sup> Cl. Mem. ¶ 219. Lommatzsch Stmt. ¶ 109; PdL’s 21 February 2003 letter (Exh. CX-78).

<sup>86</sup> Cl. Mem. ¶ 220. Lommatzsch Stmt. ¶¶ 112-114.

<sup>87</sup> Cl. Mem. ¶ 222. Lommatzsch Stmt. ¶ 115. Resp. C-M. ¶ 186. Financial Aid Agreement, section 3 (Exh. CX-78).

<sup>88</sup> Resp. C-M. ¶ 186. Concession Contract, section 33 (Exh. RA 12).

Argentine Government made a significant effort to finance the completion of the Project, even if the Concessionaire was exclusively responsible for such financial resources.<sup>89</sup>

109. PdL received the initial tranche of funds under the February 21 Agreement on 28 February 2003, and resumed work to complete the Project.<sup>90</sup> The Project was opened to traffic on 23 May 2003.<sup>91</sup>
110. Claimant asserts that Argentina had only paid PdL AR \$39.6 million from the agreed AR \$52 million loan, when Argentina abruptly stopped disbursements under the February 21 Agreement. According to Argentina, it stopped payment because a subcontractor, who had worked on the Project, made a claim against PdL for unpaid work, to which PdL replied that it had been unable to pay the subcontractor because of the loss of the third party funding resulting from Argentina's failure to timely pay the Subsidy.<sup>92</sup>
111. Claimant claims that because Argentina failed to make all required payments under the February 21 Agreement in a timely fashion, Hochtief and Impregilo were forced to make further inter-company loans to PdL to complete the Project, not called for in the Contract. Hochtief's share of the contribution made in 2003 was of US\$ 4,172,565.<sup>93</sup>
112. In early July 2003, PdL received Public Works Resolution 14 dated 30 June 2003, from the Secretariat of Public Works ("Resolution 14"), that changed the terms of the February 21 Agreement. It modified the applicable interest rate; interest was to be compounded on a daily basis; maintenance and operation expenses were pesified and would be deemed equal to the pesified amount of the projected costs in 1997; collections under the loan would be made on a daily basis; amounts that PdL could not pay would be added to the principal amount of the loan on a daily basis. According to Claimant, after one year of

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<sup>89</sup> Resp. C-M. ¶ 190.

<sup>90</sup> Cl. Mem. ¶ 223. Lommatzsch Stmt. ¶ 116

<sup>91</sup> Cl. Mem. ¶ 224

<sup>92</sup> Cl. Mem. ¶ 225. Lommatzsch Stmt. ¶ 119

<sup>93</sup> Cl. Mem. ¶ 226. Lommatzsch Stmt. ¶ 120

daily payments, and daily compounding and capitalization of interest, the principal balance of the loan grew to over AR \$41 million.<sup>94</sup>

113. On 26 August 2003, PdL formally appealed Resolution 14, and requested that operation of Resolution 14 be stayed pending resolution of the appeal. According to Claimant, as of PdL's insolvency proceeding in April 2007, PdL was forced to comply with Resolution 14 since neither the appeal nor the stay were acted upon by the Public Administration.<sup>95</sup>

(G) Further Capital infusions by Hochtief (2004-2005) and Total Loans and Capital Infusions

114. According to Claimant, because of the shortfall resulting from the daily collection of loan interest, and the reduced allowance for maintenance and operating expenses, PdL had not had funds to maintain the Project or pay daily expenses. As a result, Hochtief and Impregilo had to make further inter-company loans throughout 2004 and 2005 to fund part of those expenses.<sup>96</sup>

115. Claimant asserts that the total of Hochtief's equity contributions, inter-company loans and accrued interest on those loans up to 31 December 2009 was US \$117.8 million.<sup>97</sup>

(H) Renegotiations and PdL's Insolvency Proceedings (Concurso Preventivo)

116. Section 9 of the Emergency Law and its related decree ordered the renegotiation of all public works contracts in order to mitigate the detrimental effects of the currency devaluation and mandated that contracts be renegotiated within 120 days of 1 March 2001. The Argentine Congress has subsequently ratified and amended the general stipulations of Law 25,561<sup>98</sup>.

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<sup>94</sup> Cl. Mem. ¶¶ 227-230. Lommatzsch Stmt. ¶¶ 122-124. Resolution 14 of 30 June 2003 (Exh. CX-79).

<sup>95</sup> Cl. Mem. ¶ 231. Lommatzsch Stmt. ¶¶ 125-127.

<sup>96</sup> Cl. Mem. ¶ 232. Cl. Rep. ¶ 71. Lommatzsch Stmt. ¶ 128.

<sup>97</sup> Cl. Mem. ¶ 234. LECG Report, ¶¶ 6, 37, 62, 83; Tables V and IX.

<sup>98</sup> Law 25.561, at § 9 (Exh. CX-63).

117. By Decree No. 311/03 the *Unidad de Renegociación y Análisis de Contratos de Servicios Públicos* (“UNIREN”) was created.<sup>99</sup> UNIREN is the agency charged with coordinating the renegotiation proceedings provided for by Article 9 of the Emergency Law, Law 25,561.
118. On 16 May 2006, UNIREN and PdL subscribed the first Letter of Understanding (*Carta de Entendimiento*) (“the May 2006 CdE” or “First Letter of Understanding”).<sup>100</sup> Claimant notes that Argentina’s approval under the May 2006 CdE was conditioned on a public hearing and other procedures<sup>101</sup>, which Argentina never attempted to hold.<sup>102</sup> Respondent asserts that the public hearing requirement was in compliance with the regulations ordering the renegotiation process<sup>103</sup>. Respondent notes that the May 2006 CdE modified the conditions for reimbursement of the February 21 Financial Aid Agreement,<sup>104</sup> and asserts that the validity of the May 2006 CdE was subject to the payment of PdL’s debt to the subcontractor.<sup>105</sup>
119. A second *Carta de Entendimiento* was sent by UNIREN on 12 February 2007 (“the February 2007 CdE” or “Second Letter of Understanding”)<sup>106</sup>. This revised letter also required, as a precondition to the renegotiations, for PdL to waive the rights against Argentina of two-thirds of its shareholders under international investment law, including the BIT, and for PdL to indemnify Argentina for any such claims brought against Argentina by PdL shareholders. According to Claimant, although the February 2007 CdE was less favorable, and PdL had indicated that it could accept Argentina’s proposal,

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<sup>99</sup> Resp. C-M. ¶ 195. Decree No. 311/03 issued by the Argentine Executive (Exh. RA 222).

<sup>100</sup> Cl. Mem. ¶ 242. May 2006 CdE (Exh. CX-94). Resp. C-M. ¶ 200. Lamdany Stmt. ¶¶ 45-47. Respondent’s PHB ¶ 143. Resp. Rej. ¶ 152.

<sup>101</sup> Resp. Rej ¶ 149.

<sup>102</sup> Cl. Mem. ¶ 242

<sup>103</sup> Resp. Rej. ¶ 149. Section 9.b of Presidential Decree No. 311/2003 provides: —The execution of [integral or partial contract renegotiation] agreements must be preceded by a public hearing which helps users become involved in the decision-making process, in the form of the Unit of Renegotiation and Analysis of Public Service Contracts, to determine the procedures and mechanisms fit to implement such public hearing. (Exh. RA 222).

<sup>104</sup> Resp. C-M. ¶ 202. Letter of Understanding of 16 May 2006, Nos. five and six (Exh. CX-94). Lamdany Stmt. ¶¶ 48-49.

<sup>105</sup> Resp. PHB ¶ 143.

<sup>106</sup> Cl. Mem. ¶ 244. Cl. Rep. ¶ 85. February 2007 CdE (Exh. CX-100). Resp. C-M. ¶ 204.

Argentina nevertheless failed to implement the plan.<sup>107</sup> Respondent confirmed that the February 2007 CdE was executed on 27 February 2007,<sup>108</sup> stating that it was more advantageous to the Concessionaire than the previous one.<sup>109</sup>

120. On 24 April 2007, PdL received notice that one of its subcontractors, the joint venture of Boskalis-Ballast Nedam Baggeren, had initiated bankruptcy proceedings against PdL as a result of an unpaid arbitral award.<sup>110</sup>
121. On 2 May 2007, PdL initiated insolvency proceedings, as previously approved on 26 April 2007 by its board of directors<sup>111</sup>, to avoid the liquidation of PdL and the loss of the Concession.<sup>112</sup> The Court granted PdL's insolvency petition on 22 May 2007, which was ratified by PdL's shareholders on 24 May 2007.<sup>113</sup> Claimant notes that the viability of the insolvency payment scheme would depend on the Government's renegotiation of the Concession Contract.<sup>114</sup>
122. By letter of 10 May 2007, UNIREN notified PdL that the February 2007 CdE was no longer effective, in view of the petition that had been filed by PdL to commence an insolvency proceeding.<sup>115</sup>

(I) Ballast Nedam

123. Ballast Nedam Baggeren B.V. together with Boskalis International B.V. ("Boskalis") formed a joint venture (the "Joint Venture") that entered into a dredging subcontract with

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<sup>107</sup> Cl. Mem. ¶ 244.

<sup>108</sup> Resp. C-M. ¶ 204. Resp. PHB ¶ 144. Letter of Understanding of 27 February 2007 (Exh. CX-100).

<sup>109</sup> Resp. PHB ¶ 144.

<sup>110</sup> Cl. Mem. ¶251. Cl. PHB ¶ 96.

<sup>111</sup> Resp. PHB ¶ 147. Exh. RA 320.

<sup>112</sup> Cl. Mem. ¶ 251. Lommatzsch Stmt. ¶¶ 159-161. Cl. PHB ¶ 96. Concession Contract, section 30.1 (Exh. RA 12).

<sup>113</sup> Cl. Mem. ¶ 251.

<sup>114</sup> Cl. PHB ¶ 97.

<sup>115</sup> Resp. C-M. ¶¶ 205-206. Resp. Rej. ¶ 163. Resp. PHB ¶ 147. Letter from UNIREN No. 262/07 of 10 May 2007 (Exh. RA 232).

PdL dated 18 December 1998<sup>116</sup>. Respondent notes that the Joint Venture was PdL's main subcontractor in the Project, and that it played a prominent role at critical moments of the Concession Contract<sup>117</sup>.

124. Boskalis and Ballast Nedam Baggerem commenced an ICC arbitration on 15 January 2002 on account of PdL's inability to pay the Joint Venture for dredging services,<sup>118</sup> and a bankruptcy action against PdL in December 2005 due to the ICC award going unpaid.<sup>119</sup>
125. Hochtief confirmed that it "did at one point hold a non-controlling, minority interest in Ballast Nedam N.V., the parent company of Ballast Nedam Baggerem". The consequences thereof, if any, in respect of the issue of causation of PdL's claimed losses is a matter of dispute between the Parties.
126. According to Claimant, it was not involved in the ownership or management of Ballast Nedam Baggerem when the Joint Venture commenced ICC arbitration. Hochtief asserts that in November of 2001, Ballast Nedam Baggerem merged with a subsidiary of Hollandsche Beton Groep N.V. ("HBG"), to form a new company, Ballast HAM Dredging ("BHD"). Claimant further asserts that Ballast Nedam sold its interest in BHD in late 2002<sup>120</sup>, and that Hochtief had no interest in Ballast Nedam after 2004.<sup>121</sup> Claimant concludes that Hochtief's one-time ownership in Ballast Nedam has no relevance to any claim or defense in this proceeding.<sup>122</sup>

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<sup>116</sup> Cl. PHB. ¶ 303. *Contrato de Locación de Obra*, 18 December 1998 (Contract for Works between Puentes del Litoral and the Joint Venture Boskalis – Ballast Nedam) (Exh. RA 497). *Contrato de Unión Transitoria de Empresas*, 10 June 1998 (Joint Venture Agreement between Boskalis International bv Sucursal Argentina and Ballast Nedam Baggerem bv Sucursal Argentina) (Exh. RA 494).

<sup>117</sup> Resp. PHB ¶ 100.

<sup>118</sup> Cl. PHB ¶¶ 303, 305.

<sup>119</sup> *Ibid.*, ¶ 306.

<sup>120</sup> *Ibid.*, ¶ 305. Ballast Nedam Annual Report, 2002, at 4, 15, 17, 20, 31 – 32 (Exh. RA 495.5); Ballast Nedam Annual Report, 2003, at 43, 66 (Exh. RA 495.6).

<sup>121</sup> Cl. PHB ¶¶ 305-306. HT\_01156, Hochtief Annual Report (2004), at 59. According to Claimant, this sale, and the retirement from the Ballast Nedam board of two individuals appointed by Hochtief, is also reported in Ballast Nedam's annual report for 2004 (Exh. RA 495.7 at 5, 12).

<sup>122</sup> Cl. PHB ¶ 307.



127. Respondent notes that it only learnt about Hochtief's participation in Ballast Nedam during the examination of a witness on the fifth day of the hearing on the merits, and accuses Claimant of having concealed such relationship, as well as of depriving the Tribunal and Respondent of the possibility of analysing any evidence in relation to Hochtief's participation in the decision-making process of Ballast Nedam.<sup>123</sup>
128. According to Respondent, Claimant failed to meet certain obligations concerning transparency and conflicting interests during the selection processes conducted by the Concessionaire.<sup>124</sup>
129. Respondent notes that PdL contracted the debt with the Joint Venture, at the beginning of the Concession, while Hochtief was still a shareholder of both companies, and that such debt was a fundamental cause for the difficulties experienced by PdL's Concession, that culminated with the Joint Venture's claim before the ICC, and the subsequent bankruptcy petition against PdL.<sup>125</sup>
130. Respondent notes that the IDB was not notified of Hochtief's shareholding in Ballast Nedam either,<sup>126</sup> even though in various letters from PdL to the IDB, reference had been made to "some subcontractors hav[ing] announced their intention to file a petition for bankruptcy against PdL";<sup>127</sup> to the need of the financing resources from the IDB to "stop the filing of lawsuits against it by subcontractors."<sup>128</sup> Respondent further notes that in its letter to the IDB of 15 November 2001, PdL had mentioned owing more than \$60 million to its subcontractors and providers, but had still failed to inform that such debt had been incurred with a related company<sup>129</sup>.
131. According to Respondent, the few documents submitted by Hochtief show that its influence on Ballast Nedam was decisive in the decision-making of that company, from

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<sup>123</sup> Resp. PHB ¶¶ 99, 115.

<sup>124</sup> *Ibid.*, ¶¶ 101-103.

<sup>125</sup> *Ibid.*, ¶¶ 110-112.

<sup>126</sup> *Ibid.*, ¶ 105.

<sup>127</sup> *Ibid.*, ¶ 124. Letter from PdL to the IDB, 4 October 2001, p. 2 (Martín Bes Stmt. Exh. MB 4).

<sup>128</sup> Resp. PHB ¶ 124. Letter from PdL to the IDB, 15 November 2001, p. 1 (Exh. RA 283).

<sup>129</sup> Resp. PHB ¶ 125. Letter from PdL to the IDB, 15 November 2001, p. 2 (Exh. RA 283).

1993 until at least mid-2004, when it held almost 50% of the shares and had nearly 48% of the votes of Ballast Nedam.<sup>130</sup>

132. On 28 January 2003, the Joint Venture sought an order of attachment of PdL's accounts in connection with the claim filed against PdL for unpaid sums.<sup>131</sup> According to Respondent, this precluded the disbursements relating to certificates 5 to 13 provided for in the Financial Aid Agreement.<sup>132</sup>

(J) The Transitory Agreements

133. As part of the renegotiation process, in December 2009, a First Transitory Agreement was reached ("the December 2009 Transitory Agreement"), which was signed by PdL on December 17, 2009<sup>133</sup>. Claimant notes that this agreement could be terminated by either party if it was not implemented within 60 days (i.e. by 15 February 2010), and that, like the May 2006 and February 2007 CdEs, the December 2009 Transitory Agreement required PdL to waive the rights against Argentina of two-thirds of its shareholders, but it did not contain an indemnification requirement. According to Claimant, the December 2009 Transitory Agreement was never implemented.<sup>134</sup>
134. The December 2009 Transitory Agreement contemplated a transitory modification of the rate, as well as several aspects of the contract binding the parties, taking into account the PdL's insolvency proceedings.<sup>135</sup> The execution of the December 2009 Transitory Agreement was approved by PdL's shareholders' and Board of Directors. Respondent asserts that "UNIREN included in the records the letters issued by the company and its shareholders representing more than two thirds (2/3) of the capital stock, as well as

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<sup>130</sup> Resp. PHB ¶ 120. Shareholders' Agreement of Ballast Nedam B.V., p. 6. (Exh. RA 503).

<sup>131</sup> Resp. PHB ¶ 137.

<sup>132</sup> *Ibid.*, ¶¶ 137, 152.

<sup>133</sup> Cl. Rep. ¶ 88. Resp. Rej. ¶ 167.

<sup>134</sup> Cl. Mem. ¶¶ 245-246.

<sup>135</sup> Resp. C-M. ¶ 210.

certified copies of the registry of shareholders' and the minutes of the Board of Directors whereby the said company approved the execution of the Transitory Agreement".<sup>136</sup>

135. Upon approval of PdL's creditors' agreement (30 December 2009), a Second Transitory Agreement was agreed upon and executed by PdL on 14 June 2010<sup>137</sup> ("the June 2010 Transitory Agreement").
136. A public hearing took place in the city of Victoria on 17 June 2011, where a petition to amend the agreement's transitional tariff regime was debated.<sup>138</sup>
137. This amendment resulted in a Third Transitory Agreement, (the "October 2011 Transitory Agreement"), signed by PdL on 13 October 2011.<sup>139</sup> Such agreement was submitted to the *Procuración del Tesoro de la Nación* for an opinion, as required by the applicable regulations.<sup>140</sup>
138. Pursuant to Opinion No. 40 of 29 February 2012, certain adjustments were made to the agreement, and UNIREN presented a Fourth Transitory Agreement to PdL in March 2012, which PdL signed on 6 March 2012. (the "March 2012 Transitory Agreement")<sup>141</sup>.
139. The March 2012 Transitory Agreement was signed by the decision of the majority of PdL's shareholders<sup>142</sup>.
140. In this context, reference has been made to PdL's Shareholders' Agreements of 15 May 1999 ("the 1999 Shareholders' Agreement")<sup>143</sup>, and of 11 April 2002 ("the 2002 Shareholders' Agreement")<sup>144</sup>.

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<sup>136</sup> *Ibid.*, ¶ 211.

<sup>137</sup> Resp. Rej. ¶ 169. Second Transitory Agreement, 14 June 2010 (Exh. CX-150).

<sup>138</sup> Resp. Rej. ¶ 170.

<sup>139</sup> Cl. Rep. ¶ 90. Resp. Rej. ¶ 171. Lommatzsch Supp. Stmt., ¶ 15. Third Transitory Agreement, October 2011 (Exh. CX-156).

<sup>140</sup> Resp. Rej. ¶ 171. Cl. Rep. ¶ 90.

<sup>141</sup> Cl. Rep. ¶ 91. Lommatzsch Supp. Stmt., ¶ 18. Fourth Transitory Agreement, March 2012 (Exh. CX-160). As the March 2012 Transitory Agreement is in Spanish, Claimant submitted an English translation that was added to the record as Exh. CX-160(b).

<sup>142</sup> Resp. PHB ¶¶ 169-171.

141. The relevance of the March 2012 Transitory Agreement and of PdL's Shareholders' Agreements is a matter of dispute between the Parties. The Parties' respective experts, at request of the Tribunal<sup>145</sup>, addressed the corporate governance issue concerning the extent to which Hochtief's rights or interests in PdL could lawfully be removed, compromised, or otherwise materially and adversely affected by a decision of the majority shareholders in PdL and of any remedies available under Argentine law for the protection of the interests of minority shareholders<sup>146</sup>.
142. Claimant contends that the Shareholders' Agreements have no bearing, as a legal or factual matter, on the Tribunal's determination of Hochtief's Treaty claims or the damages that should be awarded to Hochtief.<sup>147</sup> According to Claimant, Hochtief has not waived any claims, and PdL has not compromised, settled or waived any of Hochtief's claims in the March 2012 Transitory Agreement.<sup>148</sup>
143. Respondent claims that by PdL signing the March 2012 Transitory Agreement, PdL accepted, by the majority of its shareholders, the validity of one of the two measures to which this case relates, the Emergency Law.<sup>149</sup>
144. Claimant asserts that Respondent has failed to implement any of the transitory agreements PdL entered into, and that there has been no comprehensive renegotiation of the Concession Contract.<sup>150</sup> Claimant further asserts that the basic toll rate remains frozen at the pesified contract rate (where they stood since the Project opened to traffic on 23 May 2013).<sup>151</sup>

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<sup>143</sup> Shareholders' Agreement, 25 May 1999 (Exh. RA 501).

<sup>144</sup> Shareholders' Agreement, 11 April 2002. (Exh. RA 502).

<sup>145</sup> Tribunal's letter of 7 January 2013.

<sup>146</sup> Nissen Supp. Report, Mata Second Supp. Report, and Mairal Expert Opinion of 1 February 2013.

<sup>147</sup> Claimant's letter of 14 March 2013 ¶ 1.

<sup>148</sup> Cl. PHB ¶¶ 276-279. Claimant's letter of 14 March 2013 ¶ 11.

<sup>149</sup> Resp. PHB ¶¶ 169, 171.

<sup>150</sup> *Ibid.*, ¶ 276.

<sup>151</sup> Cl. Mem. ¶ 247. Cl. Rep. ¶ 92. Lommatzsch Stmt. ¶ 157.

(K) Insurance provided by the German Government

145. Hochtief received an indemnification under the German Government's Federal Guarantees for Direct Investments in Foreign Countries program (Guarantee Policies No. GKE 3947 of 20 September 1999 and No. GKE 4151 of 6 September 2001), against political risks<sup>152</sup>, in the amount of EUR 11,359,773.20 relating to Hochtief's capital contributions to PdL.<sup>153</sup>
146. The grounds for requesting compensation under these guarantees were the same as those of this arbitration: the adoption of regulatory measures implemented by the Argentine Republic in the beginning of 2002 in connection with the Emergency Law,<sup>154</sup> the non-disbursement of the IDB loan,<sup>155</sup> and the financial aid for 2003.<sup>156</sup>
147. The relevance of these payments to this proceeding is a matter of dispute between the Parties.

#### IV. JURISDICTION AND ADMISSIBILITY

148. In its Decision on Jurisdiction dated 24 October 2011, the Tribunal decided by a majority:

“(i) to reject the Respondent's submission that the Centre has no jurisdiction and the Tribunal has no competence over this case;

(ii) to assert that the Centre has jurisdiction and the Tribunal has competence over this case; and

(iii) to decide upon the question of costs and fees at a later stage, along with the merits of the dispute.”

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<sup>152</sup> Resp. PHB ¶ 233.

<sup>153</sup> Cl. PHB ¶ 299. *See* Letter from PriceWaterhouse Coopers to Hochtief, 7 December 2007 (agreeing to pay indemnification in the amount of approximately EUR 11.4 million relating to Hochtief's capital contributions to PdL) (Exh. CX-142). Resp. PHB ¶ 233.

<sup>154</sup> Resp. PHB ¶ 233. Hochtief's Request for Compensation of 5 March 2007, pp. 2 and 6 (Exh. RA 358) and Annexes to the Request for Compensation (Exh. RA 473).

<sup>155</sup> Resp. PHB ¶ 233. Hochtief's Request for Compensation of 5 March 2007, p. 2 (Exh. RA 358)

<sup>156</sup> Resp. PHB ¶ 233. Hochtief's Request for Compensation of 5 March 2007, p. 3 (Exh. RA 358)

149. The reasoning of the majority in that Decision distinguished between questions of jurisdiction and questions of admissibility.<sup>157</sup> The Decision settled the question of jurisdiction in the present case, but did not address questions of the admissibility of each element of the claims except in so far as that was necessary in the course of the analysis of the question of jurisdiction. Accordingly, this Decision on Liability begins with an analysis of the challenges that were raised by Respondent to the admissibility of Claimant's case. Those objections fall under five broad headings: (A) matters arising from the separate personality of PdL; (B) temporal limitations upon the claims; (C) Claimant's recovery under political risk insurance; (D) Claimant's claims *qua* creditor; and (E) the 'Ballast Nedam' arguments.

(A) The 'PdL Questions'

150. Respondent raised three arguments that bear upon the admissibility of the claims, and which are rooted in the relationship between Claimant and PdL. They flow from Respondent's contention that this case is based upon Claimant's allegations that Respondent acted unlawfully towards PdL as the holder of the Concession and, in essence, that PdL stood between Claimant and Respondent.

151. Specifically, Respondent argued: (i) that the Tribunal should not admit a claim made by Claimant in respect of rights that belong to PdL;<sup>158</sup> (ii) that the Tribunal should not admit a claim made by Claimant in respect of measures that were consented to by PdL;<sup>159</sup> and (iii) that a ruling in favour of Claimant would, in light of the agreement reached between Respondent and PdL, lead either to double recovery or to recovery by a shareholder (Claimant) at the expense of the company (PdL) and its other creditors and shareholders.<sup>160</sup>

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<sup>157</sup> Decision on Jurisdiction, ¶ 90 ff.

<sup>158</sup> Resp. Rej. ¶¶ 18-24.

<sup>159</sup> Resp. PHB ¶ 1.

<sup>160</sup> *Ibid.*, ¶ 2.

152. Before turning to these three specific arguments, the Tribunal will set out its analysis of the relationship between PdL's rights and Claimant's rights.

a) PdL's Rights and Hochtief's Rights

153. The Tribunal has already decided in the context of its Decision on Jurisdiction that Hochtief is an investor. It is a shareholder in PdL, and it can bring a claim for any breach of the terms of the Treaty that has damaged its shareholding in PdL. That follows from the definition of an 'investment' in Article 1.1 of the Treaty, which includes "shares, stocks in companies and other forms of participation in companies." But in the present case all of the alleged breaches arose from Respondent's conduct in its dealings with PdL, and not from Respondent's conduct in its dealings directly with Claimant or other shareholders in PdL or with their shareholdings. The question is whether that renders Claimant's claim inadmissible.

154. The harm for which Claimant seeks redress is the "losses to Hochtief AG's investments in PdL", to use the words of the title of the LECG First Report, dated 29 April 2010. In other words, the harm to Claimant alleged to have resulted from Respondent's breach of the Treaty is the diminution in the value of Claimant's investments in PdL caused by Respondent's treatment of PdL: it is what is sometimes called 'reflective loss'.<sup>161</sup>

155. PdL has signed what might be characterized as a settlement of its claims against Respondent: the 2012 Transitory Agreement. Respondent argues that the Treaty obligations were owed to PdL, that any harm suffered was suffered by PdL and that, as a shareholder in PdL, Claimant has no right to opt out of the settlement accepted by PdL. On this view, redress has been offered by Respondent and accepted by the injured party, PdL; and Claimant as a minority shareholder in that injured party is bound by that settlement.

156. Were those the only material facts there would be a strong argument for concluding that Claimant has no basis to protect its rights and interests as a minority shareholder in PdL by rejecting the settlement that was reached by a majority of PdL shareholders with

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<sup>161</sup> See the LECG Report, 29 April 2010, ¶ 44 and Executive Summary, ¶ 1.

Respondent and pursuing a separate claim. This is the conclusion that would appear almost axiomatic from the perspective of company law. Anyone who invests as a minority shareholder runs the risk that the decisions properly taken by majority shareholders will be undesirable, or even inimical, to them: that is a consequence of shareholder democracy, and a price of being a minority shareholder.

157. In the present case, however, the analysis does not focus on the question of whether the company – PdL – is a separate legal entity (which it plainly is) and on what rights are held as a matter of Argentine law by the company and what rights are held by Claimant as a shareholder. The analysis starts instead with the question of what rights Claimant has as a matter of treaty law as an investor under the BIT; and that question must be addressed within the particular context of the BIT, and not by proceeding from principles of municipal company law, no matter how widely or how firmly those municipal law principles are established or may otherwise be relevant to issues of corporate governance that may arise in the course of considering a treaty claim. In this context, the Tribunal attaches particular importance to two material facts.
158. First, the initial investment was made by members of a consortium, which bid for the Project as a consortium. The Concession was awarded by Respondent to that consortium: not to PdL or to some other single company, but to the members of the Consortium. The incorporation of PdL was required by the terms of the bid offer in order to implement the terms of the Concession.
159. The Concession Contract<sup>162</sup> was signed by each one of the Consortium members, including Claimant, on 28 January 1998. The Ministry, too, signed on that day, and time then started to run on the obligations under the Concession Contract.<sup>163</sup> The Tribunal considers that the investment was made no later than that date, and that the Claimant's own investment at that time took the form of the obligations under the Concession Contract accepted by Claimant in return for the right to participate in the Consortium Project as agreed with the Respondent.

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<sup>162</sup> Exh. CX-32.

<sup>163</sup> Cf., Villagi's Testimony, Tr. Day 4, p. 725.



160. Claimant's rights as an investor were at that time *its own rights in relation to the Project as a member of the Consortium*, and not its rights *qua* shareholder in PdL; and Respondent's obligations to Claimant under the BIT date from that time. Among Claimant's rights at that time was the right to be treated fairly and equitably.
161. PdL was incorporated on 1 April 1998; and on 17 June 1998 all the rights and duties set out in the Concession Contract were transferred by and from the Consortium to PdL ('the transfer').<sup>164</sup> On 17 June 1998, as a result of the transfer, Claimant's investment changed its legal form; but Claimant nonetheless continued to hold an investment in Argentina.
162. This is not a case where the State has dealt with a single company throughout the relevant time, and a claimant shareholder has subsequently emerged from behind a hitherto-intact corporate veil and announced that it is seeking redress for alleged injuries to the company.
163. Nor is this a case where it can be said that Claimant is trying to obtain the benefits – chiefly, limited liability – of the corporate form while seeking to avoid its disadvantages. The Concession Contract itself ensured that the Consortium members would secure the transfer to PdL of what the Parties to the Concession Contract regarded as adequate financial resources for the Project, so that the incorporation of PdL cannot be regarded as an improper attempt to avoid financial liability.
164. Secondly, the Concession Contract itself (in Article 5.2) stipulated that PdL would assume all obligations and rights of the Consortium members under the Concession Contract. Both Respondent and Claimant entered into the Project knowing that for the purposes of pursuing the Project PdL would be the vehicle and the nominal actor, while behind PdL the commercial interests would remain in the hands of the individual members of the Consortium. The legal form of the investments would change; but the underlying commercial reality would not.

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<sup>164</sup> Exh. CX-36; Exh. RA 126.

165. It is plainly possible in circumstances such as these to transfer to a locally-incorporated corporation all of the substantive contractual rights (here, the rights under the Concession Contract) initially held individually by the investors who collectively own that locally-incorporated corporation. Indeed, that is what was done when PdL was established. Equally, the Tribunal does not doubt that in the context of BIT rights a State and an investor can, by agreement between them, extinguish the right of an investor, as a member of a consortium, to take action in its own name to enforce against the State the rights that it had previously possessed under the BIT.<sup>165</sup> But the question here is different. It is whether the individual investors can transfer to the local corporation their rights under an applicable BIT<sup>166</sup> to protect their substantive rights under the Concession Contract; and if so, whether they did so transfer their rights.
166. It is evident that there can be no simple substitution of PdL for the individual Consortium members. In the present circumstances, for example, the transfer could not confer upon PdL (an Argentine company most of whose shares were owned by investors of other, non-German nationalities) the rights that the Germany-Argentina BIT conferred on German companies, including the Claimant. That effect cannot be brought about within the provisions of the Germany-Argentina BIT. At most, the procedural rights of the Consortium members under the BIT could be extinguished, and supplanted by whatever procedural rights were available to PdL.
167. There is no evidence that Claimant's rights under the BIT were extinguished here. There is no indication in the terms of the invitation to bid, or in the Concession Contract, or in the various unimplemented settlement agreements, that the legal right and capacity of each investor under an applicable BIT to sue to uphold its substantive BIT rights was altogether extinguished by the very fact of the creation of PdL. Section 5.2 of the Concession Contract refers only to the assumption by PdL of "all obligations, liabilities and rights *hereunder* as well as all loans and guarantees applied for and obtained by the

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<sup>165</sup> The rights in question under the BIT are those of the investor, so that there is no question of an attempt by an investor to waive the right of its national State to exercise diplomatic protection on its behalf.

<sup>166</sup> Of all of the Consortium members, Hochtief alone was German. The balance of the Consortium therefore had no rights under the Germany-Argentina BIT.

Successful Bidder in connection herewith” (emphasis added). Rights and obligations *under the Concession Contract* were transferred to PdL: but there is no provision that purports to transfer to PdL Claimant’s rights and obligations under the Germany-Argentina (or any other) BIT or to extinguish such treaty rights.

168. The Tribunal accordingly considers that Claimant retains its standing to bring claims in respect of the treatment of its shareholding in PdL in a situation such as the present, where (i) the investment was clearly made at a date before the establishment of PdL and the Claimant acquired rights under the BIT at that date, and (ii) the bidding terms required the transfer of consortium rights to a company to be established and maintained for the purpose of holding the concession rights so transferred, and (iii) the actual commercial obligations (of financing, of commitment of materials, technology, labour and skills, and of organization of work, etc) remained unchanged by the transfer of rights to PdL, and (iv) there is no evidence that the Claimant had waived or renounced its rights of action against Respondent under the BIT.
169. This is the general reason in principle why the Tribunal does not regard the claims in this case as inadmissible by reason of Respondent’s arguments based upon the separate legal personalities of Claimant and of PdL.
170. Against the background of this explanation of its reasoning, the Tribunal now turns to the three specific arguments noted in paragraph [151] above.

(i) **Claimant’s investment as shareholder in PdL**

171. The Tribunal will first address the argument that the Tribunal should not admit a claim made by Claimant in respect of rights that belong to PdL. As was noted in the Decision on Jurisdiction,<sup>167</sup> Article 1(1)(b) of the BIT is unequivocal in stipulating that an investment includes “Shares, stocks in companies and other forms of participation in

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<sup>167</sup> Decision on Jurisdiction, ¶ 115.

companies.”<sup>168</sup> Further, the Protocol to the BIT specifies that the definition of an investment includes “specifically those capital investments that do not entitle their holders to voting or control rights.”<sup>169</sup> Minority shareholdings are thus clearly included.

172. Claimant owns 26% of the shares in PdL and is plainly entitled to bring a claim in respect of that shareholding,<sup>170</sup> which constitutes an ‘investment’ in Argentina within the meaning of the BIT. The question of the extent of those rights – the question of precisely what rights attach to the shareholding – is distinct; and it is raised also by the second of the arguments distinguished in paragraph [151], above.
173. It is said that under Article 5 of the Concession Contract, Claimant assigned to PdL all of its rights and obligations in respect of the Project, and that Claimant therefore retains no rights for which it can seek protection under the BIT. The Tribunal does not accept that argument.
174. The rights and obligations under the Concession Contract may belong to PdL to the exclusion of the Claimant; but the claim in this case is not made in order to vindicate any of those rights but in order to vindicate rights under the BIT that attach to Claimant’s investment in the shares of PdL. The precise extent of PdL’s own rights and obligations under the Concession Contract will plainly affect the value of Claimant’s investment in the shares of PdL; but, whatever the extent of PdL’s rights under the Concession Contract may be, Claimant as a shareholder in PdL has an interest in the shares of PdL which it is entitled to protect under the BIT.

**(ii) PdL and the March 2012 Transitory Agreement**

175. The second argument is that the Tribunal should not admit a claim made by Claimant in respect of measures that were consented to by PdL. This argument focuses not on the initial assignment of rights by Claimant to PdL but on PdL’s subsequent agreement with

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<sup>168</sup> This is the English translation in the United Nations Treaty Series (‘UNTS’). Vol. 1910, at p. 198. The English translations submitted by the Parties differ in certain details from that in the UNTS, but the Tribunal has examined the authentic German and Spanish texts and is satisfied that there are no material differences.

<sup>169</sup> Protocol, Ad Section 1(c).

<sup>170</sup> Which distinguishes the situation in this case from that in *Barcelona Traction*: see Resp. PHB, ¶ 54.

the Respondent on the settlement of outstanding claims, in the March 2012 Transitory Agreement (*'Acuerdo Transitorio'*).<sup>171</sup>

176. Respondent's argument here is that since PdL held all of the rights that were allegedly violated, PdL was competent, and PdL alone was competent, to agree upon a settlement of any and all claims concerning the violation of those rights, and that PdL did so in the March 2012 Transitory Agreement.<sup>172</sup>
177. For its part, Claimant asserts that the March 2012 Transitory Agreement has not been implemented, and in any event contains no waiver of its Treaty claims.<sup>173</sup>
178. At this point in the analysis we are concerned only with the question whether the argument is applicable as a bar to the admissibility of the claims in this case. We are not concerned at this stage with the question of the implications of PdL's signature of the March 2012 Transitory Agreement for the substantive question of Respondent's liability: that is a merits question, not a preliminary question of admissibility.
179. Whatever those implications might be, PdL's signature of the March 2012 Transitory Agreement cannot operate *in limine* to bar the admissibility of the claim and prevent its consideration by the Tribunal. Claimant contends that PdL was not entitled to settle claims concerning the violation of Claimant's rights, and that it was unfair and inequitable of Respondent to purport to settle those rights of Claimant by means of its agreement with PdL. That contention is put forward by Claimant in respect of its investment in PdL. It is a contention that Claimant is entitled to have considered, and which can be appraised only in the context of a consideration of the merits of the case.

**(iii) 'Double Recovery'; Claimant's profits as construction contractor**

180. Third, Respondent argues that there is a possibility of double recovery.<sup>174</sup> Even assuming that such a possibility exists, however, that is a matter concerning the remedy rather than

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<sup>171</sup> See above, ¶ 155.

<sup>172</sup> Resp. PHB ¶¶ 42-55.

<sup>173</sup> *Ibid.*, ¶ 276 – 279.

<sup>174</sup> Resp. PHB ¶ 2.

the claim. It is not a bar to the admissibility of a claim – unless, perhaps, it arises as an aspect of an argument based upon the principle of *res judicata*, which is not the case here. To the extent that there may be a possibility of double recovery, that is a matter to be taken into account in the context of the need to prove and to quantify loss, and in the drafting of any Order by the Tribunal. The Tribunal accordingly rejects this objection to the admissibility of the claim.

181. Similarly, Respondent submits that the fact that Claimant derived benefits from its involvement in the actual construction of the highway and bridge bears upon the admissibility of its claim.<sup>175</sup> The Tribunal does not consider that submission to have any legal basis. The fact that an investor has earned profits in the capacity of a contractor working on the physical construction of the project in question cannot operate to bar the admissibility of that investor’s claim, although it may bear upon the merits of the claim and / or upon questions of quantum. The Tribunal accordingly rejects this objection to the admissibility of the claim.

(B) The temporal limits of the dispute

182. Over the course of the proceedings, Hochtief supplemented its claims by reference to the continued unfolding of events in Argentina. Respondent asks the Tribunal to limit its consideration to the claims as they stood at 18 December 2007, which is the date of the registration of the Request for Arbitration (the Request for Arbitration itself being dated 5 November 2007).<sup>176</sup>
183. The Tribunal considers it to be axiomatic that the scope of the claims that Respondent is called upon to answer is fixed by the terms of the Request for Arbitration and the Submissions set out in the Memorial. Subject to the possibility of the making of ancillary

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<sup>175</sup> Resp. Rej., ¶¶ 13, 183-186, 194-196; Sandleris and Schargrodsky Valuation Report, ¶¶ 5, 43, 104; Sandleris and Schargrodsky Supplementary Valuation Report, ¶¶ 24, 138-139, 269, where the experts observed that Hochtief had failed to provide access to information pertaining to the revenues it received as a contractor during the construction phase.

<sup>176</sup> Resp. PHB, ¶ 231.

claims arising directly out of the subject-matter of the dispute,<sup>177</sup> those instruments define the case that the Respondent has to answer, and the case in respect of which Preliminary Objections must be made.<sup>178</sup> No ancillary claims have been made in this case; and the difference between the date of the Request for Arbitration and the date of its registration by ICSID is not material. Nor is there any suggestion that the scope of the claims as set out in the Memorial differs from that set out in the Request for Arbitration.

184. As long as the claims remain within the limits thus described, the facts that a tribunal may take into account in order to decide the claims are not confined to those facts that occurred prior to the date of the signature or registration of the Request for Arbitration and / or the Memorial. The *quantum* claimed may clearly need to be updated in the light of later events; and even matters bearing upon liability may be affected by developments up to the date of the hearing – for example, if action by the Respondent amounts to timely reparation for an earlier action that had caused injury to the Claimant.<sup>179</sup> As long as Respondent has been given a proper opportunity to respond to all factual allegations, the consideration of events occurring after the filing of the Request for Arbitration and the Memorial is permissible, and it will be for the Tribunal to determine the relevance of such references for the claims that are properly before it. Respondent had that opportunity to respond in the present case. This appears not to be contested.<sup>180</sup> This objection to the admissibility of the claims is accordingly dismissed.

(C) Claimant's political risk insurance

185. Respondent asserts that on 7 December 2007, the German Government agreed to pay Claimant EUR 11,359 million under a political risk insurance policy that covered the losses encompassed within the claims made in the present case, and that in consequence,

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<sup>177</sup> ICSID Convention Article 46; ICSID Arbitration Rules (2006), Rule 40.

<sup>178</sup> ICSID Convention Articles 36, 41; ICSID Rules (2006), Rule 41.

<sup>179</sup> See, for example, *Swisslion DOO Skopje v Macedonia* (ICSID Case No. ARB/09/16), Award, 6 July 2012, ¶¶ 133-139.

<sup>180</sup> See Resp. PHB, ¶¶ 231- 232.

by virtue of Article 6 of the BIT, Germany is now subrogated to the rights of Hochtief so that Claimant can no longer pursue its claim.<sup>181</sup>

186. The Tribunal does not agree with that analysis. Article 6 is phrased in terms that do not require that the insuring State succeed to and extinguish the rights of the insured investor once payment is made on the insurance policy. Much less does Article 6 itself bring about that legal result. Article 6 merely obliges the respondent State to recognize or admit (*‘reconocerá, ‘erkennt’*) such a transfer of rights if and when the transfer is in fact effected by provision of law or by a legal act. In the present case no such transfer has been shown to have occurred. The Tribunal accordingly dismisses this objection to the admissibility of the claim.

(D) Claimant’s claims as creditor

(i) **Article 22.2 of the Concession Contract**

187. Respondent raises objections to the elements of the claim that arise from Claimant’s position as a creditor of PdL. The first objection concerns Article 22.2 of the Concession Contract.<sup>182</sup> Respondent submits that this provision bars claims against Argentina by lenders to PdL, despite the arbitration clause in the Treaty.<sup>183</sup> In so far as the claims in this case relate to Claimant’s loans to PdL, it is said that the claims are made by Claimant as a creditor of PdL.

188. Article 22.2 provides that:

“Loans entered into by the Successful Bidder and Concessionaire, as the case may be, to finance the construction, maintenance and operation of the Project shall not be secured by Grantor, nor shall the lenders be entitled to any claim against Grantor or the Provinces, all of which shall be indicated in the relevant agreements.”

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<sup>181</sup> *Ibid.*, ¶ 233.

<sup>182</sup> Exh. RA 12.

<sup>183</sup> Resp. Rej. ¶¶ 214, 275; Resp. PHB ¶ 19.



The evident purpose of Article 22.2 of the Concession Contract is to limit the extent of Respondent's liability for loans procured by the Concessionaire. It is a means of ensuring that the State (the Grantor) makes its agreed financial contribution to the Project and that thereafter it faces no further financial exposure: it is for the concessionaire, through what was plainly expected to be a mix of equity and loan financing, to contribute the remaining finance needed for the Project. It may be that Article 22.2 was drafted with third party lenders, rather than inter-company loans, in mind. But the provision does not express any such limitation upon its scope of application, and the majority of the Tribunal sees no basis for reading such a limitation into Article 22.2.<sup>184</sup>

189. Article 22.2 provides that lenders are not entitled to “any claim against the Grantor or the Provinces.” The question is whether “any claim” includes both claims under the law applicable to the loan contract and claims under the BIT. ‘Any claim’ means, on the face of it, *any* claim. The precise legal basis of a claim is not material. The question is whether this is effective to bar BIT claims.
190. It is necessary to decide if an investor can be bound by an agreement with a host State that it will not invoke the protection of the Treaty in relation to a limited and specified range of issues. In the present case, the issues in question are loans by Claimant to PdL, which are legal arrangements to which Respondent is not a party, and whose terms were not agreed by Respondent.
191. The Tribunal considers that there is no legal reason why effect should not be given to an agreement between an investor and a host State either to limit the rights of the investor or to oblige the investor not to pursue any remedies, including its BIT remedies, in certain circumstances. Such an agreement does not purport to alter the terms of the Treaty. Nor does it necessarily purport to bar action in respect of extant responsibilities of the Grantor: it may constitute an agreement by a particular investor to limit the range of matters for which the Grantor carries the risk and responsibility. It may also be regarded

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<sup>184</sup> It is noted that other sections of the Concession Contract, such as Sections 11.1 and 11.3, do expressly provide for the position of third parties.

as an agreement by the investor not to rely upon certain treaty provisions and extant rights in the specified circumstances.

192. The majority of the Tribunal considers that Article 22.2 is such a provision, and that it operates so as to bar “any claim”, including claims under the Treaty, by a signatory to the Concession Contract, such as Claimant, against the Respondent *in so far as the claim is made by the signatory in its capacity as a lender*. Neither the Concession Contract nor the BIT contains any provision that expressly nullifies Article 22.2 or subordinates it to the protections afforded by the Treaty. The Concession Contract is governed by Argentine law,<sup>185</sup> and there is no suggestion that Argentine law imposes any such nullification or subordination upon Article 22.2.
193. In the view of the majority, Article 22.2 takes effect so as to limit the range of matters for which the Grantor carries the risk and responsibility. Under the Concession Contract, the Grantor was to provide a subsidy to the Project and once that subsidy was paid in full, the Grantor bore no further financial exposure. In the case of loans, the parties to the Concession Contract agreed that the Lender and the Successful Bidder and Concessionaire, and not the Grantor, should carry that business risk and responsibility. The Successful Bidder and Concessionaire agreed in the Concession Contract that the Grantor will not carry any liability to any lender for any loans covered by Article 22. In this way, the Concession Contract underlined the basic principle that, having paid the totality of its promised subsidy, Respondent had no further financial exposure: the obligation to arrange finance for the Project lay with the Successful Bidder and Concessionaire, whether by capital contributions, third-party loans, inter-company loans or other arrangements made by the Successful Bidder and Concessionaire.
194. Article 22.2 relates only to claims made by ‘lenders’, which the Tribunal understands to mean claims made by lenders in their capacity as such, relying upon their rights under the relevant loan agreement. The Tribunal accordingly decides, by a majority, that claims made in this arbitration by Claimant in its capacity as a lender to PdL are precluded by

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<sup>185</sup> Concession Contract, Article 35.1; and the Bilateral Investment Treaty, Article 10(5).

the terms of Article 22.2 of the Concession Contract. When valuing Claimant's interests as a shareholder in PdL, however, it will take into account all of the inter-company loans made by Claimant in the same way that all other financial transactions are counted on the balance sheet as corporate assets or liabilities of PdL; but they will not be counted as individual interests of particular lenders.

(ii) **Conformity of the loans with Argentine financial regulations**

195. Respondent argues further that Claimant's loan transactions were not all recorded as required by Argentine financial regulations,<sup>186</sup> and that the loans were accordingly not made in accordance with the laws and regulations of Argentina and are excluded from the scope of the Treaty protection by Article 2(2) of the Treaty.<sup>187</sup>

196. Given the Tribunal's prior finding, strictly speaking it is not necessary to dispose of this objection. However, the Tribunal will make a few comments because the questions raised by the objection are important ones.

197. Article 2(2) reads as follows:

“Investments made by nationals or companies of either Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Party shall enjoy full protection under this Treaty.”<sup>188</sup>

198. Claimant suggested that the loans were not subject to the reporting requirement because PdL was not a financial institution. Respondent did not accept that view; but the Parties did not adduce expert evidence focused on the regulatory requirements, nor did they make detailed submissions on the legal consequences of any failure to make reports required by Argentine regulations. It is also notable that Respondent did not suggest that the loans violated Argentine law in any respect other than a failure to fulfil the reporting requirement that was said to apply to them.

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<sup>186</sup> Respondent maintains that Claimant reported only one foreign-currency loan transaction to the Argentine Central Bank: Resp. PHB ¶ 21; Exh. RA 451.

<sup>187</sup> See Tr., Day 11, pp. 2694 – 2695.

<sup>188</sup> English translation from the version in vol. 1910 of the *United Nations Treaty Series*.

199. The Tribunal notes that in previous cases, tribunals have focused upon compliance with “fundamental principles of the host State’s law”.<sup>189</sup> This Tribunal considers that to be the correct focus when the question is addressed in the context of questions of jurisdiction and admissibility. Investments that are forbidden, or dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption can be caught by a provision such as Article 2(2) of the Argentina-Germany BIT. But not every technical infraction of a State’s regulations associated with an investment will operate so as to deprive that investment of the protection of a Treaty that contains such a provision.
200. Having considered the facts in the present case, and the submissions of the Parties on this point, the Tribunal does not consider that there is a sufficient basis for rejecting the claims concerning the loans on the basis of their non-registration under Argentine regulations. This decision concerning the effect of the alleged breaches of reporting requirements in Argentina’s financial regulations on the question of the admissibility of the claims is, however, taken without prejudice to the possibility that such breaches might, by virtue of Article 2(2) of the Treaty, limit the substantive rights enjoyed by the Claimant.
201. The Tribunal’s decision concerning the admissibility of claims in respect of Claimant’s loans to PdL thus remains based upon the majority decision concerning Article 22.2 of the Concession Contract, as explained above. The Tribunal accordingly concludes, by a majority, that claims made by Claimant in its capacity as a lender to PdL are inadmissible in this arbitration.

(E) The ‘Ballast Nedam’ argument

202. Ballast Nedam, a Netherlands company, was part of a joint venture (with Boskalis International BV, another Netherlands company) which was the main subcontractor of

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<sup>189</sup> The term used in *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award, 6 February 2008, ¶ 104, citing *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26) and *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (ICSID Case No. ARB/03/25).

PdL on the Rosario-Victoria Project. Respondent argues that Claimant attempted to conceal the true nature and extent of its relationship with Ballast Nedam, as part of a plan to recover as much as possible of its investment in Argentina by means that would remain outside the purview of this arbitration and the sight of this Tribunal.

203. In essence, Respondent suggests that Claimant had a financial interest as a shareholder in Ballast Nedam, and that Ballast Nedam colluded in threatening to force PdL into insolvency in order to put pressure on Respondent to provide financial benefits to PdL. Further, there is some suggestion that the plan was that Ballast Nedam, in its ostensible capacity as a third-party creditor of PdL, would recover sums from PdL which would enure to the benefit its shareholders, including Claimant.
204. Respondent argues that these arrangements and plans amount to an improper attempt by Claimant to mislead observers, including the Tribunal, as to the real economic interests in play in this case.<sup>190</sup> It argues that Claimant should, in consequence, be deprived of the protection of the Treaty by having its claim declared inadmissible.
205. The facts underlying these allegations and arguments are complex. They also emerged at a late stage: Respondent asserts that it was only on the fifth day of the merits hearing that it became aware that Claimant held 48% of the shares in Ballast Nedam.<sup>191</sup> The matter was, however, addressed during that hearing and in post-hearing submissions, and the Tribunal is satisfied that it has sufficient information on this matter for the purposes of reaching a decision in this arbitration.
206. The Tribunal considers that the principles governing the admissibility of claims are rooted not only in the notion of a claim that is inherently ripe and properly made, but also in the proper administration of justice. Admissibility is concerned both with the claim itself and with the arbitral process. In a case where an allegation of impropriety, made in the context of a plea of inadmissibility, is based upon facts that are inextricably bound up with the range of facts upon which the substantive claim is based, it will usually not be

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<sup>190</sup> Resp. PHB ¶¶ 99-157.

<sup>191</sup> *Ibid.*, ¶ 99.

practicable to decide upon the question as a preliminary issue. If the tribunal has jurisdiction to hear the case, it should in such circumstances do so.<sup>192</sup>

207. The Tribunal considers this to be the case in these proceedings, and accordingly rejects the argument that the claim be dismissed *in limine* on the ground that it is inadmissible because of the relationship between Claimant and Ballast Nedam.

(F) CONCLUSIONS ON ADMISSIBILITY

208. For the reasons given above, the Tribunal, having already determined (by a majority) that it has jurisdiction over the claims in this case, rejects all except one of the objections to their admissibility. That one exception concerns claims made in this arbitration by Claimant in its capacity as a lender to PdL: these are precluded by the terms of Article 22.2 of the Concession Contract. The Tribunal will identify the precise scope of those ‘creditor claims’ at the points in its analysis where the matter arises and can most clearly be addressed.

**V. MERITS**

209. Claimant invokes several provisions of the Treaty: (A) Fair and Equitable Treatment (‘FET’) under Article 2(1) of the Treaty); (B) Full Protection and Security, under Articles 2(1) and 4(1)); (C) Expropriation (Article 4(2)); (D) the ‘observance of obligations’ or ‘Umbrella Clause’ (Article 7(2)); (E) Arbitrary or Discriminatory Measures (Article 2(3)). In addition, Claimant asserts (F) that Respondent breached binding unilateral declarations in violation of international law. These are considered in turn.
210. It may assist in the reading of the following paragraphs to say at this point that, in broad terms, the majority of the Tribunal has decided that the initial steps taken by Argentina to address the financial crisis by the pesification process do not amount *in themselves* to a violation of the Treaty but that Argentina’s failure to renegotiate the contract with PdL, as provided for in Argentine law, in a timely and final fashion does amount to a breach of

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<sup>192</sup> Cf., the approach of the International Court of Justice to this general issue: *Avena, I.C.J. Reports 2004*, p. 12, ¶¶ 45 – 47.

the FET standard, for which reparation is due. Argentina's actions in respect of the payment of the Subsidy agreed with PdL do not amount to a breach of the FET standard. The terms of the 'Emergency Loan' made by Argentina to PdL, however, are not compatible with the FET standard. The Tribunal does not find that any other independent breaches of the BIT have been established.

(A) FAIR AND EQUITABLE TREATMENT: Article 2(1)

211. The claim based upon the FET principle has four components, each based upon a different aspect of conduct for which Respondent is said by Claimant to be responsible. They are (1) the failure to pay the Subsidy on time; (2) the 'pesification process'; (3) the 'Emergency Loan'; and (4) the failed renegotiation attempts. These are considered in turn.

a) The failure to pay the Subsidy on time

212. A central element of Claimant's case is the argument that Respondent failed to make the Subsidy payments as and when they were due; that this failure violated the fair and equitable treatment ("FET") provision in the Treaty; and that this violation caused Claimant financial loss. The Subsidy was intended to finance the first stages of the Project up to a capped amount, with the balance to be financed by the Concessionaire.<sup>193</sup> According to the Concession Contract, the Subsidy was to be paid out in full, in scheduled monthly instalments, before the duty to finance the continuation and completion of the Project passed across to the Concessionaire.<sup>194</sup>

213. It is not disputed that there were in fact delays in the payment of the scheduled instalments of the Subsidy.

214. Respondent's position is that the acknowledged delays do not constitute a breach of the Treaty because (i) Respondent complied with its contractual obligations by paying

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<sup>193</sup> Resp. Rej., ¶ 14.

<sup>194</sup> Concession Contract, §7.2; Final Technical Document (Exh. CX-33), §36.2.

interest in respect of those delays,<sup>195</sup> and (ii) the obligations were a purely contractual matter and a breach of them could not rise to the level of a breach of the Treaty.<sup>196</sup>

215. It is evident that, in this part of its claim, what Claimant relies on to establish a breach of its rights under the Treaty is the alleged breach by Respondent of an obligation based in contract. Respondent was initially under no obligation other than the obligation under the Concession Contract to make those Subsidy payments. There is no suggestion that PdL was without access to the normal legal procedures for the enforcement of contracts. Moreover, Respondent paid interest on the late instalments in accordance with the Contract.<sup>197</sup>

***Contractual breaches are not ipso facto treaty breaches***

216. The Tribunal does not consider that a contractual breach necessarily amounts to a breach of the Treaty's FET standard. In the particular circumstances of the present case, having regard to the 2000 *Acta Acuerdo* and to the payment by Respondent of interest in respect of delays in the payment of instalments of the Subsidy, the Tribunal does not consider that Respondent's failures to meet the contractual dates for payments of the Subsidy rise to the level of a violation of the FET standard.
217. Claimant argues that the FET standard requires more than the 'minimum standard' of protection prescribed by customary international law, and that it requires 'stability, predictability and consistency' and the protection of an investor's 'legitimate expectations'.<sup>198</sup>
218. In *Waste Management II* the tribunal (there addressing the FET standard in NAFTA Article 1105) said that even the persistent non-payment of contractual debts by a municipality was not to be equated with a violation of Article 1105, provided that it did not amount to "an outright and unjustified repudiation of the transaction and provided

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<sup>195</sup> Resp. C-M. ¶¶ 117, 135; Resp. PHB ¶ 10.

<sup>196</sup> Resp. C-M. ¶¶ 388- 389.

<sup>197</sup> Resp. PHB ¶ 10.

<sup>198</sup> Cl. Rep. ¶¶ 188-206.



that some remedy is open to the creditor to address the problem.”<sup>199</sup> The *Waste Management II* tribunal observed that otherwise the treaty “would become a mechanism of equal resort for debt collections and analogous purposes in respect to all public (including municipal) contracts, which does not seem to be its purpose.”<sup>200</sup>

219. This Tribunal agrees with the approach taken in the *Waste Management II* award. The Tribunal is mindful of the controversy concerning the precise definition and content of the FET standard. The Treaty does not define the FET standard, and the decisions of other tribunals (to which both Parties referred) are not in themselves binding sources of international law.<sup>201</sup> But the Tribunal notes that the threshold for a treaty breach set by *Waste Management II* is representative of the approach taken by investment tribunals to this question, and agrees that this is the proper approach to the interpretation of the FET obligation. The *Waste Management II* approach is particularly apposite in a case where the treaty breach is said to be constituted by a breach of contract. The conduct in this case falls, in the view of the Tribunal, very clearly short of a violation of that threshold.
220. That is sufficient reason for dismissing the claim that the failure to pay the instalments of the Subsidy on time violated Claimant’s Treaty right to Fair and Equitable treatment; and it is not necessary to consider additional arguments leading to the same conclusion.

***The wider consequences of late subsidy payments did not cause the collapse of the Project***

221. It might be argued that although the simple failure to pay Subsidy instalments according to the contractual timetable is not a breach of the FET standard under the BIT, the late payment of the Subsidy caused the failure of the first IDB loan disbursement,<sup>202</sup> and that this had a domino effect that led to the problems encountered by the Project, and that these wider consequences constituted a breach of the FET standard.

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<sup>199</sup> *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, ¶ 115; and cf., *ibid.*, ¶ 98. (*Waste Management II*)

<sup>200</sup> *Ibid.*, ¶ 116.

<sup>201</sup> Resp. C-M. ¶¶ 335-339. Cl. Rep., ¶¶ 196-203. Such decisions are only “subsidiary means for the determination of rules of law.”

<sup>202</sup> See letter from PdL to IDB dated 26 February 2001 (Exh. CX-166).

222. The Tribunal does not understand the evidence in that way. It does not consider that Claimant has shown that it was the delay in paying the Subsidy that caused the IBD to withdraw its support. On the contrary, it considers that the evidence on the record strongly points to the fact that there were “many issues” that prevented the IBD from disbursing the loan in the manner anticipated by the Consortium.
223. Particularly significant, in the view of the Tribunal, were the doubts generated by the results of a traffic study undertaken in 2001 (well prior to the enactment of the Emergency Law) with a view to confirming the financial projections that had been made by PdL to support its application for the loan.<sup>203</sup> A traffic study was deemed to be critically important to disbursing the loan proceeds because it would assist the lending parties in ascertaining the prospects of their being repaid if they were to permit the loan to be disbursed. The IDB thus explicitly made its offer of finance subject to there being “no material adverse change in the financial condition, operations or prospects of the Rosario-Victoria Bridge Project prior to the execution of ... final commitment by the Bank.”<sup>204</sup>
224. The position is well illustrated by the terms of the letter from the IDB to PdL dated 28 February 2002.<sup>205</sup> That letter is sufficiently important to warrant its quotation in full:

“Thank you for your letter dated February 1, 2002, in which you outline your concerns regarding the disbursement of the loan from the Bank and its participating banks. We can assure you that the Bank has employed good faith efforts. We have tried to address in a mutually satisfactory manner among all parties the various issues that have been identified over the course of negotiating the remaining documentation and the satisfaction of the Conditions Precedent for disbursement. Therefore, it is unfortunate that all of our efforts have been perceived by Puentes del Littoral and its Sponsors as simply delay tactics.

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<sup>203</sup> Letter from the IDB to the President of PdL, dated 28 February 2002: Lommatzsch Stmt., Exh. R. Article 5 of the IDB loan agreement with PdL (Exh. CX-46) set out the conditions precedent to disbursement, which included (Section 5.1.(t) ) the delivery to IDB of a traffic study demonstrating that the Debt Service Coverage Ratio following Technical Completion would be not less than 1.5 at any time.

<sup>204</sup> IDB letter to Financial Director, Impregilo S.p.A. and General Manager PdL, dated 4 August 1999 (Exh. RA 143).

<sup>205</sup> Exh. CX-70.

As you are aware, the Loan Agreement executed in July of 2000 contemplated that certain financial projections had to be confirmed at the time of the disbursement by a traffic study. The results of the traffic study called into question the Company's economic and financial viability. The Bank has undertaken considerable effort to restructure the financial plan to address this issue. Moreover, all of the Bank's and the Borrower's hard work to ensure the Borrower's compliance with the Disbursement Conditions have been further complicated by the enactment of the Emergency Law No. 25561 by the Argentine government on January 6, 2002 (the "Emergency Law") as well as other related governmental measures. At a minimum, the Emergency Law has complicated the Borrower's ability to meet a number of Disbursement Conditions.

Following the successful re-negotiation of the Concession Agreement, the Bank and the participating banks will be in a better position to evaluate the Company's economic and financial viability. In this regard, we have just received your proposal of February 27, 2002, are in the process of analysing it and will revert to you shortly.

As we have indicated on numerous occasions, we would welcome reaching a conclusion with the Borrower and the Sponsors regarding the many issues that have prevented the Bank from disbursing to date."<sup>206</sup>[Emphasis added.]

225. The Tribunal draws from this letter the conclusions: (i) that not only the non-payment of the Subsidy but "many issues", including in particular the results of the traffic study, led the IDB not to make the disbursements of the loan as planned, (ii) that the position was at that time recoverable and that the IDB remained willing to make loans to the Project, albeit on renegotiated terms,<sup>207</sup> and (iii) that the one act of Respondent that was particularly identified as further complicating disbursement was not the non-fulfilment of the planned timetable to Subsidy payments but rather the adoption of the Emergency Law and related governmental measures.
226. The Tribunal accordingly considers that the failure to pay the Subsidy on time did not violate the FET standard established by the BIT. The Emergency Law and other measures

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<sup>206</sup> Letter from the IDB to the President of PdL, dated 28 February 2002: Lommatzsch Stmt., Exh. R. A similar impression was given in the evidence of Mr Martin Bes, the only witness with direct knowledge of what transpired within the IDB in relation to PdL: see Tr., Day 11, pp. 2604-2612.

<sup>207</sup> It may also be noted that even in Section 6 of the 'Financial Aid' Loan signed on 21 February 2003, it was still envisaged that the IDB might make a loan to PdL (Exh. CX-78).

adopted during the ‘pesification process’ are considered in the next section of this Decision.

227. The Claimant’s inability to demonstrate that the late payments were in themselves a breach of the FET standard, or that the late payments caused the collapse of the Project, is sufficient reason for dismissing the claim that the failure to pay the instalments of the Subsidy on time violated Claimant’s Treaty right to Fair and Equitable treatment. It is not necessary to consider additional arguments leading to the same conclusion.

***Respondent’s argument based on Claimant’s alleged breach of contract***

228. For the sake of completeness, it should be said that Respondent also asserts, by way of a defence, that PdL acted in bad faith and was itself in breach of its contractual obligations in the performance of the Concession Contract, notably by failing to obtain the Firm and Irrevocable Financing Agreements (variously described as ‘FIFAs’ or ‘AFFIs’) required by Section 22.1.a) of the Concession Contract.<sup>208</sup> Respondent says that Claimant was consequently not entitled to rely upon its rights under the Concession Contract.
229. The Tribunal notes that in Clause 1 of the *Acta Acuerdo* of 20 October 2000, Respondent agreed to deem “the obligation under Section 22.1.a) of the Concession Agreement to have been fully met.”<sup>209</sup> The 2000 *Acta Acuerdo* was a settlement of the dispute between the Parties as to whether or not PdL had provided the necessary FIFAs; and the effect of the settlement is that as between Respondent and Claimant, Claimant cannot be regarded by Respondent as being in breach of Section 22.1.a). In making this finding, the Tribunal rejects the Respondent’s objections to the Tribunal’s relying upon the *Acta Acuerdo*. It was entered into by a senior official of the State and in the circumstances of this case there is no basis for its now being repudiated. The *Acta Acuerdo* did not merely provide that Respondent would take no action in respect of any breach of Section 22.1.a) that might have occurred: it provided that the Parties agreed as of the date of the *Acta Acuerdo* that any such breach had been cured. Respondent cannot, therefore, rely upon

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<sup>208</sup> Resp. Rej. ¶ 65.

<sup>209</sup> Exh. CX-48, Exh. CX-137.

any alleged breach by PdL of Section 22.1.a) as a justification for any of Respondent's own acts that took place after 20 October 2000.

230. That does not necessarily mean that Respondent's actions prior to 20 October 2000 could not be justified by reference to any failure by PdL to comply with Section 22.1.a) of the Concession Contract; but it is not necessary to decide this question because the Tribunal has determined that in any event the late payment of the Subsidy was not a breach of the FET obligation under the BIT.

b) The pesification process

231. The next body of conduct to be considered is the 'pesification process': i.e., the departure of the Argentinian peso from the statutory regime which secured parity with the US dollar. That process rested on the enactment on 6 January 2002 of Law 25,561, the Public Emergency and Foreign Exchange System Reform Law ("the Emergency Law"), and the adoption on 3 February 2002 of Decree No. 214/02. Those measures abrogated the Convertibility Law and converted into Argentine pesos money obligations that had previously been expressed in foreign currency, and abrogated indexing mechanisms tied to foreign currencies or economies. They also provided for the renegotiation of public works contracts in order to mitigate the detrimental effects of this pesification.<sup>210</sup>

232. It may be helpful to outline at the outset of this section of the analysis the broad approach of the Tribunal to the pesification question. The pesification process was part of a major economic and commercial upheaval. There is much that can be said about its causes and much that can be said about its consequences, both generally and in the context of this particular case. But the question to be addressed here is straightforward: as a matter of legal principle, does the Argentinian pesification process amount to a violation of Argentina's BIT obligations?

233. There are three layers of legal analysis involved in that question. Taking the matter for the moment in the context only of FET, the first is the question whether pesification is *prima facie* incompatible with the FET standard in circumstances where it has been

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<sup>210</sup> See below, ¶¶ 241, 248.

represented to investors by the Government that dollar-peso parity would be maintained (or to put it in another way, represented that pesification would not take place). If it is, the second question is whether there is any provision within the Treaty itself that can affect the question whether pesification is in principle a breach of the Treaty. The third question, which arises only if pesification is in principle a breach of the Treaty, is whether the wrongfulness of pesification under the Treaty can be precluded by the plea of necessity under customary international law.

***Was pesification in itself a breach of the BIT?***

234. The first question is whether the pesification was in itself a breach of the FET standard secured by the BIT.
235. Claimant pointed to many statements by the authorities in Argentina, and to reports of such statements, made prior to and after Claimant made its investment, to the effect that parity between the peso and the dollar would be maintained.<sup>211</sup> There can be no serious doubt that all of the Parties to the Contract (including the Government of Argentina) assumed that dollar / peso parity would continue.
236. On the other hand, neither the Bidding Terms<sup>212</sup> nor the Concession Contract stipulated that there could be no departure from dollar / peso parity.<sup>213</sup> Rather, the position of the Concessionaire was protected by provisions that in effect tied the Concessionaire's revenues to US dollars and the US economy. Thus, Section 24 of the Contract stipulated that "In consideration of all its obligations hereunder, Concessionaire shall receive only the toll rates set forth in the following Section, the Subsidy granted by the National Government, and the contributions of the Provinces of Santa Fe and Entre Ríos." Those toll rates were, according to Section 25.2 of the Contract, to be adjusted by "the percentage change in the United States All Items Consumer Price Index (hereafter CPI) officially published by the United States Department of Commerce (Business Statistics

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<sup>211</sup> Cl. Mem. ¶¶ 75- 88.

<sup>212</sup> Exh. CX-31.

<sup>213</sup> Section 3(i) of the Bidding Terms, and Section 2 of the Contract, set out the laws that govern the Agreement, and do not include the Convertibility Law, Law 23,928, which established parity between the dollar and the peso.

Branch).” In this way, the commercial balance of the Contract was secured, with the value of the tolls being tied, in effect, to the value of the US dollar.

237. Further, Section 25.3 of the Contract provided that:

“The Toll Rate to be collected by Concessionaire from users shall be stated in Pesos and be calculated as follows:

a) The toll rate, stated in United States dollars, shall be translated into pesos on a monthly basis with the assistance of the Oversight Agency, using the dollar/peso parity based on the average bid/offered exchange rate quoted by Banco de la Nación Argentina FIVE (5) days prior to the application date. If the peso/dollar parity based on the quote of Banco de la Nación varies upward or downward by more than ONE PERCENT (1%) of the parity used to calculate the Basic Toll Rate in effect, the latter shall be readjusted by the total percentage of such excess commencing on the first day of the following month.”

238. In these circumstances, the majority of the Tribunal considers that what Respondent promised, and what Claimant had the right to expect, was the maintenance of the value, in dollar terms, of the revenues under the Contract. Precisely *how* that value was maintained was, in the view of the majority of the Tribunal, not specified. Claimant did not have a legal right specifically to have that value maintained by means of constant adherence to peso-dollar parity. If parity were abandoned but Claimant was compensated fully and timeously for the fall, in dollar terms, in the value of its revenues, Claimant’s rights and expectations would have been fulfilled, and Claimant could not complain that it had been treated unfairly or inequitably in violation of the BIT.

239. In the view of the majority of the Tribunal, this analysis accords with the facts and the practical realities of the situation. While there was a clear expectation that the commercial balance of the Contract would be maintained by the continuation of peso-dollar parity, no specific promise or undertaking to maintain that parity was explicitly made by Respondent to Claimant. Neither the Bidding Terms nor the Concession Contract, nor any other instrument presented to the Tribunal, contains any specific and absolute undertaking not in any circumstances to pesify the Contract.

240. There can be no doubt of Claimant's intention to secure and to rely upon binding guarantees that the dollar-value of its revenues would be maintained. But equally, there is insufficient factual evidence upon which to base a finding that it would be unfair and inequitable to Claimant to fulfil that obligation to maintain of the dollar value of Claimant's revenues by some mechanism that involved a change in the peso-dollar exchange rate. Indeed, there are indications in Claimant's pleadings that it would have accepted some such change, although not a change involving pesification.<sup>214</sup>
241. The majority of the Tribunal has therefore concluded that while the Claimant had the right to the maintenance of the commercial balance secured by the Contract on the supposition that peso-dollar parity would continue, it had no absolute right to have that commercial balance maintained specifically by the continuation of peso-dollar parity in all circumstances. If parity ceased to exist, Claimant had the right to expect that the resulting disruption of the commercial balance would be corrected fully and timeously, so that it would not be materially disadvantaged. Indeed, that expectation was reflected in the right to apply for renegotiation set out in Section 31.2 of the Contract. But Claimant did not have the right to expect that there would never, in any circumstances, be any departure from parity.<sup>215</sup>
242. The majority has thus concluded that pesification of debts alone did not breach the treaty, and that if appropriate and timely steps had been taken by Respondent to restore Claimant to the position (in terms of the commercial balance of the Contract) that had been secured in the Contract, there would have been no breach of the duty to treat Claimant fairly and equitably.

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<sup>214</sup> Cl. PHB ¶¶ 224- 225.

<sup>215</sup> Section 25.3 of the Contract in fact provides for (minor) variations in the exchange rate: "The toll rate, stated in United States dollars, shall be translated into pesos on a monthly basis with the assistance of the Oversight Agency, using the dollar/peso parity based on the average bid/offered exchange rate quoted by Banco de la Nación Argentina FIVE (5) days prior to the application date. If the peso/dollar parity based on the quote of Banco de la Nación varies upward or downward by more than ONE PERCENT (1%) of the parity used to calculate the Basic Toll Rate in effect, the latter shall be readjusted by the total percentage of such excess commencing on the first day of the following month."



243. The position might have been different if Respondent had made a deliberate choice to abandon peso-dollar parity in circumstances in which parity could have been maintained and Respondent had freedom of choice in determining its exchange-rate policy. But in the view of the Tribunal,<sup>216</sup> that was not the case in Argentina during the period in question. The majority of the Tribunal accepts that although the abandonment of parity was obviously effected by a deliberate act of the Respondent – the enactment of the pesification law – and was in that narrow sense Respondent’s ‘choice’, that act was an acceptance of what foreign exchange markets had already shown to be an economic fact: the unsustainability of parity.<sup>217</sup> The IMF had endorsed the economic policies pursued by Argentina prior to the crisis;<sup>218</sup> and the Emergency Law adopted in January 2002 by the Respondent was regarded by a range of expert commentators<sup>219</sup> as a sound and coherent approach to the unavoidable facts of the extraordinary financial crisis then confronting Argentina.<sup>220</sup>
244. The majority of the Tribunal accordingly does not find that the adoption and pursuit of the policy of pesification was *per se* a breach of the FET standard. The policy was not in itself unfair, and it was not in itself inequitable, to the Claimant.

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<sup>216</sup> And other tribunals: see, e.g., *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010, ¶¶ 160, 163 (Exh. AL RA180).

<sup>217</sup> The Tribunal notes the chart at ¶ 26 of Resp. C-Mem, which shows the peso-dollar exchange rate in the foreign exchange market of the Montevideo, Uruguay, Stock Exchange. That chart shows that the dollar-value of the peso was falling in Uruguay from the first week of December 2001 onwards, several weeks before the enactment of the Emergency Law in Argentina. Cf. Roubini Report, 7 March 2012, ¶ 15: “Effectively, the Argentine government did not ‘choose’ to abandon convertibility and repeal the currency board as there was no effective economic choice or means or option left to maintain such regime. Rather, the economic facts on the ground led to its effective demise and abandonment in December 2001 and its formal legal abandonment in January 2002.”

<sup>218</sup> International Monetary Fund, News Brief 99/24, 26 May 1999, cited in Andrés Velasco, Ricardo Hausmann, Kennedy School of Government, Harvard University - Hard Money’s Soft Underbelly: Understanding the Argentine Crisis, 2002 (Exh. RA 500); Eichengreen Report, 3 September 2012, ¶ 10; Roubini Report, 7 March 2012, ¶ 23.

<sup>219</sup> See Roubini Report, 7 March 2012, especially ¶¶ 31- 49, 53-55, and Eichengreen Report, 3 September 2012, especially ¶¶ 26- 40.

<sup>220</sup> To avoid any possible doubt, it should be emphasized that although these factors are similar to those that would be taken into account in the context of a consideration of the defence of necessity, they are here wholly independent of the necessity defence. The factors do not bear upon the issue raised in the context of necessity: namely, whether in the circumstances the Respondent should be excused for what is on the face of it a breach of its international obligations. Here they bear on the question whether, in order to treat the Claimant with fairness and equity, it was absolutely essential that Respondent maintain parity at all costs. That is a question as to the precise scope of the obligation that was owed by Respondent to Claimant. Was it unfair or inequitable to Claimant for Argentina to depart from parity? In particular, was it unfair to do so in circumstances where Respondent undertook to rebalance the commercial contract in order to address the losses sustained by Claimant as a consequence of pesification?

245. In view of that decision, it is not necessary to consider whether the position in respect of the abandonment of parity is affected by any other provision in the Treaty,<sup>221</sup> or by the plea of necessity in customary international law.

246. That is, however, not an end of the matter. As has been indicated above, while the act of pesification was, in the view of the majority of the Tribunal, not *per se* a violation of the FET standard, it was the direct cause of financial losses to the Claimant. That leads to the question whether the manner in which the pesification process was implemented amounted to a breach of the FET standard.

***Was the manner in which the pesification process was implemented a breach of the BIT?***

247. It has been noted above that the preservation of the US dollar value of Claimant's revenues was undoubtedly a premise upon which the investment was made, and both Parties entered into the Concession Contract; and it was a principle to which the provisions of the Concession Contract<sup>222</sup> were intended to give effect.

248. Respondent recognized from the outset the enormously disruptive effect that pesification would have on public works contracts that had been concluded upon the basis of the premise of constant dollar-peso parity or payment in dollars. Respondent provided, in the Emergency Law itself, for the renegotiation of such contracts.<sup>223</sup> The Tribunal considers that provision to be a wholly appropriate, and necessary, response to the inevitable results of pesification upon dollarized contracts. If those contracts were left unrevised, one party would suffer a radical deterioration in the commercial position that it had secured by means of the express terms of the contract.

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<sup>221</sup> Such as Article XI of the US-Argentina BIT, which provides that the provisions of the BIT do not “preclude the application by either Party of measures necessary for the maintenance of public order ... or the protection of its own essential security interests”: < [http://unctad.org/sections/dite/ia/docs/bits/argentina\\_us.pdf](http://unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf) >. The effect of any such provision would have to be considered before the effect of the defence of necessity in customary international law is considered. There is, however, no such provision in the Germany-Argentina BIT.

<sup>222</sup> Notably Sections 6, 13, 24–33 and 31.2 of the Contract.

<sup>223</sup> Emergency Law, Section 9 (Exh. RA 187).

249. The Tribunal considers that the terms of the commitment that Respondent had made to Claimant did not require Respondent to take action during the time of the crisis actually to restore the commercial balance secured by peso-dollar parity. But it did require Respondent to make provision for restoring the commercial balance after the crisis had ended (as, indeed, it did, in the Emergency Law itself); and restoration of the commercial balance required that Claimant be compensated for losses incurred during the crisis, as well as thereafter.
250. As is explained below, in the section dealing with the renegotiation process,<sup>224</sup> the process provided for in the Emergency Law has not in fact led to the rebalancing of the commercial relationship between Claimant and Respondent in this case. Due to Argentina's failure to timeously adjust the contract in a manner satisfactory to PdL, Claimant was accordingly deprived of the protection that the dollarization of PdL's tariffs was designed to secure, and the value of its interest in PdL was thereby reduced, causing it financial loss.
251. The Tribunal thus finds that the manner in which the process for agreeing on the contractual adjustment to offset the effects of pesification was implemented, and specifically Respondent's failure to implement the promised renegotiation process timeously, constitute a breach of the FET standard under the BIT, for which Respondent is liable to make reparation. More precisely, the pesification caused the Claimant to sustain losses; and the breach of the FET in the BIT consists in the failure to implement within a reasonable period of time a renegotiated agreement to replace the security that had been provided by the dollarization provisions in the original Concession Contract and thereby restore the commercial balance of the Concession Contract between Respondent and the members of the Consortium, including Claimant, and to remedy the losses already sustained.

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<sup>224</sup> ¶¶ 268-287, below.

c) The 'Emergency Loan'

252. At the time when the funding for the Project ran out, construction of the bridge span was not complete. Both parties agreed that it could not be left in its incomplete state because of the danger of collapse. At this point in time, funds were needed to complete the Project and without a completed Project, PdL was not yet in a position to collect the toll revenues on which the payment of its share of the financing as well as any profit could be realized.
253. Claimant argued that if an adequate renegotiation had been agreed during the first half of 2002, work on the Project could have been completed on time, and that the failure to secure such a renegotiation obliged it to accept a loan from Respondent to enable it to complete the Project. The Tribunal notes, however, that there is evidence that PdL was in financial difficulties even before pesification occurred. In particular: (i) PdL was informing the Grantor in August 2001, four months *before* pesification, that it was going to have to suspend construction of the bridge at the end of the month<sup>225</sup>; (ii) PdL appeared to be unable to pay its creditors (Boskalis/Ballast Nedam)<sup>226</sup>; (iii) PdL told the IDB in October 2001 that it could be petitioned in bankruptcy by its creditors<sup>227</sup>; and (iv) PdL's smaller shareholders' were apparently unable or unwilling to make further capital contributions in September 2001.<sup>228</sup>
254. PdL requested financial assistance from Respondent; and in February 2003 Respondent offered a loan of AR \$51,648,352 which was sufficient to complete the Project.<sup>229</sup> Claimant's witness, Mr Lommatzsch, testified that PdL was advised that if it did not accept the loan and finish the Project, Respondent would declare PdL to be in default and

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<sup>225</sup> Exh. RA 167.

<sup>226</sup> LECG Exh. 26 (ICC Award, pp. 88-89).

<sup>227</sup> Exh. RA 170.

<sup>228</sup> Document HT\_01540 produced by the Claimant on 22 February 2013 (Agreement of 11 April 2002 between Impregilo S.p.A., IGLYS S.A., Hochtief Aktiengesellschaft, SIDECO Americanas S.A. and IECSA S.A., Benito Roggio y Hijos S.A., Techint Compañía Técnica Internacional S.A., the "Whereas" recitals notes that certain shareholders did not make the contributions requested of them).

<sup>229</sup> Cl. PHB ¶¶ 83-84.

terminate the Concession Contract, which would necessarily have entailed a drawdown by Argentina on a US \$143 million Letter of Credit posted by PdL's shareholders.<sup>230</sup>

255. The Loan Agreement, which secured the loan by the assignment of PdL's toll collection rights, was signed on 21 February 2003.<sup>231</sup> The possibility of the assignment of tolls for the purpose of obtaining finance for the Project was expressly provided for by Section 33 of the Concession Contract.<sup>232</sup>
256. According to Section 2 of the Loan Agreement, the loan was to be repaid "on the terms prevailing in the local market for similar loans, thus subject to the applicable lending interest rate and other terms by way of financial expenses, in accordance with the applicable data to be provided by the Central Bank of Argentina."
257. The evidence of the circumstances and reasoning behind PdL's decision in February 2003 to accept the loan and not to obtain alternative sources of funding, such as additional capital injections or further inter-company loans, does not enable the Tribunal to reach a clear conclusion as to the specific reasons for which PdL accepted the Emergency Loan, rather than to make some other arrangement to obtain additional finance. It appears that at this time alternative loan funding was scarce in Argentina.
258. It was the responsibility of the Consortium and then of PdL to arrange financing for the Project beyond the Subsidy provided by Respondent.<sup>233</sup> PdL was at liberty to obtain finance from other sources on better terms, if it could find them. Claimant says that in fact PdL had no alternative source of funding available from third party banks,<sup>234</sup> and that it was the drastic reduction in toll revenues, resulting from the Pesification Law, Law

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<sup>230</sup> Lommatzsch Stmt., ¶¶ 109 – 116.

<sup>231</sup> Exh. CX-78.

<sup>232</sup> Exh. RA 12.

<sup>233</sup> Concession Contract, Sections 8, 22, 30.3.b).

<sup>234</sup> Cl. PHB ¶ 85.

25,561, that undermined PdL's creditworthiness and was the cause of its inability to obtain finance elsewhere.<sup>235</sup>

259. Claimant asserts that in early July 2003, following a change in the Government of Argentina, it received notice that the terms of that emergency loan had been unilaterally altered by the Secretariat of Public Works through the adoption of Public Works Resolution 14 ('Resolution 14') on 30 June 2003.<sup>236</sup> Claimant says that Resolution 14 had three material effects: (i) it changed the repayment terms from "those prevailing in the local market for similar loans"<sup>237</sup> to a rate (which Claimant says was higher) charged for 30-day unsecured loans; (ii) it provided for the repayment of the loan through the daily collection of toll revenues; and (iii) it pesified the operation and maintenance costs which PdL was entitled to deduct from the toll revenues.<sup>238</sup>
260. Claimant's case is that the terms stipulated in June 2003 by Resolution 14 left PdL in an unsustainable financial position. The daily revenues appropriated to repayment of the loan were inadequate to cover interest payments and PdL's operating expenses; and the interest owing was capitalized, so that the sum owed was constantly increasing.<sup>239</sup> Claimant says that because of PdL's repayments under the loan from Respondent, PdL was unable to maintain the Project or pay daily expenses. In 2004 and 2005 those expenses were largely funded through inter-company loans made by Claimant and Impregilo. Claimant made loans totalling US \$5,481,833 in 2004, and US \$297,000 in 2005.<sup>240</sup>

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<sup>235</sup> *Ibid.*, ¶ 85. Cl. Rep., ¶ 74: "What HOCHTIEF correctly objects to is the unfair and unnecessary pesification of the toll rate, and the extremely protracted renegotiation process that is preventing HOCHTIEF from getting the expected and bargained for return on its investment. Cf., Lommatzsch Stmt., ¶ 134.

<sup>236</sup> Exh. CX-79.

<sup>237</sup> Exh. CX-78, Section 2. That rate was identified in Resolution 14 as "the General Portfolio Lending Rate for Miscellaneous Transactions, a variable rate published each day by the Banco de la Nación Argentina.

<sup>238</sup> Cl. PHB ¶¶ 86–90; Exh. CX-79.

<sup>239</sup> Cf., the evidence of Mr Andrés Aner, Transcript, Day 5, pp. 1018-1030.

<sup>240</sup> Cl. PHB, ¶ 90; LECG First Report, Exh. 034, pp. 28-29.

261. Respondent does not challenge the essential facts concerning the effect of the provisions of Resolution 14.<sup>241</sup> Respondent submitted that Resolution 14 was, however, a measure implementing, rather than unilaterally altering, the terms of the Loan Agreement of 21 February 2003,<sup>242</sup> and that it adopted “a fair market interest rate”.<sup>243</sup>
262. From a comparison of the wording of the Loan Agreement and Resolution 14, it appears to the Tribunal that Resolution 14 purported to give specificity to the vague terms in the 21 February 2003 Loan Agreement regarding interest rates. Resolution 14 identified the repayment terms that were to be treated as corresponding to the “the terms prevailing in the local market for similar loans”, as it was put in Section 2 of the Loan Agreement. Those terms corresponded to the interest rates paid by top-tier companies on 30-day *unsecured* loans.
263. The Tribunal does not consider that the specification under Resolution 14 of an interest rate appropriate for 30-day unsecured loans to the radically different case of a loan secured by the assignment of tolls from a public highway operating under a long-term concession, can reasonably be regarded as an implementation of a contractual provision stipulating the application of “the terms prevailing in the local market for similar loans.” The circumstances of the loans are not ‘similar’. No clear justification was offered for application of the 30-day unsecured loan rate to the 2003 loan to PdL,<sup>244</sup> although it was said that one constraint was the inability of Respondent to engage in a transaction that would, by charging too low an interest rate, in effect increase the Subsidy to the Project provided by the Government beyond that settled when the Consortium’s bid was accepted.<sup>245</sup>
264. The Tribunal is satisfied that the use of rates for unsecured loans as the comparator for the interest rate charged under the Loan Agreement was inappropriate, and that it is likely that, at least at some points, the interest rate charged was excessively high. The Tribunal

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<sup>241</sup> Resp. Rej., ¶¶ 132-147.

<sup>242</sup> Resp. C-Mem. ¶ 409; Resp. Rej., ¶¶ 132-133.

<sup>243</sup> Resp. Rej., ¶ 142.

<sup>244</sup> See the testimony of Mr. Aner, Transcript, Day 5, pp. 1026-1034.

<sup>245</sup> Lommatzsch Stmt. ¶ 110. Cf., Resp. PHB, ¶¶ 10-13, 56-58.

notes, however, that the rate of interest charged was not uniformly high. It dropped from the high of 30% to 18.85% as from 26 September 2003,<sup>246</sup> and stayed around that lower rate until the commencement of insolvency proceedings in May 2007. (During the period 2001-2005, all the inter-company loans made by Claimant and other PdL shareholders were set at the significantly lower rate of 15%.<sup>247</sup>) Furthermore, the evidential record does not provide sufficient data to enable the Tribunal to determine by how much (if at all) the actual rate of interest charged day-by-day under Resolution 14, compared with an appropriate Argentine market rate for secured long-term debts, exceeded the maximum interest rate that would have been fair and equitable.

265. The Tribunal considers that the use of an inappropriate comparator for the determination of interest rates under Resolution 14 was not compatible with Claimant's rights under Article 2 of the Treaty, but the majority of the Tribunal also considers that Claimant has not proved a quantifiable loss under this heading. The majority of the Tribunal accordingly decides not to make an award of damages specifically to compensate Claimant for losses arising from any excessive interest rates charged under the Emergency Loan.
266. Turning to the treatment of PdL's expenses, the Tribunal does not consider that the pesification of operation and maintenance costs which PdL was entitled to deduct from its toll revenues was a step that had been agreed in (or was compatible with) the Loan Agreement of 21 February 2003. The text of the Loan Agreement does not evidence any such agreement. This was a further step taken in Resolution 14 on 30 June 2003, which adversely affected PdL, and hence adversely affected the value of Claimant's investment.
267. It is clear that the pesification of operation and maintenance expenses, much of which required the importation of expensive equipment involving expenditure in US dollars,<sup>248</sup>

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<sup>246</sup> Resp. Rej., ¶ 140. Resp. notes that Hochtief itself already talked of an annual 20% rate in a document it submitted to the German government on 5 March 2007 (Request for Compensation from Hochtief to the German government, 5 March 2007, p. 3 (Exh. RA 358)), and not the 30% rate contended by Claimant in its Reply of 5 June 2012. Cl. Rep., ¶ 69; Resp. Rej., fn 200.

<sup>247</sup> LECG First Report, ¶ 57; and Exh. 034, p. 85

<sup>248</sup> Cl. PHB, fn. 160.



reduced the value of the expenses that PdL was entitled to deduct before making its loan repayments and left it making a loss on the maintenance and operation of the Project. The Tribunal thus finds that the pesification of operation and maintenance expenses was a violation of Article 2 of the BIT, for which reparation is due.

268. The Tribunal accordingly considers that the specific terms imposed by Resolution 14 on 30 June 2003 cannot reasonably be said to have been previously agreed in the February Loan Agreement or to be consistent with it. When those terms are considered in the context of PdL's frozen tariffs, pesified and not adjusted for inflation, they are, in the view of the Tribunal, unfair and inequitable and a violation of Article 2 of the BIT.

d) The renegotiation process

269. The Tribunal has decided that the manner in which the pesification process was implemented, and in particular Respondent's failure to implement the promised renegotiation process timeously, constitute a breach of the FET standard under the BIT for which Respondent is liable to make reparation.<sup>249</sup>

270. It is more accurate to speak of the unacceptable delay in the implementation of the renegotiation process, because even now it remains possible that the process might be implemented in the future. Renegotiation of many public contracts inevitably takes time; and some will be renegotiated before others. The limit of what would be an acceptable delay in the context of an alleged breach of the FET standard is a matter of appreciation. Some delay would not have been incompatible with Fair and Equitable Treatment; but at a certain point, the to-be-expected time that it takes for a complex renegotiation to occur becomes unacceptably unfair and inequitable. Claimant pointed to the recent award in *EDF International SA & Ors v. Argentine Republic*,<sup>250</sup> in which liability for breach of a

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<sup>249</sup> ¶ 251, above.

<sup>250</sup> *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012; CLA 238.

BIT was founded upon delays in renegotiation; but each case turns on its facts<sup>251</sup> and must be appraised separately.

(i) **The unimplemented renegotiations**

271. It was in January 2002 that Law No. 25,561<sup>252</sup> provided, in Article 9, for the renegotiation of public works contracts, a category that included the Concession Contract. Claimant's witness, Mr Lommatzsch, recalled in his first Witness Statement<sup>253</sup>, dated 29 April 2010, that he had been a director of PdL since 1998 and its President from March 2005 to August 2007.<sup>254</sup> He referred to his personal involvement in numerous discussions and other meetings between PdL and the Argentine Government between 2003 and 2009. He testified that PdL had continually tried to engage Respondent in "negotiations aimed at reaching agreement on a renegotiated contract that would compensate PdL for its losses and re-establish the toll rates so that the concession will earn PdL and its shareholders the expected return that Argentina's actions have prevented them from receiving."<sup>255</sup>
272. In May 2006 PdL signed a *Carta de Entendimiento* (the 'May 2006 CdE')<sup>256</sup> which provided for an increased toll rate and adjusted the economics of the Project. Mr Lommatzsch said that it was not a perfect solution, and not sufficient fully to compensate PdL for all of the losses attributable to Law No. 25,561, but that PdL had nonetheless signed it and awaited the approval of the new terms by the Government.<sup>257</sup>
273. The necessary Government approvals for the May 2006 CdE were not obtained and it was not implemented. A second CdE was sent to PdL by Respondent in February 2007

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<sup>251</sup> In *EDF* the renegotiation was the responsibility of a provincial government within Argentina, rather than of the federal Government of the Republic.

<sup>252</sup> Exh. CX-63.

<sup>253</sup> Lommatzsch Stmt., ¶ 137ff.

<sup>254</sup> *Ibid.*, ¶ 1.

<sup>255</sup> *Ibid.*, ¶ 136. See generally Lommatzsch Stmt. ¶¶ 130-158; Supp. Lommatzsch Stmt., ¶¶ 4-22.

<sup>256</sup> Lommatzsch Stmt., Exh. JJ.

<sup>257</sup> *Ibid.*, ¶ 145 – 146.

(the ‘February 2007 CdE’).<sup>258</sup> According to Mr Lommatzsch, its terms were less favourable to PdL than the terms of the May 2006 CdE: nevertheless, in his words, “desperate to finalize a renegotiation, and moderate the financial squeeze it had been put in due to Argentina’s actions, PdL signed the February 2007 CdE on February 27, 2007.”<sup>259</sup> The February 2007 CdE also remained unimplemented.

274. PdL signed another agreement on renegotiation, the ‘December 2009 *Acuerdo Transitorio*’,<sup>260</sup> on 17 December 2009.<sup>261</sup> Claimant Hochtief abstained from participating in the vote by PdL shareholders on the decision to sign this agreement, and indicated that it would not suspend or renounce its ICSID claim (which had been filed at the end of 2007)<sup>262</sup> against Respondent.<sup>263</sup> That agreement, too, remained without Government approval and unimplemented.
275. On 14 June 2010, the ‘June 2010 *Acuerdo Transitorio*’<sup>264</sup> was sent by UNIREN to PdL. It was substantially identical to the December 2009 *Acuerdo Transitorio*. PdL signed it, though again Hochtief abstained from voting.<sup>265</sup> It was not implemented.
276. On 13 October 2010, the ‘October 2011 *Acuerdo Transitorio*’<sup>266</sup> was sent by UNIREN to PdL. It was similar but not identical to the June 2010 *Acuerdo Transitorio*. PdL signed it, but again Hochtief abstained from voting.<sup>267</sup> It was not implemented.
277. A fourth *Acuerdo Transitorio*, the ‘March 2012 *Acuerdo Transitorio*’,<sup>268</sup> was sent to PdL on 6 March 2012. Yet again, PdL approved the agreement; but Claimant abstained.<sup>269</sup>

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<sup>258</sup> *Ibid.*, Exh. MM.

<sup>259</sup> *Ibid.*, ¶ 151.

<sup>260</sup> *Ibid.*, Exh. OO.

<sup>261</sup> *Ibid.*, ¶¶ 154 – 155.

<sup>262</sup> See ¶ 6 above.

<sup>263</sup> Exh. RA 433.

<sup>264</sup> Exh. CX-150.

<sup>265</sup> Mairal Supp. Opinion, Exh. 2; Cl. PHB ¶ 100.

<sup>266</sup> Exh. CX-156.

<sup>267</sup> Mairal Supp. Opinion, Exh. 3; Cl. PHB ¶ 101.

<sup>268</sup> Exh. CX-160.

278. Each *Acuerdo Transitorio* was intended to be an interim agreement, to be replaced within twelve months by a Comprehensive Contract Renegotiation Agreement.<sup>270</sup> No such Comprehensive Agreement has been made.
279. According to Mr Lommatzsch, whose evidence in this respect was not disputed, UNIREN renegotiated 92% of the public works contracts within its jurisdiction by April 2009.<sup>271</sup> It is not to be expected that every eligible contract could be renegotiated at once, or even within a short time of the start of the renegotiation process; and it is obvious that one contract or another must be the last to be renegotiated. The question is whether there is anything in the particular treatment of the PdL that breaches the FET standard. The Tribunal considers that there is.

**(ii) The excessive delay in the renegotiation**

280. The most salient of the particular factors that mark out this case are (i) a need for renegotiation both occasioned by, and recognized and provided for, by Respondent's own pesification legislation, (ii) Respondent's awareness of the precarious position of the Project and of PdL, evident at least from the time of the conclusion of the Loan Agreement on 21 February 2003; (iii) Respondent's awareness of the damages claim in this case, whose registration by ICSID was notified to the Parties on 17 December 2007; and, against this background, (iv) Respondent's repeated failure to implement the agreements on renegotiation that had been signed by PdL in 2006, 2007, 2009, 2010, 2011, and 2012.
281. The renegotiation process was a necessary element – the key element – of the fulfilment of Respondent's obligation under the Treaty to treat PdL in a fair and equitable manner following the 2002 pesification and the complete disruption of the premises upon which the Concession Contract was based.<sup>272</sup> The failure to proceed expeditiously to implement

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<sup>269</sup> Mairal Supp. Opinion, Exh. 4; Cl. PHB ¶ 102.

<sup>270</sup> Article 1.3 in each of the texts.

<sup>271</sup> Lommatzsch Stmt., ¶ 158.

<sup>272</sup> The preamble to Decree 214/02 refers to the “strong interference with the legal relationships, both of public law and of private law” that resulted from the crisis (Exh. CX-68).

the renegotiated terms agreed with PdL, in a situation where the urgency of the rebalancing of the economic relationship after the Respondent's legislative intervention was clear, and in particular when the Claimant's Memorial in this case focused attention upon the compatibility or lack thereof of the continuing delays and abandonments of agreed terms with Respondent's obligations under the Treaty, all combine to persuade the Tribunal that Respondent's failure to secure the implementation of the renegotiated terms was unfair to PdL.

282. Respondent's conduct amounts to more than the disappointment of the hopes and expectations of the Project Consortium. It crosses the line between what is merely sub-optimal administration and bureaucratic delay, and it becomes a failure to remedy the adverse consequences of governmental measures that is so prolonged and so complete as to infringe the investor's rights under the Treaty.
283. It is not easy to identify a precise date by which renegotiation should have been completed, but there are three indications that the renegotiation was not completed within what was a reasonable time in the context of the Argentine laws.
284. First, renegotiation was mandated by the Emergency Law, Law No. 25,561<sup>273</sup> in January 2002. Title IV (and in particular Article 9) of the Emergency Law provided for the renegotiation of public works contracts, and Article 8 of Decree 214/02 provided for adjustments of contracts to be made annually (and in some circumstances, more frequently) so as to "preserve the continuity of the contractual relationship in a way equitable for the parties."<sup>274</sup>
285. Secondly, during the PdL insolvency proceedings, in June 2008, the Argentine Court took the view that UNIREN's refusal to continue the renegotiation of the concession agreement was contrary to the aims of Argentine law, and that more than six years after

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<sup>273</sup> Exh. CX-63.

<sup>274</sup> Exh. CX-68.

the enactment of Emergency Law 25,561 “the grave imbalance in the terms of the [Concession] agreement persists”.<sup>275</sup>

286. Third, the Tribunal notes that it was practicable for the Parties to conclude a negotiated settlement by 2006 or 2007 at the latest. PdL was prepared in 2006 to accept – and, indeed, did accept – a negotiated settlement, and the Claimant was also willing to accept that settlement as a shareholder in PdL. But the 2006 CdE was repudiated by the presentation of the 2007 CdE to PdL by Respondent on 12 February 2007.<sup>276</sup>

287. The Tribunal considers that Respondent’s failure to conclude an agreement on renegotiation was a violation of the FET standard in the BIT. While the Tribunal is satisfied that the violation had occurred by 26 February 2007, when Claimant sent to Respondent its notice regarding the existence of a dispute under the BIT,<sup>277</sup> that is not the date that will be relevant to the calculation of the reparation due in respect of injury caused by the breach. The breach consists in the failure to redress the commercial balance that had been disrupted by the pesification Law, Law 25,561 on 6 January 2002; and the injury for which reparation is due includes losses suffered on and after 6 January 2002.

e) Conclusion on FET

288. The Tribunal has thus concluded that there were violations of the FET standard in Article 2 of the BIT, in respect of which reparation is due, constituted by:

(1) the failure to restore and redress the commercial balance that had been secured by the Concession Contract, after that balance had been disrupted by the pesification Law, Law 25,561, on 6 January 2002; and

(2) the pesification of operation and maintenance expenses in Resolution 14 of 30 June 2003.

(B) FULL PROTECTION AND SECURITY: Articles 2(1) and 4(1)

(C) EXPROPRIATION: Article 4(2)

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<sup>275</sup> Exh. CX-106.

<sup>276</sup> Cl. Rep. ¶ 85; CdE (February 2007) (Exh. CX- 100).

<sup>277</sup> Exh. CX-101.

- (D) THE ‘OBSERVANCE OF OBLIGATIONS’ OR ‘UMBRELLA CLAUSE’: Article 7(2)
- (E) ARBITRARY OR DISCRIMINATORY MEASURES: Article 2(3)
- (F) BREACH OF BINDING UNILATERAL DECLARATIONS

289. Having considered and decided upon Respondent’s liability for breach of the FET standard in Article 2 of the BIT, the Tribunal now turns to the other BIT standards upon which Claimant relied.

290. Not all BIT standards are the same; nor is the FET standard, despite its undoubted breadth, capable of subsuming every other BIT standard. As a matter of fact, however, it may be evident that where the same facts are said to constitute breaches of more than one BIT standard, and where the alleged losses are the same in each case, equally detailed analysis of the application of each of the treaty standards to the facts of the case is redundant.

291. So it is here; and especially because the terms of the protections accorded under Articles 2, 3 and 4 of the BIT appear to overlap. The claims concerning Full Protection and Security [BIT Articles 2(1) and 4(1)],<sup>278</sup> the claims concerning expropriation [BIT Article 4(2)],<sup>279</sup> the claims concerning arbitrary or discriminatory measures,<sup>280</sup> and the claims concerning the ‘observance of obligations’ or ‘umbrella clause’,<sup>281</sup> are all based on essentially the same facts and same arguments as the claims based upon the FET standard. It is not argued that these other standards entail a different approach to causation or to determination of quantum, or to liability for a different range of losses;<sup>282</sup> and the Tribunal considers that these additional grounds for the claims are adequately addressed by its decisions in respect of the FET standard. The same is true of claims

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<sup>278</sup> See Cl. Mem. ¶¶ 426-437.

<sup>279</sup> See *Ibid.*, ¶¶ 454-508.

<sup>280</sup> See *Ibid.*, ¶¶ 438-447, 448-453

<sup>281</sup> See *Ibid.*, ¶¶ 509-527.

<sup>282</sup> See *Ibid.*, ¶¶ 536- 549, 550-551. See also the LECG Report, *Losses to Hochtief AG’s Investments in Puentes del Litoral S.A.*, 29 April 2010, submitted by Claimant.

based upon general international law obligations and the breach of binding unilateral commitments made by Respondent.<sup>283</sup>

(G) THE DURATION OF THE EMERGENCY AND THE OPERATIVE DATE OF THE BREACHES

292. The Tribunal has decided that (1) Respondent's failure to implement timeously the renegotiation process (i.e., by 2006 or 2007, but taking account of prior losses: see paragraph 286 above) and (2) the adoption of Resolution 14 in June 2003, violated the BIT. The next question is whether either breach might be excused or rendered unlawful by the defence of necessity. That would be possible only if the emergency persisted at the relevant time,
293. Fixing a date for the 'end' of an economic crisis is a highly subjective exercise, overwhelmingly influenced by the precise factors or indicia upon which one focuses and the degree of change or stability that one regards as qualifying as a return to a normal, non-crisis situation.
294. The Tribunal found persuasive the expert evidence suggesting that 2003 saw a resumption of growth in the economy<sup>284</sup> and that the worst of the crisis in macro-economic terms was over by mid-2003 (although the Tribunal accepts that the social and other effects on Argentine society identified by Dr Kliksberg persisted well after that time).<sup>285</sup> Other tribunals have found significant dates in this period, such as the date of the election of President Kirchner on 26 April 2003.<sup>286</sup> The selection of such a date does not signify the possibility of making a precise objective determination of a date on which the economic crisis ended: rather, it signifies the exercise by a tribunal of its power to decide a case on the evidence before it, and the need to stipulate a particular date in order to give

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<sup>283</sup> See Cl. Mem. ¶¶ 528- 536.

<sup>284</sup> Eichengreen Report, ¶ 26.

<sup>285</sup> Edwards Report, ¶ 208.

<sup>286</sup> *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, ¶¶ 229-230.



effect to the tribunal's reasoned judgment. No more and no less can be expected than a serious attempt by a tribunal to identify a suitable date on the basis of the evidence provided by the Parties.

295. The evidence presented by the respective experts, for both Parties,<sup>287</sup> in this case indicates that the crisis was over by the mid-2003, the time during which President Kirchner was elected. Bearing in mind the practicalities of financial accounting and calculation, this Tribunal accordingly fixes 1 May 2003 as the date at which the crisis ended.
296. The road and the bridges were opened to toll-paying traffic on 23 May 2003.<sup>288</sup> The Tribunal has found no compelling evidence that the delay in the opening of the Project was caused by conduct that is attributable to Respondent and is in breach of the BIT. PdL's income stream accordingly began to flow on 23 May 2003; and it was that income stream whose dollar value is protected by the FET provision in Article 2 of the BIT. But that flow begins after the end of the crisis, as determined by the Tribunal.
297. To be precise, the actions of Respondent, in breach of its obligations under the BIT, that produced the reduction in value of PdL's income stream were the failure to correct the imbalance caused by the pesification introduced by the Emergency Law, Law No. 25,561 in January 2002, and the imposition of the terms of the Emergency Loan by Resolution 14 on 30 June 2003.
298. The effects of the non-correction of the Emergency Law upon which the Tribunal bases its calculation of reparation due to PdL are in principle all losses sustained after and as a result of the enactment of the Emergency Law on 6 January 2002. In practice, the majority of the Tribunal has found no quantifiable losses of this kind that arose prior to 23 May 2003. It was after the opening of the road and bridges to toll-paying traffic on that date, that the impact of the pesification and the Emergency Loan upon PdL's income stream from tolls began to be felt. The Tribunal accordingly decides by a majority that

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<sup>287</sup> Edwards Report, ¶ 208, and Tr., Day 6, p. 1140. Eichengreen Report, ¶ 26, and Tr. pp. 2122-2123.

<sup>288</sup> Cl. Mem. ¶ 4.

while the renegotiation and ‘rebalancing’ should have occurred by 2006 or 2007,<sup>289</sup> the duty to restore the balance extended back to cover all ‘unbalancing’ losses resulting from the 2002 Emergency Law, and thus covered the losses arising after 23 May 2003.

299. While it is theoretically possible that some type of damage arose prior to 23 May 2003 – for example, the value of the difference between the terms of the Emergency Loan granted by Argentina to PdL and whatever loan or other financing might have been available to PdL had it been able to show the lender that the Contract had been satisfactorily readjusted to offset the effects of pesification – the majority of the Tribunal finds that no such losses have been proven.
300. The adoption of Resolution 14 occurred after 23 May 2003. Its impact similarly postdates both the end of the economic crisis and the opening of the road and bridges to toll-paying traffic.
301. The Tribunal accordingly rejects the submission that either breach can be excused or exculpated by reason of the economic crisis and the doctrine of ‘necessity’ under customary international law. That rejection inevitably follows from the chronology of the facts in this case. The economic crisis had ended by the time that the losses for which reparation is due were sustained.

(H) CLAIMANT’S SHARE OF THE REPARATION

302. The analysis has proceeded thus far by focusing on the reparation due in respect of the breach of the FET standard in the BIT, but without addressing the question of Claimant’s entitlement to a part of that reparation.
303. The Tribunal has found, in summary, that Claimant is entitled as an investor within the meaning of the BIT to sue in respect of breaches of the BIT committed by Respondent in its dealings with PdL, in which Claimant had an investment at the material times. Further, the Tribunal has determined that the adoption of Resolution 14 on 30 June 2003 and

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<sup>289</sup> See above, ¶¶ 286-287.

Respondent's failure to implement the renegotiated agreements timeously violated the BIT.

304. It does not follow that just because Claimant is entitled to sue in its own name, without bringing PdL into the proceedings, it is also entitled to take away all or part of the reparation without bringing PdL into the picture. As a shareholder in PdL, Claimant has obligations as well as rights; and one of those obligations is to accept that the assets of PdL would be properly applied to satisfy the legitimate demands of all PdL's creditors and all PdL's shareholders, according to the priorities laid down by law.
305. In the view of the Tribunal, it cannot be assumed that Claimant has an unencumbered right to a share of the reparation due to PdL that corresponds to the share of the stock in PdL held by Claimant. Other shareholders and creditors of PdL may have claims on sums paid by way of reparation. The question is, whether this is a matter for the Tribunal in this case, or whether any such claims are a matter between Claimant and persons not party to these proceedings.
306. The Tribunal has decided that it is beyond both its responsibilities and its powers to make dispositive orders in this respect. Neither PdL nor any other persons are parties to this arbitration or subject to its jurisdiction. The Tribunal accordingly proceeds on the basis of the approach adopted by other tribunals, and makes an award for reparation of which Claimant will be entitled to a share corresponding to the proportion of its shareholding. But it does so with the proviso that Claimant must disclose this award to the board of PdL, drawing the board's attention specifically to this Section (H).
307. The Tribunal has accordingly decided that Claimant is entitled to 26% of the damages caused to PdL by Respondent, as the share corresponding to its share in the equity of PdL.

308. Claimant asks for full reparation for all of its losses caused by Respondent.<sup>290</sup> It submits that there should be no deduction made in respect of the payment that it received under the political risk insurance that it had arranged with the German Government.<sup>291</sup>
309. The Tribunal decides that the insurance payment, which is understood to amount to EUR 11,359 (US\$ 17.7 million<sup>292</sup>) should not be deducted from the amount due to Claimant. The insurance payment is a benefit which Claimant arranged on its own behalf, and for which it paid. It does not reduce the losses caused by Respondent's actions in breach of the BIT: it is an arrangement that had been made by Claimant with a third party in order to provide a hedge against potential losses. The Tribunal does not consider that any principle of international law requires that such an arrangement, to which Respondent was not a party, should reduce Respondent's liability.<sup>293</sup> It may be that under such insurance policies the protected investors are obliged to hand over to the insurer all or part of any sums recovered as damages: but that is a matter of private contract, into which the Tribunal has no cause to inquire.
310. The Tribunal has already determined that amounts received by Claimant in its capacity as a contractor on the Project do not affect its entitlement to compensation for injury to its investment in the Project.<sup>294</sup>

(I) THE APPROACH TO THE DETERMINATION OF QUANTUM

***The general approach: the reduction in value of Claimant's shareholder interest in PdL***

311. The Tribunal has considered carefully the arguments in the reports of the Parties' respective experts, and their respective approaches to the determination of quantum. In their 2010 report Claimant's experts Messrs Abdala and Spiller of LECG (later Compass/Lexecon) estimated damages as of 31 December 2009, at US\$ 74.6 million,

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<sup>290</sup> Cl. Rep., Section XIV, 'Damages'.

<sup>291</sup> Cl. Rep., ¶ 435 ff.

<sup>292</sup> See the Sandleris and Schargrodsky Valuation Report, ¶ 173.

<sup>293</sup> Cf., *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Cases Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010, ¶ 691 (a decision on third party funding and liability for costs.)

<sup>294</sup> Above, ¶ 181.

using the Discounted Cash Flow ('DCF') approach, and at US\$ 109.0 million using the Net Capital Contribution ('NCC') approach. Those figures were revised in their 2012 report to US\$ 109.4 million and US\$ 157.2 million respectively, as of 31 May 2012. Respondent's experts Messrs Sandleris and Schargrodsky estimated damages as of late December 2010 at sums within a range from negative US\$ 3.83 (i.e., damages owed to the Respondent)<sup>295</sup> to a positive US\$ 1.07 million.

312. The wide gap between the experts' estimates is largely attributable to the different assumptions concerning key issues on which they based their work. For example, Claimant's experts valued damages as at later dates (2010, 2012), and on the basis that sums recovered under the political risk insurance that Claimant had taken out should be disregarded, that but for Respondent's measures tariffs and expenses would have been dollarized and revised, so that Respondent is responsible for losses resulting from pesification, and that Respondent was responsible for the non-payment of the IDB loan and for delays in completing the Project and that Respondent is liable to repay the loans advanced to PdL by Hochtief. Claimant's experts also assume that but for Respondent's actions PdL would have been profitable, and that Claimant would have received dividends and have seen the value of its equity share in PdL increase, and would have had its loans to PdL repaid.
313. On the other hand, Respondent's experts assumed that the date for valuation should have been early 2002, when the pesification measures were enacted; that Claimant's receipts under the political risk insurance should be deducted; that there was no possibility of maintaining dollarized tariffs after 2002, even in a 'but for' scenario; and that Respondent was not responsible for the non-payment of the IDB loan (and Claimant was therefore in breach of its contractual obligation to obtain FIFA) or for delays in completing the Project. Respondent's experts assume that PdL would not have been profitable and that no dividends could have been paid to the shareholders.

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<sup>295</sup> See the explanation in Resp. PHB ¶¶ 77-80.

314. There is little common ground between the experts; and the Tribunal finds that the approach of neither set of experts is entirely satisfactory. Indeed, where there were great differences between the scenarios contemplated by the experts, comparison of their reports was an exercise of regrettably limited utility. The Tribunal does, however, have a clear view on the losses for which compensation is due.
315. In broad terms, the measure of the damage is the amount by which the value of Claimant's 26% shareholding in PdL was reduced by Respondent's conduct in violation of the BIT. It is to be assumed that this amount is equivalent to 26% of the reduction in value of PdL caused by Respondent's breaches of the BIT.
316. The main element in the reduction in the value of PdL is the difference between the sums that PdL actually received from tolls and the sums that it should have received if pesification had not occurred and if the toll rates had been revised annually in line with the US Consumer Price Index, as the Concession Contract provided.
317. Claimant's experts have taken a relatively conservative approach to the determination of toll receipts. They have, of course, the actual figures for receipts up until recent months; and in calculating the toll revenues as they would have been 'but for' the pesification and toll freeze they have assumed that the higher 'dollarized' tolls would have reduced demand, and therefore toll income, because of the elasticity of demand.<sup>296</sup> Respondent's experts challenge, *inter alia*, the elasticity values, and the validity of any assumption that PdL could (even in the absence of Respondent's actions) have maintained dollarized tariff rates after 2002.
318. The Tribunal finds the approach of Claimant's experts to the estimation of the estimation of toll receipts in the 'but for' scenario to be persuasive. In their Second (2012) Report,<sup>297</sup> Claimant's experts revised their estimate of toll receipts in the 'but-for' scenario, in the light of the analysis of elasticities in the study 'Rosario to Victoria Bridge Traffic and Revenues' (1 June 2012), by Mr Philip Bates of Buro Happold. Mr Bates proposed an

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<sup>296</sup> LECG First Report, ¶¶ 138-151.

<sup>297</sup> Compass Lexecon, Second Report, 5 June 2012, Section III.1.6.

‘envelope’ of elasticity values. The initial values used by Messrs Abdala and Spiller lay comfortably within the envelope; but the Tribunal considers that it is appropriate, given the burden that lies upon Claimant to prove its case, to prefer the experts’ calculations based on Mr Bates’ lower bound figures.<sup>298</sup>

319. The other element driving the reduction in value of PdL is the pesification of operation and maintenance expenses imposed by Resolution 14.
320. The Tribunal has given careful consideration to the question of the claims for consequential costs. Claimant claimed for losses flowing from its inability to obtain the IDB loan, and the delay in beginning operations.<sup>299</sup> These include the extra costs incurred as a result of the failure of the IDB loan to materialize, and the allegedly excessive costs of the 2003 Emergency Loan.
321. The factual evidence is, in the view of the Tribunal, not adequate to support the conclusion that Respondent is responsible for the non-materialization of the IDB loan. Nor is the evidence of the market rate for loans to companies in the position of PdL in Argentina in 2003 sufficiently clear to warrant the making of an order for compensation specifically related to the alleged increases in PdL’s costs of borrowing.
322. The pesification of operation and maintenance costs in Resolution 14, in contrast, is a clear departure from the basic principles on which the Concession Contract was concluded, and notional reparation for those losses is to be counted in the ‘but for’ scenario, from which Claimant’s entitlement to reparation will be calculated.
323. Claimant also asserts that it suffered damage to its investment as a result of the fall of PdL towards bankruptcy. The evidence on this point is not clear. Prior to the onset of the financial crisis, the Consortium’s members’ own invoices as contractors were paid,<sup>300</sup> evidently enabling them to recoup their own capital contributions; but PdL’s principal

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<sup>298</sup> *Ibid.*, ¶ 109.

<sup>299</sup> See e.g., the LECG Report, ¶ 2.

<sup>300</sup> In a letter dated 4 December 2002 from the Boskalis International BV-Ballast Nedam Baggeren BV joint venture to the Argentinean Ministry of Economy, it was alleged that PdL gave priority to paying its own shareholder/contractors before paying its principal subcontractor, the joint venture. (Exh. RA 460)

subcontractor, the Boskalis-Ballast Nedam joint venture, was not paid, setting in motion the events that led to the ICC award against PdL rendered on 28 November 2003 and the insolvency proceedings initiated against PdL in April 2007, first by Boskalis-Ballast Nedam on the ground of non-payment of the ICC award and then by PdL's own board. But evidence is lacking to prove that PdL did not receive sufficient monies from Respondent to have been able to pay the invoices received from Boskalis-Ballast Nedam if PdL had chosen to give priority to the payment of those invoices.

324. Given the Project's difficult financial straits in the deteriorating financial conditions of Argentina in the months leading up to the Emergency Law's enactment, the Tribunal finds that there is insufficient evidence to warrant the conclusion that the bankruptcy proceedings against PdL were caused by the pesification process or any other breach of the BIT for which Respondent was responsible; and it declines to order the payment of any reparation in respect of PdL's fall towards bankruptcy. Indeed, the Tribunal's assumption must be that if it requires a revenue stream to be calculated in dollars, in order to avoid any unjust enrichment, it must equally assume that all of PdL's liabilities are similarly to be calculated in dollars. On this basis, and having regard to the normal priority of creditors over shareholders, PdL must be assumed to have been placed in a position to fully repay all of its debts, including to Boskalis-Ballast Nedam, to Argentina (for the Emergency Loan), and to those shareholders such as Hochtief who advanced loans to the company. It follows that the valuation exercise must assume no insolvency and the full repayment of sums owing to creditors without any discount.
325. The Tribunal has accordingly decided that for the purpose of calculating the reparation due to Claimant in this case, the reduction in value is to be Claimant's 26% share of the difference in US dollars between the actual value of PdL at the date of this Decision, and the value that PdL would have had if all other factors had remained as they stand in the 'actual scenario' except that:
- a) Peso-dollar parity had been maintained; and
  - b) The tolls had been revised in accordance with the US Consumer Price Index, as provided in Article 25 of the Concession Contract;



- c) The numbers of each kind of toll payments had been the actual numbers reduced to take into account the impact of the elasticity of demand as estimated in the lower bounds of Mr Bates' report, as indicated by Claimant's experts in paragraph 109 of their Second Report (2012) ; and
- d) The actual operation and maintenance costs and all other financial liabilities incurred by PdL, including all of its debts, had not been pesified or reduced in the insolvency proceedings.

### ***Temporal limitations on recovery***

326. As far as the temporal limitations on damages are concerned, as noted above, since the Respondent has not effected a proper readjustment of the Concession Contract, the actual losses in the present case begin when the income stream began to be affected, on 23 May 2003, because no earlier loses have been proven. Respondent's liability arises from its failure after the end of the economic crisis to restore PdL to the economic position upon which the Parties had agreed at the beginning of the Project, and to maintain PdL in that position. That is a continuing failure, and the losses resulting from it continue to accrue. The Tribunal accordingly decides by a majority that damages are to be assessed as at the date of this Decision.

327. The calculation is therefore to be effected by reference to the reduced value of PdL as it stands at the date of the Decision. The Tribunal would reject the claims for the recovery of anticipated losses that may arise after the date of the Award, because the Tribunal has no reason to suppose that Respondent will ignore the implications of this Decision for its continuing obligations towards PdL and Claimant.<sup>301</sup> The approach adopted here does not violate that principle. It is the *present* value of PdL that has been reduced, albeit by taking into account present expectations as to the future treatment of the Project. It is that loss in the present value of PdL that is the basis of the compensation in this Decision.

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<sup>301</sup> See in this respect, *Mobil Investments Canada and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4), Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 473 *et seq*: cf., *Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, I.C.J Reports 2009, p. 267, ¶ 150.

328. The Tribunal accordingly decides that damages are to be assessed as at the date of this Decision. As noted above, the damages begin when the income stream begins to be affected, on 23 May 2003.

(J) COSTS

329. The Tribunal has considered the submissions of the Parties on the question of costs, and the manner in which the litigation has been pursued.

330. Although the Tribunal has not ordered the payment of reparation under every one of the heads of claim presented by the Claimant, the core of the claim has been upheld and the Tribunal has held that Claimant is entitled to reparation for the losses caused by Respondent's violation of Claimant's rights under the BIT. Those losses include Claimant's reasonable costs in pursuing this claim, payable as at the date of this Decision.

331. The Tribunal considers that the costs, including legal costs and the costs of expert witnesses, are high, but not excessively high given the length and complexity of these proceedings. It starts from the principle that the successful Party should recover its costs, but considers that a substantial part of the Claimant's case was not accepted and that in the circumstances it would not be fair to impose the entire costs upon the Respondent. Accordingly, it reduces the costs claimed (US \$9,233,758) by 25% and decides that the Respondent should reimburse the Claimant in the sum of US \$6,925,318.50.

(K) INTEREST

332. The Tribunal has decided that compound interest is payable on sums due to Claimant from the date on which the payment should have been made to Claimant (e.g., each day on which there was a difference between the actual rate toll revenues and the non-pesified, revised toll revenues).

333. Compound interest is payable on any and all sums due under this Decision from the date of the Decision until the date when the payment of such sums is made.

334. Interest is payable at the rates of short-term US Treasury Bills at the relevant times, compounded quarterly.

(L) THE SUM TO BE PAID

335. The Tribunal has not been able, on the basis of the information submitted by the Parties, to calculate the actual sum that results from the application of the principles set out above. This Decision orders the payment of that sum; and if the Parties are unable to agree within three months on the actual sum in US dollars payable as a result of this Decision, the Tribunal will invite each Party to submit, simultaneously and within a further two months, a brief setting out that Party's calculation of each element of the sum due in accordance with paragraph 325, and an explanation of the points on which there is disagreement. The Tribunal will then fix the actual sum payable.

## VI. DECISION OF THE TRIBUNAL ON LIABILITY

336. On the basis of the foregoing, the Tribunal DECIDES as follows:

- a. Having already determined (by a majority) that it has jurisdiction over the claims in this case, the Tribunal concludes, by a majority, that claims made by Claimant in its capacity as a lender to PdL are inadmissible. All the other objections by Respondent to the admissibility of Claimant's claims, are rejected;
- b. As explained in paragraphs 209-288, Respondent breached its obligations under Article 2 of the BIT to grant to Claimant fair and equitable treatment, by (1) the failure to restore and redress the commercial balance that had been secured by the Concession Contract, after that balance had been disrupted by the pesification Law, Law 25,561, on 6 January 2002; and (2) the pesification of operation and maintenance expenses in Resolution 14 of 30 June 2003, and reparation is due in respect of those breaches;
- c. The Tribunal finds that it does not need to resolve Claimant's claims concerning Full Protection and Security [BIT Articles 2(1) and 4(1)], expropriation [BIT Article 4(2)], arbitrary and discriminatory measures, and 'observance of obligations' or 'umbrella clause', because they are all based on essentially the same arguments as the claims based upon the FET standard. As noted under paragraph 291, it has not been argued that these other standards entail a different approach to causation or to determination of quantum, or to liability, and the Tribunal considers that these additional grounds for the claims are adequately addressed by its decisions in respect to the FET standard;
- d. As is explained in paragraphs 292-301, Respondent's submission that the breaches in the present case can be excused or exculpated by reason of the economic crisis and 'necessity' under customary international law, is rejected;
- e. Claimant is entitled to 26% of the damages caused to PdL by Respondent, corresponding to its share in the equity of PdL, and the Tribunal decides, by a majority, that such damages are to be assessed as at the date of this Decision;

- f. The political risk insurance payment that Claimant had arranged with the German Government should not be deducted from the amount due to Claimant, as explained in paragraph 309;
- g. Since the Tribunal has not been able, on the basis of the information provided by the Parties, to calculate the actual compensation to be paid, the Parties are to calculate and submit, in accordance with the principles set out in paragraph 325, the information required under paragraph 335, in the manner and within the time limits indicated therein;
- h. As decided in paragraphs 332-334, interest on all sums due to Claimant from the date on which the payment should have been made to Claimant, and on any and all sums due under this Decision from the date of the Decision until the date when the payment of such sums is made is payable at the rates of short-term US Treasury Bills at the relevant times, compounded quarterly.
- i. As to costs, and as explained in paragraphs 329-331, Respondent should reimburse the Claimant in the sum of US\$6,925,318.50.

Done in English and in Spanish, both versions being equally authentic.

*Charles N. Brower*

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Honorable Charles N. Brower  
Arbitrator

*J. Christopher Thomas*

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Mr. J. Christopher Thomas, Q.C.  
Arbitrator

*Vaughan Lowe*

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Professor Vaughan Lowe  
President of the Tribunal