**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**WEBUILD S.P.A. (FORMERLY SALINI IMPREGILO S.P.A.)**
Claimant

and

**ARGENTINE REPUBLIC**
Respondent

**ICSID Case No. ARB/15/39**

# DECISION ON LIABILITY AND DIRECTIONS ON QUANTUM

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Professor Kaj Hobér
Professor Jürgen Kurtz

***Secretary of the Tribunal***
Ms. Mercedes Cordido-Freytes de Kurowski

***Assistant to the Tribunal***
Professor Freya Baetens

*Date of dispatch to the Parties*:3 March 2023

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## TABLE OF ABBREVIATIONS/DEFINED TERMS

| | |
|---|---|
| *Acta acuerdo* | Agreement between Puentes and Argentina of 20 October 2000 |
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings of 2006 |
| Argentina or the Respondent | The Argentine Republic |
| Bidding Terms | Pliego de Bases y Condiciones del Concurso y sus Circulares |
| BIT or the Treaty | Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments which was signed on 22 May 1990 and entered into force on 14 October 1993 |
| Boskalis Ballast | Boskalis-Ballast Nedam Baggeren, one of Puentes' principal subcontractors and the claimant in an ICC arbitration brought against Puentes for unpaid services that resulted in an award of approximately US$ 30 million and was the basis of a 2007 bankruptcy petition against Puentes |
| C-[#] | Claimant's Exhibit |
| Claimant's Memorial | Claimant's Memorial on the Merits dated 3 January 2017 |
| Claimant's Reply | Claimant's Reply on the Merits dated 16 November 2018 |
| CL-[#] | Claimant's Legal Authority |
| Claimant | Webuild S.p.A. (formerly known as Salini Impregilo S.p.A.) |
| Concession | Concession for the Project set out in the Bidding Terms |
| Concession Contract | Concession Contract executed between the Claimant's local Argentine incorporated |

| | |
|---|---|
| | company, Puentes del Litoral S.A., and the Argentine Republic on 28 January 1998 |
| Consortium | The Claimant, Hochtief Aktiengesellschaft, and several Argentine construction companies |
| Convertibility Law | Law No. 23,928 |
| CPI | U.S. Consumer Price Index |
| DCF | Discounted Cash Flow |
| Decision on Jurisdiction | Decision on Jurisdiction and Admissibility issued by the Arbitral Tribunal on 23 February 2018 |
| Emergency Law | Law No. 25,561 |
| FAL or Financial Assistance Loan | Financial Assistance Loan agreement executed 21 February 2003 and 4 March 2003 |
| FET | Fair and Equitable Treatment |
| FIFA | Firm and Irrevocable Financing Agreement |
| First LOU | Letter of Understanding of 16 May 2006 |
| First Transitory Agreement | Transitory Agreement of 17 December 2009 |
| Foreign Investment Act | Decree No. 1853/93 |
| Fourth Transitory Agreement | Transitory Agreement of 6 March 2012 |
| Hearing on the Merits or Hearing | Hearing on the Merits held on 2 February 2021 and from 11 to 19 February 2021 by video conference |
| Hochtief | German international construction group Hochtief Aktiengesellschaft |
| *Hochtief* Arbitration | *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31 |
| Hochtief Shareholder Loans | Shareholder Loans made by Hochtief |

| | |
|---|---|
| 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 |
| IDB | Inter-American Development Bank |
| IDB Loan or Loan | Loan agreement between Puentes and the Inter-American Development Bank of 1 August 2000 |
| IRR | Internal Rate of Return |
| MEyOSP | Argentine Ministry of Economy and Public Works and Services |
| MFN | Most-Favored-Nation Clause |
| NCC | Net Capital Contributions |
| OCCOVI | Órgano de Control de Concesiones Viales |
| Project | The construction of several roads and a series of bridges and embankments, including a 608-meter long cable-stayed main bridge, which would connect the cities of Victoria and Rosario in the provinces of Entre Ríos and Santa Fe, Argentina |
| Puentes, PdL or Concessionaire | Puentes del Litoral S.A. |
| R-[#] | Respondent's Exhibit |
| Renegotiation Protocol | Protocol for the renegotiation of the Concession agreed on 6 April 2005 |
| Renegotiation Report | Report on the Merits of the Memorandum of Understanding UNIREN – PUENTES DEL LITORAL SA of 19 January 2007 |
| Request | Request for Arbitration from Salini Impregilo S.p.A. against the Argentine Republic dated 1 September 2015 |

| | |
|---|---|
| Resolution 14 | Resolution SOP No. 14/03 |
| Respondent's Counter-Memorial | Respondent's Counter-Memorial on the Merits dated 21 June 2018 |
| Respondent's Rejoinder | Respondent's Rejoinder on the Merits dated 7 March 2019 |
| Respondent | The Argentine Republic |
| RL-[#] | Respondent's Legal Authority |
| Second LOU | Letter of Understanding of 16 May 2006 |
| Second Transitory Agreement | Transitory Agreement of 14 June 2010 |
| Shareholder Loans | Loans made by Claimant and Hochtief to Puentes |
| SOP | Secretariat of Public Works |
| State Reform Law | Law No. 23,696 |
| Termination Resolution | Argentine resolution of 26 August 2014, terminating the Concession Contract |
| Third Transitory Agreement | Transitory Agreement of 13 October 2011 |
| Tr. Day [#]: [Speaker(s)] [page:line] | Transcript of the Hearing |
| Tribunal | Arbitral Tribunal constituted on 11 July 2016 and reconstituted on 15 July 2021 |
| UNIREN | Unit of Renegotiation and Analysis of Public Utility Contracts |
| Valuation Date | Date of the Termination Resolution (31 August 2014) in Claimant's damages calculations |
| Webuild | Webuild S.p.A. (formerly, Salini Impregilo S.p.A.), an Italian industrial group incorporated under Italian law |
| Webuild Shareholder Loans | Shareholder Loans made by Webuild |

# 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 Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments which was signed on 22 May 1990 and entered into force on 14 October 1993 (the "**BIT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 (the "**ICSID Convention**").

2. The Claimant is Webuild S.p. A. (previously Salini Impregilo S.p.A.) ("**Webuild**" or "**the Claimant**"), an Italian industrial group specialising in large civil engineering projects, incorporated under Italian law. On 20 May 2020, the Claimant informed the Tribunal that on 4 May 2020, the shareholders of Salini Impregilo S.p.A. held an extraordinary meeting during which they passed a resolution to change the company's name to Webuild S.p.A.[1] Previously, on 26 November 2013, Salini S.p.A. had merged by incorporation into Impregilo S.p.A. On 1 January 2014, Impregilo S.p.A. changed its name to Salini Impregilo S.p.A. Depending on the date of the Parties' submissions, the names of **Salini**, **Salini Impregilo** or **Webuild** are used without distinction to designate the Claimant.

3. The Respondent is the Argentine Republic ("**Argentina**" or "**the Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i). The Tribunal also recalls that during the Hearing on the Merits, the Claimant explained that since it "needed a local presence on the ground, and Marval, O'Farrell, Mairal has been advising on other issues involving the case for some time, and is one of the most respected firms in the country, and

[1] Following several submissions from the Parties with reference to the Claimant's change of its corporate name from Salini Impregilo S.p.A. to Webuild S.p.A., on 5 November 2020, the Tribunal issued Procedural Order No. 4, in which the Tribunal concluded that it was satisfied with the documents and explanations that had been provided by the Claimant, and would not require further submissions from either Party.

we asked them to help us for the Hearing. So, they are making an appearance on the record for the first time for this Hearing."[2]

5. The Claimant and other investors formed a Consortium to participate in a bid for the construction of several roads and a series of bridges and embankments, including a 608-meter-long cable-stayed main bridge, which would connect the cities of Victoria and Rosario in the provinces of Entre Ríos and Santa Fe in Argentina (hereinafter defined as "**the Project")**. The Consortium won the bid, and on 28 January 1998, executed a Concession Contract with the Respondent for the performance of the Project.[3] A locally incorporated Argentine company, Puentes del Litoral S.A. ("**Puentes**" or the "**Concessionaire**"), was created as required by the Concession Contract and began construction in late 1998.[4] The Claimant submits that it owns 26% of Puentes' stock and confirms having invested US$ 33.2 million in the Project.[5]

6. The Claimant alleges that Argentina has failed to restore Puentes' "Concession Contract's economic balance [following the enactment of the Emergency Law,] has hindered Claimant's investment to the point of complete loss, has ended the Concession Contract by using pretextual reasons and has failed to compensate Claimant and Puentes for the adverse economic effects of its unlawful conduct".[6] As a result, the Claimant contends that the Respondent breached several provisions under the BIT, in particular: (i) the fair and equitable treatment ("**FET**") standard (Article 2.2); (ii) the non-discrimination standard (Articles 2.2 and 3); and (iii) the obligation not to unlawfully expropriate an investment (Article 5).[7] The Claimant also invokes Article 7 of the U.S.-Argentina BIT by way of the most-favored nation clause ("**MFN**") under the BIT (Article 3.1).[8]

[2] Tr. Day 1: 21:20 – 22:4.
[3] Claimant's Memorial, ¶ 47.
[4] Claimant's Memorial, ¶ 4.
[5] Claimant's Memorial, ¶ 170.
[6] Request for Arbitration, ¶ 4; Claimant's Memorial, ¶ 168. Tr. Day 2: 142:18-22, 150:5-14.
[7] Claimant's Memorial, ¶ 177.
[8] Claimant's Memorial, ¶¶ 161-162. The Request for Arbitration identified a larger number of claims than were ultimately set forth in the Memorial (¶ 10): "Argentina has breached at least the following obligations and standards of conduct with respect to Salini Impregilo's investment: Investments by investors of one of the Contracting Parties shall not be nationalized, expropriated, seized or otherwise appropriated, either directly or indirectly, through

7. The Respondent argues that its "actions showed full support and commitment to the works for the Rosario-Victoria physical connection […]. In spite of Concessionaire's breaches, the State maintained the Concession, until the time where PdL's shareholders decided to terminate such concession upon dissolution of Concessionaire. The abrupt alteration in the economic and financial balance of the Contract was a result of financing problems faced by Concessionaire and its shareholders, not attributable to the State, prior to the outbreak of the crisis in late 2001 and the adoption by the State of emergency measures to counteract such crisis […]. Also, the financing difficulties faced by Concessionaire and its shareholders, prior to the crisis and the emergency measures, were the factor leading PdL to file for insolvency proceedings in order to avoid being adjudged bankrupt as petitioned by its subcontractors".[9] As a result, the Respondent asks the Tribunal to reject the Claimant's claims.

## II. PROCEDURAL HISTORY

### A. REGISTRATION OF THE REQUEST

8. On 1 September 2015, ICSID received a request for arbitration of the same date from the Claimant against the Respondent (the "**Request**").

9. On 17 September 2015, 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

measures having an equivalent effect in the territory of the other Party, unless the following conditions are complied with: the measures are taken for a public purpose, in the national interest or for security; they are taken in accordance with due process of law; they are non-discriminatory or not contrary to any commitments undertaken; and they are accompanied by provisions for the payment of prompt, adequate and effective compensation; Each Contracting Party shall always accord fair and equitable treatment to the investments made by the investors of the other Contracting Party; Each Party shall observe any obligations it may have entered into with regard to investments; Neither Party shall impair by unjustified or discriminatory measures, the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other Contracting Party's investors; [SEP] Each Contracting Party shall, in its own territory, accord to investments made by investors of the other Contracting Party, to the returns and activities related thereto and to any other matter regulated by this Agreement, a treatment not less favorable than that accorded to its own investors or to investors of third countries; Investment shall at all times ... enjoy full protection and security and shall in no case be accorded treatment less than that required by international law; and Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations." (footnotes omitted)

[9] Respondent's Counter-Memorial, ¶ 8.

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 ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

## B. THE ARBITRAL TRIBUNAL

10. The Tribunal was originally constituted on 11 July 2016 in accordance with Article 32(7)(b) of the ICSID Convention, and was composed as follows:

    (i) Professor Kaj Hobér, a national of Sweden, appointed by the Claimant;

    (ii) Professor Jürgen Kurtz, a national of Australia and Germany, appointed by the Respondent; and

    (iii) Judge James R. Crawford, a national of Australia, appointed by his co-arbitrators in consultation with the Parties.

11. On 31 May 2021, the Parties were informed that Judge James R. Crawford had passed away on that day. In accordance with ICSID Arbitration Rule 10(2), the proceeding was suspended until the vacancy resulting from Judge Crawford's passing had been filled. The Parties were also informed that pursuant to ICSID Arbitration Rule 11(1), the vacancy should be promptly filled by the same method by which Judge Crawford's appointment had been made.

12. On 8 July 2021, Ms. Lucinda A. Low, a national of the United States, accepted her appointment as President of the Tribunal by the co-arbitrators in consultation with the Parties.

13. On 15 July 2021, the Tribunal was reconstituted with Ms. Lucinda A. Low (U.S.), as President, appointed by the co-arbitrators, in consultation with the Parties; Professor Kaj Hobér (Swedish), as co-arbitrator, appointed by the Claimant; and Professor Jürgen Kurtz (Australian/German), as co-arbitrator, appointed by the Respondent. As required under

ICSID Arbitration Rule 6(2), Ms. Low provided a declaration and a statement, which was circulated to the Parties and the co-arbitrators.

## C. THE DECISION ON JURISDICTION AND ADMISSIBILITY

14. On 23 February 2018, the Tribunal issued a Decision on Jurisdiction and Admissibility (the "**Decision on Jurisdiction**"). The Tribunal refers to section III of the Decision on Jurisdiction for the prior procedural history.

15. The Respondent raised three preliminary objections to jurisdiction and, additionally, contended that the Claimant lacked standing. Each objection will be addressed here, as a way of summary.

16. Extinctive prescription was the first preliminary objection raised by Argentina. In the Respondent's view, the Claimant's claims were a matter to be dealt with under Argentine domestic law as provided for in Article 8.7 of the BIT. Since such claims referred to measures taken over a decade ago, they were time-barred.[10] On the other hand, the Claimant contended that, to the extent that extinctive prescription existed under international law, Argentina had failed to prove its four cumulative elements.[11]

17. The Tribunal held that the Claimant's international law claims were not to be decided under Argentine domestic law, and it further made a distinction between the limitation of actions due to the passage of time and extinctive prescription. Under international law, the BIT and the ICSID Convention were silent in regard to the time limits for bringing a claim. With respect to extinctive prescription, the Tribunal concluded that the delay in bringing the claim was not attributable to the Claimant and that it was a matter of admissibility rather than jurisdiction.[12] The Respondent's first preliminary objection thus failed.

18. The second jurisdictional objection raised by the Respondent was the alleged failure by the Claimant to comply with the 18-month local litigation requirement under Article 8 of the

[10] Decision on Jurisdiction, ¶¶ 50, 55, 58.
[11] *Ibid*., ¶ 68.
[12] *Ibid*., ¶¶ 82-94.

BIT. Both Parties agreed that the BIT required the foreign investors to submit any dispute to the competent administrative or judicial local courts before resorting to international arbitration. Puentes had filed an administrative complaint on 11 June 2013 and had initiated local court proceedings in Argentina on 30 May 2014. However, the Respondent contended that Puentes' claims were different than those presented by the Claimant before this Arbitral Tribunal,[13] or alternatively, that the Claimant had failed to abandon the domestic proceedings as required by Article 8.4 of the BIT.[14] The Claimant refuted the Respondent's position and held that Puentes' proceedings in Argentina had satisfied the local litigation requirement as they dealt with the same subject matter.[15]

19. The Tribunal, after careful consideration of each of the components of Article 8 of the BIT, concluded: first, that the "substantive underpinnings" of the dispute had been correctly submitted to the local jurisdiction as required by Articles 8.2 and 8.3 of the BIT;[16] and second, that as to the requirement to abandon domestic proceedings under Article 8.4 of the BIT, the Claimant was not in a position to "withdraw proceedings to which it was not a party".[17] Therefore, the Respondent's second jurisdictional objection equally failed. Moreover, in the light of these conclusions, the Tribunal found it had "no need to consider the parties' arguments with respect to the MFN and *res judicata* issues. Nor is it necessary to address Salini Impregilo's arguments with respect to futility and estoppel."[18]

20. Thirdly, the Respondent requested that if the Tribunal were to assert its jurisdiction, it should apply the *forum non conveniens* doctrine as the Argentine courts were the most appropriate forum to address the Claimant's contractual claims.[19] The Claimant contended that its claims referred to breaches of the BIT by the Respondent and, as such, should not be resolved by such forum.[20] The Tribunal concluded that the Claimant never "committed

[13] *Ibid*., ¶ 103.
[14] *Ibid*., ¶ 100.
[15] *Ibid*., ¶ 106.
[16] *Ibid*., ¶ 133.
[17] *Ibid*., ¶ 148.
[18] *Ibid*., ¶ 150.
[19] *Ibid*., ¶¶ 152, 155.
[20] *Ibid*., ¶ 159.

to bringing its BIT claims…to the Argentine courts".[21] In conclusion, Argentina's third jurisdictional objection failed.

21. Finally, the Respondent raised the issue of the Claimant's lack of standing. The Respondent contended that the Claimant gave up its rights under the Concession Contract by transferring them to Puentes, and by ceasing to be a party was precluded from bringing a claim before the Tribunal.[22] The Claimant argued that it was bringing a claim as an investor in relation to its investment, Puentes, under the BIT. The Tribunal agreed with the Claimant's position. Salini/Webuild is an Italian investor whose 26% stock ownership in Puentes qualified as an investment under the provisions of Article 25 of the ICSID Convention.[23]

22. In conclusion, in its Decision on Jurisdiction, the Tribunal decided:

> *(1) To reject the Respondent's preliminary objections to its jurisdiction and to the admissibility of the claims;*
>
> *(2) To reserve all questions of costs to a later stage of the proceedings.*[24]

## D. PROCEDURAL HISTORY OF THE MERITS PHASE

23. On 3 January 2017, the Claimant filed its Memorial on the Merits accompanied by the witness statements of Messrs. Guillermo Osvaldo Díaz, Martin Lommatzsch and Gabriel Omar Hernández, as well as the damages expert report of Compass Lexecon ("**Claimant's Memorial**").

24. On 18 April 2018, after previous exchanges between the Parties and the Tribunal, the Tribunal confirmed the procedural calendar and the hearing reserved dates for the merits phase of the proceedings.

[21] *Ibid.*, ¶ 173.
[22] *Ibid.*, ¶ 175.
[23] *Ibid.*, ¶¶ 185-186.
[24] *Ibid.*, ¶ 187.

25. On 21 June 2018, the Respondent filed its Counter-Memorial on the Merits accompanied by the witness statements of Messrs. Martín Bes, Eduardo Ratti and Alfredo Eduardo Villaggi, as well as the valuation expert report prepared by Ms. Melani Machinea and Mr. Ernesto Schargrodsky ("**Respondent's Counter-Memorial**").

26. On 31 October 2018, the Claimant informed the Tribunal of the Parties' agreement to extend the procedural calendar for the submission of the subsequent pleadings. After receiving the Respondent's confirmation, the Tribunal granted the Parties' extension.

27. On 16 November 2018, the Claimant filed its Reply on the Merits accompanied by the second witness statements of Messrs. Gabriel Omar Hernández and Martin Lommatzsch, the third witness statement of Mr. Guillermo Osvaldo Díaz, the expert report of Dr. Horacio Liendo, and the expert report of Berkeley Research Group ("**Claimant's Reply**").

28. On 7 March 2019, the Respondent filed its Rejoinder on the Merits accompanied by the second witness statements of Messrs. Martín Bes and Alfredo Eduardo Villaggi, the witness statements of Ms. María Paulina Segovia and Mr. Juan Carlos Isi, the second valuation expert report prepared by Ms. Melani Machinea and Mr. Ernesto Schargrodsky, the expert report of Mr. Julio Pablo Comadira, and the expert report of Mr. Pablo Gerchunoff ("**Respondent's Rejoinder**").

29. On 14 March 2019, the Tribunal confirmed that the Hearing on the Merits would be held in Washington, D.C. from 8 July 2019 to 14 July 2019 (excluding 13 July 2019), as agreed by the Parties.

30. On 11 June 2019, the Tribunal decided to postpone the Hearing on the Merits for reasons explained to the Parties; and announced that it would propose new dates for the Parties to hold the Hearing, ideally during the second half of 2019 at The Hague or elsewhere in Europe.

31. The Hearing on the Merits was subsequently rescheduled to be held from 17 February to 23 February 2020, at the ICC Paris Centre. On 18 September 2019, the venue was changed to The Hague Hearing Centre.

32. On 18 November 2019, the Tribunal informed the Parties that, due to an unforeseen scheduling conflict, the Hearing on the Merits would have to be rescheduled.

33. On 6 December 2019, the President of the Tribunal held a conference call with the Parties regarding the rescheduling of the Hearing on the Merits.

34. Following several exchanges between the Parties and the Tribunal, on 8 January 2020, the Tribunal confirmed that the Hearing on the Merits would be held from 19 to 25 October (excluding Saturday, 24 October) 2020 at The Hague Hearing Centre.

35. Between 24 June and 15 July 2020, the Parties submitted several communications to the Tribunal concerning the implications of the Covid-19 pandemic for the Hearing on the Merits in the present case.

36. On 17 July 2020, the Tribunal, after considering the arguments advanced by both Parties, decided to postpone the Hearing on the Merits until February 2021, and proposed that the Hearing be held remotely on a secure platform. The Tribunal Members could be available on 9-21 February 2021, and invited the Parties to confirm their availability (including witnesses/experts) during the entire period.

37. On 18 August 2020, following consultation with the Parties, the Tribunal issued Procedural Order No. 3, confirming among others, its decisions: (i) to postpone the Hearing on the Merits that was scheduled to be held in October 2020 at The Hague; (ii) that the rescheduled Hearing would be held remotely; and (iii) that in due course, the Tribunal, in consultation with the Parties, would fix the date for the Organizational Meeting.

38. Following several exchanges between the Parties and the Tribunal, on 9 September 2020, the Tribunal confirmed that the Hearing on the Merits would be held remotely, with (i) a seven-day hearing on 11-17 February 2021 and (ii) two reserved days, 18 and 19 February 2021. Given that the Respondent's witness, Ms. Paulina Segovia, would not be available during those dates, her examination was subsequently scheduled to take place on 2 February 2021.

39. On 6 December 2020, the Tribunal circulated, for the Parties' comments, draft Procedural Order No. 5 concerning the organization of the Hearing on the Merits.

40. On 6 January 2021, following consultation with the Parties, the Tribunal appointed Professor Freya Baetens as Assistant to the Tribunal in this case. On 15 July 2021, the Parties were informed that the Tribunal had re-confirmed her appointment as Assistant to the reconstituted Tribunal.

41. On 18 January 2021, the Tribunal, after considering the Parties' positions on the various items, issued Procedural Order No. 5, with the procedural rules that the Parties had agreed upon and/or the Tribunal had determined would govern the conduct of the Hearing on the Merits.

## E. HEARING ON THE MERITS

42. The Hearing on the Merits was held on 2 February 2021 and from 11 February to 19 February 2021 by video conference ("**the Hearing**"). The following persons participated in the Hearing:

*Tribunal*:

| | |
|---|---|
| Judge James R. Crawford | President |
| Professor Kaj Hobér | Arbitrator |
| Professor Jürgen Kurtz | Arbitrator |

*ICSID Secretariat*:

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| Ms. Mercedes Cordido-F. de Kurowski | Secretary of the Tribunal |
| Ms. Marisela Vázquez | Paralegal |

*Assistant to the Tribunal:*
Professor Freya Baetens

***For the Claimant*:**

*Counsel:*

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|---|---|
| Mr. Doak Bishop | King & Spalding |
| Mr. Roberto Aguirre Luzi | King & Spalding |
| Mr. Craig Miles | King & Spalding |
| Mr. David Weiss | King & Spalding |
| Ms. Eldy Roché | King & Spalding |

| | |
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| Mr. Eduardo Bruera | King & Spalding |
| Mr. Arturo Oropeza | King & Spalding |
| Mr. Alonso Gerbaud | King & Spalding |
| Ms. Pam Anders | King & Spalding |
| Mr. Giles Kwei | King & Spalding |
| Mr. Enrique V. Veramendi | Marval, O'Farrell, Mairal |
| Mr. Héctor Mairal | Marval, O'Farrell, Mairal |
| Mr. Francisco J. Sama | Marval, O'Farrell, Mairal |

*Party Representatives:*

| | |
|---|---|
| Mr. Guillermo Díaz | Party representative and witness |
| Ms. Marcela Gabrielli | Party representative |
| Ms. María Irene Perruccio | Party representative |

*Witnesses:*

Mr. Martin Lommatzsch
Mr. Gabriel Hernández

*Experts:*

| | |
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| Dr. Horacio Liendo | Liendo & Asociados |
| Ms. María Laura Deluca (Support) | Liendo & Asociados |
| Mr. Santiago Dellepieane | BRG |
| Ms. Daniela Bambaci | BRG |
| Mr. Ian Friser-Frederiksen (Support) | BRG |
| Ms. Agustina Gallo (Support) | BRG |
| Mr. Agustín Paul (Support) | BRG |
| Ms. Angie Ocampo Giraldo (Support) | BRG |

***For the Respondent*:**

*Counsel*:

| | |
|---|---|
| Mr. Carlos Alberto Zannini | Procuración del Tesoro de la Nación |
| Mr. Sebastián Soler | Procuración del Tesoro de la Nación |
| Ms. Mariana Lozza | Procuración del Tesoro de la Nación |
| Ms. M. Alejandra Etchegorry | Procuración del Tesoro de la Nación |
| Ms. Inda Valeria Etchechoury | Procuración del Tesoro de la Nación |
| Ms. M. Soledad Romero Caporale | Procuración del Tesoro de la Nación |
| Ms. Cintia Yaryura | Procuración del Tesoro de la Nación |
| Ms. Natalia Paola Guillén | Procuración del Tesoro de la Nación |
| Mr. Julián Rivainera | Procuración del Tesoro de la Nación |
| Ms. Adriana Cusmano | Procuración del Tesoro de la Nación |
| Mr. Emiliano Leanza | Procuración del Tesoro de la Nación |
| Mr. Nicolás Duhalde | Procuración del Tesoro de la Nación |
| Mr. Braian Joachim | Procuración del Tesoro de la Nación |
| Mr. Guillermo Olivares | Procuración del Tesoro de la Nación |

*Witnesses:*
Ms. Paulina Segovia
Mr. Martín Bes
Mr. Alfredo Villaggi

*Experts*:
Mr. Julio Pablo Comadira
Ms. Melani Machinea — UTDT
Mr. Ernesto Schargrodsky — UTDT
Mr. Juan Napoli (Support) — UTDT

*Court Reporters*:
Ms. Dawn Larson — WW Reporting – English
Ms. Elizabeth Cicoria — D-R Esteno – Spanish
Mr. Paul Pelissier — D-R Esteno – Spanish
Ms. Marta Rinaldi — D-R Esteno – Spanish

*Interpreters*:
Ms. Silvia Colla
Mr. Charles Roberts
Mr. Daniel Giglio

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

*On behalf of the Claimant:*

Mr. Martin Llommatzch
Mr. Guillermo Díaz
Dr. Horacio Liendo
Mr. Santiago Dellepieane
Ms. Daniela Bambaci

*On behalf of the Respondent:*

Ms. Paulina Segovia
Mr. Martín Bes
Mr. Alfredo Villaggi
Mr. Julio P. Comadira
Ms. Melani Machinea
Mr. Ernesto Schargrodsky

44. The Parties filed their statements of costs on 12 March 2021.

45. As previously indicated, following the passing away of Judge James R. Crawford, pursuant to ICSID Arbitration Rule 11(1), the co-arbitrators, in consultation with the Parties, appointed Ms. Lucinda A. Low, a national of the United States, as President of the Tribunal, and the Tribunal was reconstituted on 15 July 2021.

46. On 26 January 2022, the Tribunal requested either of the Parties to provide the Tribunal with an electronic copy in legible form of Annexes II (Financial Plan) and V (Financial Assistance) to Exhibit C-0171 ["*First memorandum of Understanding, May 16, 2006 (attached to Letter from Puentes del Litoral to UNIREN, May 16, 2006)*"].

47. On 27 January 2022, the Claimant provided the documents requested by the Tribunal on 26 January 2022. The Claimant also noted that Annex II had been reproduced in Excel Format as Exhibit BD-35 to Ms. Daniela M. Bambaci and Mr. Santiago Dellepiane's Assessment of Damages to Salini Impregilo S.p.A.'s Investments in Argentina, dated 2 January 2017, which they also attached for ease of reference. The Claimant directed the Tribunal in this regard to the hearing transcripts.[25]

48. By communication of 1 February 2022, the Respondent provided the Tribunal with a clarification regarding the Claimant's communication of 27 January 2022. The Respondent submitted that Exhibit BD-35 is not a reproduction of the information contained in the 2006 *Acta Acuerdo* and its Annexes, but that it contains additional information. As a result, the Respondent requested the Tribunal to take this into account when considering Exhibit BD-35.

49. On 2 February 2022, the Respondent informed the Tribunal that "following the discontinuance of the proceeding for partial annulment of the award requested by Hochtief Aktiengesellschaft ("**Hochtief**"), the award became final and the Argentine Republic fulfilled the obligations thereunder".

[25] Tr. Day 9: 1175:11-1176:10.

50. On 23 April 2022, the Secretary of the Tribunal, on instructions of the President of the Tribunal, provided the Parties with an update on the status of the Tribunal's work.

51. On 28 June 2022, the Tribunal requested the Parties' authorization for the Assistant to the Tribunal to be reimbursed for travel and other expenses within the limits prescribed by the ICSID Administrative and Financial Regulation, which the Parties did on 30 June 2022.

## III. FACTUAL BACKGROUND

52. Based on its consideration of all the evidence produced in this case, the Tribunal provides below a non-exhaustive summary of the factual background to the dispute.

### A. ARGENTINA'S PRIVATIZATION REFORMS

53. In the 1990s, with the aim of attracting foreign investment and addressing its hyperinflation, Argentina developed a set of privatization reforms and initiatives.

54. The most important reforms were the enactment of Law No. 23,928 (the "**Convertibility Law**"), Decree No. 1853/93 (the "**Foreign Investment Act**") and Law No. 23,696 (the "**State Reform Law**"). Pursuant to the Convertibility Law, the Argentine peso (AR$) was pegged to the United States Dollar (US$) at a rate of US$ 1 to AR$ 1. The Convertibility Law allowed contracts to be denominated in US$.[26] According to the Claimant, the fact that a creditor would be paid in US$ and the risk of a declining AR$ would be shifted to the contractual debtor made the Convertibility Law an attractive incentive for foreign investment.[27] For its part, the Foreign Investment Act disposed of the obligation on foreign investors to register or seek governmental approval prior to investing in Argentina, and permitted them to repatriate capital and send earnings abroad.[28]

55. According to the Claimant, these reforms were advertized in industry publications with the aim of fostering foreign investment and were promoted by State officials. For instance, in

[26] **Exhibit C-0005**, Law No. 23, 928, Convertibility Law.
[27] Claimant's Memorial, ¶ 24.
[28] **Exhibit C-0064**, National Decree No. 1853-1993.

November 1993 the Argentine Undersecretariat of Investment published a compendium for foreign investors entitled "Argentina, a Growing Country", where the new investor-friendly reforms were advertised.[29]

56. At the same time, Argentina negotiated several bilateral investment treaties. The first one to be signed was the "Agreement between the Argentine Republic and the Italian Republic on the Promotion and Protection of Investments" on 22 May 1990 (the "**BIT**" or "**Treaty**"), the Treaty at issue in these proceedings.[30] The signature of these bilateral investment treaties was followed by an amendment to the Argentine Constitution which placed them at a higher rank than Argentina's internal law.[31]

## B. THE BIDDING PROCESS AND THE BRIDGE-AND-TOLL-ROAD CONCESSION

57. The Project was proposed with the aim of providing a better connection between the provinces of Entre Ríos and Santa Fe.[32] It was part of a larger goal of improving the East-West connection that joins Brazil, Uruguay, Argentina and Chile, which would allow more efficient exchanges between these countries and greater access to the ports of the Atlantic and Pacific coasts.[33]

### (1) The Bidding Process

58. On 6 December 1995, Argentina started the bidding process for the Project by enacting Presidential Decree No. 855/95. The Decree appointed the Argentine Ministry of Economy and Public Works and Services ("**MEyOSP**") through the Secretariat of Public Works ("**SOP**") as the enforcement authority.[34]

[29] Claimant's Memorial, ¶¶ 27-29.
[30] **Exhibit C-0001**, Agreement between the Argentine Republic and the Italian Republic on the Promotion and Protection of Investments.
[31] **Exhibit C-0242**, Law No. 24,430, Argentina Constitution, Art. 75(22), 10 January 1995.
[32] **Exhibit C-0006**, National Decree No. 855/1995, 12 June 1995, Fourth Whereas; **Exhibit C-0076**, Bidding Terms, July 1997, Annex I, Art. 2.
[33] **Exhibit C-0076**, Bidding Terms, July 1997, Annex I: Project Description, Section 1.
[34] **Exhibit C-0006**, Presidential Decree No. 855/95, Art. 6.

59. The bidding process opened on 15 July 1997 with Argentina's enactment of the *Pliego de Bases y Condiciones del Concurso y sus Circulares* (the "**Bidding Terms**").[35]

60. The concession for the Project set forth in the bidding documents (the "**Concession**") would operate for 25 years from the date on which the winner of the bid took possession of the Concession. It was a subsidized Concession, meaning that a substantial portion of the construction costs would be funded by the State. There would be no guaranteed minimum revenues or traffic volume and the Concession would be for all purposes a risk contract, except for the subsidy to be granted to the Concessionaire. The Concession would be awarded to the bidder requesting the lowest subsidy.[36]

61. Together with the German international construction group Hochtief and several Argentine construction companies, the Claimant formed a consortium (the "**Consortium**") and submitted its bid. As part of its offer, the Consortium presented a Business Plan estimating costs and traffic, as well as a proposal for a subsidy based on the promised toll rates, and which estimated initial construction costs at US$ 350,202,193 and operating expenses over a 21-year period at US$ 410,147,286. According to the Concession's Business Plan, the projected internal rate of return ("**IRR**") amounted to 12.94%.[37]

62. Argentina notes that there were two bidding processes, and that in the second bidding process the participating consortia were requested to improve their bids.[38]

63. By Resolution MEyOSP No. 1039 of 13 November 1997, the Consortium was declared the successful bidder.[39]

**(2) The Concession Contract**

64. On 28 January 1998, Argentina and the Consortium executed the 25-year Concession Contract, which was approved by Decree No. 581/1998 on 14 May 1998.[40] According to

[35] **Exhibit C-0076**, Bidding Terms, July 1997, Annex I: Project Description.
[36] **Exhibit C-0007**, National Decree No. 650/1997, 15 July 1997.
[37] **Exhibit C-0079**, Consortium's Bid.
[38] Respondent's Counter-Memorial, ¶¶ 11-34.
[39] **Exhibit C-0328**, Resolution MEOySP No. 1309/97, 13 November 1997, section 2.
[40] **Exhibits RA 111 / C-0010**, Decree No. 581/98, 14 May 1998, Arts. 1-2.

the Claimant, the Bid and the Business Plan submitted by the Consortium are integrated into the Concession Contract as binding documents.[41]

65. As required under the Contract, the Consortium incorporated Puentes on 1 April 1998.[42] The shareholding structure of Puentes is or was during the relevant period of time divided among Salini S.p.A. (22% held directly and 4% held indirectly via Iglys S.A. for a total of 26%), Hochtief (26%), Techint Compañía Técnica Internacional S.A.C.I. (8%), Benito Roggio e Hijos S.A. (20%), Sideco Americana S.A. (19%) and IECSA S.A. (1%). Sideco and IECSA joined after the Consortium was constituted.[43]

66. On 17 June 1998, all rights and obligations arising from the Concession Contract were assigned by the Consortium to Puentes.[44]

67. Under the Concession Contract, Puentes' equity had to be at least US$ 30 million. The Consortium was required to contribute US$ 7.5 million initially, with the remainder to be contributed within two years.

68. On 14 September 1998, Puentes took over the Project by signing the *Acta de Toma de Posesión*.[45]

69. Under the Concession Contract, Puentes was to undertake construction and operation of the bridges and roads. A few months after construction commenced, the Provinces of Santa Fe and Entre Ríos asked Puentes to add a fourth lane to the main bridge, which entailed a review of the Project's construction costs. The expansion was approved by Argentina's Secretary of Public Works and the State's transitory commission overseeing the Project. The construction costs were updated to US$ 384,702,193 and Argentina agreed to pay for the added costs.[46]

[41] Claimant's Memorial, ¶ 47.
[42] **Exhibit C-0008**, Concession Contract; **Exhibit C-0011**, Puentes' Certificate of Incorporation and Amendments.
[43] Claimant's Memorial, ¶ 53; Respondent's Counter-Memorial, ¶ 33.
[44] **Exhibit RA-004**, Deed of Transfer of Rights and Duties.
[45] **Exhibit C-0126**, Certificate of Puentes Taking Possession of the Concession.
[46] Claimant's Memorial, ¶ 54; Respondent's Counter-Memorial, ¶ 41.

70. Argentina notes that Puentes had to comply with two obligations within 90 days of the Contract's execution, namely: (i) to submit Firm and Irrevocable Financing Agreements ("**FIFAs**"), evidencing that it had the necessary funds to perform its contractual obligations; and (ii) the filing of a stand-by letter of credit.[47] This submission deadline was set for 30 October 1998.[48]

71. On 15 October 1998, the Claimant secured a letter of credit in favor of Argentina in the amount of US$ 143.1 million.[49]

72. On 29 January 1999, the State granted an extension to the Concessionaire until 28 February 1999 to submit the FIFAs and provisionally accepted the commitment letters from the shareholders.[50]

73. On 9 December 1999, upon expiration of the extension granted by Resolution MEyOSP No. 86, the State demanded the submission of the FIFAs within 15 business days.[51]

**(3) Funding of the Project**

74. The main source of funding for the Project was the subsidy to be paid by the Argentine Government in the amount of US$ 207,100,000. The remaining two sources were the US$ 30 million in equity to be contributed by the Consortium and the Consortium's own funding after the subsidy was paid in full, including third-party loans.[52]

75. For payment of the subsidy, Puentes had to submit a monthly certificate of work progress specifying the incurred costs, the works performed and a total amount due for that certificate. Once certified, Argentina was to disburse payment.[53]

[47] Respondent's Counter-Memorial, ¶ 42; **Exhibit C-0008**, Concession Contract, Section 22.1.
[48] **Exhibit RA-066**, Record of Transfer of Possession, item 3, 14 September 1999.
[49] **Exhibit C-0083**, Letter from Puentes del Litoral to the Coordinator of the Transitory Commission of the Rosario-Victoria Highway, 30 October 1998.
[50] **Exhibit RA-112**, Resolution MEyOSP No. 86, 29 January 1999, recits.
[51] **Exhibit RA-234**, Letter from Interim Commission ROS-VOC No. 530/99, 9 December 1999 (free translation).
[52] **Exhibit C-0008**, Concession Contract, Sections 5, 7.
[53] **Exhibit C-0008(A)**, Annex I, Final Technical Document, Section 36.

76. The Concession Contract also required a performance guarantee and a bond. The performance guarantee would remain in place until a year after the Project was opened to the public. Its value would be equal to the difference between the construction costs as estimated in the Consortium's bid and the subsidy, plus twenty percent. Argentina had to approve the type and wording of the guarantee. The posting of a US$ 1 million bond was required before the Project opened to traffic to ensure the maintenance and operation of the Concession – this requirement was duly fulfilled.[54]

77. It is undisputed between the Parties that Argentina was delayed in some subsidy disbursements. According to the Respondent, the delay resulted from Puentes' breach of its obligation to submit FIFAs and from Puentes' delay in submitting work certificates.[55] On 4 July 2000, Argentina temporarily suspended disbursement of the subsidy through Resolution SOP No. 723/00.[56]

78. On 1 August 2000, Puentes and the Inter-American Development Bank (the "**IDB**") concluded a US$ 73,751,000 loan agreement (the "**IDB Loan**" or the "**Loan**").[57] The first Loan disbursement was scheduled for 1 March 2001. Disbursement was subject to certain conditions precedent.

79. The conditions required by the IDB under the Loan as well as the reasons for its non-disbursement by the IDB are disputed between the Parties. According to the Claimant, the IDB's refusal to disburse was caused by Argentina's failure to pay 90% of the Subsidy by 1 March 2001 and Argentina's then-looming economic crisis.[58] For its part, the Respondent contends that the IDB Loan was not a FIFA as required by the Concession Contract, and that a fundamental reason for the IDB's failure to disburse the Loan was the negative result

[54] **Exhibit C-0008**, Concession Contract, Section 8.
[55] Respondent's Rejoinder, ¶¶ 177-180.
[56] **Exhibit RA-068**, Resolution SOP No. 723/00.
[57] **Exhibit C-0013**, Loan Agreement between IDB and Puentes, 1 Aug. 2000.
[58] Claimant's Reply, ¶ 24.

of an updated traffic study of June 2001 that the Consortium had commissioned at the IDB's request.[59]

80. On 20 October 2000, Puentes and Argentina entered into an agreement, the nature of which is disputed between the Parties ("***Acta Acuerdo***").[60]

81. The Claimant contends that *Acta Acuerdo* was a settlement agreement concluded between the Parties to prevent the IDB from refusing to disburse the Loan. According to the Claimant, the *Acta Acuerdo* (i) included the Parties' understanding that timely payment of the subsidy was an essential condition for the disbursement of the Loan, (ii) recognized that Puentes had complied with its contractual requirements to ensure sufficient funding for the Project, (iii) bound Argentina to make subsidy payments in the total amount of US$ 29,989,274 by 15 December 2000, and (iv) obliged Argentina to make future payments according to a payment schedule. Under the *Acta Acuerdo*, Puentes would dismiss all administrative appeals it had filed against Argentina, open the Project to traffic by 15 September 2002 and stop the accrual of interest on past due payments.

82. In the Respondent's view, the *Acta Acuerdo* (i) never amended the Concession Contract, (ii) was not backed by any precedents nor ratified by any resolution or decree, and (iii) was contingent upon Puentes' commitment to invest all the proceeds of the IDB Loan in the works and increase its capital stock, which did not occur.[61]

83. On 26 February 2001, Puentes informed the IDB that Argentina had not paid 90% of the subsidy as required by the conditions precedent to Loan disbursement. Puentes requested a waiver to meet this condition by September 2001. According to the Claimant, the IDB did not respond.[62]

[59] Respondent's Counter-Memorial, ¶ 50.
[60] **Exhibit C-0086**, Agreement between Puentes and Argentina (*Acta Acuerdo*).
[61] Respondent's Rejoinder, ¶ 80.
[62] **Exhibit C-0089**, Letter from Puentes to the IDB, 26 February 2001; Claimant's Memorial, ¶ 58.

84. By May 2001, Argentina had paid 90% of the subsidy and Puentes, its shareholders and Argentina engaged in communications and meetings with the IDB urging it to disburse the first part of the Loan.[63]

85. According to the Claimant, one of the IDB Loan's conditions precedent obliged Puentes' shareholders to increase their equity by US$ 13,650,000 prior to the first disbursement. The Claimant asserts that, in December 2000, the shareholders were forced to inject this equity to cover the deficit caused by Argentina's late payments.[64]

86. On 25 July 2001, Puentes wrote to Argentina asking it to rebalance the Concession.[65] The reasons for the request are disputed between the Parties. While the Claimant asserts that it requested the rebalancing due to Argentina's changed economic circumstances,[66] the Respondent submits that Puentes' request was motivated by its own financial situation.[67]

87. The Claimant asserts that it decided to provide more funding in the form of inter-company loans to ensure continuation of the construction works. According to the Claimant, from September to December 2001, it loaned Puentes US$ 6,481,667.00.[68]

## C. ARGENTINA'S ECONOMIC CRISIS

### (1) The Enactment of the Emergency Law

88. In Argentina's view, its economy began to slow down at the end of 1998 due to the drying up of capital flows to emerging markets. The recession prolonged and deepened into the worst economic and social crisis that Argentina had ever faced, affecting severely the

[63] Claimant's Memorial, ¶ 58; Respondent's Counter-Memorial, ¶¶ 126-129.
[64] Claimant's Memorial, ¶ 57.
[65] **Exhibit R-071**, Letter from Puentes to the Chief of Cabinet, 25 July 2001.
[66] Claimant's Reply, ¶ 40.
[67] Respondent's Counter-Memorial, ¶¶ 122-124.
[68] **Exhibit C-0095**, Loan Agreement between Salini Impregilo S.p.A. and Puentes del Litoral (for US$ 880,000), 8 December 2001; **Exhibit C-0096**, Loan Agreement between Salini Impregilo S.p.A. and Puentes del Litoral (for US$ 2,691,000), 8 December 2001; **Exhibit C-0097**, Loan Agreement between Salini Impregilo S.p.A. and Puentes del Litoral (for US$ 1,010,667), 8 December 2001; **Exhibit C-0098.**

provinces of Entre Ríos and Santa Fe. The Respondent further states that the unsustainability of the convertibility regime became apparent by the end of 2001.[69]

89. On 6 January 2002, Argentina enacted Law No. 25,561 (the "**Emergency Law**"), which declared a public emergency in its economic, financial, and currency exchange sectors. The Emergency Law (i) repealed the AR$ 1 to US$ 1 ratio established by the Convertibility Law, (ii) converted public-contract obligations denominated in U.S. Dollars into Argentine pesos at the rate AR$ 1 to US$ 1, (iii) set aside the contractual indexation clauses based on price indices of other countries; and (iv) ordered the Argentine Government to renegotiate contracts affected by the Emergency Law within 180 days.[70]

90. The Parties do not dispute that the Emergency Law affected the Concession Contract. Puentes would no longer be entitled to collect the toll rate at the actual currency exchange rate and future toll rates would no longer be adjusted to the U.S. Consumer Price Index.

91. On 25 June 2002, Argentina enacted Decree No. 1090/2002, dictating that all claims against the Government for breach of contract had to be resolved within the renegotiation process and that any company filing a claim for breach of contract against Argentina after the enactment of the Decree would be automatically excluded from the renegotiation process.[71]

92. According to the Claimant, due to the enactment of the Emergency Law, the IDB determined that it would re-evaluate the Loan after Argentina and Puentes had renegotiated the Concession Contract. On 28 June 2002, the IDB terminated the Loan Agreement. The Claimant submits the IDB did so because of the economic crisis, and the enactment of the Emergency Law and its effect on the tariff structure.[72]

[69] Respondent's Counter-Memorial, ¶¶ 195-207.
[70] **Exhibit C-0014**, the Emergency Law.
[71] **Exhibit C-0108**, Decree No. 1090/2002, 25 June 2002, Art. 1.
[72] Claimant's Memorial, ¶ 66.

**(2) Shareholder Loans and the Financial Assistance Loan**

93. According to the Claimant, on 17 January 2002, Salini and Hochtief loaned Puentes US$ 5,500,000 and US$ 4,370,000, respectively, to enable Puentes to finalize the nearly complete main bridge, which was finished in its entirety on 5 February 2002.[73] (In this Decision, loans from Salini and Hochtief will be referred to collectively as the **"Shareholder Loans";** Shareholder Loans made by Salini will be referred to as the **"Webuild Shareholder Loans",** and Shareholder Loans made by Hochtief will be referred to as the **"Hochtief Shareholder Loans"**.)

94. On 21 March 2002, the Argentine Government asked Puentes to attend a meeting and submit a presentation explaining how the Emergency Law was affecting the Concession.[74] Puentes provided the requested presentation on 26 April 2002, in which it estimated damages due to the Emergency Law in the amount of US$ 130,854,000 and explained that the Emergency Law had (i) slowed down construction due to a lack of funding, and (ii) prevented third-party funding. Puentes informed Argentina that it could no longer unilaterally finance the Project and that to resume work as well as finish construction Argentina would need to provide AR$ 60 million.[75]

95. On 22 October 2002, the Government and the provinces of Entre Ríos and Santa Fe entered into an agreement to complete the works pursuant to which Argentina would provide the required funds.[76]

96. On 26 November 2002, Argentina notified Puentes that it would provide funding as an advance payment of future compensation for the reduction in the toll fee.[77]

97. On 3 February 2003, Argentina enacted Presidential Decree No. 172 approving the model for a loan agreement in the amount of AR$ 51,648,352. Under the loan agreement, Puentes

[73] **Exhibit C-0416**, Minutes of Puentes' Board of Directors, 17 January 2002.
[74] **Exhibit C-0023**, Letter from the Ministry of Economy to Puentes, 21 March 2002.
[75] **Exhibit C-0024**, Letter from Puentes to the President of the Renegotiation Contract Commission, 26 April 2002.
[76] **Exhibit RA-076**, Agreement between the Argentine State and the provinces of Entre Ríos and Santa Fe, 22 October 2002.
[77] **Exhibit C-0118**, Letter from the Undersecretary of Coordination for the Secretary of Public Works to Puentes, 26 November 2002.

would use future toll revenue to repay the loan, net of its operating and maintenance expenses. The interest rate would be set in accordance with rates published by the Argentine Central Bank for loans with similar characteristics. The agreement indicated that the Argentine Secretary of Public Works would determine the specific repayment process at a later stage.[78]

98. According to the Claimant, Puentes "had no choice but to accept the offered loan" since Argentina informed Puentes that if it did not accept it, Argentina would declare Puentes in default, terminate the Concession and draw on the guarantees of Puentes' shareholders.[79]

99. The loan agreement was executed on 21 February 2003 and on 4 March 2003, Argentina disbursed the initial tranche of the loan (the "**Financial Assistance Loan"** or "**FAL"**). The FAL was secured: Under section 3 of the FAL Agreement, Puentes assigned the right to collected tolls (net of operating and maintenance costs) to the Road Infrastructure Trust Fund (*Fondo Fiduciario de Infraestructura Vial*).[80]

100. As a result of the Agreement, construction resumed, and the Project was opened to the public on 23 May 2003.[81]

101. According to the Respondent, after the Project opened to traffic, several failures were detected in the road and Puentes' repair works were never completed.[82]

102. After disbursing AR$ 39.6 million of the FAL on 4 March 2003, Argentina made no further payments of the agreed AR$ 51,648,352.[83] According to the Claimant, this forced Salini and Hochtief to provide additional Shareholder Loans to Puentes to allow it to complete the construction of the Project. In particular, the Claimant provided US$ 3,439,390.37 in Webuild Shareholder Loans in 2003.[84]

[78] **Exhibit C-0015**, Decree No. 172/2003, 3 February 2003.
[79] Claimant's Memorial, ¶ 79.
[80] **Exhibit C-0119**, Agreement between the Ministry of Economy and Puentes, 21 February 2003.
[81] Claimant's Memorial, ¶ 81.
[82] Respondent's Rejoinder, ¶¶ 133-140.
[83] Claimant's Memorial, ¶ 82.
[84] *Ibid*.

**(3) Resolution 14**

103. On 30 June 2003, Argentina issued Resolution SOP No. 14/03 ("**Resolution 14**"),[85] which (i) increased the interest rate on the FAL to the one used for short-term (30-day), unsecured loans, (ii) provided that interest on the Financial Assistance Loan was to be compounded daily, (iii) pesified the maintenance and operating expense allowances contained in the Bid at 1997 values without updating the amounts to account for inflation, (iv) provided that toll revenue would be allocated to repayments of the Financial Assistance Loan on a daily basis, and (v) provided that the amounts that Puentes could not pay would be added to the Financial Assistance Loan's principal on a daily basis. While the Claimant asserts that Resolution 14 increased the interest rate (which the FAL had pegged at the rate set by the Argentine Central Bank for loans with similar characteristics), the Respondent rejects such assertion and submits that the Resolution alone determined the applicable rate.[86]

104. On 26 August 2003, Puentes challenged Resolution 14 before the competent administrative authorities and requested an immediate stay pending determination of the challenge.[87]As the tribunal in the *Hochtief v. Argentina* ICSID arbitration (the "***Hochtief* Arbitration**") noted: "neither the appeal nor the stay were acted upon by the Public Administration",[88] so Puentes was forced to comply with Resolution 14.

105. To cover Puentes' operating expenses, Salini and Hochtief provided additional Shareholder Loans. From 2003 to 2005, the Claimant loaned Puentes US$ 9,051,804.37 in Webuild Shareholder Loans.[89]

[85] **Exhibit C-0018**, Resolution 14, 30 June 2003.
[86] Claimant's Memorial, ¶ 83; Respondent's Counter-Memorial, ¶ 245.
[87] **Exhibit C-0016**, Puentes' Administrative Challenge.
[88] **CL-0013**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, ("***Hochtief***, **Decision on Liability**"), ¶113.
[89] Claimant's Memorial, ¶ 104.

## D. THE RENEGOTIATION OF THE CONCESSION CONTRACT AND PUENTES' INSOLVENCY PROCEEDINGS

106. Under the Emergency Law, as noted earlier, Argentina was ordered to renegotiate all public works contracts.

107. Through Presidential Decree No. 311/03, Argentina created the Unit of Renegotiation and Analysis of Public Utility Contracts ("**UNIREN**") within the Ministry of Economy and Production and the Ministry of Federal Planning, Public Investment and Services. UNIREN was put in charge of coordinating the renegotiation proceedings under the Emergency Law.[90]

108. According to Presidential Decree No. 311/03, once the public hearing and public consultation processes encouraging citizen participation had taken place, the Office of the Treasury Attorney General would issue an opinion. Assuming the new terms were approved in this opinion, the renegotiation agreements would then be jointly signed by the Ministry of Economy and Production and the Ministry of Federal Planning, Public Investment and Services, and *ad referendum* of the Argentine Executive Branch.[91]

109. On 18 March 2002, the Ministry of Economy issued Resolution 20, which approved the regulations and procedures for the renegotiation of public works contracts.[92]

110. On 6 April 2005, Puentes, UNIREN and the *Órgano de Control de Concesiones Viales* ("**OCCOVI**"), the entity in charge of regulating road concession projects, agreed on a protocol for the renegotiation of the Concession (the "**Renegotiation Protocol**"). The Renegotiation Protocol called for Argentina and Puentes to approve the terms for a renegotiated agreement within 45 days.[93]

[90] **Exhibit C-0137**, Presidential Decree No. 311/03, 3 July 2003.
[91] Respondent's Counter-Memorial, ¶ 278.
[92] **Exhibit C-0140**, Resolution No. 20/2002, 18 March 2002.
[93] **Exhibit C-0169**, Minutes of Meeting to discuss Renegotiation Protocol, 6 April 2005.

111. On 16 May 2006, the Parties subscribed to a letter of understanding (the "**First LOU**" or "**2006 LOU**").[94] The First LOU provided for an increase in toll rates to "partially re-establish the economic-financial balance of the concession which was affected by the economic emergency", through, among other provisions:

- Increasing the toll rate for two-axle vehicles from AR$ 9.00 to AR$ 12.87 (the average increase across all the toll rate segments was 104.46%);[95]

- Providing that Argentina would subsidize this rate increase via a Government trust so that users would not absorb any of the rate increase;[96]

- Allowing for further toll rate increases at the end of 2007 if certain costs increased by 5% according to an Argentine inflation index;[97]

- Amending Resolution 14 by reducing the applicable interest rate (from rates applied to unsecured 30-day loans to rates applied to first-rate companies or 9.5%, whichever was higher);[98]

- Providing that a full and final renegotiation to completely restore the Concession's economic equilibrium would take place within twelve months;[99]

- Pesifying the shareholders' performance bonds and letters of credit at a rate of US$ 1 = AR$ 1),[100] and;

- Requiring the Government to hold a public hearing for the First LOU to become enforceable.[101]

[94] **Exhibit C-0171**, First Letter of Understanding (LOU), 16 May 2006. This document is also referred to in the Parties' and Experts' submissions as an MOU.
[95] *Ibid.*, ¶ V and Annex IV.
[96] *Ibid.*, ¶ XII.
[97] *Ibid.*, ¶ VI.
[98] *Ibid.*, ¶ IX.
[99] *Ibid.*, ¶ IV.
[100] *Ibid.*, ¶ VII.
[101] *Ibid.*, ¶ XIII.

112. According to the Respondent, the First LOU changed the conditions for the repayment of amounts granted under the Financial Aid Agreement.[102] Argentina also argued that the First LOU did not become effective due to Puentes' failure to regularize the situation with its creditors.[103]

113. On 19 January 2007, Argentina issued the "Report on the Merits of the Memorandum of Understanding UNIREN – PUENTES DEL LITORAL S.A." (the "**2007 Renegotiation Report**").[104] According to the Claimant, the report explained why the first letter of understanding was justified and why Argentina should give it effect. The Claimant further asserts that Puentes did not learn about the 2007 Renegotiation Report until after signing the second letter of understanding (the "**Second LOU**" or "**2007 LOU**").[105]

114. On 27 February 2007, the Parties entered into the Second LOU, which changed some of the key provisions of the First LOU. Under the new letter, the balance of the Financial Assistance Loan would be converted into equity and Salini and Hochtief had to increase their shareholdings in Puentes by converting into equity the unpaid balance of their Shareholder Loans up to the amount necessary to stabilize Puentes' financial condition.[106]

115. On 24 April 2007, Boskalis-Ballast Nedam Baggeren ("**Boskalis-Ballast**"), one of Puentes' principal subcontractors, petitioned to place Puentes into bankruptcy in an effort to collect an unpaid arbitration award ("the **ICC Arbitration")**.[107] From 1998 until 2001, Puentes had paid Boskalis-Ballast US$ 64 million, after which Puentes owed Boskalis approximately US$ 32 million.[108]

[102] Respondent's Counter-Memorial, ¶ 293.
[103] Respondent's Counter-Memorial, ¶ 294.
[104] **Exhibit C-0103**, Renegotiation Report.
[105] Claimant's Memorial, ¶¶ 111-113.
[106] **Exhibit C-0175**, Second Letter of Understanding, 27 February 2007.
[107] **Exhibit C-0184**, Letter from Puentes to UNIREN informing it of Boskalis-Ballast's request.
[108] **Exhibit CWS-0001**, Witness Statement of Guillermo O. Díaz, 27 December 2016, ¶ 24.

116. To avoid liquidation, Puentes initiated reorganization proceedings on 2 May 2007. The Claimant asserts that it informed Argentina about the commencement of the proceedings on 8 May 2007.[109]

117. On 10 May 2007, Argentina repudiated the Second LOU, alleging that Boskalis-Ballast's claim and the reorganization proceedings had changed the circumstances upon which it had been negotiated. According to the Respondent, over the course of the hearing in the *Hochtief* Arbitration,[110] it learned that Hochtief held a 48% interest in Ballast Nedam, one of the joint venture partners in Boskalis-Ballast, and that Puentes failed to inform OCCOVI that it would hire a third party related to Puentes.[111] To the contrary, the Claimant asserts that Puentes did inform Argentina of its contract with Boskalis-Ballast[112] and that, in any event, Hochtief did not have a shareholding interest in the joint venture itself.[113]

118. According to the Claimant, in June 2008 the court overseeing the reorganization proceedings ordered UNIREN to continue the renegotiation of the Concession Contract.[114]

119. Argentina notes that it held a claim in the reorganization proceedings for the financial aid granted to Puentes under the FAL. The reorganization court allowed Argentina's claim in the amount of AR$ 38,915,075.68.[115]

## E. THE TRANSITORY AGREEMENTS

120. On 17 December 2009, the Parties agreed on a transitory agreement (the "**First Transitory Agreement**").[116] The Claimant notes that the First Transitory Agreement did not require a public hearing for its ratification.[117]

[109] Claimant's Memorial, ¶ 123.
[110] *See* ¶¶ 205 *et seq. infra*.
[111] Respondent's Counter-Memorial, ¶ 150.
[112] Claimant's Reply, ¶ 84.
[113] Claimant's Reply, ¶ 85.
[114] **Exhibit C-0040**, Court Order in Puentes del Litoral S.A. s/insolvency proceedings, 11 June 2008, p. 1508.
[115] Respondent's Rejoinder, ¶¶ 248-249.
[116] **Exhibit C-0042**, First Transitory Agreement, 17 December 2009.
[117] Claimant's Memorial, ¶ 128.

121. The Claimant notes that the First Transitory Agreement provided for, *inter alia*, (i) an internal rate of return on the Project of 8.87% calculated in constant pesos from September 1997; (ii) renegotiation of the Concession Contract within twelve months from the date of signing the transitory agreement; and (iii) denunciation by either party of the agreement leaving it without effect in the event that it did not enter into force within 60 days from the date of signature.

122. On the basis of Puentes' consent to the First Transitory Agreement, Puentes requested the court overseeing its reorganization proceedings to approve a settlement agreement with its creditors.[118] The settlement agreement became enforceable when it was approved by the bankruptcy court. According to the Claimant, Puentes paid several instalments under the creditor settlement agreement, including US$ 8.3 million to Boskalis-Ballast and US$ 4,089,561 to the State for the Financial Assistance Loan.[119]

123. Argentina proposed a second transitory agreement, which was signed by Puentes on 14 June 2010 (the "**Second Transitory Agreement**").[120] Argentina issued the required notices in March 2011 and held the required hearing on 17 June 2011, during which an amendment to the transitional tariff regime was discussed.[121]

124. As a result, a new transitory agreement (the "**Third Transitory Agreement**") was proposed, which was signed by Puentes on 13 October 2011.[122]

125. In February 2012, the Office of the *Procurador del Tesoro de la Nación* issued a series of recommendations including formalistic changes and recommended that a new agreement be signed.[123]

[118] Claimant's Memorial, ¶ 131; **Exhibit C-0206**, Court Order in Puentes del Litoral S.A. s/insolvency proceedings, 30 December 2009.
[119] Claimant's Reply, ¶ 134.
[120] **Exhibit C-0044**, Second Transitory Agreement, 14 June 2010.
[121] **Exhibit C-0214**, UNIREN's Final Report on Public Hearing, 30 June 2011.
[122] **Exhibit C-0047**, Third Transitory Agreement, 13 October 2011.
[123] **Exhibit C-0210**, Report by Argentina's Office of the Treasury Attorney General, 29 February 2012.

126. On 6 March 2012, Puentes agreed to and signed a new transitory agreement (the "**Fourth Transitory Agreement**").[124]

## F. TERMINATION OF THE CONCESSION CONTRACT

127. By 2012, Puentes' accumulated losses exceeded its equity value.[125] According to the Claimant, to avoid dissolution under Argentine law, Puentes' shareholders agreed to increase its equity by AR$ 1 million (approximately US$ 350,000). The Claimant asserts that Puentes' shareholders conditioned the new equity contribution on Argentina approving the amended bylaws, including the increase in Puentes' equity, and ratifying the Fourth Transitory Agreement.[126]

128. Subsequently, Puentes asked the Government for approval to amend its bylaws and increase its social capital or equity on several occasions. According to the Respondent, the Claimant's request would have effectively decreased the capital stock provided for in the Concession Contract, and it did not grant the requested approval.[127]

129. On 10 June 2013, Puentes denounced the Fourth Transitory Agreement.[128] The next day, it filed an administrative complaint against Argentina for breach of the Concession Contract alleging that Argentina had failed to restore the Concession's economic equilibrium and claiming damages.[129]

130. On 30 May 2014, Puentes filed a lawsuit in Argentine courts. The suit sought the Concession Contract's rescission due to Argentina's failure to re-establish its economic equilibrium, as well as damages. The action was pending before the Argentine courts at the time of the submissions in this case;[130] the Tribunal does not know its current status.

[124] **Exhibit C-0048**, Fourth Transitory Agreement, 6 March 2012.
[125] Claimant's Memorial, ¶ 144.
[126] *Ibid*.
[127] Respondent's Counter-Memorial, ¶ 336.
[128] **Exhibit C-0233**, Letter from Puentes to Ministry of Federal Planning, Public Investment and Services, 10 June 2013.
[129] **Exhibit C-0049**, Administrative Complaint filed by Puentes, No. 46/13, File SO1 0123098/2013, 11 June 2013.
[130] **Exhibit C-0009**, Complaint *in Puentes del Litoral S.A. v. Argentina*, 30 May 2014.

131. On 30 June 2014, Puentes' board decided to dissolve the company.[131] The Tribunal does not know at this writing whether it has in fact since been dissolved.

132. On 26 August 2014, Argentina issued a resolution terminating the Concession Contract (the "**Termination Resolution**").[132] The reasons for the Termination Resolution are disputed between the Parties. According to the Claimant, the Termination Resolution cites four grounds to justify attributing fault to Puentes: (i) the reorganization proceedings of Puentes; (ii) the *Hochtief* Arbitration; (iii) Puentes' board's decision to dissolve the Company due to its loss of equity; and (iv) Puentes' administrative complaint.[133] The Respondent, on the other hand, asserts that the only reason it terminated the Contract was the dissolution of Puentes, which constituted grounds for automatic termination per Article 30.9 of the Concession Contract.[134]

133. The Termination Resolution also called for the drawing down of Puentes' performance bond and for Puentes to pay any outstanding fines. Argentina cashed the performance bond, which by then had a value of AR$ 1,385,320.

134. After terminating the Concession Contract, Argentina granted the Concession to a new operator, Caminos del Río Uruguay, S.A.[135] On 1 September 2014, Puentes formally handed over the Concession and in March 2016, Argentina increased the Concession's toll rate.[136]

## IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

135. The Claimant seeks the following relief:

> *a. A declaration that Argentina violated the BIT and international law with respect to Salini Impregilo's investments;*

[131] **Exhibit C-0234**, Minutes of Puentes' Board of Directors' Meeting, 30 June 2014.
[132] **Exhibit C-0051**, Resolution No. 1994/14, 29 August 2014.
[133] Claimant's Memorial, ¶ 149.
[134] Respondent's Counter-Memorial, ¶ 332.
[135] **Exhibit C-0237**, Resolution No. 2012/2014, 29 August 2014.
[136] **Exhibit C-0428**, Resolution No. 1114/2016, 4 August 2016.

> *b. Compensation to Salini Impregilo for all damages that it has suffered, as set forth herein and as may be further developed and quantified in the course of this proceeding;*
>
> *c. All costs of this proceeding, including Salini Impregilo's attorneys' fees and expenses; and*
>
> *d. Pre-and-post award compound interest until the effective date of payment of the award.*[137]

The specifics of the claimed violations and asserted damages are set forth *infra*.

136. For its part, the Respondent requests the Tribunal:

> *(a) that each and every claim made by Claimant be rejected; and*
>
> *(b) that Claimant be ordered to pay all the costs and expenses arising out of this arbitration proceeding.*[138]

## V. LIABILITY

137. The Claimant relies on several provisions of the Treaty and alleges that, in particular, Argentina has violated (i) the FET standard (Article 2.2); (ii) the non-discrimination (MFN) standard (Articles 2.2 and 3); and (iii) the obligation not to unlawfully expropriate an investment (Article 5).

138. The Respondent contends that it has not breached any of its international obligations under the BIT and that, in any event, the defense of necessity would preclude wrongfulness of its acts.

[137] Claimant's Reply, ¶ 391.
[138] Respondent's Rejoinder, ¶ 636.

## A. ADMISSIBILITY OF THE CLAIMS FOR LOANS

### (1) The Parties' Positions

#### *a. The Respondent's Position*

139. The Respondent posits that Webuild's claims raised in this arbitration are partly related to certain loans made by the Claimant to Puentes ("**Webuild Shareholder Loans**").[139] According to the Respondent, to the extent such claims relate to those Shareholder Loans, they are inadmissible in light of the bidding documents' terms and the Concession Contract, which is part of the applicable law to the dispute. The Respondent contends that these documents and the Contract state that, once the subsidy was paid, Argentina had no further liability regarding financing. Consequently, claims to which Webuild may be entitled as creditor of Puentes are excluded, as already established by the tribunal in the *Hochtief* Arbitration.[140]

140. The Respondent further submits that it would be absurd to allow Webuild to bring claims against Argentina on account of the Webuild Shareholder Loans when the Claimant alleges that these Loans were made to cover part of Puentes' financial deficit caused by Puentes' and Webuild's failure to obtain financing.[141]

141. The Respondent also contends that the claims asserted by the Claimant arising out of the Webuild Shareholder Loans are already being repaid in Puentes' reorganization proceedings. According to the Respondent, this would amount to a double recovery.[142]

142. Lastly, Argentina contends that the tribunal in the *Hochtief* Arbitration interpreted Article 22.2 of the Concession Contract correctly when holding that Webuild's claims as lender to Puentes should be rejected.[143]

[139] *See* Table 3, Loans from Impregilo to PdL, Bambaci/Dellapiane First Report, ¶ 101.
[140] Respondent's Counter-Memorial, ¶¶ 355-363; Respondent's Rejoinder, ¶ 335.
[141] Respondent's Rejoinder, ¶ 358.
[142] Respondent's Counter-Memorial, ¶¶ 364-366; Respondent's Rejoinder ¶¶ 370-373.
[143] Respondent's Rejoinder, ¶¶ 360-369.

***b. The Claimant's Position***

143. The Claimant argues that the Respondent's conclusion regarding Article 22.2 of the Concession Contract is incorrect, and that Section 3(j) of the Bidding Terms, which are binding, expressly provides that investment treaty rights (which in this case include Shareholder Loans) apply to investments in Puentes.[144]

144. It further posits several reasons for its position that Article 22.2 of the Concession Contract does not bar claims under applicable investment treaties: (i) its text does not mention treaties or international law; (ii) its grammar and structure emphasize that it is limited only to certain kinds of claims; and (iii) such an interpretation would be harmonious with Section 3(j) of the Bidding Terms.[145] The Claimant contests Argentina's allegation that Article 22.2 bars claims it has made based on the Webuild Shareholder Loans. It claims that the text as well as the structure of the provision indicate otherwise, and that the conduct of the Parties reinforces the interpretation that Article 22.2 was solely concerned with third-party financing.[146]

145. According to the Claimant, any waiver of treaty rights with respect to the Shareholder Loans would require compliance with the standards for waiver set out in Argentine and international law. Under the former, the waiver must be clear, unequivocal and specific. Waivers of rights are not presumed, and the interpretation of acts to prove any such waiver needs to be restrictive. Pursuant to the latter, a waiver of rights needs to be clear and unambiguous and a *jurisprudence constante* requires that waivers of jurisdiction or claims under an investment treaty may not be implied.[147]

146. Moreover, the Claimant submits that, despite Article 22.2 having freed Argentina from bearing commercial risks, the provision was not designed to force Webuild to accept the

[144] Claimant's Reply, ¶¶ 158-164.
[145] *Ibid*., ¶¶ 165-172.
[146] *Ibid*., ¶¶ 173-187.
[147] *Ibid*., ¶¶ 194-208.

political risks underlying the Concession, including the risk that Argentina might engage in treaty-breaching conduct.[148]

147. Relating to the proceedings in the *Hochtief* Arbitration, the Claimant argues that the majority holding is unpersuasive and flawed in several ways: (i) inasmuch as the Parties did not present detailed arguments regarding the proper interpretation of Article 22.2, the majority was not able to fully consider its interpretation; (ii) the majority did not consider Section 3(j) of the Bidding Terms, which expressly reserve treaty protections for Puentes; (iii) it failed to consider other arguments regarding Article 22.2's scope; and (iv) it did not properly account for Article 22.2's historical and policy basis.[149]

148. Lastly, regarding Argentina's contention that the Tribunal cannot admit Webuild's position because Argentina filed claims in Puentes' bankruptcy proceedings, the Claimant alleges that this Tribunal in its Decision on Jurisdiction already confirmed the lack of any risk of double recovery.[150]

**(2) The Tribunal's Analysis**

***a. Preliminary Observations***

149. At the outset, the Tribunal observes that the Respondent has not raised a jurisdictional objection with respect to the Webuild Shareholder Loans, only an admissibility issue.

150. As a result, the Respondent's inadmissibility argument regarding the Webuild Shareholder Loans is not grounded in the BIT, but in the provisions of the Concession, in particular Article 22.2 (to which the Tribunal will return in the discussion below). In this regard, the present Tribunal agrees with the tribunal in the *Hochtief* Arbitration when it ruled that: "[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an

[148] *Ibid*., ¶¶ 191-192.
[149] *Ibid*., ¶¶ 209-219.
[150] *Ibid*., ¶ 220.

attribute of a claim but not of a tribunal"[151] and "[d]efects in admissibility can be waived or cured by acquiescence: defects in jurisdiction cannot."[152]

151. In the present case, because the Respondent has only raised an admissibility issue regarding the Webuild Shareholder Loans, the Tribunal still has to assess its jurisdiction *proprio motu* as well as the admissibility of the claims themselves.

152. Article 1.1 of the BIT stipulates that: [153]

> *El término 'inversión' designa, de conformidad con el ordenamiento jurídico del país receptor e independientemente de la forma jurídica elegida o de cualquier otro ordenamiento jurídico de conexión, todo aporte o bien invertido o reinvertido por personas físicas o jurídicas de una Parte Contratante en el territorio de la otra, de acuerdo a las leyes y reglamentos de esta última. En este marco general, son considerados en particular como inversiones, aunque no en forma exclusiva: […]*
>
> *d) créditos directamente vinculados a una inversión, regularmente contraídos y documentados según las disposiciones vigente en el país donde esa inversión sea realizada.*

In its unofficial English translation:

> *'Investment' means, in accordance with the host country laws and regardless of the selected legal form or any other connected law, any contribution invested or reinvested by an individual or a legal entity of one Contracting Party in the territory of the other Party, in accordance with the laws and regulations of the latter. Within this general framework, it includes in particular, though not exclusively: […]*

[151] **CL-0011**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011("***Hochtief*, Decision on Jurisdiction**"), ¶ 90.
[152] **CL-0011**, *Hochtief*, Decision on Jurisdiction, ¶ 95.
[153] The official languages of the BIT are Spanish and Italian. Given that the official languages of this Decision are Spanish and English, this Decision only refers to the official Spanish version and the unofficial English translation.

> *d) claims of money directly related to an investment, properly executed and evidenced in accordance with the laws in force in the country where such investment is made.*

153. On the basis of this Article, including the specific reference to "loans" in paragraph d), it would seem *prima facie* that the claims based on the Webuild Shareholder Loans are covered by this Tribunal's scope of jurisdiction. It remains for the Tribunal to consider, however, the meaning and role of the 'in accordance with laws and regulations' language of the BIT, both in the *chapeau* of this Article, where it is referenced not once but twice, and again in subparagraph d), dealing specifically with loans, where it modifies the language "properly executed and documented".

154. Inasmuch as these references qualify the terms "investments" and "loans", they operate to limit the universe of what the BIT can recognize as an investment, to the extent of their scope. In this manner, the term 'in accordance with laws and regulations' can be seen to function as a local law portal through which investments must pass in order to qualify for protection under the BIT. The question is what the parameters of that portal (or in this case, portals) are.

155. The Claimant has submitted that these provisions function as a legality clause.[154] And indeed, the Tribunal is aware that a number of tribunals have treated language of this type (*i.e.*, 'in accordance with law' language) as creating a legality requirement, that would not just encompass investment formalities (indeed, some have argued that the illegality must be substantial and would exclude minor violations), but would preclude, for example, corrupt or fraudulent investments.

156. This BIT is more complex, however. Its multiple and slightly diverse references to an "in accordance with law" requirement, as referenced above, require the Tribunal to consider whether the multiple references are intended to have the same or different meanings. The

[154] *See*, e.g., Claimant's closing argument, Tr. Day 10: 1338-1342.

Respondent did not submit any arguments that materially advance the interpretation on this basis; instead, the Respondent's submissions are focused on the Concession Contract.

157. The Tribunal's analysis begins with the clause in subsection d) of Article 1.1 of the BIT on loans. This clause appears to the Tribunal, on a textual analysis, to be the clearest of the three references regarding its scope and function. The language "properly executed and documented" modifies the "in accordance with" language. The use of the specific terms "executed and documented", coupled with "properly", indicate to the Tribunal that this clause is concerned with the formalities required by Argentine law for loans to be properly entered into. This clause, therefore, appears to state a formalities requirement for investments taking the form of loans; for loans (such as the Shareholder Loans) made in Argentina, its legal requirements regarding such formalities would be controlling.

158. This leaves the question about the meaning of the two references to "in accordance with" in the *chapeau* to Article 1.1 of the BIT. The *chapeau* is of course more general and structured so as to encompass a variety of legal forms of investment. Standard canons of construction would suggest that distinct meanings should be found for all of its language, even if repetitive, to avoid surplusage. But it is difficult to discern any distinct meaning for the two "in accordance with" references in the *chapeau*. In its second iteration in the *chapeau*, the 'in accordance with' language explicitly modifies "invested" ("any kind of contribution or asset invested…in accordance with the laws and regulations…"). The *chapeau*'s first iteration of "in accordance with", although a separate clause in the original Spanish as well as the translation, only makes sense if it is also read to modify 'invested'. Although such a reading would arguably make this clause redundant, otherwise it becomes simply a floating clause that modifies nothing, which makes no sense whatsoever. Both clauses seem to emphasize the primacy of the laws and regulations of the country that receives the investment; indeed, the first clause emphasizes the need for conformity with

the laws of the host country notwithstanding the legal form of the investment or the presence of "any other connected law".[155]

159. Thus, both clauses in the *chapeau* are focused on the need for the investment's compliance with the laws of the host country. The Tribunal cannot discern any different meaning for the two clauses. However, again from a textual reading, it is not clear they are aimed, as the loan-specific provision in d) seems to be, at formalities. The absence of any formalities-focused language in the *chapeau*, in contrast to that in d), suggests to the Tribunal that a different meaning should be given to those terms. To invest them with content that is distinct from that in subsection d), the loan-specific provision, the Tribunal considers that, at least for investments taking the form of loans, the BIT may incorporate both a legality requirement (by virtue of the *chapeau*'s two references) under Argentine law, and a formalities requirement (by virtue of subsection d)) that is based, in this case, on Argentine law.[156]

160. No evidence has been put before the Tribunal either of illegality or of improper formalities in connection with the Webuild Shareholder Loans. If there were, then presumably the Respondent would have put forward such evidence and argued that these Loans were not within the Tribunal's jurisdiction. The Respondent made a number of jurisdictional arguments, but not this particular argument. Moreover, if there were issues in connection with the propriety of the manner in which any of the Shareholder Loans were entered into or with their legality, it seems highly likely that the Argentine court seized with the Puentes reorganization proceeding would have so found. But it did not; indeed, the evidence is that

[155] Although the first reference in the *chapeau* uses the prepositional phrase (in the Spanish) "*de conformidad con" ["conformemente"* in the Italian version], while the second uses "*de acuerdo a" ["in conformita alle"* in the Italian version], these different phrases hardly suggest a distinct meaning. Indeed, both are translated as "in accordance with" in the unofficial English version.

[156] This approach is in keeping with the governing law of the BIT, Article 8.7 of which provides "*El tribunal arbitral decidirá sobre la base del derecho de la Parte Contratante parte en la controversia –incluyendo las normas de esta última relativas a conflictos de leyes--, las disposiciones del presente Acuerdo, los términos de eventuales acuerdos particulares concluidos con relación a la inversión, como así también los principios de derecho internacional en la materia*." In the unofficial English translation: "*The arbitral tribunal shall decide the dispute in accordance with the laws of the Contracting Party involved in the dispute —includes its rules on conflict of laws—, the provisions of this Agreement, the terms of any possible specific agreement concluded in relation to the investment as well as with the applicable principles of international law*."

the court admitted the Shareholder Loans, providing further strong evidence of their proper form and legality.[157]

161. In sum, even giving wide effect to the "in accordance with laws" portals in Article 1.1 requiring consideration of the requirements of Argentine law and regulations, there is no indication that the Webuild Shareholder Loan claims do not meet the requirements of Article 1.1(d) of the BIT by virtue of Article 22.2 of the Concession Contract or otherwise. They must therefore constitute "investments" under the BIT and there would appear to be no jurisdictional bar to those claims.

***b. Admissibility***

162. The issue of admissibility of the Webuild Shareholder Loan claims turns on the interpretation of Article 22.2 of the Concession Contract. This provision stipulates that:

> *Los préstamos que contraiga el Postulante Ganador y la Concesionaria, según corresponda, para la financiación de la construcción, mantenimiento y explotación de las obras no gozarán de ninguna garantía del Concedente, ni los financistas podrán efectuar reclamación alguna contra el mismo ni contra las Provincias, lo que se hará constar en los convenios respectivos. [emphasis added]*

In its unofficial English translation:

> *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 the Grantor, nor shall the lenders be entitled to any claim against the Grantor or the Provinces, all of which shall be indicated in the relevant agreements. [emphasis added]*

163. The Parties' respective arguments with respect to this provision have been summarized earlier.[158] Whether this clause should be interpreted as an exclusion of any claims based on Shareholder Loans, or a waiver by the Claimant of any rights to pursue BIT claims

[157] Tr. Day 2: 236:6-15; Tr. Day 2: 247:2-15; Tr. Day 10: 1340:20-22; Tr. Day 10: 1341:1-14.
[158] *See* ¶¶ 139-148 *supra*.

based on such Loans, is a matter of contract interpretation and the application of the governing law in relation to the Concession Contract. Accordingly, the resolution of these particular questions requires the application of Argentine law.

164. Both Parties made extensive submissions on the Argentine law they considered to be relevant to this issue, including expert opinions—Dr. Liendo for the Claimant and Mr. Comadira for the Respondent—and testimony at the Hearing on the Merits. The Tribunal has given careful consideration to their testimony and sought to reconcile the divergent views (set out in detail below) they expressed on particular points of importance.

165. The Tribunal has organized its consideration according to the following sub-topics which have been the object of submissions by the Parties: first, the textual and contextual analysis of Article 22.2 of the Concession Contract; second, the relevance of the Bidding Terms, and particularly Section 3(j), to the interpretation of Article 22.2; third, the standards for waiver if Article 22.2 is to be construed as containing a waiver of BIT rights; fourth, the question whether the scope of Article 22.2 extends to political as well as commercial risks or is limited to commercial risks; and finally, the persuasive value of the *Hochtief* tribunal's analysis of this issue.

166. As will be explained below, the Tribunal concludes that Article 22.2 does not operate to exclude or waive claims based on loans that qualify as investments under the BIT, as these Shareholder Loans do.

(i) Textual and contextual analysis of the scope of Article 22.2 of the Concession Contract

167. Article 22.2 of the Concession Contract, quoted earlier, contains two restrictive clauses on its face: the first prevents the successful bidder or concessionaire from securing any loans entered into to finance the construction, maintenance and operation of the project with the Grantor [*i.e.*, Argentina]; the second prevents "lenders" from having any claim against either "the Grantor or the Provinces". It also requires that such restrictions be indicated in the "relevant agreements".

168. It is the interpretation of the second restrictive clause that concerns the Tribunal here. In particular, the question is whether this clause covers third-party project financing loans only, as the Claimant contends, or also covers the Webuild Shareholder Loans, as the Respondent contends. According to the Claimant's expert, Dr. Liendo, the purpose of Article 22.2 is "[t]o specify that the Republic was not contractually liable to the Concessionaire's lenders",[159] describing the absence of a surety contract under which "one of the parties secures a third party's debt and the third party's creditor accepts that ancillary obligation".[160] Moreover, "given the experience in previous years and the absence of prior concessions for the construction and operation of highways awarded in bidding processes without Treasury guarantees, the Republic deemed it necessary to warn and inform potential bidders that these processes would be different from all bidding processes previously held in the country".[161]

169. Dr. Liendo maintained that the private funding of large infrastructure works *without Treasury guarantees* was only possible if the economic rules that had eliminated structural inflation, restored public credit, and adopted adequate rules of risk distribution between the public and private sectors were upheld. Or, alternatively, such a result could be possible if the State had committed to "'restoring the Agreement to its original condition' existing prior to any '[g]overnment action defined as such by laws, decrees or any other provisions issued by any government body [...] affecting the financing, studies, construction or operation of the Concession.'"[162] As a result, "the Republic's liability arises from the fact that it prevented Puentes from using the revenues collected from the concession on the terms and conditions set forth in the Contract due to acts and omissions exclusively attributable to the [State]".[163]

[159] Liendo Report, ¶ 53.
[160] *Ibid*., ¶ 56.
[161] *Ibid*., ¶ 59. The Tribunal notes that Dr. Liendo has served as a public official in the Argentine Government from 1991 to 1996 and appears to have personal knowledge of and experience with Argentine Government policies in this regard.
[162] *Ibid*., ¶ 65.
[163] *Ibid*., ¶ 68.

170. The Respondent's expert, Mr. Comadira, does not address this point. His expert opinion focused on the legal framework in which Article 22.2 of the Concession Contract operates. He considers the Concession Contract to be an administrative contract. Under his submissions, the Argentine law governing administrative contracts is an "exorbitant" legal system, defined as residual or by exclusion of private law, composed of substantive and procedural prerogatives of the Government, balanced against guarantees of private persons.[164] Supported by an analysis of Argentine Supreme Court jurisprudence, Mr. Comadira argued that an "administrative contract" is a meeting of the minds generating subjective legal situations, in which one of the intervening parties is a Government entity, whose subject-matter comprises a public purpose or a purpose inherent to the Administration, and contains explicitly or implicitly, exorbitant clauses of private law.[165]

171. Furthermore, Mr. Comadira engaged in a discussion of general principles governing administrative contracts: the principle of mutability and administrative *ius variandi*,[166] the continuity principle,[167] the power of direction and control,[168] the power of imposing penalties,[169] the revocation for reasons of opportunity, merits or convenience,[170] annulment due to illegitimacy, [171] and an act of God or *force majeure* and breaches of the contractor.[172] He also set out the interpretation of Bidding Terms and conditions, whereby the latter constitute the law of the bid or the contract specifying the purpose of the procurement and the rights and duties of the bidders and the awardee. These are to be interpreted restrictively to safeguard equality of participants, and, in case of doubt, the interpretation has to go against the private person and in favor of the State (and is even more stringent if the contractor has technical and legal skills).[173] In his view, the interpretation of administrative concession contracts is to be construed restrictively: "nothing is to be taken as conceded

[164] Comadira Report, ¶ 25-28.
[165] *Ibid*., ¶ 29.
[166] *Ibid*., ¶¶ 39-42.
[167] *Ibid*., ¶¶ 43-54.
[168] *Ibid*., ¶¶ 55-56.
[169] *Ibid*., ¶¶ 57-63.
[170] *Ibid*., ¶¶ 64-69.
[171] *Ibid*., ¶¶ 70-72.
[172] *Ibid*., ¶¶ 73-75.
[173] *Ibid*., ¶¶ 76-83.

but what is given in unmistakable terms, or by an implication equally clear".[174] The principle of equality in bidding processes is projected into the contract which has to be consistent with applicable bidding terms and conditions: there can be no modifications unless to address objective needs of public interest.[175] Finally, Mr. Comadira discussed the administration's power to impose penalties: whether, upon occurrence of an event that is a ground for termination of the contract, such decision is a duty of the administration or at its discretion. He put forward that, in case of dissolution or liquidation of the company, it must be the former, otherwise the personal liability of officials might be engaged. [176]

172. Based on this interpretive approach, Mr. Comadira considered that the second restrictive clause of Article 22.2 had to be taken at face value as an unqualified and unlimited restriction that applied to any project lender, whether or not a shareholder, and to conclude otherwise would violate the governing principle of restrictive interpretation in favor of the State.[177]

173. Dr. Liendo disagreed with Mr. Comadira's analysis of the application of the restrictive principle to this specific provision. During the Hearing, Dr. Liendo specifically disagreed with the interpretation by Mr. Comadira of the Argentine Supreme Court's jurisprudence on a principle put forth by the U.S. Supreme Court that "nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear." In accordance with such a principle, any affirmation must be shown: "[s]ilence is negation, and doubt is fatal to the Concessionaire's right."[178] Dr. Liendo argued that:

> *[t]his statement only refers to those instances in the Concession Agreement where privileges and licenses and rights are granted to the Concessionaire. Precisely, because in the Concession Agreement, we have a private party exercising public functions. So,*

[174] *Ibid*., ¶¶ 84-92.
[175] *Ibid*., ¶¶ 92-97.
[176] *Ibid*., ¶¶ 98-113 referring to Puentes – Article 30.9, second paragraph of the Contract.
[177] *Ibid*., ¶¶ 186-194.
[178] Hearing: Response to Mr. Comadira on administrative principles (Tr. Day 6: 750:16-18).

> *the scope of the powers granted to a third party that's going to cooperate with the administration needs to be quite restricted.*[179]

However, he continued,

> *when we look at Article 22.2, we do not see that 22.2 includes any kind of franchises, privileges, or rights to the Concessionaire. To the very contrary, Argentina made it clear in that contractual provision that no guarantee had been given to a third party under that contract--that is to say, the lender of the Concessionaire.* [180]

174. When questioned further on this point, Dr. Liendo responded that when the right of the private person "does not arise from the Concession but, rather, from its own property rights which are guaranteed in our system by the national constitution, it doesn't require that it be given in concession by the Administration. It is its own right."[181] In these cases, he maintained, there is no need for a restrictive interpretation of the Contract in favor of the Grantor and against the Concessionaire, but rather the opposite. The interpretation would be favorable to the property right holder, whose rights can only be impaired by statutory provisions, *i.e.,* provisions adopted by Congress imposing restrictions on property rights.

175. According to Dr. Liendo, when there is a question of a waiver of rights, as is presented by the second restrictive provision of Article 22.2, the interpretation should not be in favor of the Grantor but rather in favor of the Concessionaire. To support this argument, he referred to the *Edenor* case.[182] Edenor is a company that distributes electricity in Buenos Aires under a Public Services Concession. In connection with the renegotiations after the adoption of the Emergency Law, an Agreement was reached in which the State waived collecting fines for breaches prior to a given date. Edenor had engaged in conduct that would have attracted sanctions after the date of the Agreement but before its ratification by the Executive Branch. The company argued that the Agreement would not be applicable until such time as it was ratified by the Executive, so it considered that these breaches,

[179] *Ibid*., pp. 750:21-751:6.
[180] *Ibid*., pp. 751:7-13.
[181] Tr. Day 6: 824:1-4; 824:7-831:18.
[182] *See also* Liendo report, ¶ 41.

which were the basis for the Grantor to impose fines, were exempted from payment. The Court held that the waiver on the part of the State (not to collect fines) should be interpreted restrictively, finding that the waiver corresponded to the period after the Agreement had been concluded, even if it had not been ratified. It was understood that the Parties had taken into account those acts that would be the motive for sanctions that existed at the time that the Renegotiation Agreement was entered into. In other words, the Court adopted a restrictive approach to interpreting the waiver.

176. As a result, Dr. Liendo concluded that the parameters for when interpretation should be restrictive are clear: when the granting of a public power, a franchise or a concession of privileges is concerned, the interpretation should be restrictive in favor of the Grantor. But when the exercise of property rights is concerned, the interpretation should be favorable to the holder of the property rights, unless the opposite has been agreed upon in a clear, unequivocal, and express manner.

177. Mr. Comadira disagreed with Dr. Liendo on this point, saying that while some cases he referred to, did involve privileges, others were simple administrative contracts.[183]

178. Dr. Liendo further argued that Article 22.2 should be construed as referring solely to third-party loans, not shareholder loans: "the Argentine State's interest in specifying that it was not a guarantor of said loans and that, therefore, those agreements were *res inter alios acta* with respect to it are addressed to third-parties to the contractual relationship between the Republic, the Successful Bidders and the Concessionaire, because, clearly, Article 22.2 was agreed upon by them and, therefore, both parties already knew what they had stipulated."[184] Moreover, "it is inconsistent with the structure of the Contract to consider that the provisions on third-party financing contemplate a limitation on the Grantor's liability to the Successful Bidder and the Concessionaire, which are matters addressed elsewhere in the Contract."[185]

[183] Tr. Day 7, 856:13-21.
[184] Liendo Report, ¶ 75.
[185] Liendo Report, ¶ 79.

179. Furthermore, according to Dr. Liendo, "acts of God and force majeure events are regulated in Article 31 of the Contract, setting forth the Grantor's obligation to restore any conditions that may be affected by acts of government if, on account of their magnitude, they 'alter the economic-financial balance' of the Contract, expressly mentioning the item 'financing' among those subject to disturbance and restoration, together with studies, construction, and operation."[186] In his view, "[t]he Contract clearly states, specifically in Articles 22.1, 22.3, and 22.4, that the Successful Bidders and the Concessionaire were responsible for dealing with the funding of the portion of the work under their charge, either by means of third-party financing or through self-financing."[187]

180. Mr. Comadira again disagreed with Dr. Liendo, particularly insofar as the scope of the terms 'lenders' and 'claims' in Article 22.2 of the Concession Contract is concerned. In his view, Article 22.2:

> *reflects the clear objective of restricting the liability of Grantor to the payment of the subsidy agreed-upon, thus releasing it from any liability to anyone who grants loans to Concessionaire. Accordingly, the risks of such financing agreements lie on the borrower, exclusively -whether it is the Successful Bidder or Concessionaire. For the purposes of this article, it is irrelevant who has extended the loan, since irrespective of who the lender is, Grantor does not assume any obligations towards the lender.*[188]

Citing Argentine court decisions on the interpretation of administrative contracts, he put forward that any exception extending the rights of the Concessionaire, or its shareholders would be "contrary to the hermeneutics of administrative contracts."[189]

181. Moreover, Mr. Comadira argued that "[i]f Claimant's position regarding article 22.2 were accepted, *i.e.*, if it were accepted that such article is not applicable to loans granted by Concessionaire's shareholders, the possibility of extending Grantor's liability would be in the hands of Concessionaire and its shareholders exclusively, to the extent that the

[186] Liendo Report, ¶ 81.
[187] Liendo Report, ¶ 82.
[188] Comadira Report, ¶ 189.
[189] *Ibid*., ¶ 191.

limitation of liability expressly contemplated in such article could be rendered ineffective and the risks of financing would be transferred to Grantor."[190] He is of the opinion that "Article 22.2 is clear and categorical when it bars any claim ("any claim") by lenders against Grantor and the Provinces involved, and such a restriction should be expressly indicated in the agreements –an obligation that, as stated in the preceding paragraphs, was imposed on the Successful Bidder or Concessionaire exclusively, in their capacity as borrowers."[191]

182. Finally,

> *[w]hile article 7 and related provisions set forth the obligations and responsibilities towards Concessionaire, article 22.2 refers to the position assumed towards lenders. When the Concessionaire's shareholders assume the role of Concessionaire's lenders, they deliberately agree to abide by the provisions of article 22.2, knowing that such article restricts the risks and responsibility assumed by Grantor.*[192]

As a result,

> *[t]he limitation of the Government's liability under the terms of article 22.2 should be expressly stated by the borrower in the loan agreement, as expressly provided for in such article. It is clear that the failure to indicate expressly such a restriction in the loan agreements executed between Concessionaire and the Claimant cannot remove the limitation of liability of the Government. Even more so in the case of a loan agreement executed by Concessionaire and its own shareholder. If this possibility was accepted, it would have been sufficient that Concessionaire failed to include such clause in all the loan agreements executed to render the provisions of article 22.2 of the Contract ineffective.*[193]

183. With regard to financing, Dr. Liendo argued that Article 31.2 of the Concession Contract was relevant to the issue as this provision recognizes the Concessionaire's right to

[190] *Ibid*., ¶ 192.
[191] *Ibid*., ¶ 199.
[192] *Ibid*., ¶ 201.
[193] *Ibid*., ¶ 202.

restoration of the economic and financial equation of the Concession if it is affected by acts of government "directly or indirectly affecting the financing, studies, construction or operation of the Concession," highlighting in particular the explicit reference to financing in this clause.[194] He argued that the Parties' subsequent actions confirm his interpretation, whereby he referred to the LOUs and Transitory Agreements whose investment plan updates included both equity and debt as part of the re-establishment of the equilibrium as required by Article 31.2.[195]

184. At the Hearing on the Merits, Mr. Comadira disagreed with this position, saying that financing under Article 31.2 of the Concession Contract is different from financing under Article 22.2.[196]

(ii) Consideration of the role of the Bidding Terms

185. In considering the scope of Article 22.2 of the Concession Contract, the Parties' submissions, including expert submissions, discussed the relevance of the Bidding Terms.

186. Section 3(j) of the Bidding Terms deals with BIT rights:

> *In the cases contemplated by the relevant rules, the investment promotion and protection arrangements entered into by the ARGENTINE REPUBLIC shall be applicable.*

187. Both the Claimant and the Respondent used *lex specialis* to support their respective positions on the role of the Bidding Terms in the construction of Article 22.2. The Claimant argued in its written submissions that the Bidding Terms are more specific and therefore should prevail over the Concession Contract.[197] Equally, at the Hearing on the Merits, the Claimant submitted that the Bidding Terms provision is more specific because it deals with investment treaties and contains no exceptions for debt.[198] The Respondent, on the other

[194] Liendo Report, ¶¶ 43-44.
[195] Liendo Report, ¶¶ 47-51.
[196] Tr. Day 7: 944:19-949:3.
[197] Claimant's Reply, ¶ 171.
[198] Claimant's Opening Statement, slides 212-213.

hand, argued in its written submissions that the Concession Contract provision is specific in dealing with loan claims and therefore should prevail over the Bidding Terms.[199]

188. The question is whether there is a hierarchy between the Bidding Terms and the Contract provisions. At the Hearing on the Merits, the Claimant cited to Article 2 of the Concession Contract, under which, it asserted, the Bidding Terms prevail in the event of a conflict between the Bidding Terms and the provisions of the Concession Contract.[200] But the Claimant also argued that the Terms can be interpreted harmoniously if Article 22.2 is read as being limited to third-party lenders. This is also supported by Dr. Liendo when he states that "a contextual and harmonic interpretation of the documents that make up the Contract," *i.e.* including the Bidding Terms in accordance with Section 2 (applicable provisions and documents) of Annex 1 to the Concession Contract, which "allows us to conclude that Article 22.2 […] would only apply to the action or right arising from the loan agreement signed by the lender and the Concessionaire, but this does not preclude, limit, or exclude the right to invoke the BIT's protection if that 'investment' is affected by the host State."[201] For this reason, he continues, "interpreting Article 22.2 of the Contract calls for a harmonization that gives all other contract provisions value and meaning and, to that effect, we must especially consider what the BIT provides regarding the scope of the protection it accords to investments by nationals of the Treaty's signatory States." [202]

189. In other words, Dr. Liendo would seem to regard the Bidding Terms as part of the Contract, so any conflict between the Bidding Terms and the main terms of the Contract would be a conflict between two contractual clauses. In such event, "the appropriate interpretation of those provisions must give value and meaning to all of them, making sure that no provision annuls or hinders the effects of the other(s)."[203]

190. Neither the Respondent, nor its expert, Mr. Comadira, seem to explicitly deny or confirm the existence of a hierarchy between the Bidding Terms and the Contract provisions. Mr.

[199] Respondent's, Rejoinder, ¶¶ 343 et seq.
[200] Claimant's Opening Statement, slides 212-213.
[201] Liendo Report, ¶ 45.
[202] Liendo Report, ¶ 46.
[203] Liendo Report, ¶ 44.

Comadira emphasises that the Bidding Terms as well as the Concession Contract itself must all be construed restrictively, and in case of doubt, interpreted against the concessionaires, to safeguard the principle of equality as applied in the Argentine legal system.[204]

(iii) Waiver arguments

191. In addition to making arguments regarding the scope of Article 22.2 of the Concession Contract and the Bidding Terms, the Claimant, relying on its Argentine law expert, made a waiver argument: namely, that if Article 22.2 were construed as applying to the Webuild Shareholder Loans and therefore excluding claims made on the basis of such Loans, it did not contain a valid waiver of rights to make claims involving investments protected by the BIT.

192. In his Report, Dr. Liendo stated that under both Argentine and international law, waivers of rights of actions must be clear, unequivocal and specific, because they cannot be presumed "and the interpretation of acts in order to prove any such waiver shall be restrictive."[205] Article 22.2 of the Concession Contract, he argued, does not contain such a waiver. However, even if a clear, unequivocal, and specific waiver were to exist, "it should not run counter to other provisions of the Contract under which the treaty right or action considered waived is upheld."[206] He also submitted that, "[i]n the event of a conflict between two or more contract clauses, the appropriate interpretation of those provisions must give value and meaning to all of them, making sure that no provision annuls or hinders the effects of the other(s)." [207]

193. Pursuant to Section 874 of the Argentine Civil Code, which was in force when the events took place, "[t]he intention to waive cannot be presumed, and the interpretation of acts in order to prove any such waiver shall be restrictive, pursuant to Section 874 of the Civil

[204] Comadira Report, ¶¶ 83 and 92.
[205] Liendo Report, ¶ 41, citing Exhibit HL-02.
[206] Liendo Report, ¶ 42.
[207] Liendo Report, ¶ 44.

Code." [208] According to Dr. Liendo, the Argentine Supreme Court reiterated this principle in several decisions.[209]

194. Dr. Liendo emphasised the need to give value and meaning to all contract provisions, making sure that no provision annuls or hinders the effects of the others.[210] In his view, Article 22.2 is a clause that only addresses the effects of the absence of safeguards by the State in favor of the Concessionaire's creditors "without even contemplating the potential lenders' nationality […] and, thus, neither that article nor any other provision of the Contract includes a direct, indirect, or implied reference to a waiver of the protection accorded by the BIT."[211] The generic reference to "any claim" contained in that contract provision should be read as an exclusive reference to claims arising from "[l]oans entered into by the Successful Bidder and Concessionaire," not the other claims which the Successful Bidder or the Concessionaire may bring against the Grantor for any other reason. [212]

195. Mr. Comadira addressed this issue indirectly in his Report through his position on the interpretation of administrative contract provisions (discussed above).[213] When asked about the waiver argument during the Hearing, he explained that such waiver may not be presumed in private law but, referring to his arguments regarding administrative contracts, this was different in public law: if the right is clear and unequivocal, no waiver can be considered.[214] Mr. Comadira did seem to concede that none of cases he cited discussed the issue of waivers, but he sought to distinguish between State waivers (not presumed) and waivers by private persons on the basis of Section 874 of the Civil Code jurisprudence.

196. The arguments of the Respondent's expert, Mr. Comadira, thus appeared to seek to dismiss the waiver issue more than address it, by focusing on the narrow interpretation of

[208] Liendo Report, ¶ 94 (referring to Exhibit HL-02).
[209] *Ibid*., see fn. 9.
[210] Liendo Report, ¶ 44.
[211] Liendo Report, ¶ 39.
[212] Liendo Report, ¶ 40.
[213] Comadira Report, ¶¶ 195-204 (meaning of "claim").
[214] Tr. Day 7: 956:4-966:2.

concession contracts instead of the reconciliation of the Bidding Terms and the Contract.[215] Mr. Comadira's report does not appear to deal with the effect of the Bidding Terms beyond generalities, arguing that the Bidding Terms should be interpreted restrictively to protect the equality of bidders and the public interest. However, at the Hearing, he appeared to agree that contract provisions should be interpreted harmoniously and that there is a relationship of subordination between the Concession Contract and the Bidding Terms.[216]

(iv) Commercial versus political risks

197. Finally, the Parties' respective experts discussed the issue of whether Article 22.2 of the Concession Contract should be interpreted as negating claims against the State based on both commercial and political risks, or only commercial risks.

198. Dr. Liendo maintained that there are two types of actions to which the Claimant is entitled in relation to the Webuild Shareholder Loans: (i) contractual performance actions arising from the loan agreements it signed with the Concessionaire; and (ii) actions arising from the Republic's failure to comply with its obligations under the BIT. The former can only be brought against the Concessionaire; the latter can only be brought against the State because it granted the rights to collect tolls during the Concession, which it then altered without restoring the economic and financial balance of the Contract, which it ultimately terminated.[217] None of these rights, he submitted, were waived in Article 22.2 of the Contract and, therefore, that Article does not preclude taking into account, for the purposes of compensation, all of the invested assets or contributions, irrespective of the legal form chosen to make the investment.[218] Each individual or legal entity has only one personality,

[215] Comadira Report, ¶¶ 76-83.
[216] Tr. Day 7: 942:11-943:5.
[217] Liendo Report, ¶ 100 referring to Exhibit HL-15, Bielsa, Rafael, Derecho Administrativo*,* Vol. II, page 1121, published by Thomson Reuters LA LEY, 7th Edition updated by Roberto Luqui, Buenos Aires, 2017; Exhibit HL-14, Marienhoff, Miguel, Tratado de Derecho Administrativo*,* Vol. III-A, page 363, published by Abeledo Perrot, Buenos Aires, October 2011.
[218] Liendo Report, ¶ 106.

which is why the splitting of the investor entailed by the *Hochtief* tribunal's interpretation is inappropriate.[219]

199. Mr. Comadira was of the opinion that Article 22.2 completes the definition of the obligations and responsibilities assumed by Grantor: financing is a commercial risk.[220] In his analysis, however, he did not discuss the equilibrium provisions (Contract Art. 31.2 or the Emergency Law). He considered that under Article 9, the State has the power but not the obligation to renegotiate.[221]

(v) The Tribunal's preliminary analysis

200. Given that the Parties' respective expert's conclusions are based on fundamentally different points of departure—for Mr. Comadira, the position that Shareholder Loans are categorially excluded flows directly from the principle of restrictive interpretation of administrative contracts, while for Dr. Liendo, the principle has no application to this particular issue but is instead an issue of proper construction of the Concession Contract and the application of waiver principles to the rights at issue--the Tribunal has been faced with diverging positions that are difficult to reconcile. After detailed consideration, however, the Tribunal has concluded that Dr. Liendo's view on the scope of Article 22.2 is the more persuasive. Despite the fact that Article 22.2 of the Concession Contract is written in broad terms and does not include any exceptions, it makes sense in the overall context to read Article 22.2 as precluding any recourse to the State for commercial claims based on loans by third Parties entered into for project-financing purposes, but not any BIT-qualifying claims. In the Tribunal's view, this is the better view even without consideration of the Bidding Terms, but becomes an even stronger conclusion if the Bidding Terms are taken into account.

[219] Liendo Report, ¶ 109. In Dr. Liendo's view, compensation has to include all of its constituting elements, and it is inadmissible to subordinate the foregoing to the personality of the Claimant, *i.e.*, whether it is acting in its capacity as successful bidder, concessionaire, shareholder, or lender. *See also* Liendo Report, ¶ 112.
[220] Comadira Report, ¶¶ 206-212.
[221] Tr. Day 7: 859:12-860:5.

201. The first clause of Article 22.2 essentially stipulates that the State will not provide any security for any loans. The Tribunal agrees with Dr. Liendo that when viewed in context this clause seems implicitly to assume a third-party lender. The second clause, by starting with 'nor', would seem to be expressing a similar concept but adding that even with unsecured loans, the Successful Bidder and Concessionaire (*i.e.*, the consortium members originally, and later Puentes as assignee) have an obligation to ensure that the loan agreements entered into with third parties contain non-sovereign-recourse provisions. The use of the term 'lenders' in the second clause, in contrast to the use of the term 'Successful Bidder and Concessionaire' in the first, also suggests dealings with third parties and not shareholder-lenders, as Dr. Liendo submits.

202. With regard to the Bidding Terms, it appears to the Tribunal that Article 2 of the Concession Contract, stipulating that the Bidding Terms *"rigen este Contrato",* establishes that the Bidding Terms dictate the scope of the Contract. "*Regir*" in Spanish means to govern or rule, indicating a superior hierarchical position.[222] Given the terms of the BIT, as noted earlier, the Webuild Shareholder Loans qualify as covered "investments" and can therefore be the subject of claims, unless excluded or waived. If Article 22.2 were to be read to constitute a waiver of such claims, it would not only violate waiver principles that seem not to be in serious dispute between the Parties' experts, but would also create a conflict between the Bidding Terms and the Contract. While the Tribunal is satisfied that the Respondent did not intend to provide a sovereign guarantee of the project financing, both the Bidding Terms and the equilibrium provisions of the Contract require a different conclusion with respect to political risk.[223]

203. The Tribunal therefore concludes that even though Article 22.2 may not be as clear and unequivocal as the Claimant has argued, following the principle of harmonious interpretation, which both experts appear to agree is part of Argentine law, and taking into account the other submissions of the Parties and their experts regarding the interpretation

[222] "To govern (sth.) (over so. / sth.); to reign; to rule; to dominate", Leo Online Dictionary: https://dict.leo.org/spanish-english/regir.
[223] The Tribunal is of the view that the Respondent's argument that once a subsidy has been paid, the State does not bear any further financing liability, conflates the distinction between commercial and political risk.

of Article 22.2 of the Concession Contract in its full context, the better view is that while it may exclude third-party loan claims, it does not exclude claims that qualify as "investments" under the relevant BIT, whether they take the form of shares or loans.

204. Argentina's criticism of Webuild for providing support to the Concessionaire in the form of loans rather than additional equity contributions does not advance its case. As the Tribunal understands it, the winning bidder was required to invest a certain level of equity in Puentes and the Consortium did so. There was no requirement that additional contributions take the form of equity rather than debt. Had Webuild invested additional equity in Puentes, over the apparent objections or unwillingness of the minority shareholders to make further contributions, presumably with the result that the minority shareholders would have been diluted, its resultant increased equity stake would be subject to recovery in these proceedings in the same way as its 26% equity stake. But its additional investments took the form of debt instead. The issue here is not that the Webuild Shareholder Loans were impermissibly granted, or should have taken the form of equity, but whether they can be admitted as claims in these proceedings or are precluded by Article 22.2.

(vi) Limited persuasive value of the *Hochtief* decision

205. The Tribunal turns finally to the decision of the tribunal in the *Hochtief* Arbitration in relation to claims based on the Webuild Shareholder Loans, which the Tribunal finds upon close examination has limited persuasive value in this case, notwithstanding the parallel posture (albeit in the context of a different treaty) of the two cases in relation to this issue.

206. The *Hochtief* tribunal's decision (by majority) relied heavily on the language of Article 22.2 of the Concession Contract and its lack of any exception for BIT claims to hold that claims based on the Hochtief Shareholder Loans were precluded by the terms of Article 22.2.[224] The tribunal did not, however, engage in a detailed textual or contextual analysis to reach that conclusion,[225] although it did note that "other sections of the Concession

[224] **CL-0013,** *Hochtief*, Decision on Liability, ¶ 194.
[225] *Ibid*., *see Hochtief*, Decision on Liability, (Annex A) ¶¶ 187-194 for full discussion.

Contract, such as Sections 11.1 and 11.3, do expressly provide for the position of third parties".[226] However, Article 11 does not deal with financing, but essentially makes the Concessionaire liable for its management of the Concession properties and execution of the work, including for damage it causes to third parties. Its references to third parties, using different terminology, are therefore not particularly probative.

207. The *Hochtief* tribunal did not consider the more relevant provisions of Article 31 of the Contract, and the fact that the equilibrium provisions both there and under the Emergency Law appear to include financing matters and debt within their scope.

208. Nor did the *Hochtief* tribunal reference Section 3(j) of the Bidding Terms, or discuss its implications for the interpretation of Article 22.2, in its analysis of the issue, as the Claimant in the present case has noted. Indeed, the *Hochtief* Decision on Liability states that "[n]either 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."[227] This ignores Section 3(j) of the Bidding Terms as well as Article 2 of the Concession Contract which make the Bidding Terms (among others) governing of the Concession Contract.

209. It appears to the Tribunal that the limited treatment of the issue of the Hochtief Shareholder Loan claims' admissibility by the *Hochtief* tribunal may be a function of the fact that the parties in the *Hochtief* Arbitration did not focus on it in detail. The *Hochtief* Decision on Liability does not contain any citations to parties' submissions in this regard, except in para. 187, where the tribunal cites the Respondent's objection. Nor did the *Hochtief*

[226] **CL-0013,** *Hochtief,* Decision on Liability, fn 184. Both of these provisions are part of *Article 11, Responsabilidades).* Article 11.1 states that: "*La Concesionaria será responsable, ante el Concedente y terceros por todos los actos que por sí o por intermedio de contratistas y subcontratistas ejecute para la correcta administración de los bienes afectados a la concesión, y por todas las obligaciones y riesgos inherentes a su adquisición, construcción, operación, administración y mantenimiento. Asimismo la Concesionaria será civilmente responsable por los perjuicios o daños que pueda ocasionar a personas o bienes. Ella, su personal y las empresas con las que contrate trabajos serán responsables, además, por el cumplimiento de todas las leyes, ordenanzas y disposiciones emanadas de las autoridades con jurisdicción en la zona de la obra."*Article 11.3, second paragraph, states that "(...) *Deberá hacerse cargo, asimismo, de las acciones que surgieren por daños causados a terceros o a sus bienes, como consecuencia en ambos casos del obrar de la Concesionaria o de las responsabilidades que le son propias en su carácter de concesionaria de una obra pública (...)*."

[227] **CL-0013,** *Hochtief*, Decision on Liability, ¶ 192.

tribunal appear to have the benefit of the type of detailed expert opinions on Argentine law that have been submitted in this case.[228]

210. Overall, therefore, the limited extent of the submissions and analysis concerning the admissibility of Hochtief Shareholder Loan claims does not materially assist this Tribunal in reaching a decision on the Shareholder Loan claims before it. This significantly undercuts the persuasive value of the *Hochtief* decision for the present Tribunal. While consistency is an important value in these types of proceedings, this Tribunal must consider the totality of the submissions before it in this case, including the detailed expert opinions on Argentine law, and reach its decision based on its analysis of those submissions. Having concluded that the tribunal's decision in the *Hochtief* Arbitration has limited persuasive value for the present Tribunal, likely due to the scarce record available to it, the Tribunal affirms its considered decision that the Webuild Shareholder Loan claims are admissible.

(vii) Conclusion and Implications for Damages

211. Having considered in depth the submissions of the Parties and their experts on the proper interpretation of Article 22.2 of the Concession Contract, including the relevance of the *Hochtief* tribunal's decision, the Tribunal has determined that the claims of Webuild predicated on its Shareholder Loans are admissible. The Respondent's request that the Tribunal declare these claims inadmissible is therefore denied. While this determination means that Webuild Shareholder Loans will be part of any damages calculation should any of the Claimant's merits claim succeed, how precisely they should be factored into that calculation is a question that will require further consideration under that scenario. The Tribunal is mindful of the need to avoid double recovery, as well as the potential need to address other issues that might affect the proper calculation of damages. This may include, for example, in the event this Tribunal finds a violation on the merits, a determination of

[228] The *Hochtief* tribunal's decision on the Shareholder Loan claims was an issue raised in the Application for Annulment of the Claimant; however, those proceedings were terminated based on an apparent settlement reached by the parties prior to any decision on the Application. On 9 August 2021, the ICSID *ad hoc* Committee issued a procedural order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1). *See also* ¶ 49 *supra* (reflecting notification to this Tribunal of the discontinuance).

the extent to which the failure timely to reestablish the Concession Contract's equilibrium prevented the repayment of the Webuild Shareholder Loans.[229]

## B. FAIR AND EQUITABLE TREATMENT

### (1) The Parties' Positions

#### *a. The Claimant's Position*

(i) The Standard of Fair and Equitable Treatment

212. The Claimant submits that under the FET standard included in Article 2.2 of the BIT, Argentina has a positive obligation to accord fair and equitable treatment to covered investments and a negative obligation to refrain from unjustified or discriminatory treatment. Therefore, according to the Claimant, unjustified or discriminatory treatment breaches the FET standard, but the Government's conduct can also violate the FET standard without being unjustified or discriminatory.[230]

213. The Claimant argues that the following actions are comprised under the FET standard: (i) actions that frustrate an investor's legitimate expectations in relation to its investments; (ii) actions that treat an investor or an investment with a lack of transparency; (iii) conduct that creates an unstable and unpredictable legal framework or business environment for the investment; (iv) conduct that violates due process or results in a denial of justice including – but not limited to – improper judicial or administrative proceedings as well as governmental interference in such proceedings; (v) discriminatory actions; and (vi) actions taken in bad faith.[231]

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[229] As the Claimant's expert Dr. Liendo opined, the scope of the compensation as regards the intercompany loans would therefore be "*limited to the portion that was not paid by the Concessionaire […] due to the disruption of the concession's economic and financial equation*." Liendo Report, ¶ 71.
[230] Claimant's Memorial, ¶¶ 178-180.
[231] *Ibid*., ¶ 184 and the extensive case law cited therein: **CL-0013**, *Hochtief v. Argentina,* Decision on Liability ¶ 219 ; **CL-0003***, Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award ("***Impregilo*, Award**"), ¶¶ 291, 297, 331; **CL-0014**, *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A v. Argentine Republic.* ICSID Case No. ARB/03/16*, and AWG Grp. v. Argentine Rep.,* UNCITRAL*,* Decision on Liability, 30 July 2010, ¶¶ 222-225; **CL-0029**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶ 147; **CL-0030**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Final Award, 8 June 2009, ¶ 621; **CL-0027**, *Waste Management, Inc. v. United Mexican*

214. The Claimant further emphasizes that the FET standard is particularly linked to the notion of legitimate expectations, which has been established as a dominant and central element by various arbitral tribunals.[232]

(ii) Argentina Violated the Claimant's Legitimate Expectations

215. The Claimant alleges that Puentes had a legitimate expectation that the Concession's economic equilibrium would be restored if Governmental action had affected it negatively. Puentes' right, it posits, is protected by the right to property embodied in the Argentine Constitution, which cannot be altered by Argentina without fair compensation.[233]

216. The Claimant asserts that even though Puentes did assume some risks in connection with the Concession Contract, it did not assume potential risks generated by the Government's conduct. This was reflected in the Concession Contract, which entitled Puentes to request a review and the restoration of the economic equilibrium if negatively affected by Argentina's conduct. The Claimant contends that it was therefore reasonable for Puentes to expect Argentina to restore the Concession's economic equilibrium and provide compensation for the negative impact of Argentina's conduct.[234]

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*States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 ("***Waste Management II**"),* ¶ 98; **CL-0008**, *LG&E Energy Corp. et al. v. Argentine Republic,* ICSID Case No. ARB/02/01, 3 October 2006, Decision on Liability ("***LG&E*, Decision on Liability**"), ¶ 128; **CL-0031**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 70, 76, 88 (30 Aug. 2000); **CL-0008**, *LG&E,* Decision on Liability, ¶ 131; **CL-0005**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ("***CMS*, Award**") ¶ 284; **CL-0032**, *Occidental Exploration and Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 183; **CL-0033**, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340; **CL-0034**, *Técnicas Medioambientales TECMED, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 153, n.189; **CL-0035**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ("***Rumeli*, Award**"),¶ 609; **CL-0009**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ("***Vivendi I*, Award**"), ¶ 7.4.11(; **CL-0036**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award ¶ 188 (6 Nov. 2008); **CL-0037**, *Oostergetel and Laurentius v. Slovak Republic*, Final Award, 23 April 2012 ¶ 272; **CL-0039**, *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, 29 Mar. 2005, p. 75; **CL-0040**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 450; **CL-0041**, *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 Nov. 2010, ¶¶ 297, 301.

[232] *Ibid*., ¶¶ 184-185.

[233] *Ibid*., ¶ 186.

[234] *Ibid*., ¶¶ 187-188.

217. In the Claimant's view, the Emergency Law created an economic imbalance by causing the conversion of the toll rates from US$ 7.40 to AR$ 7.40 and their freezing until the finalization of the renegotiation process. The Claimant argues that the need to restore the Concession's equilibrium was acknowledged by Argentina through the Emergency Law, which provided that public contracts would be renegotiated by the State within a period of 180 days. Argentina's acknowledgment of the Emergency Law's negative impact on the Concession's economic equilibrium was further expressed in the LOUs and the transitory agreements.[235]

218. The Claimant argues that Puentes waited for over ten years for Argentina to restore the economic equilibrium – to no avail. Argentina did not ratify either the LOUs or the transitory agreements. The Claimant further contends that the execution of these instruments would not even have restored the Concession's economic equilibrium, but they would have provided a first important step, enabling Puentes to repay its debts to Argentina and other lenders and ultimately, once complete renegotiation had occurred, would have restored the internal rate of return contemplated in the LOUs and the transitory agreements.[236]

219. The Claimant emphasizes that Argentina also caused the Claimant to expect that it would comply with the terms of the Financial Assistance Loan. Since no other third-party funding was available and due to Argentina's warning either to accept the FAL or abandon the investment, the Claimant argues that it had no other choice but to accept the Financial Assistance Loan, notwithstanding its onerous terms.[237]

220. The Claimant asserts that it relied on Argentina's contractual commitments when it contributed an additional US$ 3,439,390.37 to finish Project construction. Arguably, these types of commitments have been viewed by tribunals as the most likely to create legitimate investor expectations that the State will conduct itself in a certain manner. For example, the arbitral tribunal in *Total v. Argentina* held that specific legal obligations assumed by

[235] *Ibid*., ¶¶ 189-191.
[236] *Ibid*., ¶ 197.
[237] *Ibid*., ¶ 198.

the host State in contracts, concessions or stabilization clauses create a legitimate expectation upon which the investor is entitled to rely as a matter of law.[238]

221. In the Claimant's view, Argentina's issuance of Resolution 14 unilaterally modified the terms of the Financial Assistance Loan, thereby changing Puentes' finances and destroying its ability to pay back the Financial Assistance Loan or earn any profit.[239]

(iii) Argentina's Conduct Was Arbitrary, Grossly Unfair, Unjust and Idiosyncratic

222. The Claimant alleges that Argentina's conduct, consisting of (i) its failure to renegotiate the Concession Contract, and (ii) its termination of the Concession, was arbitrary, grossly unfair, unjust and idiosyncratic.[240] The Claimant does not, however, challenge the legality of the Emergency Law *per se*.

223. The Claimant highlights that past tribunals have found that Argentina's failure to restore the economic balance after the enactment of the Emergency Law breached the FET standard (*e.g.*, *Impregilo v. Argentina* and *EDF International v. Argentina*). It further underscores that the delay in concluding the renegotiation process within a reasonable time was held by the *Hochtief* tribunal to be a breach of the FET standard since it crossed a line between what was merely sub-optimal administration and bureaucratic delay, and what became a failure to remedy the adverse consequences of Argentina's measures that was so prolonged and so complete as to infringe the investor's rights under the BIT. The Claimant further notes that the *Hochtief* tribunal also held that Argentina's failure to implement any of the LOUs and transitory agreements was unfair to Puentes.[241]

224. According to the Claimant, Argentina's unfair and inequitable treatment is comprised of the following acts: (i) it presented a renegotiation proposal in April 2005, more than three years after the enactment of the Emergency Law, which provided 180 days for the renegotiation of public contracts; (ii) it repudiated the First LOU by unilaterally replacing

[238] *Ibid*., ¶ 199.
[239] *Ibid*., ¶ 200.
[240] *Ibid*., ¶¶ 202, 207.
[241] *Ibid*., ¶¶ 203-204.

it with the Second LOU; (iii) it denounced the Second LOU based on a claim by one of Puentes' subcontractors 'in spite of the fact that Argentina was already well-aware of that claim prior to proposing the Second [LOU] and that the resolution of the subcontractor's claim depended on the successful renegotiation of the Concession Contract'; (iv) it represented to Puentes that a transitory agreement rather than a letter of understanding would allow the agreement to be ratified more quickly, although it ultimately failed to implement any of the four agreements subsequently executed; (v) it represented to Puentes that a transitory agreement would not require a public hearing for its ratification (after Puentes agreed to two transitory agreements, Argentina claimed that a public hearing needed to be held nevertheless); and (vi) it forced Puentes into dissolution by failing to ratify the Fourth Transitory Agreement and by preventing Puentes' shareholders from injecting more capital into the company to prevent its dissolution.[242]

225. These actions, in the Claimant's view, demonstrate Argentina's continued delay in the negotiations with Puentes. Additionally, the Claimant posits that Argentina violated its own legally-imposed deadlines, made unreasonable excuses for its failure to execute, convinced Puentes to accede to terms promising benefits that were never delivered, and withheld approvals that would have prevented Puentes' dissolution.[243] In the words of Puentes' CFO, Mr. Gabriel Hernández: "Resolution SOP 14/03 and the Emergency Law financially asphyxiated the company."[244]

226. Lastly, the Claimant alleges that Argentina wrongfully terminated the Concession Contract citing Puentes' dissolution as a ground for termination, despite the fact that Argentina had blocked Puentes' shareholders from approving a capital injection to avoid dissolving the company. In the Claimant's view, each ground for termination alleged by Argentina is equally absurd and arbitrary.[245]

[242] *Ibid*., ¶ 205.
[243] *Ibid*., ¶ 206.
[244] **CWS-0003**, Witness Statement of Gabriel Hernández, 27 Dec. 2016, ¶ 35.
[245] Claimant's Memorial, ¶ 207.

(iv) The *Jurisprudence Constante*

227. The Claimant notes that several other arbitral tribunals have concluded that Argentina's failure to renegotiate public contracts disrupted by the emergency measures violated the FET standard. The Claimant emphasizes that while there is no rule of *stare decisis* in international investment law, it has been held that a series of cases that resolve a particular issue in the same manner can – and should – operate as an influential guide to subsequent tribunals addressing the same issue.[246]

228. The Claimant highlights that several investment tribunals have held that Argentina breached the FET standard with its pesification measures and abrogation of inflation-protection clauses. The Claimant notes that every tribunal addressing this issue has found that Argentina breached the FET standard when failing to renegotiate the public concessions negatively affected by the Emergency Law, thereby failing to restore the contracts' economic equilibrium after the end of the economic crisis.[247]

229. The Claimant posits that, in accordance with this *jurisprudence constante*, absent very compelling circumstances, this Tribunal should find that Argentina's failure to renegotiate Puentes' Concession and to restore its economic equilibrium constitutes a breach of the FET standard.[248]

(v) Argentina's FET Arguments Are Incorrect

230. The Claimant makes various responses to Argentina's FET arguments. First, contrary to the Respondent's contention, the Claimant argues that it did not breach the Concession Contract from the very beginning. In its view, the financial issues Puentes faced arose from a range of factors, such as (i) the looming Argentine economic crisis, (ii) Argentina's repeatedly late payment of the agreed subsidy amounts, (iii) the IDB's and banks' withdrawal in response to both these factors, and (iv) the Emergency Law. The Claimant

[246] *Ibid*., ¶¶ 208-209; Claimant's Reply, ¶ 227.
[247] Claimant's Memorial, ¶ 210; Claimant's Reply, ¶ 225.
[248] Claimant's Memorial, ¶ 212.

argues that, in any event, its alleged non-compliance would be irrelevant to the question whether Argentina had to re-establish the Contract's economic equilibrium and whether it did so in fact.[249]

231. Second, the Claimant argues that Argentina's alleged measures to support the Project are neither correct nor relevant. In any event, far more consequential than any role Argentina played in the IDB negotiations was its failure to pay the subsidy on time, its pesification and its failure to re-establish the Concession's economic equilibrium. According to the Claimant, Argentina's financial assistance to Puentes was an abusive money-making venture for the State.[250]

232. Third, Argentina's argument that the economic equilibrium was disrupted before the enactment of the Emergency Law is, in the Claimant's view, solely based on the fact that the IDB refused to disburse the Loan because of expectations that traffic volume would be reduced. The Claimant submits that the IDB negotiations were affected by several factors, such as Argentina's failure to pay the subsidy in a timely manner. It further contends that there are reasons to believe that the IDB would have disbursed the Loan, had Argentina met its contractual obligations.[251]

233. Fourth, the Claimant argues that whether Puentes owed Boskalis-Ballast or not, Puentes could not pay its subcontractors without Argentina having restored the Concession's economic equilibrium. Arguably, the tribunal in the *Boskalis-Ballast* ICC Arbitration explicitly recognized that the uncorrected imbalance created by Argentina's pesification put Boskalis-Ballast and Puentes in difficult economic circumstances.[252]

234. Fifth, the Claimant notes that Argentina's reliance on the findings of the *Hochtief* tribunal that Puentes was in financial difficulties is irrelevant. It stresses that, in any event, the

[249] Claimant's Reply, ¶¶ 232-234.
[250] *Ibid*., ¶¶ 235-238, 256-259.
[251] *Ibid*., ¶¶ 239-242.
[252] *Ibid*., ¶¶ 243-247.

*Hochtief* tribunal was wrong in its assessment of why and to what degree Puentes was experiencing financial challenges before the Argentine economic crisis.[253]

235. Sixth, Argentina's position that renegotiating the Concession Contract would have contravened the principle of equality among bidders fails to consider that Argentina had committed itself to rebalancing the Concession Contract if its conduct disrupted the Concession's economic balance. If the Consortium and the other concessionaires would have known during the bidding process that Argentina would refuse to rebalance their contracts' equilibrium, they would have either not participated or submitted a different bid. Accordingly, the principle of equality supports the reestablishment of the equilibrium.[254]

***b. The Respondent's Position***

236. The Respondent posits that the FET standard, coinciding with the minimum standard of treatment, does not provide an absolute guarantee of legal stability or an insurance policy, as confirmed by the *Hochtief* tribunal. A broad interpretation of the standard that would protect the investor's expectations is nowhere to be found: not in the Italy-Argentina BIT, nor in any other BIT concluded by Argentina.[255]

237. The Respondent emphasizes that due regard has to be given to the context and circumstances of the case at hand, in particular that: (i) the Project was approved under the public works concession regime; (ii) it was stated in the Concession Contract that Puentes would not receive sureties or guarantee from Argentina and that the Concession would not have any guaranteed minimum revenues or traffic volume; and (iii) the Concession Contract was a risk contract as per Decree No. 650/1997.[256]

238. The Respondent further contends that Puentes did not manage to obtain financing for the Project from the very outset for reasons not attributable to Argentina, being the fact that the obligation to submit the FIFA was of essence to the Contract. Argentina claims that,

[253] *Ibid*., ¶¶ 248-251.
[254] *Ibid*., ¶¶ 252-255.
[255] Respondent's Counter-Memorial, ¶ 389; Respondent's Rejoinder, ¶¶ 389-390.
[256] Respondent's Counter-Memorial, ¶¶ 394-397; Respondent's Rejoinder, ¶¶ 398-399.

despite Puentes' failure, Argentina still disbursed the subsidy, maintained the Concession and granted Puentes financial aid, thereby bearing the burden of the risk assumed by Puentes. The Respondent notes that, while Argentina could have terminated the Concession Contract, it opted for maintaining it.[257]

239. Argentina alleges that regard should also be given to the measures it adopted to support the Project. Among others, it granted repeated extensions for Puentes to comply with its obligation to submit the FIFA, negotiated with the IDB and supported Puentes in its efforts to obtain financing; it also granted Puentes financial aid at a time when Argentina was facing an unprecedented economic, financial, social, political and institutional crisis, and maintained the Concession despite Puentes' multiple breaches.[258]

240. The Respondent argues that Puentes itself recognized that the economic and financial equilibrium of the Concession Contract was disrupted before the Emergency Law was enacted.[259] Arguably, Puentes' financial problems arose prior to the crisis, as demonstrated by the ICC arbitration proceedings commenced by its subcontractor Boskalis-Ballast. According to Argentina, the *Hochtief* tribunal also noted that there was evidence that Puentes was in financial difficulties even before pesification. This shows that the disequilibrium alleged by the Claimant occurred before the emergency measures and is solely attributable to the Claimant.[260]

241. Moreover, the Respondent posits that the Claimant's contention that Argentina's failure to rebalance the Concession forced Puentes into reorganization proceedings is false. The Respondent asserts that Puentes' insolvency proceedings were caused by the bankruptcy claim brought by its subcontractor Boskalis-Ballast to secure the ICC Arbitration award rendered in its favor.[261]

[257] Respondent's Counter-Memorial, ¶¶ 398-403; Respondent's Rejoinder, ¶¶ 393-396, 401-403.
[258] Respondent's Counter-Memorial, ¶ 404; Respondent's Rejoinder, ¶¶ 412-414, 424, 448.
[259] Respondent's Counter-Memorial, ¶¶ 405-407; Respondent's Rejoinder, ¶¶ 420-423; 426-428.
[260] Respondent's Counter-Memorial, ¶¶ 408-414; Respondent's Rejoinder, ¶¶ 429-434.
[261] Respondent's Counter-Memorial, ¶¶ 434-437; Respondent's Rejoinder, ¶ 434.

242. Argentina emphasizes that the disruption of the economic equilibrium of the Contract due to Puentes' financial difficulties before the adoption of the emergency measures made it difficult to renegotiate the Concession and, at the same time, meet the goal of protecting the public interest and the principle of equality among bidders, both of which the State must ensure.[262]

243. The Respondent further claims that the *Hochtief* tribunal did not actually find that the pesification policy as such breached the FET standard. It further contends that a lack of adjustment of tariffs does not in itself amount to treatment that is contrary to the FET standard but rather must be assessed in light of all circumstances of the case.[263]

244. The Respondent contends that Puentes falsely claims that it was forced to sign the Financial Assistance Loan Agreement and that Argentina unilaterally changed the terms of the Agreement through Resolution 14. Puentes was free to accept or reject the FAL Agreement and it could even terminate it if Puentes obtained more convenient financing sources.[264] Further, in Argentina's view, Resolution 14 did not increase the interest rate.[265]

245. Further, the Respondent requests the Tribunal to consider that: (i) Puentes was not providing public services at the time the renegotiation commenced; (ii) other concessionaires showed themselves to be collaborative, which allowed negotiations to be concluded well ahead of the Agreement entered into with Puentes; and (iii) Argentina continued with the renegotiation process, even after being warned by the subcontractors that the adoption of any measures should be subject to the prior regularization of Puentes' situation with its subcontractors and suppliers.[266]

246. The Respondent contends that the need to establish a common line between the renegotiation process and Puentes' insolvency proceedings rendered the terms of the

[262] Respondent's Counter-Memorial, ¶ 415; Respondent's Rejoinder, ¶¶ 443-445.
[263] Respondent's Counter-Memorial, ¶¶ 418-419; Respondent's Rejoinder, ¶ 447.
[264] Respondent's Counter-Memorial, ¶¶ 421-422; Respondent's Rejoinder, ¶¶ 438, 449.
[265] Respondent's Counter-Memorial, ¶ 434-436; Respondent's Rejoinder, ¶¶ 457, 459-461.
[266] Respondent's Counter-Memorial, ¶¶ 438-440; Respondent's Rejoinder, ¶ 463.

Second LOU ineffective, and a new agreement needed to be reached consistent with the new situation.[267]

247. According to Argentina, the filing of a petition for the commencement of insolvency proceedings is one of the grounds for termination of the Concession Contract, with the same effects and scope as in the event of termination through the fault of the Concessionaire. The Respondent emphasizes that, nonetheless, Argentina did not terminate the Concession and continued to seek a solution, even once Hochtief initiated its ICSID arbitration. This is acknowledged by the Claimant itself.[268]

248. The Respondent contends that the Claimant's reliance on the transitory agreements to support its argument that Argentina purportedly violated the FET standard is contradictory. If the LOUs and the transitory agreements created obligations for Argentina, that means that the renegotiation was successful and, therefore, it is not possible to invoke a breach of the BIT on this basis. On the contrary, if the LOUs and the transitory agreements did not result in an effective agreement between the Parties, it cannot be argued that they created obligations for Argentina. The Respondent submits that Puentes itself denounced the Fourth (and last) Transitory Agreement, thereby abandoning the renegotiation process of the Contract. It was also Puentes that filed an administrative claim requesting that the Concession Contract be declared terminated on the basis of Argentina's fault. Puentes further filed a complaint in court.[269]

249. With respect to the Claimant's argument relating to Puentes' request for a capital increase, the Respondent alleges that such purported request was in fact intended to *decrease* the equity set out in the Contract from AR$ 30 million to AR$ 1 million. In the Respondent's view, said amount was insufficient to attain the corporate purpose and inconsistent with the Contract's obligation regarding the level of equity funding.[270]

[267] Respondent's Counter-Memorial, ¶ 441; Respondent's Rejoinder, ¶ 471.
[268] Respondent's Counter-Memorial, ¶¶ 443-444; Respondent's Rejoinder, ¶ 473.
[269] Respondent's Counter-Memorial, ¶¶ 445-447; Respondent's Rejoinder, ¶¶ 474-476.
[270] Respondent's Counter-Memorial, ¶¶ 448-451.

250. Lastly, the Respondent submits that the Claimant incorrectly cites the grounds that justified Argentina's termination of the Concession Contract. Article 1 of the Termination Resolution declared the termination of the Concession Contract by reason of the Concessionaire's dissolution and liquidation. Termination was thus automatically triggered by the decision of Puentes' shareholders to dissolve the company, and was not based on the grounds alleged by the Claimant. In the Respondent's view, termination of a contract, carried out in accordance with its terms, does not amount *per se* to a violation of the standards set forth in the applicable BIT.[271]

**(2) The Tribunal's Analysis**

251. At the outset, the Tribunal agrees with the Claimant that, under the applicable FET standard, Argentina has a positive obligation to accord fair and equitable treatment to covered investments, in accordance with investors' legitimate expectations, and a negative obligation consisting of refraining from unjustified or discriminatory treatment.

252. The positive obligation incorporated in the FET standard is included in Article 2.2 (first sentence) of the BIT: '*Cada Parte Contratante acordará siempre un trato equitativo y justo a las inversiones de inversores de la otra. Parte Contratante […]*'. In the unofficial English translation: '*Each Contracting Party shall always accord a fair and equitable treatment to the investments made by the investors of the other Contracting Party. […]'*

253. The negative obligation incorporated in the FET standard is included in Article 2.2 (second sentence) of the BIT: '*[…] Cada Parte Contratante se abstendrá de adoptar medidas injustificadas o discriminatorias que afecten la gestión, el mantenimiento, el goce, la transformación, la cesación y la liquidación de las inversiones realizadas en su territorio por los inversores de la otra Parte Contratante*'. In the unofficial English translation: *'[…] Neither Party shall impair by unjustified or discriminatory measures, the management, maintenance, enjoyment, transformation, cessation, or disposal of investments*'.

[271] Respondent's Counter-Memorial, ¶¶ 452-460; Respondent's Rejoinder, ¶¶ 480-484.

(i) Positive obligation under the FET standard

254. The applicable BIT does not restrict the positive obligation to accord FET to the minimum standard under customary international law, but allows for the broader range of treatment provided through autonomous treaty practice, comprising of "a variety of distinct components".[272] The Claimant cites *Waste Management II* with approval on this point:

> *[F]air and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process . . .. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*[273]

255. This Tribunal would, however, like to emphasize that *Waste Management II* is a NAFTA Chapter Eleven case, and given the precise formulation of NAFTA Article 1105, its tribunal had to consider the facts from a customary law point of view – unlike the present Tribunal. Regardless of whether the customary standard has developed to the same extent (a point on which the present Tribunal does not wish or need to take a position), as argued by the Claimant and summarized above,[274] FET as an autonomous treaty standard protects, at its core, the reasonable legitimate expectations of an investor vis-à-vis the State's conduct in relation to its investment. This standard has been elaborated upon at length in the case law, including in *Impregilo, Hochtief, National Grid, Total, EDFI and SAUR, BG and LG&E,*[275] giving rise to a *jurisprudence constante*. Even though these cases were

[272] Claimant Memorial, ¶ 183.
[273] **CL-0027**, *Waste Management II* ¶ 98.
[274] *See* ¶¶ 212-235 *supra*.
[275] **CL-0003**, *Impregilo* Award ¶ 331; **CL-0013**, *Hochtief,* Decision on Liability ¶ 281; **CL-0015**, *National Grid P.L.C. v. Argentine Republic, UNCITRAL,* Award, 3 November 2008 ("***National Grid*, Award**"), ¶ 179; **CL-0004**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ("***Total*, Decision on Liability**"), ¶ 180; **CL-0136**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, 1 February 2016, ¶ 325; **CL-0002**, *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentina Republic.*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 1005; **CL-0016**, *BG Group Plc. v. The Republic of Argentina,* UNCITRAL Arbitration, Final Award, 24 Dec. 2007, ¶ 309; **CL-0008**, *LG&E*, Decision on Liability, ¶ 137.

decided on the basis of different BITs, the relevant treaties all contain identical or similarly worded FET clauses. [276]

256. As to the positive obligation to accord FET in the present case, the primary legitimate expectation of the Claimant was grounded in the Concession Contract itself: while this Contract may not create any expectation of a particular rate of return or profitability, it establishes the foundation for other expectations, including the expectations of a certain economic environment based on the existence of the Convertibility Law and the indexing of values, as well as the specific expectation that the economic equilibrium of the contract would be maintained (Article 31.2 of the Concession Contract). Such an expectation is particularly relevant for long-term commitments by foreign investors in sectors such as infrastructure which are capital-intensive and risk-laden.

257. The revenue side of the equilibrium equation was fundamentally altered by the Emergency Law through the creation of an economic imbalance by causing the conversion of the toll rates from US$ 7.40 to AR$ 7.40 and their freezing until the finalization of the renegotiation process.[277] The Emergency Law recognized the need to restore the Concession's equilibrium by providing (in its Article 9) that public contracts would be renegotiated by the State within a period of 180 days, but this provision was not complied with by the State. The purpose of such renegotiation would not be the improvement of any company's position, but merely the restoration of the equilibrium. Article 9 incorporates an obligation of conduct which, when coupled with the promises of restoration of the economic equilibrium as a matter of local law, creates a legitimate and reasonable expectation of result.

258. An additional persuasive element in this regard is the Argentine Commercial Court Judgment of 11 June 2008, holding that UNIREN's failure to continue renegotiation (after

[276] Respondent's Counter-Memorial, ¶¶ 373-393; Respondent's Rejoinder, ¶¶ 377-392.
[277] The evidence before the Tribunal indicates that the cost side of the equation was also adversely affected by the Emergency Law and subsequent acts and omissions (Resolution 14, the failure to renegotiate the Concession Contract and restore its economic equilibrium, the failure to approve Puentes' request to increase its capital so as to comply with Argentine corporate law and avoid dissolution, and the Termination Resolution). These measures exacerbated the effects of the de-pegging of the peso to the U.S. Dollar and of de-indexation, and contributed to the ultimate failure of Puentes.

the 2007 LOU) was in breach of Argentine law, and expressing its concern that more than six years after enactment of the Emergency Law 'the grave imbalance in terms of the agreement persists'.[278]

259. Explicit and specific representations were made by the State through both the renegotiation clause in the Emergency Law, providing that equilibrium would be restored within a reasonable time frame, and the obligations under Article 31.2 of the Concession Contract. The investor clearly relied on these provisions when returning to the negotiation table and signing the 2006 LOU, indicating it was accepting the conditions. In other words, the Claimant's reasonable expectations that the Concession's economic equilibrium would be restored within a reasonable time if Governmental action (*e.g.,* tariff pesification under the Emergency Law) affected it negatively, were legitimate. By 2006, enough time had passed after the enactment of the Emergency Law in 2002 to support the conclusion that the State had had ample opportunity to conclude a successful renegotiation and implement its results accordingly. The fact that a number of other developments were ongoing and affecting the economic and political position of the Government is not relevant with regard to the impact of the Emergency Law. As a result, the Tribunal finds that the Respondent has acted in breach of Article 2.2 (first sentence) of the BIT when it failed in November 2006 to restore the economic equilibrium of the Contract.

260. The Tribunal, while troubled by several aspects of the 2003 Financial Assistance Loan (including Resolution 14), does not consider that it needs to determine whether this Loan represents a separate breach of FET. (The Tribunal notes that the Claimant does not appear to maintain this is the case, since its damages claim does not cover this time period.) The Tribunal does, however, consider that the terms on which the Financial Assistance Loan, as its terms were ultimately set by Resolution 14, was granted, had the effect of exacerbating the financially straitened situation of Puentes created by the Emergency Law,

[278] **Exhibit C-0040**, Court Order in Puentes del Litoral S.A. s/insolvency proceedings, File No. 093971, Court 13, Sec. 26, 11 June 2008.

making the need for restoration of the equilibrium in a reasonable time even more compelling.[279]

261. Finally, with respect to the Respondent's failure to approve the requested equity infusion in 2012, the Tribunal accepts that the failure to restore the economic equilibrium of the Concession within a reasonable time had the consequence that Puentes was necessarily driven into a state of insolvency over a period of time thereafter—"financial asphyxiation", as it was termed by the Claimant, with the predictable effect on shareholders' equity. This act was therefore not an isolated contractual decision but part of the relevant course of conduct. It represented in effect the "nail in the coffin" for Puentes.

262. The Tribunal did not find the Respondent's legal arguments persuasive: reliance on the *NEER* standard does not justify the breach of the Claimant's legitimate expectations; nor does termination of the Concession Contract serve as a defense to liability under the BIT. The main element of the breach is the failure to rebalance and restore the equilibrium in 2006; the later termination of the Contract is irrelevant, given the Tribunal's finding that the insolvency of Puentes was a consequence of the breach.

263. Neither was the Tribunal persuaded by the factual arguments of the Respondent: the status of the Project at the time of the Emergency Law is irrelevant given the Respondent's conduct and the fact that the Project was completed and operational at the time the breach occurred. The Claimant had indeed assumed risks with respect to commercial matters such as traffic volume and revenues but again, this is irrelevant in light of the Tribunal's basis for finding a breach on the part of the Respondent. The same analysis applies to the Claimant's alleged breach of its contractual undertakings regarding financing (failure to obtain third-party financing) during the construction phase and the measures taken by the Respondent to support the Project. (Argentina nevertheless still disbursed the subsidies, maintained the Concession and granted Puentes financial aid that enabled the Project to be completed.) These facts, and the acknowledged financial support provided by the

[279] This was not only a function of the interest rate, compounding provisions, and repayment terms, but also because of the operation of the expense pesification provisions.

Respondent in the form of the subsidy and the Financial Assistance Loan, do not alter the fact that the Concession Contract and the Emergency Law created an obligation of rebalancing which was violated.[280]

264. Equally, the situation of Puentes with its subcontractors and suppliers and the filing of a petition for the commencement of insolvency proceedings are not considered decisive. While these factors may have complicated or prolonged the renegotiation process to some extent, they do not explain its extensive duration and ultimate failure. Had the Concession Contract been timely rebalanced, some of the events highlighted by Respondent may not even have occurred. The Tribunal's finding that the breach took place in 2006 obviates the need to address any subsequent issues from a liability standpoint.

265. On the contrary, Argentina behaved in an arbitrary, grossly unfair, unjust and idiosyncratic manner in not renegotiating the Concession Contract within a reasonable time, *i.e.,* not presenting a renegotiation proposal after the 180-day deadline set out in the Emergency Law; unilaterally replacing the first LOU; denouncing the second LOU; making representations regarding the First Transitory Agreement; not ratifying the Fourth Transitory Agreement; and in preventing Puentes' shareholders from injecting more capital into the company to avoid its dissolution. Equally, the Respondent conducted itself in an unjust manner when terminating the Concession.

266. The Tribunal appreciates that Argentina has argued that termination was an automatic result of the Concessionaire's dissolution and liquidation. While the Contract may have technically permitted such an action, FET requires that the Tribunal consider the

[280] At most, they might have an effect on the terms of the new equilibrium, but this would be a matter for Argentine law. In so holding, the Tribunal is not taking the position that contractual breaches or other conduct by a concessionaire or other holder of a public contract are never relevant to a determination of whether FET has been violated, only that on the facts of this case, they do not defeat either the investor's legitimate expectations as to rebalancing or the ultimate conclusion of breach. The Tribunal appreciates that Argentina asserts that Puentes itself took the position that the Contract's equilibrium had been upset by late July 2001, when Puentes wrote to the government asking it to rebalance the Concession. *See* para. 86 *supra.* The Parties dispute whether this request was commercially motivated (Argentina's position) or the result of the changing economic circumstances of the country (the Claimant's position). It is not disputed that Argentina's economic position as a country began to deteriorate several years before the enactment of the Emergency Law in January 2002. It is not clear to the Tribunal what the precise mix of commercial and macroeconomic factors behind Puentes' request may have been, but in any event a need to make such a determination is obviated by subsequent events.

termination not in isolation, but in conjunction with the other facts and circumstances of this case. Viewed in light of the totality of the facts and circumstances, it is clear that the termination was the final consequence of the failure to rebalance and the prolonged period of disequilibrium in which Puentes tried to operate under the unsustainable yoke of frozen tariffs, the terms of the Financial Assistance Loan, and increasing costs. If Respondent's failure to approve the equity infusion was the nail in the coffin of the investment following the failure to timely renegotiate, the termination of the Contract was its burial.

267. The Tribunal does not accept Argentina's argument that if the LOUs and Transitory Agreements created obligations for Argentina, this means that the renegotiation was successful and, therefore, it is not possible to invoke a breach of the BIT. It is manifest that the renegotiation, despite multiple attempts over a period of years, was not successful. But the breach of FET stems from the obligation created by the Emergency Law and the Concession Contract to restore the economic equilibrium within a reasonable time. Although the Respondent implies that the Claimant, in contrast to other concessionaires, was not sufficiently cooperative, this has not been proven. The Claimant has demonstrated that it fully participated in the process and acquiesced in the various LOUs and Transitory Agreements in the hope and expectation that an agreement would be reached. The Respondent has not demonstrated any bad faith on the part of the Claimant. And while the history of this Concession might have introduced some complexities not present in other concessions, the extreme and unjustified duration of the renegotiation efforts leaves little doubt in the Tribunal's mind that the "reasonable time" standard for rebalancing was breached.

(ii) Negative obligations under the FET standard

268. The Tribunal's determination that the positive obligation to accord fair and equitable treatment to the Claimant's investments specified by Article 2.2 (first sentence) was violated effectively establishes that the negative obligation set forth in the second sentence of that same Article has been violated, at least with respect to the "unjustified" prong of that negative obligation. As the foregoing analysis has indicated, the Respondent had an

obligation to restore the Concession's equilibrium within a reasonable time in the wake of the 2002 Emergency Law, based on both the provisions of the Concession Contract and the Emergency Law itself. That did not occur. Instead, the Concessionaire was subjected to a protracted series of negotiations between 2006 and 2014 during which period of time its toll rates were frozen at 2002 levels and its financial viability increasingly undermined, culminating in its insolvency and the Concession Contract's termination. Neither the circumstances of Puentes or the Project during that period, nor Puentes' prior conduct, justified such treatment. While recognizing the financial and other support that the Respondent gave to Puentes and the Project at various times, that support did not justify the treatment they received, either. Accordingly, on the facts of this matter, the Tribunal finds that Article 2.2 (second sentence) has also been violated.

269. As a result, the Tribunal holds that the evidence presented before it supports a finding that the Claimant has been treated in an unfair, inequitable and unjustified manner, thereby acting in breach of Article 2.2 (first and second sentences) of the BIT.

270. The Tribunal makes no findings at this juncture regarding the other "limb" of the second sentence of Article 2.2, discrimination, as that concept will be addressed in its various formulations in Articles 3, and 4 of the BIT in the following section.

## C. DISCRIMINATORY MEASURES

### (1) The Parties' Positions

#### *a. The Claimant's Position*

(i) The Content of the Prohibition of Discriminatory Treatment

271. It should be noted at the outset that the Claimant's discrimination claim encompasses several provisions of the BIT which contain discrimination elements. It has approached this claim in an overarching way.

272. The Claimant contends that most tribunals and international authorities have interpreted the concept of discrimination as concerning (i) different treatment, (ii) between two appropriate comparators, (iii) that cannot be justified.[281]

273. According to the Claimant, the first element is non-controversial. Thus, one must assess whether a State has subjected a covered investment to treatment less favorable than treatment accorded to others.[282]

274. The second element, in the Claimant's view, consists of determining who are the appropriate persons as points of comparison and what subject matters fall within the concept of treatment. In terms of "who", the BIT's national treatment and most-favored-nation provisions (Articles 3.1 and 4) provide that covered investments may not receive less favorable treatment as compared to the investments of Argentine nationals and other foreigners. The Claimant contends that, with regard to the subject matter, Article 2.2 provides that States may not subject covered investments to discrimination with respect to nearly all of the investment's phases, and Article 3 states that the national treatment and most-favored-nation provisions apply to all matters governed by the BIT.[283]

275. Regarding the third requirement – whether the less favorable treatment is justified – the Claimant notes that arbitral tribunals have used the concept of "like circumstances" to address the question of whether there was any legitimate reason justifying the less favorable treatment.[284]

276. The Claimant submits that while some arbitral tribunals have determined that investments that compete with each other are in "like circumstances", an investment treaty's prohibitions against discriminatory treatment should not be interpreted as being limited to different treatment between investments that compete since (i) nothing in the BIT suggests that competition should determine the scope of discriminatory treatment; and (ii) the object and purpose of investment law is distinct from trade law. While trade law is concerned

[281] Claimant's Memorial, ¶ 217; Claimant's Reply, ¶¶ 266, 268-275.
[282] Claimant's Memorial, ¶ 217.
[283] *Ibid*., ¶ 218.
[284] *Ibid*., ¶¶ 219-222.

with reciprocal exchange of market opportunities and preventing protectionism, investment law seeks to protect the economic value of investments from a host state's opportunistic behaviour.[285]

(ii) Argentina Subjected Puentes to Less Favorable Treatment than Other Road Concessions

277. The Claimant argues that Argentina refused to grant Puentes any toll rate increase for over 12 years, while, at the same time, it granted numerous and substantial toll increases to other toll road operators. According to the Claimant, between 2002 to 2013, Argentina granted toll rate increases to at least 12 road operators, namely (1) Autopistas Urbanas, S.A.; (2) AUSOL; (3) Grupo Concesionario del Oeste, S.A.; (4) AEC S.A.; (5) Caminos del Río Uruguay; (6) Concesionaria del Sur; (7) Consortium formed by Vial 3 and Emcovial; (8) Cincovial, S.A.; (9) Caminos de las Sierras (Zárate-Brazo Largo Bridge); (10) AUFE S.A.C.; (11) ARSSA; and (12) Raúl Uranga – Carlos Sylvestre Begnis Tunnel.[286]

278. The Claimant contends that, as compared to these 12 toll-road concessionaires, Puentes received less favorable treatment.[287]

(iii) Investments of Argentines and Other Foreign Nationals in Toll-Road Concessions as Elements of Comparison

279. According to the Claimant, Argentine nationals and nationals of other countries owned the shares in the project companies that held the other toll-road concessions to which Argentina granted toll increases. Since the shares of those investors in those companies and the related interests in the toll-road concessions constitute investments of those Argentine and foreign investors, they constitute appropriate points of comparison.[288]

[285] *Ibid*., ¶¶ 223-225.
[286] *Ibid*., ¶¶ 226-227.
[287] *Ibid*., ¶ 228.
[288] *Ibid*., ¶¶ 229-231.

280. In the Claimant's view, toll rate increases constitute an appropriate subject matter for purposes of "treatment" because they concern the use and operation of an investment, thereby falling within the ambit of the BIT.[289]

(iv) The Claimant's Investment in Puentes and the Investments of Argentine and Other Foreign Nationals in Other Road Concessions Are in "Like Circumstances"

281. The Claimant's investment and the investments of Argentine and other foreign nationals in other road concessions are in "like circumstances": (i) they are in the same economic sector as Puentes; (ii) their rates were denominated in Dollars and linked to the U.S. Consumer Price Index ("**CPI**"); (iii) their concession contracts allocated risks such as construction costs, traffic volumes, financing and government measures in a similar fashion to the Concession; (iv) the Emergency Law also negatively affected those toll-road concessionaires; and (v) they equally participated in the renegotiation process.[290]

282. In the Claimant's view, even if the term "like circumstances" were to be construed as being limited to investments in direct competition, Puentes was subjected to discriminatory treatment. Apart from the Project works, the only two means to travel between the Provinces of Entre Ríos, Santa Fe and Buenos Aires are the Zárate-Brazo Largo bridge toll-road concession and the Raúl Uranga-Carlos Sylvestre Begnis tunnel. According to the Claimant, the concessionaires operating these two concessions received toll rate increases.[291]

283. The fact that Puentes and Caminos del Río Uruguay were in "like circumstances" was also confirmed in the Claimant's view when Argentina, after terminating the Contract, awarded the Concession to Caminos del Río Uruguay. According to the Claimant, a few weeks later Argentina increased the toll rate for Rosario-Victoria bridge and roadway built by Puentes.[292]

[289] *Ibid*., ¶ 230.
[290] *Ibid*., ¶ 232.
[291] *Ibid*., ¶ 233.
[292] *Ibid*., ¶ 234.

284. The Claimant contends that the Emergency Law further demonstrates that Puentes was in "like circumstances" with other toll-road concessionaries since that Law obligated Argentina to restore the economic equilibrium of all concessions it affected.[293]

285. Lastly, the Claimant argues that the reasons put forward by Argentina to sustain that Puentes was not in "like circumstances", lack merit. UNIREN's May 2014 report asserted that Puentes' Concession was different because (i) the Contract provided that Argentina would provide a subsidy to finance the construction, (ii) the main bridge was not complete when the Emergency Law was enacted, and (iii) Argentina provided the Financial Assistance Loan to Puentes, enabling it to complete construction, after noting five aspects that the Concession had in common with the other toll-road concessions.[294]

286. In the Claimant's view, UNIREN's decision to compare Puentes with other concessionaires proves that Puentes was in "like circumstances" with the other road-toll concessions that did receive toll-rate increases. The aspects that, according to Argentina, distinguished Puentes from the other concessionaires are incorrect and unreasonable. First, the subsidy did not change the fact that the Emergency Law made it impossible for Puentes to cover its costs with its toll revenue. Moreover, some of the other concessionaires received subsidies from a trust fund created in 2001 from a tax on diesel oil and with the aim of compensating toll-road concessionaires for the reduction in their income and the maintenance of their contracts' economic equilibrium.[295] Second, according to the Claimant, the Emergency Law did not differentiate between concessions that had finished their works and those that were not yet operating at the time of its enactment. It applied to the Concession Contract in any case because it pesified and froze its toll rate. Further, Argentina invited Puentes to the March 2002 kick-off renegotiation meeting with the other affected concessionaires, and asked Puentes to explain how the Emergency Law had affected the Concession despite the Project being incomplete at that time.[296] Third, in the

[293] *Ibid*., ¶ 235.
[294] *Ibid*., ¶¶ 236-237.
[295] *Ibid*., ¶ 238.
[296] *Ibid*., ¶ 239.

Claimant's view, the Financial Assistance Loan was necessary because the Emergency Law had made it impossible to obtain third-party funding.[297]

***b. The Respondent's Position***

(i) The Content of the Prohibition on Discriminatory Treatment

287. Argentina submits that, pursuant to Articles 2.2 and 3 of the BIT,[298] discriminatory treatment exists when the different treatment: (i) is accorded on grounds of nationality; (ii) is less favorable than that accorded to other investors in like circumstances; (iii) is accorded with the intention to harm the foreign investor; (iv) causes actual injury to the foreign investor; and (v) lacks reasonable justification.

(ii) Argentina Did Not Discriminate Against Webuild

288. In the Respondent's view, the Emergency Law was non-discriminatory in nature as it was general in scope and affected all toll-road concessionaires. The Law established general rules applicable to all economic agents without including any unreasonable distinctions and without targeting any specific group of citizens or investors. Argentina contends that the Law pursued the protection of the economic public policy interests which had been threatened by the serious economic, financial, exchange rate, social, political and institutional crisis that Argentina was facing.[299]

289. Argentina emphasizes that the renegotiation process established by the Emergency Law was aimed at (i) assessing all contracts on an equal footing without conferring any privileges, (ii) weighing the level of commitment shown by each concessionaire in the performance of their contract prior to the outbreak of the crisis, and (iii) assessing the objective possibilities of reaching a reasonable solution of the basis of shared efforts between the concessionaire and Argentina, taking due account of the users' interests.[300]

[297] *Ibid*., ¶ 239.
[298] Argentina's submissions treat the Claimant as arguing discrimination under Articles 2.2 and 3 of the BIT only, and do not address Article 4.
[299] Respondent's Counter-Memorial, ¶¶ 471-476.
[300] *Ibid*., ¶ 477.

290. The Respondent posits that, contrary to the Claimant's allegation that Puentes was treated in a discriminatory manner because Argentina did not restore the Concession's economic equilibrium, the economic equilibrium was disrupted before the enactment of the Emergency Law and was caused by Puentes' own financing problems. According to the Respondent, Puentes' financial situation made it difficult to renegotiate the Concession Contract and, at the same time, meet the goal of protecting the public interest and the principle of equality among bidders.[301]

291. Argentina submits that, when determining whether a treatment is more or less favorable than another, such treatment must be assessed as a whole and not by referencing to only one specific aspect. In this regard, the measures adopted by Argentina to support the Project need to be considered. According to the Respondent, such measures included, among others, the grant of repeated extensions to allow Puentes to comply with its obligation to submit the FIFA, Argentina's negotiation with the IDB and support to help Puentes obtain financing, the grant of financial aid at the time when Argentina was facing its crisis, as well as its maintenance of the Concession despite Puentes having breached the Concession Contract several times.[302]

292. The Respondent claims that Puentes' Concession presented certain features that distinguish it from other toll-road concessionaires, as stated by UNIREN in its Report of 28 May 2014.[303] First, most of the works under the Concession were subsidized by Argentina. Contrary to the Claimant's contention, other concessionaires did not receive subsidies from a special trust created in 2001. Rather, the trust was created by Decree No. 976/01 for granting compensation to certain concessionaires of the national road network for the decrease in their revenues as a result of a reduction in the toll rates. Second, contrary to other toll-rate concessionaires, Puentes had not completed the main works when the Emergency Law was enacted. The Concession Contract was nonetheless referred to renegotiation. Third, completion and commissioning of the works under the Concession

[301] *Ibid*., ¶¶ 478-482.
[302] *Ibid*., ¶¶ 483-484.
[303] **Exhibit C-0316**, Report issued by UNIREN, May 28, 2014, p. 5.

were only possible through Argentina's financial aid, a benefit which was not granted to other toll-road concessionaires or any other public works and services company.[304]

293. The Respondent alleges that, contrary to the Claimant's contention, the Financial Assistance Loan was necessary not because the Emergency Law made it impossible to acquire third-party funding, but rather because of Puentes' failure to obtain financing and the disruption of the Concession's economic equilibrium prior the enactment of the Emergency Law, and for reasons not attributable to Argentina.[305]

294. Argentina further argues that two additional events negatively affected the renegotiation process: (i) Puentes' insolvency proceedings, which had a major impact on the evolution of the renegotiation process and entailed a new legal situation thereby rendering the Second MOU ineffective; and (ii) Hochtief's ICSID claim against Argentina. The *Hochtief* Arbitration entailed the pursuit of two avenues of redress affecting the renegotiation process.[306]

295. Lastly, the Respondent alleges that the toll rate increase of the Rosario-Victoria connection occurred a year and a half after the connection was added to the Concession granted to Caminos del Río Uruguay, S.A after termination of Puentes' Concession Contract.[307]

**(2) The Tribunal's Analysis**

296. In light of the Tribunal's decision regarding Article 2.2, the Tribunal has decided, for reasons of judicial economy, not to address the discrimination claims in detail.

297. In particular, having decided that Argentina violated Article 2.2 (second sentence) of the BIT by unjustified measures, the Tribunal sees no need to decide whether those measures were also discriminatory within the meaning of Article 2.2.[308]

[304] Respondent's Counter-Memorial, ¶¶ 485-490; Respondent's Rejoinder, ¶¶ 497-502.
[305] Respondent's Counter-Memorial, ¶ 491; Respondent's Rejoinder, ¶ 505.
[306] Respondent's Counter-Memorial, ¶¶ 493-499; Respondent's Rejoinder, ¶¶ 508-513.
[307] Respondent's Rejoinder, ¶ 514.
[308] The Tribunal has some doubt in any event whether the test of discrimination proffered by Claimant is the right test in the context of an FET provision as it is for Article 3.

298. Article 4 of the BIT provides that:

> *En caso que los inversores de una de las Partes Contratantes sufrieran pérdidas en sus inversiones en el territorio de la otra Parte por causa de guerra o de otros conflictos armados, estados de emergencia u otros acontecimientos políticos-económicos similares, la Parte Contratante en cuyo territorio se ha efectuado la inversión concederá en lo relativo a indemnizaciones un tratamiento no menos favorable del que otorgue a sus propios ciudadanos o personas jurídicas o a los inversores de un tercer Estado.*

In its unofficial English translation:

> *Investors of one Contracting Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, a state of national emergency, or other similar political-economic events shall be accorded, by such other Party in whose territory the investment was made, treatment no less favourable than that accorded to its own nationals or legal entities or to investors of any third country as regards damages.*

299. This provision has only been argued in passing by the Claimant. It has not been addressed by Respondent. Moreover, the Tribunal notes that its application is limited by its terms to differential damages arising from situations of "war or other armed conflict, a state of national emergency, or other similar political-economic events". Given that the Claimant claims damages only from 2006, after the national emergency had ended, it is not clear this Article would apply, and the Tribunal sees no reason to explore it further absent submissions from the Parties.[309]

300. That leaves Article 3.1, which provides that:

> *Cada Parte Contratante, en el ámbito de su territorio, acordará a las inversiones realizadas por inversores de la otra Parte Contratante, a las ganancias y actividades vinculadas con aquéllas y a todas las demás cuestiones reguladas por este Acuerdo, un trato*

[309] As with Article 2, the Tribunal has doubt whether the concept of "discrimination" in this context is satisfied by the same test as for Article 3.

> *no menos favorable a aquél otorgado a sus propios inversores o a inversores de terceros países.*

In its unofficial English translation:

> *Each Contracting Party shall, in its own territory, accord to investments made by investors of the other Contracting Party, to the returns and activities related thereto and to all other matters regulated by this Agreement, a treatment not less favourable than that accorded to its own investors or to investors of third countries.*

301. While the Tribunal considers that other toll-road concessionaires may well be appropriate comparators, particularly given the lack of any distinction in the Emergency Law between completed and still-in-progress concessions, and the conduct of the Respondent in inviting renegotiation to concessionaires in both categories, more significant questions are presented in relation to other issues this claim presents. With respect to the issue of "like circumstances", while it is difficult to imagine what differences could justify the prolonged period of limbo into which Puentes was placed by the renegotiation saga described earlier, it is reasonable to consider that at least some of the factors highlighted by the Respondent that it says set Puentes apart (the subsidy, the Financial Assistance Loan, the carryover effects of financial issues from the construction phase into the operations phase), and particularly those issues that carried over into the operational phase, would have needed to be taken into account in some fashion in the renegotiation process. Other questions include: (i) whether the renegotiation process constitutes a form of "treatment" as required by Article 3; and (ii) whether, assuming the "treatment" requirement is satisfied, such treatment reflected discrimination on the basis of nationality, no evidence of which has been shown. Given the Tribunal's decision that both the positive and negative obligations of Article 2.2 of the BIT have been breached, the Tribunal sees no benefit in reaching a conclusion on these issues.

## D. EXPROPRIATION

### (1) The Parties' Positions

#### *a. The Claimant's Position*

302. The Claimant argues that the BIT prohibits two types of expropriatory measures. First, neither Contracting Party may directly expropriate an investment of a national of the other Contracting Party. Second, neither signatory may indirectly expropriate through measures having an equivalent effect. In the Claimant's view, common factors that are often considered include the measures' economic impact and whether they violate an investor's legitimate expectations. This second element is derived from the language of the BIT, which provides that the expropriatory measure may not be "discriminatory or contrary to a commitment undertaken". Further, there exists a consensus that not only tangible property and physical assets may be expropriated, but that also a broad range of economically significant rights, including legal and contractual rights, might be subject to expropriation.[310]

(i) Argentina Indirectly Expropriated the Claimant's Investment

303. In the Claimant's view, five acts or omissions of Argentina – taken together – constitute an indirect expropriation of the Claimant's investment in Puentes' shares, the Concession Contract and the Inter-Company Loans: (i) the Emergency Law; (ii) Resolution 14; (iii) the failure to renegotiate the Concession Contract and restore its economic equilibrium; (iv) the failure to approve Puentes' request to increase its capital so as to comply with Argentine corporate law and avoid Puentes' dissolution; and (v) the Termination Resolution.[311]

304. **The Emergency Law**. According to the Claimant, it is undisputed that the measures under the Emergency Law, consisting of the pesification and freezing of toll rates as well as the initiation of renegotiation, affected Puentes' economic equilibrium. This was

[310] Claimant's Memorial, ¶¶ 241-250.
[311] *Ibid*., ¶ 251. This latter act is also argued to constitute a direct expropriation. *Ibid.,* ¶¶ 258-267. *See* ¶¶ 311-315 *infra.*

acknowledged by Argentina. The Claimant contends that, nonetheless, Argentina took no effective measure to restore the Concession's equilibrium.[312]

305. **Failure to Renegotiate the Concession**. In the Claimant's view, it is undisputed that Argentina was obliged to restore the Concession's economic equilibrium pursuant to the Concession Contract. Argentina, Puentes and its shareholders were all aware that the only possible way to re-establish the Concession's economic balance would be to increase Puentes' toll rates.[313]

306. **Resolution 14**. The Claimant contends that after Puentes opened the bridge to traffic, Argentina issued Resolution 14 which unilaterally changed the financial terms of Argentina's Financial Assistance Loan, thereby worsening Puentes' economic and financial situation. The Claimant asserts that Resolution 14 required Puentes to allocate almost all of its toll revenue to service the Financial Assistance Loan.[314]

307. **Failure to approve Puentes' increase of capital and termination**. In the Claimant's view, by 2012 Puentes' liabilities exceeded its equity due to Argentina's refusal – for over ten years – to grant it toll rate increases. Under Argentine corporate law, Puentes' shareholders were forced to either contribute more equity or dissolve the company. The Claimant alleges that Argentina – which had to approve the equity increase – refused to do so. As a result, Puentes' shareholders were forced to dissolve the company, which was then used as a ground for termination by Argentina.[315]

308. The Claimant posits that the abovementioned measures destroyed the entire economic value of its investment. These measures also violated the Claimant's legitimate expectations that Argentina would take steps to maintain the Concession's economic equilibrium if Argentina's measures negatively affected that balance as reflected in the Concession Contract, Argentine law and the Regulatory Framework. They also violated the Claimant's legitimate expectations under the Emergency Law and the Contract that the

[312] *Ibid*., ¶ 252.
[313] *Ibid*., ¶ 253.
[314] *Ibid*., ¶ 254.
[315] *Ibid*., ¶ 255.

renegotiation process and the six agreements signed by Puentes would restore the Contract's economic equilibrium. The Claimant asserts that, as a consequence, Webuild and Puentes lost their legal rights to possess and control the toll highway and bridge as well as their rights to collect revenue.[316]

309. The Claimant contends that the standard proposed by the Respondent, consisting of requiring the seizure of title to determine that an unlawful indirect expropriation has occurred, should not be taken into account. Under the analysis, and contrary to Argentina's criticisms, the practice of considering an investor's legitimate expectations to determine an unlawful expropriation is undisputed. The Claimant further notes that Argentina has not advanced any evidence showing that Puentes was not substantially deprived of its rights.

310. With regard to Argentina's police powers argument, the Claimant alleges that the defense has to be non-discriminatory in order to be valid, which is not the case. It also cannot be said that the exercise of police powers has been done with *bona fides*. In particular, Resolution SOP No. 14/03 did not merely implement the terms of the Financial Assistance Loan but imposed abusive loan terms on the Claimant.[317]

(ii) The Termination Resolution Constitutes a Direct Expropriation

311. In the Claimant's view, when deciding whether the termination of a concession is an expropriatory measure, a tribunal must consider whether the termination is in conformity with the contract or whether it was unlawful. Under this analysis, the decisive issue is whether the reasons given for the termination constituted a legally valid ground for terminating the Concession Contract according to its provisions.[318]

312. The Claimant contends that Argentina failed to provide legal grounds for the Concession Contract's termination and that the grounds it advanced were absurd. The Claimant alleges

[316] *Ibid*., ¶ 256.
[317] Claimant's Reply, ¶¶ 293-307.
[318] Claimant's Memorial, ¶¶ 258-261.

that despite Argentina framing its reasons within the Contract's permitted grounds for termination, a closer inspection reveals that they are nothing more than pretext.[319]

313. In the Claimant's view, Argentina primarily relies on Puentes' dissolution for terminating the Concession Contract, while failing to recognize that its own actions forced the Company's dissolution. Prior to termination, Argentina refused Puentes' request to amend its bylaws and allow an equity increase. It further refused to ratify the Fourth Transitory Agreement, which would have prevented Puentes from dissolving. Further, even though Argentina did not base the Concession Contract's termination on its remaining complaints, these are equally absurd. First, Argentina alleges that Puentes' reorganization proceedings modified the basis of the renegotiation process, making it difficult for the Concessionaire and UNIREN to reach an agreement. Nonetheless, the emergency measures expressly excluded reorganization proceedings as a ground for terminating a concession contract.[320]

314. Second, the Claimant disagrees with Argentina that Hochtief's ICSID claim prevented rebalancing the Concession. It notes that years after commencement of the *Hochtief* Arbitration, Argentina continued proposing and signing transitory agreements, giving Puentes the impression that it could resolve its claims with Argentina.

315. Lastly, the Claimant observes that Puentes did not file its administrative complaint against Argentina in bad faith since, by the time Puentes filed the complaint, Puentes had negotiated with Argentina for a decade, had asked Argentina to approve its bylaws amendment allowing an injection of equity, and had agreed to every renegotiation agreement Argentina had proposed.[321]

(iii) Argentina's Expropriation of the Claimant's Investment Was Unlawful

316. According to the Claimant, under Article 5 of the BIT, for an expropriation to be lawful the following four requirements need to be met cumulatively: (i) the measure must be for a public purpose, security or national interest of the expropriating State; (ii) the measure

[319] *Ibid*., ¶ 262.
[320] *Ibid*., ¶ 264.
[321] *Ibid*., ¶ 266.

must be taken in accordance with due process of law; (iii) the measure must not be discriminatory or contrary to undertaken commitments; and (iv) the measure must be accompanied by prompt, adequate and effective compensation, which represents the fair market value of the expropriated investments.[322]

317. The Claimant alleges that Argentina's termination of the Concession Contract was not in the public interest and that Argentina did not claim in the Termination Resolution (or otherwise) that it was terminating the Contract to serve a public interest. The Claimant asks the Tribunal to conclude that Argentina's expropriatory measures were unlawful since Argentina relied on unlawful contractual grounds to terminate the Concession Contract.[323]

318. According to the Claimant, Argentina's treatment of the Claimant was less favorable than that granted to other toll-road concessionaires. It contends that the Contract's termination substantially differed from that of other very similar concessions.[324]

319. Further, the Claimant claims that Argentina has never paid any compensation to the Claimant for its expropriatory measures, much less the "real market value" that the BIT requires for lawful expropriations.[325]

320. Lastly, the Claimant contends that Argentina's expropriatory measures violated due process since (i) Argentina expropriated the Concession Contract on the false pretense that Puentes had breached the agreement, and (ii) Argentina's invoked reasons were the direct consequence of its own conduct.[326]

***b. The Respondent's Position***

321. The Respondent contends that, as a preliminary matter, it is inconsistent to argue that the same measure qualifies at the same time as both a direct and an indirect expropriation.[327]

[322] *Ibid*., ¶ 268.
[323] *Ibid*., ¶¶ 268-271.
[324] *Ibid*., ¶¶ 272-273.
[325] *Ibid*., ¶¶ 274-275.
[326] *Ibid*., ¶¶ 276-279.
[327] Respondent's Counter-Memorial, ¶ 502.

322. It further argues that there has been neither a direct nor an indirect expropriation in the present case as there has been no formal transfer of title or outright seizure of the Claimant's shares in Puentes, nor has Argentina adopted measures that destroyed the entire economic value of the Claimant's investment.[328]

323. In the Respondent's view, for an indirect expropriation to occur, the following requirements must be met cumulatively: (i) the disputed measure must interfere with the investor's property rights; (ii) the interference with the investor's property rights must be substantial; and (iii) the measure must not constitute regulations falling within the exercise of the State's police powers.[329]

324. With regard to the first requirement for an indirect expropriation, Argentina submits that the interference of the measure at issue with the investor's legitimate expectations does not suffice. Rather, the Claimant should prove the existence of government interference with a specific right in its investment, namely its shares in Puentes. According to Argentina, the Claimant has failed to do so and even continues to exercise its shareholder rights in Puentes as it is party to two court cases that at least at the time of the submissions in this case were pending before Argentine courts. (The current status is unknown to the Tribunal.) The Claimant incorrectly bases its expropriation claim on the non-restoration of the economic equilibrium of the Concession after the Emergency Law, since the disruption of the economic equilibrium occurred before the outbreak of the crisis and the adoption of the emergency measures.[330]

325. Regarding the second requirement, the Respondent argues that the measures at issue did not have the requisite magnitude or severity. Thus, the actions or omissions invoked by the Claimant, whether taken as a whole or individually, do not constitute a substantial deprivation of property rights, nor do they evidence an expropriatory intention or effect.

[328] *Ibid*., ¶¶ 503-504.
[329] *Ibid*., ¶ 505.
[330] Respondent's Counter-Memorial, ¶¶ 506-510; Respondent's Rejoinder, ¶¶ 521-528.

The Respondent further claims that the Claimant bears the burden of proving that it suffered a substantial interference with its property rights.[331]

326. Lastly, regarding the final requirement, Argentina claims that good faith, non-discriminatory regulations falling within the exercise of a State's police powers do not amount to expropriation and, therefore, do not require compensation.[332]

327. Argentina submits that the measures did not violate Article 5 of the BIT. The Emergency Law and efforts to renegotiate the Concession Contract were not unreasonable and disproportionate in the face of the grave crisis endured by Argentina. The State could not but enact the Emergency Law and renegotiate the concession contracts. With respect to Resolution 14, the non-approval of Puentes' request regarding the amendment of its bylaws and the termination of the Concession Contract, these were adopted within the framework agreed upon by the Parties in the Concession Contract and the Financial Aid Agreement. In the latter regard, the tribunal in *Impregilo v. Argentina* held that a measure adopted in conformity with obligations assumed by the State and investor under a contract cannot be considered to be expropriatory or compensable.[333]

328. With regard to the request for the amendment to the bylaws, Argentina claims that it was Puentes' intention to effect a 30-fold reduction of the equity with respect to the amount stated in the Concession Contract, and that it is inconceivable that a company in charge of a road corridor as the one in this case could have equity amounting only to AR$ 1,000,000. The Respondent further claims that the Claimant falsely presents the facts when stating that it requested authorization for a capital stock increase. According to Argentina, what the Claimant requested was a capital stock decrease, from AR$ 30,000,000 to AR$ 1,000,000.[334]

329. According to the Respondent, the Termination Resolution does not constitute an expropriatory measure. It was issued in response to Puentes' dissolution, which constituted

[331] Respondent's Counter-Memorial, ¶¶ 511-513; Respondent's Rejoinder, ¶¶ 521-535.
[332] Respondent's Counter-Memorial, ¶¶ 514-525; Respondent's Rejoinder, ¶¶ 536-538.
[333] Respondent's Counter-Memorial, ¶¶ 526-528; Respondent's Rejoinder, ¶¶ 539-543.
[334] Respondent's Counter-Memorial, ¶¶ 530-531; Respondent's Rejoinder, ¶¶ 544-545.

a ground for automatic termination under the Concession Contract based on the fault of the Concessionaire.[335]

**(2) The Tribunal's Analysis**

330. The Claimant has cited to both paragraphs 1(a) and 1(b) of Article 5 of the BIT in support of its claim of expropriation. However, its arguments are almost exclusively, albeit loosely, focused on the requirements of Article 5.1(b), and do not address Article 5.1(a) in any detail. Accordingly, the Tribunal will focus on Article 5.1(b), which provides

> *Las inversiones de los inversores de una de las Partes Contratantes, no serán directa o indirectamente nacionalizadas, expropiadas, incautadas o sujetas a medidas que tengan efectos equivalentes en el territorio de la otra Parte, a no ser que se cumplan las siguientes condiciones:*
>
> *- que las medidas respondan a imperativos de utilidad pública, de seguridad o interés nacional;*
>
> *- que sean adoptadas según el debido procedimiento legal;*
>
> *- que no sean discriminatorias ni contrarias a un compromiso contraído;*
>
> *- que estén acompañadas de disposiciones que prevean el pago de una indemnización adecuada, efectiva y sin demora.*

In the unofficial English translation:

> *Investments by investors of one of the Contracting Parties shall not be nationalized, expropriated, seized or otherwise appropriated, either directly or indirectly, through measures having an equivalent effect in the territory of the other Party, unless the following conditions are complied with:*
>
> *--the measures are for a public purpose, security or national interest;*

[335] Respondent's Counter-Memorial, ¶ 532.

> *--they are taken in accordance with due process of law;*
>
> *--they are non-discriminatory or contrary to a commitment undertaken;*
>
> *--they are accompanied by provisions for the payment of prompt, adequate and effective compensation.*

331. *Prima facie*, the Tribunal notes that, at most, the measures identified by the Claimant (the Emergency Law, Resolution 14, the failure to renegotiate the Contract and restore its economic equilibrium, the failure to approve Puentes' request to increase its capital so as to comply with Argentine corporate law and avoid Puentes' dissolution, and the Termination Resolution) could be capable of causing an indirect expropriation, not a direct expropriation. Contrary to Argentina's submission, such expropriation, if any, would not be limited to the "investment" (*i.e.*, shares) referenced in the jurisdictional decision.[336]

332. The termination of the Concession Contract via the Termination Resolution and the subsequent award of the Concession to another party can be seen as the culmination of a series of actions that effectively deprived the Claimant of the value of its investments in Puentes.[337] Puentes was formed for the purpose of carrying out the Concession and the Concession Contract is not only a tangible property right, but was the basis on which Puentes carried out its business and thus its key asset. Without the Contract, even if Puentes technically remained in existence for some period of time, its value as an investment vehicle was gone.[338]

333. The Tribunal notes that there is significant overlap with the Claimant's reasoning in regard of the fair and equitable treatment standard, especially as pleaded over the course of the oral hearings. In particular, the Claimant has sought to amalgamate the concept of legitimate expectations, as used in the FET context, with the Article 5.1(b) reference in the

[336] *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, ¶ 186.
[337] While the Termination Resolution may have been technically permitted by the Concession Contract, in the Tribunal's view, that does not prevent its being considered as part of the measures constituting an indirect expropriation.
[338] It was in any event technically insolvent by that time; hence the need for a capital infusion.

third of the four listed requirements to "commitment undertaken". Even if there is some overlap on the facts of this case given the BIT's specific reference to commitments, the Tribunal is doubtful that the concept of legitimate expectations, as such, is applicable in the expropriation context. The Tribunal agrees with Argentina that expropriation is focused on the degree of interference with property rights. Nonetheless the Tribunal accepts that there was a commitment by Argentina, both in the Concession Contract and the Emergency Law, to restore the economic equilibrium of the Concession. Thus, even without discrimination, as to which, as set forth in the preceding section, the Tribunal harbors significant doubt, this element could be satisfied. A restoration of the Concession Contract's equilibrium in a timely fashion would presumptively have led to a different ultimate outcome than Puentes' dissolution following its insolvency and the Termination Resolution.

334. But the measures the Claimant has challenged in this context are not solely concerned with the failure to restore the Concession's economic equilibrium. They start with the Emergency Law, which surely represents a measure taken for a public purpose, security or national interest. This was a generalized measure, taken in response to a national economic emergency. The Tribunal considers that the Emergency Law as well as the renegotiation process were legitimate exercises by Argentina of its police powers.

335. Thus, the indirect expropriation claim boils down to those measures that were not of general application but were related specially to Puentes and the Concession—Resolution 14, the failure of the renegotiation efforts, the non-approval of the equity infusion, and the Termination Resolution. These are all measures that have been considered in the context of FET and include the measures that have been found either to have constituted a breach of FET or to have exacerbated the situation. Accordingly, judicial economy would suggest there is no need to resolve an expropriation claim unless, if upheld, the damages that would accrue to the Claimant would be more favorable.

336. Article 5.1(c) of the BIT specifies the compensation to be given for an expropriation (the Parties disagree as to whether it applies to both lawful and unlawful expropriations). The

specific standard is the market value of the investment "immediately before the expropriation or nationalization decision was announced". There is also a provision for interest to accrue "until the date of payment at a normal commercial rate of interest". In the Tribunal's view, this market value standard applies to lawful expropriations, a circumstance which is not present here. In the event of an unlawful expropriation, the applicable standard would be the customary public international law standard, as reflected in the *Chorzow Factory* decision, as discussed in paragraphs 360 to 363 *infra*.

337. Based on the foregoing, a finding of an unlawful expropriation would not lead to greater damages than would be the case for a FET violation. For these reasons, the Tribunal considers it unnecessary to consider the expropriation claim further.

## E. NECESSITY

### (1) The Parties' Positions

#### *a. The Respondent's Position*

(i) Safeguarding of Argentina's Essential Interests Against a Grave and Imminent Peril

338. Argentina claims that, in the hypothetical case that the Tribunal should find the challenged measures to be in breach of the BIT, the necessity defense would preclude the wrongfulness of the measures under general international law.[339]

339. The Respondent submits that a State may invoke necessity if the act is the only way for the state to safeguard an essential interest against a grave and imminent peril. It further alleges that when faced with the 2001 crisis, it had no choice but to adopt the Emergency Law and related measures adopted in 2002 to safeguard its essential interests. The tribunal in *LG&E v. Argentina* held that a State's essential interest can comprise economic or financial interests. The tribunal further described the seriousness of Argentina's crisis by explaining that 'the conditions as of December 2001 constituted the highest degree of public disorder

[339] Respondent's Counter-Memorial, ¶¶ 534-540; Respondent's Rejoinder, ¶ 550.

and threatened Argentina's essential security interests.' The tribunals in *Continental v. Argentina*[340] and *Metalpar v. Argentina*[341] decided in similar terms.[342]

340. The Respondent further claims that, in the face of this crisis, leading economists affirmed that Argentina's currency board regime could no longer be sustained and that the abrogation of the fixed exchange rate through devaluation and pesification were the only viable alternative.[343]

(ii) Non-Contribution of Argentina to the Situation of Necessity

341. The Respondent affirms that a State may not invoke necessity as a ground to preclude wrongfulness if it has contributed to the situation of necessity. The contribution to the situation must be sufficiently substantial and not merely incidental or peripheral.[344]

342. According to Argentina, this is not the case at hand. After implementing the convertibility plan under the Washington Consensus following the recommendation of international organizations, Argentina started to face external shocks in 1997. To tackle the recession, Argentina adopted certain measures with the support of international organizations, which provided unfruitful. The recession ultimately resulted in the 2001 crisis.[345]

343. In this regard, Argentina claims that it made every effort to prevent its economy from collapsing, as acknowledged by the tribunal in *Continental v. Argentina*. Further, as recognized by the tribunal in *Metalpar v. Argentina*, there were several external factors that played a role in Argentina's situation. The Respondent relies on *LG&E v. Argentina* and *Urbaser v. Argentina* which, according to the Respondent, also concluded that

[340] **AL RA 236**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 ("***Continental*, Award**"), ¶ 180.
[341] **AL RA 224**, *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008 ("***Metalpar*, Award**"), ¶ 208.
[342] Respondent's Counter-Memorial, ¶¶ 544-551; Respondent's Rejoinder, ¶ 554 (footnotes omitted).
[343] Respondent's Counter-Memorial, ¶¶ 552-556; Respondent's Rejoinder, ¶¶ 555-562.
[344] Respondent's Counter-Memorial, ¶ 561; Respondent's Rejoinder, ¶ 568.
[345] Respondent's Counter-Memorial, ¶¶ 562-563.

Argentina had not contributed to the crisis to the point of precluding necessity as a defense.[346]

(iii) No Impairment of an Essential Interest of the State Towards Which the Obligation Exists, or of the International Community

344. The Respondent raises the point that the international obligations the Claimant alleges Argentina has breached are contained in the Argentina-Italy BIT, a treaty concluded with Italy. In this regard, the emergency measures adopted as a response to the 2001 crisis do not impair the essential interests of Italy, or those of the international community as a whole, as affirmed by the tribunal in *LG&E v. Argentina*.[347]

(iv) No BIT Exclusion of Necessity

345. Argentina acknowledges that a State cannot invoke necessity as a ground for precluding wrongfulness if the obligation excludes the possibility of invoking necessity. In this regard, it argues that none of the BIT provisions that the Claimant alleges Argentina has breached exclude the possibility of invoking necessity or limit its invocation.

346. The Respondent submits that, pursuant to Article 8.7 of the BIT, the applicable principles of international law are part of the law applicable to the dispute, necessity being included in the applicable international law.[348]

***b. The Claimant's Position***

347. The Claimant argues that necessity measures may not continue after the crisis period has ceased.[349]

[346] Respondent's Counter-Memorial, ¶¶ 564-571, citing **AL RA 236**, *Continental*, Award, ¶¶ 225-227, 236; **AL RA 224**, *Metalpar*, Award, ¶ 195; **AL RA 211**, *LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ("***LG&E*, Decision on Liability**"), ¶¶ 256-257, and **AL RA 262**, *Urbaser & CABB v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016 ("***Urbaser*, Award**"), ¶ 710.. Respondent's Rejoinder, ¶¶ 578-586.
[347] Respondent's Counter-Memorial, ¶¶ 573-574 (footnotes omitted).
[348] Respondent's Counter-Memorial, ¶¶ 575-577.
[349] Claimant's Reply, ¶ 309.

348. The Claimant further submits that Argentina already argued the defense of necessity in the case of *Impregilo v. Argentina*, in which the tribunal held that the emergency measures may not continue after a crisis ends. It concluded that Argentina's economic crisis had almost certainly ended by 2003 and, in any event, before Puentes sought to rebalance the Concession's economic equilibrium. The findings of the *Impregilo* tribunal in this regard are *res judicata* in these proceedings since the four required elements were met: (i) the same parties were parties to a prior final award; (ii) an issue or question was distinctly put at issue; (iii) the tribunal actually decided that issue; and (iv) the holding regarding that issue or question was necessary to one of the holdings in the award's *dispositif*.[350]

349. The Claimant further clarifies that it does not allege that abrogating the fixed exchange rate or pesification violated its rights under the BIT. Rather, the Claimant contends that its claims concern Argentina's conduct after the crisis and that Argentina cannot claim that during the relevant period for this case it faced a "grave and imminent peril".[351]

350. In the Claimant's view, Argentina has also failed to prove how the adopted measures were the only way to safeguard an essential interest against grave and imminent peril. Nonetheless, the measures that the Claimant alleges violated the BIT are: (i) the abusive terms of the Financial Assistance Loan; (ii) the denial of Puentes' request to increase its share capital to avoid liquidation; (iii) the Concession's termination; and (iv) the failure from 2006 to 2014 to re-establish the Concession's economic equilibrium. According to the Claimant, Argentina failed to prove that any of these measures were the only way to safeguard anything, that an essential interest was at stake and what the grave and imminent peril was.[352]

351. The Claimant argues that, with regard to the Concession's economic equilibrium, the Emergency Law obligated Argentina to restore the economic equilibrium of affected public concessions. According to the Claimant, at no time during the negotiation of the transitory agreements did Argentina take the position that it could not restore the equilibrium because

[350] *Ibid*., ¶¶ 310-315; **CL-0003**, *Impregilo*, Award, ¶ 360.
[351] *Ibid*., ¶¶ 316-317.
[352] *Ibid*., ¶¶ 318-321.

this would threaten an essential state interest. On the contrary, an Argentine bankruptcy judge ordered Argentina to restore the Concession's economic equilibrium and Argentina restored the economic equilibriums of numerous other similarly-situated concessions.[353]

**(2) The Tribunal's Analysis**

352. In the *Hochtief* Arbitration, the necessity defense under customary international law was dismissed twice. First, the majority of that tribunal did not find that the adoption and pursuit of the policy of pesification was *per se* a breach of the FET standard,[354] so no necessity justification was examined. Second, a breach of FET was found by the *Hochtief* tribunal as set forth below, but the tribunal did not consider the necessity defense persuasive. The *Hochtief* tribunal held 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.*[355]

The tribunal proceeded to dismiss the necessity defense because it did not consider the emergency to have persisted: "[t]he economic crisis had ended by the time that the losses for which reparation is due were sustained."[356]

353. Other tribunals have reached similar findings, including *Impregilo.*[357]

354. The Parties in the present case have not advanced any arguments that would lead the present Tribunal to conclude differently: the majority of the crisis had passed at the time of breach so the necessity defense is not applicable in this case. As a result, any

[353] *Ibid*., ¶¶ 322-324.
[354] **CL-0013,** *Hochtief,* Decision on Liability, ¶ 244.
[355] *Ibid.*, ¶ 292.
[356] *Ibid.*, ¶ 301.
[357] Claimant's Reply, ¶ 315, including authorities cited at note 566.

counterarguments to this defense need not be further discussed, nor any arguments by Argentina that it did not contribute to the state of necessity.

# VI. DAMAGES

## A. STANDARDS OF COMPENSATION

### (1) The Parties' Positions

#### *a. The Claimant's Position*

355. According to the Claimant, Argentina must be ordered to pay full reparations, which would wipe out all the consequences of the illegal act and re-establish the situation which would have existed if the act had not been committed. Regarding the compensation to be paid, which Claimant frames principally in the context of an unlawful expropriation, the Claimant argues that customary international law is applicable. Under this analysis, payment of compensation to Webuild should occur, Claimant submits, on the basis of the higher of the market value at the time of expropriation plus interest or the value on the date of the award.[358]

356. According to the Claimant, even if the expropriation were lawful or the measure of compensation for unlawful expropriation were the same as that provided in the BIT with respect to lawful expropriation, it would still be entitled to prompt, adequate and effective compensation. This would require Argentina to pay full compensation equivalent to the "actual" or fair market value of its investment.[359]

357. The Claimant further alleges that in the event the Tribunal does not consider that Argentina expropriated its investment, Argentina is still bound to compensate it fully under the *Chorzów Factory* standard for its unfair and unequitable treatment, its failure to grant full protection and security and its discriminatory measures. In its view, there is strong

[358] Claimant's Memorial, ¶¶ 282-298; Claimant's Reply, ¶ 329.
[359] *Ibid*., ¶¶ 300-306.

precedent for basing damages caused by these breaches on the fair market value standard, plus historical or discrete losses when applicable.[360]

358. As a result, the Claimant requests that, when it comes to the value of its investment, Argentina pay the greater of (i) the market value of the expropriated investment at the time of the Termination Resolution in August 2014, and (ii) the market value of the expropriated investment at the date of the award, calculated with the benefit of post-taking information and assuming that Argentina would have complied with its statutory and contractual obligations related to the Concession. Further, the Claimant contends that Argentina must not only pay the value of its expropriated investment, but must also compensate for all historical, consequential and incidental damages and expenses caused by the expropriation, which would include (i) eliminating the effects of the historical damage caused to Webuild by Argentina's wrongful conduct during the creeping expropriation starting in September 2006 and up to its formal termination of the Concession Contract in August 2014; (ii) compensating for the lost value of Shareholder Loans which could not be re-paid due to Argentina's pre-termination wrongful conduct; and (iii) any other consequential costs and damages suffered by Claimant as a result of the expropriation after August 2014 (arbitration and litigation costs in this ICSID arbitration, including attorneys' fees, etc.).[361]

***b. The Respondent's Position***

359. According to the Respondent, if the Tribunal determines that there was a breach of the BIT, the standard of compensation will be fair market value.[362] The Respondent further asserts that under general principles of international law and the applicable domestic law, the existence of an obligation to compensate Puentes is subject to a series of general principles of international law, which are not present in the Claimant's claim. It identifies the following as relevant principles: causation; reasonableness; damages that are non-

[360] *Ibid*., ¶¶ 307-321.
[361] *Ibid*., ¶ 322.
[362] Respondent's Counter-Memorial, ¶ 586.

hypothetical in amount and limited to the period when the wrongful act occurred; no double recovery; mitigation; repair; and cause and effect.[363]

**(2) The Tribunal's Analysis**

360. Having concluded that the Respondent breached Article 2.2, the Tribunal concurs with the submission of the Claimant that the applicable standard for quantum is the customary international law standard, best reflected in *Chorzów Factory* decision, rather than the BIT's Article 5 expropriation standard which, in the Tribunal's view, deals with lawful expropriations and is therefore not relevant in this case. Although *Chorzów Factory* involved an unlawful expropriation, its damages standard has been applied in cases involving other treaty violations, such as FET, where the underlying treaty did not set forth a standard of damages.[364]

361. *Chorzów Factory* requires that "reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[365] *Chorzów Factory* does not, however, detail precisely what methodologies may be consistent with its "full reparation" standard. Tribunals applying it, including *S.D. Myers v. Canada*, *CMS v. Argentina, Azurix v. Argentina* and *National Grid v. Argentina,* have considered a number of different methodologies to be appropriate.[366] The Tribunal accepts that market value, the standard for lawful expropriations, is not a limitation. As the *ADC v. Hungary* tribunal held, "the *Chorzów Factory* standard requires that the date of valuation should be the date of the

[363] *Ibid*., ¶¶ 591, 593; Respondent's Rejoinder, ¶¶ 597-599.
[364] *See* e.g., **CL-0035**, *Rumeli,* Award ¶ 792; **CL-0120**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 615; **CL-0250**, *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12- Annulment, Decision on Annulment, 1 September 2009, ¶ 332; **CL-0009,** *Vivendi I,* Award, ¶¶ 8.2.5, 8.2.7; **CL-0102**, I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP 2009) p. 34.
[365] **CL-0099**, PCIJ, *The Factory At Chorzow (Claim for Indemnity) (Germany v. Poland),* Judgment, 13 September 1928, p.40.
[366] *See* e.g., **CL-0137**, *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000, ¶ 309; **CL-0005**, *CMS*, Award, ¶ 410; **CL-0028**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 424; **CL-0015**, *National Grid*, Award ¶¶ 269-270, 296.

Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed."[367]

362. In terms of the Respondent's list of principles, the Tribunal notes the overlap among several of them: "causation" and "cause and effect" seem to be expressing virtually the same concept that is implied in *Chorzów Factory's* use of the term "consequence"—*i.e.*, that the damages must flow from the wrongful act; while "mitigation" and "repair" also seem to be highly similar. Many tribunals have emphasized that while damages are not always susceptible of being quantified with complete precision, they need to be reasonable in amount and not too remote. Avoiding double recovery and requiring appropriate mitigation are also recognized as relevant principles in the context of full reparation. Whether they should be limited to the time period when the wrongful act occurred is more questionable; in the Tribunal's view, the principle of full reparation for the consequences of the act is the overriding principle, while principles such as non-remoteness rather than a temporal limit *per se* will operate to contain the extent of recoverable damages.

363. Before turning to the actual calculation of quantum, the Tribunal will address the issue of causation raised by the Respondent.

## B. CAUSATION

364. The Respondent maintains that the Claimant's, not the Respondent's, conduct is the cause of Puentes' ultimate financial failure and dissolution; that the disruption of the economic equilibrium was caused by the Claimant's failure to obtain financing and preceded Argentina's economic emergency; that its insolvency was the result of how Puentes dealt with its subcontractors.[368] For these reasons, Argentina considers that it should have no

[367] **CL-0098**, *ADC Affiliated Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2004, ¶ 497.
[368] This position is best illustrated by the Respondent's "chain of events" slide in its closing presentation at the Hearing. *See* Respondent's Closing Statement, slide 169.

damages liability; its experts' calculations reflecting some liability are provided in the event the Tribunal concludes to the contrary.[369]

365. The Claimant maintains that these events did not cause the ultimate failure of Puentes, and it was the "financial asphyxiation" of the company due to the failure of Argentina to restore the Concession's economic equilibrium following the emergency, exacerbated by the burdens of the Financial Assistance Loan as modified by Resolution 14, that did so.[370]

366. The Tribunal does not consider the financing failure, whatever its causes, to have been responsible for the destruction of Puentes. The financing failure—which in the Tribunal's view most likely was the result of a mix of commercial and macroeconomic factors which are difficult to isolate with any precision--—undoubtedly created problems for the completion of the Project.[371] As Respondent has highlighted, Puentes itself in 2001, prior to the enactment of the Emergency Law, characterized its financial difficulties as a state of disruption of the economic equilibrium of the Concession Contract.[372] This characterization of its economic difficulties seems odd to the Tribunal, since the Project was not completed at that time and Puentes therefore had no operating revenues (although it did have subsidies). However, it clearly reflects the financial challenges Puentes was then confronting which threatened the completion of construction. (It was fortuitous in the Tribunal's view that construction was as advanced as it was by the time the Emergency Law was enacted.) But those problems were ultimately overcome, and the Project entered into operation in 2003. Thereafter, the factor that in the Tribunal's judgment most crippled Puentes in the operational stage was the lack of increase in its toll rates over a prolonged period, leaving it unable to cover its operating costs and service its debt, including the onerous obligations imposed by the Financial Assistance Loan, as modified by Resolution

[369] Respondent's Counter-Memorial, ¶ 608.
[370] *See, e.g.,* **CWS-0003,** Witness Statement of Gabriel Hernández, 17 Dec. 2016, ¶ 35.
[371] The *Hochtief* tribunal found that "there were 'many issues' that prevented the IDB from disbursing the loan in the manner anticipated by the Consortium." *Hochtief*, Decision on Liability, ¶ 222.
[372] Respondent's Counter-Memorial, ¶¶ 599-604, citing to, *inter alia,* **RA-011**, letter from PDL to OCCOVI of 3 August 2001.

14. This was the direct result of the failure of Argentina to meet its obligation to restore the economic equilibrium of the Contract after a reasonable time.

367. Had the economic equilibrium of the Concession been restored in 2006, as the Tribunal has concluded it should have been, it is reasonable to assume that Puentes would have been able to avoid Boskalis-Ballast's filing of the insolvency petition, and the subsequent reorganization proceedings in 2007. To be sure, Puentes had a debt overhang from the construction phase, including not only the subcontractor debt to Boskalis-Ballast and Shareholder Loans, but also the high-cost Financial Assistance Loan. The Financial Assistance Loan was secured by the toll revenues of Puentes and therefore had priority of payment in the period in question, leaving even fewer resources to cover other obligations and operating costs. As noted earlier in the discussion of FET, the Tribunal considers that the FAL, as modified by Resolution 14, contributed to the economic problems of Puentes.[373]

368. Although the Tribunal finds that the financial failure of Puentes was the consequence of the failure to restore the Concession's economic equilibrium and that the legal element of causation is therefore satisfied, it considers it inappropriate to hold Argentina responsible for 100% of the damage. As the Tribunal noted in its analysis of the admissibility of the Webuild Shareholder Loan claims, beyond the need to avoid double recovery, consideration must be given to precisely how those claims and the pre-operational financial challenges of Puentes in general should be taken into account, in recognition of the fact that Puentes' economic challenges were not entirely of Argentina's creation and resulted in an "overhang" in the operational phase of the Project. The Tribunal will return to this issue after discussing the quantum calculation issues that have been raised.

[373] *See* ¶¶ 251-267 *supra*.

## C. QUANTUM

### (1) The Parties' Positions

#### *a. The Claimant's Position*

369. Webuild presents a damages methodology that measures the fair market value of its investment in Puentes as of the date of the Termination Resolution in August 2014 (the "**Valuation Date**"), comprised of two projected income streams: (i) historical damages from 1 September 2006 to the Valuation Date; and (ii) future damages from the Valuation Date to the end of the Concession on 13 September 2023, discounted back to the Valuation Date. The calculation assumes on a "but for" basis that Argentina had implemented the terms of the 2006 LOU by September 2006, as provided therein. The Claimant's experts thus estimate the value of the Claimant's equity and debt share in Puentes as of 31 August 2014 assuming that Puentes' toll rates would have been initially adjusted on 1 September 2006, and would have been recalculated 12 months later, in order to restore the Concession's economic equilibrium.[374]

370. The Claimant's experts rely primarily on the discounted cash flow ("**DCF**") method, or "income" approach, which has four main value drivers: (i) AR$ revenues, determined by AR$ toll rates and traffic; (ii) operating expenses (including sales, general and administrative expenses); (iii) capital expenditures; and (iv) discount rate.[375]

371. The Claimant's experts value Puentes at US$ 764.8 million in the "but for" scenario as of 31 August 2014. After deducting debt repayments and multiplying the remaining equity value by the 26% ownership of Puentes by Webuild, the experts obtain equity damages to Webuild of US$ 167.2 million. They also conclude that in this "but for" scenario, Webuild would have recovered its loans to Puentes plus interest after Puentes honored its debts with other creditors, in the amount of US$ 52.8 million.[376]

[374] Claimant's Memorial, ¶ 324.
[375] *Ibid.*, ¶¶ 328-329.
[376] *Ibid.*, ¶¶ 331-332.

372. In total, the Claimant's experts initially calculate damages to Webuild (taking into account both debt and equity) in the amount of US$ 219.9 million under the income approach and US$ 285.3 million under the alternative "net capital contributions" ("**NCC**") approach.[377]

373. In its Reply on the Merits, the Claimant provided an updated amount on damages (both debt and equity) to Webuild in the sum of US$ 174.2 million under the income approach, and US$ 176.9 million under the NCC approach.[378]

***b. The Respondent's Position***

374. The Respondent's experts valued Webuild's stake in Puentes based on the guidelines established by the *Hochtief* tribunal. Instead of the 31 August 2014 Valuation Date used by the Claimant, the Respondent submits that the date should be in 2002, as was the case in the *Hochtief* arbitration. It also argues for a different methodology, "free cash flows to shareholders", as was used by the Tribunal in *Hochtief,* instead of "free cash flow to firm", as used by the Claimant's experts.

375. In its Counter-Memorial, after opining that no damages should be awarded, the Respondent's experts calculated the value of Webuild's stake in Puentes in the amount of US$ 11.63 million as of 31 August 2014.[379] In the Rejoinder, the experts calculated a value for that stake of US$ 10.93 million as of 31 August 2014.[380]

376. According to the Respondent, Puentes' allegations relating to the termination of the Concession Contract cannot give rise to a claim under the BIT, but merely form a claim under the Contract which Puentes has submitted to the Argentine courts. The Respondent contends that this item should not be compensated in the present treaty proceedings.[381]

[377] *Ibid.*, ¶¶ 333-335.
[378] Claimant's Reply, ¶ 389. Under the income method, the damages component represented by the equity stake was US$ 121.4 million, with the debt amounting to US$ 52.8 million, while under the NCC method, the equity stake represented US$ 59.3 million, with the debt amounting to US$ 117.6 million.
[379] Respondent's Counter-Memorial, ¶¶ 610, 612.
[380] Respondent's Rejoinder, ¶ 612.
[381] Respondent's Counter-Memorial, ¶ 611.

377. Lastly, the Respondent disputes a number of the assumptions on the basis of which the Claimant's experts have made their "but for" calculations, as well as some of the calculations.[382] These are discussed in detail in the course of the Tribunal's analysis below and will not therefore be detailed at this juncture.

**(2) The Tribunal's Analysis**

378. The Tribunal does not consider the approach to the calculation of damages taken by the *Hochtief* tribunal to be appropriate for this case. Hochtief's FET claim was put forward on a materially different basis than the FET claim in this case, challenging *inter alia* the pesification effected by the Emergency Law and claiming an entitlement to dollarized tariffs.[383] It also covered a different period of time. Although the *Hochtief* tribunal did not accept the proposed damage calculations of either the Claimant or the Respondent in that case and performed its own calculation, it nonetheless awarded damages on the basis of the Emergency law's elimination of pesification and toll rate increases based on the U.S. CPI,[384] beginning on 23 May 2003, when it found the income stream began to be affected.[385]

379. In contrast, the basis of the Claimant's case here is not pesification, but Argentina's failure within a reasonable time following the end of the emergency to restore the economic equilibrium of the Concession Contract. Webuild has not sought to recover any damages for the period between 2002 and 2006 (including the period of the Financial Assistance Loan). Its historical damage calculations begin in September 2006, grounded in the terms of the 2006 LOU. Its "but for" scenario is consistent with the basis of the FET violation that the Tribunal has determined took place (*i.e.,* the failure to restore the Concession's economic equilibrium at the time of the 2006 LOU).

380. In the Tribunal's view, therefore, the approach proposed by the Respondent is inapposite. The Tribunal further considers that the DCF model, put forward by the Claimant as its

[382] Respondent's Rejoinder, ¶¶ 614-618.
[383] Claimant's Reply, ¶¶ 347-351.
[384] *Hochtief*, Decision on Liability, ¶ 316.
[385] *Hochtief*, Decision on Liability, ¶ 326.

primary method of valuation, which in the Tribunal's experience is a widely accepted methodology in investment treaty disputes where a completed and operating project is involved, is the most suitable model for this case.

381. The Tribunal is also not persuaded that the methodology of free cash flow to shareholders, the approach taken by the *Hochtief* tribunal, instead of the free cash flow to the firm (*i.e.,* Puentes), used by the Claimant's experts, is the most appropriate methodology, nor that some of the assumptions made by that tribunal, *e.g.*, assuming repayment of all debt before any distributions would be made to shareholders, reflect the most likely conditions in an operating scenario in which the economic equilibrium of the Concession has been restored and Puentes is therefore engaged in normal operations.

382. The Tribunal's remaining analysis will therefore focus on the DCF model proposed by Claimant, the methodology of free cash flow to the firm, and the calculations of damages pursuant to that model, and consider the issues raised by the Respondent with respect to the DCF calculations, including the assumptions on which those calculations are based.

383. As noted earlier, the four key drivers of value in the DCF calculations are: revenues (driven by toll rates and traffic assumptions); operating expenses; capital expenditures; and the discount rate (for cash flows from the Valuation Date to the end of the Concession on 13 September 2023). In the subsections below, the Tribunal will discuss the issues raised by the Respondent with respect to three of these four areas—revenues, expenses and the discount rate (no issues appear to have been raised with respect to capital expenditures). With respect to some of the issues, the Tribunal defers any decision pending further submissions and/or calculations from the Parties. Its requests for further information are set forth in each relevant subsection below and summarized in a separate subsection at the end of this section.

(i) Revenues

*(a) Reliance on toll rates in 2006 LOU in "but for" and frequency of toll rate increases*

384. The Respondent objects to the Claimant's experts' reliance on toll rates in the 2006 LOU in its "but for" scenario, asserting that they are too high, including in comparison to the current concessionaire. The Respondent also argues that the monthly toll rate increases assumed by the Claimant's experts are not provided for in the 2006 LOU.[386]

385. The Claimant argues that the 2006 LOU is consistent with the approach taken by Argentina in the Bid and Concession Contract, in the renegotiation of other concessions, and was proposed by Argentina; it also criticizes the use by Argentina's experts of dollarized tolls given pesification and asserts that comparing the toll rates of the current concessionaire is inapposite given that concessionaire's lack of investment in the Project.[387]

386. As noted earlier, the Tribunal considers reliance on the toll rates in the 2006 LOU to be appropriate in this case. They are not hypothetical or speculative, and are consistent with the basis of the finding that the FET standard was violated by the failure to restore the Concession's economic equilibrium at that time. The toll rates in the DCF model used by the Claimant's experts conform to the toll rates set forth in the 2006 LOU. Section Five (Rate Schedule) of that document provides: "[w]ith a view to partially restoring the economic-financial equation under the CONCESSION CONTRACT, a new Rate Schedule is hereby established for the CONCESSION as set forth in Annex IV hereto …"[388]

387. The damages report of the Claimant's experts states that: "we assume that the toll rate review set out in the 2006 MoU[389] would have been ratified and completed. Therefore, using the 2006 PEF, we estimate the toll rate level that would allow the Concessionaire to

[386] Respondent's Counter-Memorial, ¶¶ 613-617; Respondent's Rejoinder, ¶¶ 607-611; *see also* Respondent's Closing Statement, slides 194 and 198.
[387] Reply, ¶¶ 353 *et seq*; Claimant's Opening Statement, slides 118-119.
[388] **Exhibit C-0171**, First Letter of Understanding (LOU), 16 May 2006. This document is also referred to in the Parties' and Experts' submissions as an MOU.
[389] As noted earlier, the 2006 LOU is also sometimes referred to as the 2006 MOU.

obtain the regulated rate of return as explained in Section IV.2 and in detail in Appendix B."[390]

388. The reference to the "2006 PEF" (*Plan Economico Financiero)* is to "the valuation model used by the regulator to estimate the economic equilibrium of the Concession," and is based on the model presented by the Consortium of which Webuild was part and adjusted to reflect Argentina's new economic reality in 2006.[391]

389. The Tribunal agrees that the current concessionaire's lack of investment in the Project makes it an inappropriate comparator for purposes of evaluating the toll rates in the "but for" scenario. As noted above, it considers the 2006 LOU to provide a reasonable basis for revised toll rates that would have represented, in the words of that LOU, a "partial restoration" of the Concession's equilibrium.

390. Under the terms of the 2006 LOU, the new toll rates it specified appear to have a duration of a year-plus (the remainder of 2006 and 2007). Section 6 of that document permits the Concessionaire, starting on 31 December 2007, to apply for a rate redetermination based on a cost increase as measured by specified indices in excess of 5%. It goes on to specify a process for approval of rate redetermination requests that initially involves OCCOVI and ultimately the "National Executive Branch", during a period not to exceed 150 days.

391. The Concession Contract seemed to contemplate toll increases on an annual basis (Article 25.2), again depending on cost increases as measured by the CPI. Annex II to the 2006 LOU, the *Plan Económico Financiero,* also appears to assume annual increases in toll

[390] Bambaci-Dellepiane Damages Report of 2 January 2017, **CER-0001**, p. 42, ¶ 83 [footnote inserted].
[391] *Id.* p. 63, ¶. 115. The 2006 PEF appears to be reflected in Exhibit BD-35, which is entitled the *Plan Económico Financiero para Renegociación.* Argentina submitted for the first time at the Hearing on the Merits that this exhibit was not part of the 2006 MOU and has never been validated. Respondent's Closing Statement, slide 184. Although this exhibit does not appear to be included in the annexes to the 2006 MOU, that does not necessarily in the Tribunal's view call the validity of the document into question. Moreover, Annex II to the 2006 MOU is entitled *Plan Económico Financiero.* As first introduced into the record, it was not legible, but was provided in a legible form by the Claimant following the Hearing at the Tribunal's request. *See* ¶¶ 46-47, *supra.* The Claimant's expert, Ms. Bambaci, explained at the Hearing that Annex II was derived from **BD-35**, an Excel spreadsheet containing the output from the 2006 PEF. Tr. 8:1129-1148. The Respondent also commented on Exhibit **BD-35** in a post-Hearing submission, in response to statements made by the Claimant when it provided the legible documents. *See* ¶¶ 47-48, *supra.* In any event the *ingresos* set forth in the two documents for toll revenues appear to be consistent, so whatever distinctions there may be between the two documents may not be relevant in any event.

rates.[392] In the Tribunal's view, this is a more realistic interval than a monthly interval, given the Government approvals involved and the linkage to price increases. Unlike the 2006 LOU, the Contract provision does not appear to limit toll rate increases to situations where costs have increased more than 5%. Given that Puentes agreed to the 2006 LOU, however, in the Tribunal's view, this is an appropriate limitation.

392. It is not clear to the Tribunal at this juncture what impact, if any, the frequency of toll increases has on the revenue calculation. Given the possibility that it does, and that such impact may be material, the Tribunal considers that a recalculation of toll rate increases on the basis of annual rate increases linked to the price indices set forth in Section 6 of the 2006 MOU and including the 5% threshold specified therein, is in order. It therefore instructs the Parties to provide an agreed recalculation on this basis or, if a recalculation cannot be agreed, for each party to submit its recalculation.

*(b) Assumption regarding toll subsidy*

393. The Respondent has questioned whether a subsidy incorporated into the revenue calculations of the Claimant's quantum experts is appropriate on two grounds: first, whether this subsidy would extend beyond 2006, particularly in light of the Respondent's submission that tariff compensation ceased to be granted to all road concessionaires in 2012; and second, because it is not included in the 2007 LOU or the Transitory Agreements.[393]

394. The Claimant has indicated that this subsidy was put forward by Argentina in the 2006 LOU, and Argentina's submissions seem at least implicitly to accept that position. As to its duration, one of its testifying quantum experts indicated on redirect during the Hearing that, based on the terms of section 12 of the 2006 LOU, if the subsidy had been abolished in 2012, that provision would require its replacement by something similar.[394] She went

[392] **Exhibit C-0171,** Annex II, p. 1.
[393] Respondent's Closing Statement, slides 185-188.
[394] Tr. Day 9: 1177 *et seq*. (redirect of Ms. Bambaci). The relevant text reads (in translation): "*The circumstance shall not prevent the … 'compensation method from being replaced' … if doing so is previously agreed upon by the Parties with another method that correctly recognizes the economic impact of the referred rate reduction.*" Tr. Day#9:1178:21-1179:4.

on to testify that if that were the case, there would be no substantial effect on the calculation of revenues.[395] The Claimant has indicated that its calculations assume the same level of subsidies will continue throughout the term of the Concession.[396]

395. OCCOVI Resolution No. 14/2012 is the document reflecting the abolition of the subsidy in 2012.[397] Argentina devoted some attention to this issue in its closing presentation at the Hearing,[398] but did not quantify the effect on revenues. The Tribunal does not have evidence indicating why the provision may not have been included in the 2007 LOU or Transitory Agreements.

396. The Tribunal considers that a decision on whether the subsidies would be maintained for the duration of the Concession is premature. It asks the Parties to provide an indication in the revised damages calculation of what the impact would be if the subsidies did not continue beyond 2012.

*(c) Elasticity*

397. The Respondent submits that higher toll rates would lead to lower traffic on the toll road. In its view, this implies a higher elasticity rate than that posited by the Claimant's experts: -0.30 for light traffic (*e.g.*, passenger vehicles) and -0.25 for heavy traffic (*e.g.*, trucks and commercial vehicles).[399]

398. The Claimant disagrees, noting that the majority of users of the toll road are commercial truck drivers (*i.e.*, drivers of heavy vehicles) and that the alternatives to the toll road require traveling much longer distances, making these users more willing to continue to use the toll road even in the face of higher tolls. Their elasticity numbers are substantially different, particularly for heavy traffic: -0.22 for light traffic and -0.05 for heavy traffic.[400]

[395] Tr. Day 9: 1179: 18.
[396] Tr. Day 2: 222: 11 *et seq.*
[397] **Exhibit C-0289**, Resolution No. 140/2012, 26 Jan. 2012.
[398] Respondent's Closing Statement, slides 186-199.
[399] Respondent's Closing Statement, slide 199. *See also* First UTDT Report, pp. 60-64 and Second UTDT Report, pp. 36-40.
[400] Claimant's Reply, ¶ 363 *et seq*; Claimant's Opening Statement, slide 121. *See also* First BRG Report, App. D, pp. 85-92 and Second BRG Report, Section VI.2, pp. 42-47 and Appendix E, pp. 84-88.

399. To address this issue, the Tribunal considers it helpful first to review the toll rate scheme in general. The table below prepared by Claimant's quantum experts illustrates the seven categories of vehicles for which tolls would be assessed, and the toll rates for each, under the 2006 LOU as of 1 September 2006 and prior thereto:

**Table 8: Toll Rate Scheme**

| Category | | Description | Toll Rate Scheme | |
|---|---|---|---|---|
| | | | *Until Sep 1, 2006* | *As of Sep 1, 2006* |
| 1 |  | Motorcycles | Base Toll Rate * 0.50 | Base Toll Rate * 0.50 |
| 2 |  | 2-axle (height below 2.10 m and w/o dual wheel) | Base Toll Rate * 1.00 | Base Toll Rate * 1.00 |
| 3 |  | 2-axle (height above 2.10 m or with dual wheel) | Base Toll Rate * 2.00 | Base Toll Rate * 2.00 |
| 4 |  | 3 to 4 axles (height below 2.10 m and w/o dual wheel) | Base Toll Rate * 2.00 | Base Toll Rate * 2.00 |
| 5 |  | 3 to 4 axles (height above 2.10 m or with dual wheel) | Base Toll Rate * 3.00 | Base Toll Rate * 5.25 |
| 6 |  | 4 to 6 axles | Base Toll Rate * 4.00 | Base Toll Rate * 7.00 |
| 7 |  | More than 6 axles | Base Toll Rate * 5.00 | Base Toll Rate * 8.75 |

*Source: Bambaci - Dellepiane based on 2006 Plan Económico Financiero (BD-035) and Concession Contract (BD-004).*

Based on the elasticity figures in the table below, the Tribunal understands that categories 5-7 are what are considered to constitute "heavy" traffic, while categories 1-4 are treated as "light" traffic.

**Table 9: Summary of Elasticity Parameters used by vehicle category**

| Category | | Elasticity Parameter |
|---|---|---|
| 1 |  | -0.22 |
| 2 |  | -0.22 |
| 3 |  | -0.22 |
| 4 |  | -0.22 |
| 5 |  | -0.05 |
| 6 |  | -0.05 |
| 7 |  | -0.05 |

*Source: Bambaci - Dellepiane model, sheet "Val Revs (m)" (BD-005).*

400. While the user profile does seem to suggest a basis for the Claimant's experts' assumptions regarding elasticity, especially as it concerns the so-called "heavy" traffic categories, the Tribunal notes that the Respondent's proposed elasticity numbers are apparently those put forward by Hochtief's quantum expert witness Philip Bates in its ICSID arbitration.[401] Although Mr. Bates' report does not appear to be in the public domain, the *Hochtief* tribunal's Decision on Liability suggests that the "but for" toll rates were set forth in Dollars rather than Argentine pesos (consistent with the theory of the case).[402]

401. In accepting the Claimant's experts' estimation of toll receipts in their "but for" scenario, the *Hochtief* tribunal adopted the lower end of the range of elasticity values contained in the "envelope" of values proposed by Mr. Bates.[403] In these proceedings, the Respondent has put forward multiple values, all lower than those put forward by the Claimant, that include calculations using the lower end of the envelope of values put forward by Mr. Bates in the *Hochtief* proceedings.[404]

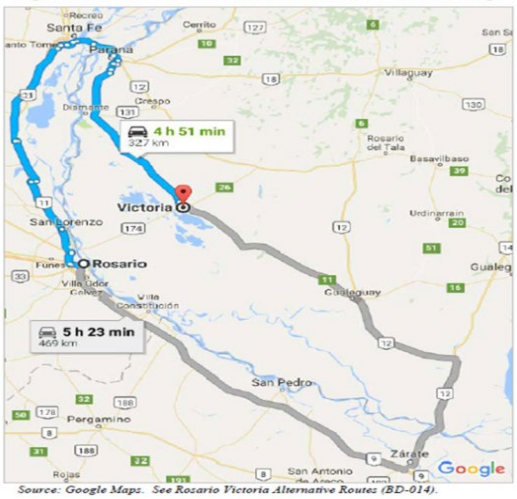
402. Given the differences in framing between the *Hochtief* case and the instant case, as well as and the evidence that has been submitted in these proceedings, the Tribunal does not consider it appropriate to simply accept the *Hochtief* elasticity values. In particular, the Claimant's Reply evidence would seem to suggest that users, particularly those in the "heavy traffic" categories who are likely to be commercial users, would be less affected by toll rate increases than might be the case if the alternatives were better. The *Hochtief* tribunal did not cite detailed evidence in support of its decision, but simply expressed a preference for the lower end of the spectrum put forward by the expert.[405]

403. There is undisputed evidence before the Tribunal that that the alternatives to the toll road established by the Project involve traveling significantly greater distances, with

[401] Respondent's Counter-Memorial, ¶ 613.c.
[402] **CL-0013,** *Hochtief*, Decision on Liability, ¶¶ 250, 312, 313.
[403] **CL-0013,** *Hochtief*, Decision on Liability, ¶ 318.
[404] First Report of Machinea/Schargrodsky, 18 June 2017, ¶¶ 186-195.
[405] As its reason for selecting the lower end, the *Hochtief* tribunal stated only that it "considers that it is appropriate, given the burden that lies upon the Claimant to prove its case, to prefer the experts' calculations based on Mr Bates' lower bound figures". *Hochtief*, Decision on Liability, ¶ 318.

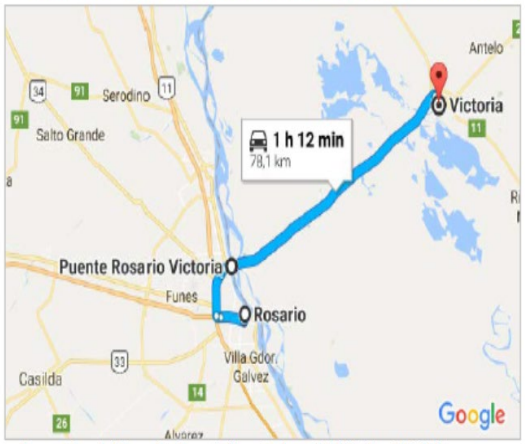
concomitant costs in time and operating expense of the vehicles involved. The excerpts below (taken from the Claimant's Opening Statement at the Hearing)[406] show, first, the Rosario-Victoria route established by the Project and the associated time and distance, and second, the alternative routes, with time and distance.

**Figure 1: Rosario – Victoria routes, before Rosario-Victoria Bridge**




*Source: Google Maps. See Rosario Victoria Alternative Routes (BD-014).*

**Figure 2: Rosario – Victoria route, using Rosario-Victoria Bridge**




*Source: Google Maps. See Rosario Victoria through RV Bridge (BD-015).*

404. In other words, there are no easy alternatives to the Project's toll road for those wanting to travel east-west in that part of Argentina. This does not tell the Tribunal what the precise elasticity should be, but it does support the view that there would be some degree of demand inelasticity, which would be greater for heavier traffic, that pays the higher tolls, than passenger cars or non-commercial vehicles, who may be less sensitive to the time value of money and less able to pass increased costs through.

405. The Tribunal considers that it requires further information in order to decide this issue. It therefore requests that the Parties agree on a revised calculation, in the context of the overall set of revisions requested herein, that makes three different assumptions of elasticity: namely, the Bates envelope of elasticities at the low end, high end and midpoint. In addition, if those calculations do not do so already, they should reflect greater inelasticity for heavy than light traffic (reflecting the differential levels set forth in Table 9 above), in light of the evidence before the Tribunal. The Respondent is instructed to share with the

[406] Claimant's Opening Statement, slide 4.

Claimant any information the Claimant may require to prepare this calculation. If the Parties cannot agree on a recalculation, each party should submit its recalculation.

*(d) Rate of Return Assumptions*

406. The Respondent has criticized the internal rate of return ("**IRR**") on the Project assumed by the Claimant's experts in their calculations, in two respects: first, because in its view the model uses a guaranteed rate of return for the Project, which is not provided for in the Concession Contract; and second, because the "but for" IRR of 9.18% is greater than the expected IRR.[407]

407. The calculations of the Claimant's experts do not appear to stem from the assumption that the Contract guarantees a specific rate of return to the Claimant, but that the Concession's original economic equilibrium was based on assumptions about the internal rate of return (also referred to as the regulated rate of return as noted below). Consequently, a restoration of that equilibrium would imply a similar rate of return.

408. In their first Report, the Claimant's experts Bambaci and Dellapiane state that:

> *The initial economic equilibrium of the Concession was determined by the cash flows presented by the winning Consortium during the bidding process. Contemplating the investments required, and the cash flows expected (at the allowed per-car toll rate of US$ 7.40), the resulting internal rate of return or 'IRR' of these forecasts was 12.94% ('regulated rate of return'). The internal rate of return of a project is that which reconciles positive expected future cash flows so that when expressed in present value, they are equal to the value of investments (i.e. negative cash flows), and therefore the net present value (NPV) equals zero.*[408]

409. Their first report calculated the original equilibrium of the Concession in real U.S. Dollars. However, in the second Report, they determined that the original equilibrium was actually measured in a combination of nominal and real U.S. Dollars, resulting in a re-calculation

[407] Respondent's Opening Statement, slide 157.
[408] BRG First Report, ¶ 44. *See also* Appendix B.

of the original IRR. This resulted in a decrease in the original IRR from 12.94% to 8.87%.[409]

410. In its second report, the Claimant's experts indicate that the IRR of the cash flows they calculate for the Project is in fact 9.18% due to the "actual evolution of traffic rather than the expected [in the 2006 PEF]".[410] They confirm that the IRR of their new cash flow calculation is 9.18%, which, they say, is "not substantially different" than the target IRR of 8.87%.

411. The Respondent is correct that the Concessionaire was not guaranteed a particular return from the Project. Indeed, it is not contested that the Contract was an "at risk" contract from a commercial perspective.[411] However, the 2006 LOU, Section 4, entitled Rate of Return, appears to contemplate the calculation of an IRR based in constant pesos as at September 1997 for the entire Concession period, and a waiver of the IRR rights set forth in the Concession Contract.[412] The issue therefore appears to the Tribunal to be more one of calculation than concept.

412. The Tribunal considers that insofar as an IRR is based on actual, historical numbers, an increase from 8.87% to 9.18% may be explainable.[413] However, to the extent that future projections assume a higher rate of return than the IRR assumed in the 2006 LOU, the Tribunal has difficulty with the justification for such increase, particularly where the Project will continue, in the Claimant's projections, to secure State subsidies. It may also

[409] *See* BRG Second Report, ¶¶ 7-8. This obviously undercut the statements made by the Claimant based on the first report about "shared sacrifice".
[410] BRG Second Report, ¶ 63.
[411] The Claimant does not accept that this encompassed sovereign, or government, risk. *See*, e.g., Claimant's Opening Statement, slide 19, citing to Concession Contract, Art. 31.2, **C-0008**.
[412] **C-0031**, Letter from UNIREN to Puentes attaching the First MOU, 10 May 2006; **C-0171**, Letter from Puentes to UNIREN, 16 May 2006 (sending the First MOU signed and dated).
[413] In their original report, Bambaci and Dellapiane concluded that the *ex post* rate of return, which they also refer to as an "implicit" IRR, in the "but-for" valuation was 8.449% rather than 12.94% due to the effects of the crisis, particularly changes in the foreign exchange regime, on the economic equilibrium. **CER-0001,** ¶¶ 12, 95. However, their second report uses the 12.94% IRR figure, and does not seem to pick up the "ex post" or "implicit" IRR concepts used in the first report.

be questioned whether the conditions that led to an increase in the historical period could be sustained.

413. Accordingly, the Tribunal asks the Claimant to clarify to what extent, if any, future cash flows are calculated based on an IRR in excess of 8.87%, and specify the basis of such calculations. Further, to the extent that is the case, the Tribunal requests an adjusted calculation based on the 8.87% rate, along with a calculation using the 9.18% rate, so that the effect of any higher rate that the Claimant's experts consider historical performance may justify is clear.

*(e) Adjustment of Working Capital*

414. The final issue raised by the Respondent with respect to the "but for" calculation of revenues relates to an adjustment to the working capital of Puentes made by the Claimant's experts. According to the Respondent, a deferred tax benefit was incorporated into the model as a current asset, when in its view, it is a non-current asset. The effect of the inclusion of this tax benefit, it is asserted, artificially increased the cash flows of Puentes for 2006 and thereafter, with an overall impact on the damages calculation of US$ 27.2 million.[414]

415. The Claimant's experts, in their second report, appear to address this issue (relating to tax credits), stating that:

> *227. As of 2005, PdL's Financial Statements reflected uncertainty as to whether it would be able to use its accumulated tax credits, and therefore registered only part of it as an asset. The Financial Statements explain that only the tax credit recoverable within the legal prescription periods were added to the 'other non-current credits,' so the total carryforward tax (i.e., tax credit) is provisioned. In our first report, we assumed that PdL would only be able to recover this limited amount of tax credit. This assumption was incorrect.*
>
> *228. In our but-for scenario, the company would have been able to use its accumulated tax credits to reduce the income tax payable*

[414] Respondent's Opening Statement, slide 158; Respondent's Closing Statement, slides 195-197.

> *amounts arising from the higher revenue from the renegotiated tariffs. In this updated assessment, we introduce an income tax credit of AR$ 135,580,968 (or US$ 46.379.159) as stated in PdL's 2005 Financial Statement. In fact, Machinea-Schargrodsky agree with this assumption as they have included the accumulated tax credit in their own valuation based on the Hochtief Award.*[415]

416. In the Tribunal's view, this explanation only partially addresses the issues raised by Argentina. The Tribunal understands that a tax loss carryover, which appears to result in a tax credit, would increase the profitability of Puentes and in consequence, cash flows in a DCF calculation. The Tribunal is not certain it understands the implications of the current versus non-current asset issue raised by Argentina. Paragraph 227 quoted above seems to suggest Puentes's historical tax losses (or at least the ones whose future availability to Puentes was uncertain as of 2005) were in fact treated as non-current assets, while the portion that could be used was in fact treated as a current asset. If this is correct, then the Tribunal would understand that the "but-for" scenario would permit the use of the remainder of the tax loss carryover as a credit for the period permitted by Argentine law. Assuming a five-year loss carryforward, Puentes would be able to use the remainder of its previous losses in 2007-2010 (since 2006 was Year 1), but not in any years thereafter. Given the apparent magnitude of this item in relation to the quantum of damages, the Tribunal seeks confirmation from the Parties before deciding this issue that: (i) its understanding of the "current" versus "non-current" asset issue as set forth above is correct; (ii) whether under Argentine law loss carryovers are in fact limited to five years; and (iii) that the treatment of this issue in the experts' calculations is consistent with the legal position in Argentine law. If the relevant period is five years, revised calculations shall also be provided.

(ii) Expenses

*(a) Recalculation of Interest Rate on Financial Assistance Loan*

417. The Respondent disputes the decision by the Claimant's experts, in the "but for" scenario, to reduce the interest rate on the Financial Assistance Loan.[416] This was the rate, it will be

[415] BRG Second Report, ¶¶ 227-228.
[416] Respondent's Counter-Memorial, ¶ 613.d.

recalled, that was set subsequent to the FAL by Resolution 14.[417] The reduction has the effect of increasing the value of the Claimant's equity investment by US$ 2.7 million.[418]

418. The Claimant's response to this criticism is that it was proper to recalculate the interest rate on the Financial Assistance Loan, since the rate, unilaterally fixed by Resolution 14, was abusive.[419] Moreover, it submits that the rate was reduced in the 2006 LOU and with equilibrium restored, Puentes would have been able to borrow commercially.[420]

419. It appears to the Tribunal that the rate may well have been reduced in the 2006 LOU. Section 9 of that LOU appears to peg the rate to the Interest Rate for Loans to Leading Companies in the 25th percentile, as published by the Central Bank, or to an annual rate of 9.5%, whichever is higher.[421] It is not clear what these new rates would have been under the 2006 LOU; the Parties are requested specifically to confirm them, and Claimant is also asked to confirm the rates assumed by its experts in the "but for" scenario. [422]

420. The *Hochtief* tribunal held that the terms of the Financial Assistance Loan, as ultimately set by Resolution 14, were a violation of FET.[423] While this Tribunal has deemed it unnecessary to make such a finding given the differences between the two claims, it has found that the Financial Assistance Loan, as its terms were ultimately set by Resolution 14, at a minimum exacerbated Puentes' financial situation and made timely restoration of the economic equilibrium of the Contract even more necessary.[424]

[417] *Supra* ¶¶ 103-105.
[418] Claimant's Reply, ¶ 364.
[419] *Ibid. See also* **CER-0001,** ¶ 136.
[420] Claimant's Reply, ¶ 364; *see also* Claimant's Opening Statement, slide 122: "*[i]t is economically rational to assume that interest rates would be reduced in the 'but for' scenario because the uncertainty of repayment is mitigated by the toll-rate increase resulting from implementation of the 2006 MOU.*"
[421] *See* **BD-034**, p. 8; and BRG First Expert Report, ¶ 136. Previously, the applicable rate, as set by Resolution 14, was the *Tasa Activa de Cartera General para Operaciones Diversas from Banco de la Nación,* BD-032. Note that this seems to be a daily rate.
[422] The "but for" calculations appear to have been made on the basis of a so-called "synthetic" cost of debt from December 2005 to August 2014 at a rate of 10.39% pre-tax on average. *See* Respondent's Closing Statement, slide 199. However, this does not clarify the issue.
[423] **CL-0013,** *Hochtief*, Decision on Liability, ¶¶ 263-265.
[424] *See* ¶¶ 366-368 *supra.*

421. The Tribunal therefore considers that a reduction of the rate on the Financial Assistance Loan once the emergency had ended and the Contract's financial equilibrium restored is logical and reasonable, more so if supported by the 2006 LOU. The Claimant should confirm the assumed rate of interest in the "but for" scenario, and that it conforms to the provisions of Section 9 of the 2006 LOU. Assuming the rates used conform to this provision, the Tribunal sees no need for new calculations. If not, a new calculation shall be performed based on the terms of the 2006 LOU.

*(b) Reduction of Interest Rate on Shareholder Loans and Amount of Shareholder Loans in "But For"*

422. The Respondent disputes the reduction in the Claimant's experts' "but for" calculations of the interest rate charged by Webuild and Hochtief, the two largest Puentes shareholders, on Shareholder Loans to Puentes after Argentina ceased making further advances to Puentes against the FAL.[425] Webuild alone made approximately US$ 3.5 million in Shareholder Loans to Puentes in 2003. The interest rate on its Shareholder Loans and the Loans from *Hochtief* was 15%.

423. The Claimant's response to this criticism appears to be that in the "but for" scenario, once economic equilibrium had been restored and the toll rates had been increased, the uncertainty surrounding the Project's financial viability would have been reduced, and other financing would have been available, enabling Puentes to rely less on shareholder financing (or at least be able to compel shareholders to reduce their interest rates).[426] Its experts' calculations demonstrate that a reduction of the rate increases the equity claim but reduces the debt claim in the DCF analysis, resulting in an overall reduction of the value of Webuild's equity stake in Puentes by approximately US$ 23 million.[427] (It should be noted that the Tribunal suspects that the word "increase" in paragraph 140 should be "decrease", based on Table 8 that shows a reduction with the new interest rate of "Total

[425] *See* ¶¶ 374-377 *supra.*
[426] *See* BRG Second Report, ¶ 140.
[427] BRG Second Report, ¶ 140; *see also* Table 8 (**BD-115**).

Damages to Salini Impregilo" from US$ 198.0 to 174.2, a reduction which corresponds to the 12.4% figure in that paragraph.)

424. Given the Tribunal's decision on admissibility of the Webuild Shareholder Loan claims,[428] this change would therefore appear to benefit Argentina. It also appears to the Tribunal to be logical and reasonable.

425. The Respondent's expert also submitted that there would be more Shareholder Loans in the "but for" scenario than the Claimant's experts have posited.[429] The Claimant considers this to be economically irrational.[430]

426. Given that the "but for" scenario is premised on the economic equilibrium having been restored after the end of the emergency, and that the Project was completed and operational, it is reasonable in the Tribunal's view to assume that to the extent the Project had borrowing needs, it would be able to look to commercial markets to fulfill those needs. Moreover, the Project already had significant debt by virtue of the Financial Assistance Loan and the Shareholder Loans. The history of the Project indicates to the Tribunal that Shareholder Loans were viewed as a last resort. Not all shareholders of Puentes were apparently willing or able to make such loans, with the result that the two largest shareholders were compelled to do so in order to complete the Project. Accordingly, the Tribunal considers that an assumption of no further Shareholder Loans is reasonable.

*(c) Other Issues*

427. The Respondent has alleged that the Claimant's expense calculation contains additional errors: 1) use of inapplicable indices from Decree No. 1295/02 to update expenses; and 2) an error in estimating operating expenses for 2014 by not annualizing administrative expenses, which error was carried over into subsequent years to the end of the Concession Contract.[431]

[428] *See* ¶ 211 *supra*.
[429] Respondent's Counter-Memorial, ¶ 613.f.
[430] Claimant's Reply, ¶¶ 371-372; Claimant's Opening Statement, slide 123.
[431] Respondent's Rejoinder, ¶ 615; Respondent's Opening Statement, slide 158.

428. The Respondent has not quantified the impact of these errors and, as they appear only to have been raised at the time of the Rejoinder, the Claimant did not have an opportunity to respond in a submission.

429. Presumably had the economic impact of these items been significant, the Respondent would not only have raised its concerns in its Rejoinder, but would have quantified their impact, as it did with other issues. In any event the issues raised by the Respondent are not sufficiently clear for the Tribunal to evaluate them, and the Tribunal considers that they are not sustained.

*(iii) Discount Rate*

430. The Claimant's "but for" calculations use the same rate, its Weighted Average Cost of Capital, or WACC, both to update historical losses of Puentes as of the Valuation Date and to discount future losses.[432] The Respondent takes issue with the use of the WACC for both sets of losses. It argues that the same rate should not be used for both: that future flows should be discounted by the cost of equity; and historical flows should be updated applying a risk-free rate (one-year U.S. Treasury bills is proposed) as they carry no associated risk.[433]

431. The Claimant in response has submitted that the same risk-adjusted rate should be used for both; otherwise, the result would be the unjust enrichment of the Respondent.[434]

432. The Tribunal considers valid Argentina's position that the risk profile of historical losses is different from future losses, and further considers that a risk-free rate for such losses is more appropriate than a risk-adjusted rate. It also agrees with the Claimant, however, that care must be taken to avoid unjust enrichment of the Respondent through the application of a risk-free rate to historical losses that is not appropriate.[435] Moreover, the Claimant is correct that Article 5 of the BIT provides for a normal commercial rate of interest for lawful

[432] BRG Second Report, ¶ 61 ("In our First Report, we estimated the WACC ranging between 9.3% and 13.6% for 2006-2013 and at 8.9% as of September 2014.").
[433] Respondent's Counter-Memorial, ¶ 613.h; *see also* UTDT Second Report, ¶¶ 10-11.
[434] Claimant's Reply, ¶¶ 374-383; *see* Claimant's Opening Statement, slide 125.
[435] Claimant's Memorial, ¶ 344; Claimant's Reply, ¶¶ 326, 373-379, 385-387.

expropriations. It would therefore be anomalous in the Tribunal's view to provide for an interest rate for an FET violation, an unlawful act, that is lower than the BIT prescribes for a lawful act. A "normal commercial rate of interest" in the Tribunal's view does not mandate a WACC, however. The Tribunal invites further submissions from the Parties as to what a non-risk-based normal commercial rate around the Valuation Date in 2014 would have been.

433. As for the discount rate for future cash flows, the Tribunal agrees with the Claimant that this should be a risk-weighted rate. In its view, given the methodology being followed (free cash flow to firm), and the fact that cash flows to Puentes would be used to pay both creditors and shareholders, the Tribunal does not consider that the cost of equity is as suitable a measure as the WACC, which takes into account the cost of debt as well as the cost of equity. It therefore would apply the WACC calculated by the Claimant's experts for the relevant period.

434. A final issue that has been raised by Respondent is the risk of double recovery. As the Tribunal has already observed in its Decision on Jurisdiction, this issue can be managed.[436] To do so, however, requires that the Tribunal be provided with current information on the status of any recovery of Puentes from the domestic proceedings to date. The Tribunal therefore requests that Claimant provide it with such information.

## D. COMPOUND PRE- AND POST-AWARD INTEREST

### (1) The Parties' Positions

#### *a. The Claimant's Position*

435. The Claimant requests an award of pre-award and post-award interest from 31 August 2014 until the date Argentina pays in full, at the highest possible lawful rate, such as Argentina's borrowing rate or another rate that the Tribunal may deem appropriate to the circumstances

[436] Decision on Jurisdiction, ¶ 173.

of the case.[437] Further, the Claimant seeks that any award of interest granted by this Tribunal be compounded on an annual basis.[438]

***b. The Respondent's Position***

436. In the Respondent's view, the Claimant's request for capitalization of interest should be rejected and the amount of a potential capitalization should be adjusted using a risk-free rate.[439] The Respondent also argues that Argentine law's asserted prohibition on capitalization of interest precludes any compounding.[440]

**(2) The Tribunal's Analysis**

437. The Tribunal agrees with the Claimant that annual compounding is appropriate and that compounding in general is consistent with many recent decisions of investment tribunals. Moreover, although Article 5 of the BIT, prescribing a commercial rate of interest, does not apply *strictu sensu*, it stands to reason that if that is the BIT's standard for lawful expropriations, a similar standard should apply for treaty violations. While the BIT deals with rates and not the issue of compounding, the reference to "commercial" suggests that compounding, which is common commercially, is consistent with that term. Capitalization of interest is not at issue; indeed, the Tribunal recalls that the FAL terms as fixed by Resolution 14 featured daily compounding of interest.

## VII. DECISIONS AND FURTHER INSTRUCTIONS

### A. DECISIONS

438. For the reasons set forth above, the Tribunal decides as follows:

(1) Webuild's claims with respect to its Shareholder Loans are admissible;

[437] Claimant's Memorial, ¶ 338.
[438] *Ibid.*, ¶¶ 339-346.
[439] Respondent's Counter-Memorial, ¶¶ 619-630.
[440] Respondent's Counter-Memorial, ¶ 624.

(2) Argentina has violated Article 2.2 of the BIT, first sentence, the obligation to give fair and equitable treatment to investments covered by the BIT, through its failure by September 2006, after the end of the economic emergency, to reestablish the economic equilibrium of the Concession as required by the Concession Contract and the Emergency Law;

(3) Argentina has also violated Article 2.2 of the BIT, second sentence, by its unjustified conduct in failing to reestablish the economic equilibrium of the Concession within a reasonable time after the end of the economic emergency;

(4) In light of the Tribunal's decision relating to Article 2.2 (first and second sentences), no decision needs be reached by the Tribunal on the discrimination claims raised by the Claimant under Articles 2.2, 3 and 4, or the expropriation claim raised by the Claimant under Article 5, of the BIT;

(5) Argentina's defense of necessity is denied;

(6) With respect to damages as a consequence of the breaches noted above, no final decision on the quantum of damages and interest to be awarded is made at this time, with such decision being deferred to the ~~final~~ Award following further submissions of the Parties on the questions set forth in subsection B of this section and further deliberations of the Tribunal. The Tribunal has determined that the *Chorzów Factory* standard of full reparation, using an income method, calculated on the basis of free cash flow to the firm, shall be used to calculate damages, including historical damages from September 2006 to the Valuation Date of 31 August 2014, and future damages from that date to the end of the Concession; and,

(7) The Tribunal reserves any decision on costs for the Award in these proceedings.

## B. FURTHER INSTRUCTIONS AND QUESTIONS

439. The Tribunal instructs the Parties (or a Party, as indicated) to prepare revised calculations of damages consistent with its decision set forth in Section VII.A on the following basis:

a. *Toll Rates.* Initial toll rates should correspond to those set forth in the 2006 LOU, which by its terms was aimed at a partial restoration of the Concession's equilibrium. Readjustment of rates after the initial period set by the 2006 LOU shall be done on an annual basis consistent with the indices and 5% threshold specified in that LOU (based on paragraph 390 above).

b. *Toll Subsidy.* The revised calculations of damages shall include a figure showing the impact of termination of any toll subsidy included in the 2006 LOU after 2012 versus the continuation of such subsidy until the end of the Concession (based on paragraphs 393 to 396 above).

c. *Elasticities.* The revised calculation of damages should be based on three different assumptions regarding elasticity values: one at the low end of the envelope of values put forward by Mr. Bates in the *Hochtief* Arbitration; one at the high end; and one at the midpoint. Given the Tribunal's finding of greater inelasticity of demand for heavy rather than light traffic, the values in each calculation should reflect this differential, using the same degree of differential as reflected in Table 9 set forth in paragraph 399 above.

d. *Rate of Return.* The Claimant is also requested to clarify to what extent, if any, future cash flows in any calculation of damages are based on an IRR in excess of 8.87% and, to the extent that may be the case, to provide an additional calculation based on an IRR of no greater than 8.87%, along with a calculation using an IRR of 9.18% (or such other rate as may result from the new calculation of damages requested by this Decision), taking into account any variations caused by actual performance), so that the effect of any higher rate that the Claimant's experts

consider historical performance may justify is clear, as set out in paragraphs 406 to 413 above.

e. *Working Capital: Current vs. Non-Current Assets and Duration of Tax Credit Carryover.* The Parties are requested to clarify the position regarding tax credit carryovers, as set forth in paragraphs 414 to 416 above. If such carryovers are limited in duration to five years under Argentine law, the revised calculations of damages shall be consistent with that limitation.

f. *Rate of Interest on the FAL.* To enable the Tribunal better to understand the treatment of the interest rate on the FAL in the "but for" scenario, the Claimant is requested to confirm specifically the assumed rate of interest on the Financial Assistance Loan in that scenario. The Parties are also requested to confirm the Interest Rate for Loans to Leading Companies in the 25$^{th}$ percentile as published by the Argentine Central Bank, as referenced in Section 9 of the 2006 LOU. Assuming the 2006 LOU provisions have been correctly applied, the FAL rate reduction shall be unchanged from the earlier calculations performed by Claimant's experts. If, however, that rate has not been correctly applied, a new calculation shall be performed using the correct rate based on the 2006 LOU (paragraphs 417 to 421 above).

g. *Rate of Interest on Shareholder Loans and Additional Shareholder Loans.* The assumed rate of interest on shareholder loans (including the Shareholder Loans) shall be unchanged from the earlier calculations performed by those experts. No additional shareholder loans shall be assumed to have been made in the "but for" scenario (paragraphs 422 to 426 above).

h. *Effect of Debt Overhang from Pre-Operation Phase.* The Claimant is requested to clarify the extent to which, if any, in the "but for" scenario there existed a debt overhang from the construction phase (whether to subcontractors such as Boskalis-Ballast, shareholders or Argentina under the FAL) that would presumably not have been present absent the cancellation of the IDB Loan and the effects of the

economic emergency on Puentes' ability to retire such debt, and the impact any such overhang might have on the revenues Puentes would be required to earn in order to achieve the targeted IRR in that scenario (paragraph 368 above).

i. *Other.* Except as set forth herein, all other assumptions in the calculation of damages in the "but for" scenario shall remain unchanged.

j. *Interest Rate on Historical Losses.* Historical losses are to be calculated using a risk-free standard commercial rate of interest on or around the Valuation Date. The Tribunal invites further submissions from the Parties as to what a non-risk-based normal commercial rate around the Valuation Date in 2014 would have been. A short-term instrument such as a one-year U.S. Treasury bill would appear to be inapposite for a long-term investment and in light of the standard of a commercial rate of interest; the Parties should therefore consider rates based on instruments of longer tenor, *e.g.*, five or ten years. Alternative calculations should be provided using the chosen rates (paragraph 432 above).

k. *Discount Rate for Future Losses.* The discount rate for future projected losses shall continue to be the WACC (paragraph 433 above).

l. *Compounding.* Interest shall be compounded annually (paragraph 437 above).

440. In addition: the Tribunal requests answers to the following questions from the Parties or a Party, as indicated:

a. *Current Legal Status of Puentes.* The Claimant is invited to clarify the current status of Puentes, including whether its dissolution is complete, and if so, the date on which that dissolution occurred. If any liquidating distributions were made to shareholders, these should be identified, by shareholder. The Claimant and the Respondent are also invited to provide information on the current status of the two domestic court cases pending at the time of the submissions in this case.

b. *Subcontractor and Other Repayments.* The Claimant is also invited to confirm: (1) that all subcontractors are fully repaid in its "but for" scenario, and to specify the timing of such repayment(s); and (2) to provide current information regarding any repayments of Shareholder Loans (including to Webuild) or third parties, including but not limited to subcontractors, that have been made pursuant to the reorganization plan, to the extent the record is not up to date, or to confirm that the record fully reflects such repayments.

c. *Effect of Reduction of Interest Rate on Shareholder Loans.* The Claimant is requested to confirm that the Tribunal's reading of paragraph 140 of the Second BRG Report is correct in considering that the word "increase" should be "decrease" (and if not, to clarify the position on the issue discussed in paragraphs 422-426 above).

d. *Double Recovery Issues.* To avoid double recovery, the Claimant is also requested to confirm the status of any recovery it or its shareholders have received from any claims it has pursued in Argentine courts, and to indicate the status of any such proceedings.

441. The Respondent is requested to provide any information that the Claimant may reasonably require to respond to the Tribunal's requests. The Parties are encouraged to work together to provide joint or agreed responses to these questions to the extent possible.

442. The Parties are encouraged to provide their responses to the above requests within sixty (60) days of this Decision via a joint submission. Alternatively, if the calculations are not agreed, the Parties shall note any areas of disagreement in their joint submission, or make separate simultaneous submissions.

Professor Kaj Hobér
Arbitrator

Professor Jürgen Kurtz
Arbitrator

Ms. Lucinda A. Low
President of the Tribunal

Professor Kaj Hobér
Arbitrator

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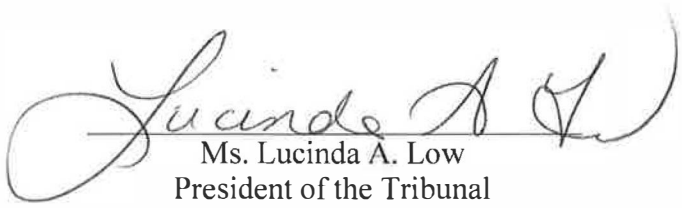

Ms. Lucinda A. Low
President of the Tribunal