

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the Proceeding between

**Urbaser S.A.**  
**and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa**  
(Claimants)

and

**The Argentine Republic**  
(Respondent)

ICSID Case No. ARB/07/26

**AWARD**

Rendered by

**Professor Andreas Bucher, President**  
**Professor Pedro J. Martínez-Fraga, Arbitrator**  
**Professor Campbell McLachlan QC, Arbitrator**

*Secretary of the Tribunal:* Mr. Marco Tulio Montañés-Rumayor

*Date of dispatch to the Parties:* December 8, 2016

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Zabalía Lagos*

*Representing Respondent:*

Dr. Carlos Francisco Balbín  
Procurador del Tesoro de la Nación  
*Procuración del Tesoro de la Nación*  
Buenos Aires, Argentina

## Table of Contents

<b>I.</b>	<b>Background</b>	1
A.	Procedure	1
B.	The dispute in short terms	34
<b>II.</b>	<b>The Concession Area</b>	38
A.	The situation before privatization	39
B.	Privatization promoted at the national level and in the Provinces	41
C.	The bidding process in the Province of Greater Buenos Aires	52
1.	Region B	52
2.	Bidders' information	57
D.	AGBA as the Concessionaire	61
E.	Characteristics of economic and social life in the Concession area	65
1.	Overview	65
2.	During 1998-2002	71
<b>III.</b>	<b>The Regulatory Framework</b>	76
<b>IV.</b>	<b>Claimants' Allegations on Violations of the Regulatory Framework</b>	94
A.	Summary	94
B.	Scope of the dispute	101
C.	Claimants' allegations reviewed	109
1.	The Zoning Coefficient	109
2.	Vacation time salaries accrued prior to Takeover	112
3.	The Determination and application of tariffs by AGBA	115
4.	Failure to deliver the UNIREC plants	131
5.	The prohibition of applying the connection and work fees	147
6.	The obstacles to the implementation of the collection mechanism	162
7.	The prohibition of accounting for changes in the tax burden	192
8.	The implementation of the metering system	201
9.	The water and sewage coefficients	216
10.	AGBA's exclusivity in the Concession area	228
11.	The Regulatory Agency's and the Grantor's inaction	236
D.	Conclusion	240
<b>V.</b>	<b>The Salient Features of AGBA's Concession</b>	242
A.	Categories of Work	243
1.	Basic distinctions	243
2.	Connection of illegal users	248
3.	Reconditioning of existing connections	258
4.	Expansion work	265
a.	The Parties' respective positions	266
b.	The Tribunal's findings	272
c.	Expansion related to the UNIREC plants	295
B.	Collectability of bills for services	297
1.	Claimants' position	299
2.	Respondent's position	307
3.	The Tribunal's findings	315

C.	POES	324
1.	Claimants' position	331
2.	Respondent's position	337
3.	The Tribunal's findings	348
4.	The performance under the POES in the districts with UNIREC plants	365
5.	The undertakings for investment retained in the POES	371
D.	Investments	379
1.	Claimants' initial investment	388
a.	The shareholding in AGBA	388
b.	Other funds provided initially by the shareholders	406
2.	Third party funding	408
a.	Claimants' position	408
b.	Respondent's position	420
c.	The Tribunal's findings	427
3.	No increase of shareholders' investments	449
4.	The income arising from the Concession	468
5.	Overall assessment	478
a.	Claimants' position	478
b.	Respondent's position	481
c.	The Tribunal's conclusion	487
E.	Contractual equilibrium v. business risk	494
1.	Claimants' focus on contractual equilibrium	495
2.	Respondent's focus on business risk	498
3.	The Tribunal's views	506
4.	The tariff regime and review	516
5.	The cause of the disruption of the equilibrium: investment v. crisis	520
a.	Claimants' position	520
b.	Respondent's position	526
c.	The Tribunal's findings	532
<b>VI.</b>	<b>Fair and Equitable Treatment</b>	<b>548</b>
A.	The law applicable to the merits of the claims	548
B.	Article V of the BIT and the standard on fair and equitable treatment	559
1.	Claimants' position	559
2.	Respondent's position	580
3.	The Tribunal's findings	603
a.	Extreme positions	603
b.	Positions lacking substance	609
c.	Basics	613
d.	The standard is not tied to one set of expectations	616
e.	The standard encompasses the entire legal, social and economic framework	618
f.	The investor's protected expectations	626
<b>VII.</b>	<b>The Emergency Measures and their Effects on the Concession</b>	<b>634</b>
A.	The crisis	634
B.	The emergency measures	640
1.	Claimants' views	641
2.	Respondent's views	646
C.	The impact of the emergency measures on AGBA's Concession	658

1.	Claimants' views	658
2.	Respondent's views	667
3.	The Tribunal's findings	672
D.	The responsibility for the emergency measures (state of necessity)	684
1.	Claimants' views	686
2.	Respondent's views	698
3.	The Tribunal's findings	709
E.	The requirement for renegotiating the Concession Contract	733
<b>VIII.</b>	<b>The New Regulatory Framework and the Renegotiation</b>	<b>739</b>
A.	The main elements of the New Regulatory Framework	741
1.	Claimants' presentation	741
2.	Respondent's presentation	752
3.	The Tribunal's findings	756
B.	No immediate application of the New Regulatory Framework to AGBA	759
1.	Claimants' position	759
2.	Respondent's position	763
3.	The Tribunal's findings	765
C.	The conduct of the renegotiation based on the New Regulatory Framework	768
1.	Claimants' position	768
2.	Respondent's position	779
3.	The Tribunal's findings	787
D.	The failure of the renegotiation	796
1.	Claimants' position	796
2.	Respondent's position	803
3.	The Tribunal's findings	812
<b>IX.</b>	<b>The Termination of the Contract</b>	<b>848</b>
A.	The way towards termination	848
B.	Provincial Decree No. 1666/06 on termination	856
1.	Outline of the grounds for termination	856
2.	General matters	858
a.	Claimants' views	858
b.	Respondent's views	869
c.	The Tribunal's findings	871
3.	Scope of the dispute	875
4.	The grounds of termination reviewed	883
a.	The POES service expansion goals	883
aa.	Claimants' position	883
bb.	Respondent's position	888
cc.	The Tribunal's findings	890
b.	The micro-metering goals	904
c.	Nitrate quality levels	910
d.	Maintenance of drinking water storage tanks	913
e.	Water pressure quality goals	916
f.	The commissioning of the sewage treatment plants	919
g.	The renewal of the Concession Contract performance bonds	924
h.	The sewage quality parameters	927
i.	The cooperation with the Regulatory Agency and the application of the Customer Rules	931

5.	Are AGBA's alleged breaches cured by the non-application of sanctions?	934
6.	Conclusion	943
<b>X.</b>	<b>Expropriation</b>	951
A.	Claimants' position	951
B.	Respondent's position	975
C.	The Tribunal's findings	997
<b>XI.</b>	<b>Discriminatory and Unjustified Measures</b>	1010
A.	Article III(1) of the BIT	1010
B.	Claimants' claim based on allegedly discriminatory measures	1012
1.	Claimants' position	1012
2.	Respondent's position	1040
C.	Claimants' allegations on unjustified measures	1055
1.	Claimants' position	1055
2.	Respondent's position	1068
D.	The Tribunal's findings	1080
1.	The meaning and purpose of Article III(1) of the BIT	1080
2.	The claims based on allegedly discriminatory measures	1090
3.	The claims based on allegedly unjustified measures	1102
<b>XII.</b>	<b>Respondent's Counterclaim</b>	1110
A.	Jurisdiction and admissibility	1110
1.	Claimants' objections	1110
a.	Preliminary matters	1110
b.	The Tribunal's lack of competence	1117
c.	The Counterclaim does not relate to a dispute arising directly from an investment within the meaning of the ICSID Convention and the BIT	1126
2.	Respondent's position	1135
3.	The Tribunal's findings	1143
B.	The merits of the Counterclaim	1156
1.	Respondent's position	1156
2.	Claimants' position	1167
3.	The Tribunal's findings	1182
a.	The applicable law under the BIT	1182
b.	The BIT's relation to international law and human rights	1193
c.	The human right to water in the framework of AGBA's Concession	1211
<b>XIII.</b>	<b>Costs</b>	1222
<b>XIV.</b>	<b>Decision</b>	1234

## I. Background

### A. Procedure

1. On July 20, 2007, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a Request for Arbitration (“the Request”) dated July 6, 2007, presented in Spanish (“Solicitud de Arbitraje”) and submitted by Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa (“Claimants” respectively “Urbaser” and “CABB”) against the Argentine Republic (“Argentina” or “Respondent”). The Claimants submitted the Request pursuant to Article X of the Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain signed on October 3, 1991<sup>1</sup> (“Argentina-Spain BIT” or “the BIT”).

2. On October 1, 2007, the Acting Secretary–General of ICSID registered the Request and notified Claimants and Respondent (the “Parties”) of the registration.

3. The Parties agreed to waive the nationality requirement as provided in Article 39 of the ICSID Convention (the “Convention”). Respondent selected the formula provided for in Article 37(2)(b) of the Convention regarding the constitution of the Tribunal. Claimants agreed to this choice, subject to the provisions of Article 38 of the Convention.

4. On December 18, 2007, Claimants appointed a Spanish national as arbitrator and proposed the designation of another arbitrator as president of the Tribunal. Respondent rejected the latter proposal on December 28, 2007, and suggested another candidate as president of the Tribunal. Claimants objected to this new proposal on January 3, 2008. On February 15, 2008, Respondent appointed an Argentine arbitrator and advanced a new proposal for president of the Tribunal. Because both arbitrators proposed by the Parties shared the nationality of Claimants and Respondent, respectively, pursuant to Article 39 of the Convention the agreement of all parties was required to confirm these appointments. On June 18, 2008, Claimants rejected both of Respondent’s proposals.

5. On September 29, 2008, Claimants withdrew their initial appointment of an arbitrator and instead appointed Professor Pedro J. Martínez-Fraga, a national of the United States of America, as Arbitrator. The Parties were informed on October 30, 2008 that Professor Martínez-Fraga had accepted his appointment.

6. On December 18, 2008, Respondent stated that the Parties had agreed to accept the appointment of a national of a party pursuant to Article 39 of the Convention. On January 20, 2009, Claimants requested that the two remaining arbitrators be appointed by

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<sup>1</sup> Acuerdo para la promoción y protección recíprocas de inversiones firmado por la República Argentina y el Reino de España el 3 de octubre de 1991.

the Chairman of the Administrative Council, one of them to serve as the Tribunal's president. By letter dated February 13, 2009, the Centre confirmed that in the absence of an agreement between the Parties, no party could designate an arbitrator having the nationality of either Party.

7. On February 23, 2009, Respondent appointed Sir Ian Brownlie, a national of the United Kingdom, as arbitrator. On February 26, 2009, the Centre confirmed that Sir Ian had accepted his appointment.

8. On May 26, 2009, Respondent rejected and Claimants accepted a proposal by the Centre for the appointment of the president of the Tribunal. The Centre made a new proposal on June 9, 2009. On June 16, 2009, Claimants accepted and Respondent rejected the proposal. The Centre made another proposal on July 10, 2009, which the Parties rejected on July 17, 2009.

9. The Centre then considered Claimants' earlier request to have the third presiding arbitrator appointed by the Chairman of the ICSID Administrative Council as provided for in Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules. By letter dated July 30, 2009, the Centre informed the Parties that it intended to propose the appointment of Professor Andreas Bucher, a Swiss national and a member of the ICSID Panel of Arbitrators, as the third arbitrator and President of the Tribunal. In an additional letter dated August 21, 2009, the Secretary-General of ICSID concluded that the Respondent's objections to the proposed appointment were not compelling.

10. On August 25, 2009, Respondent agreed to the appointment of another Swiss national that the Centre earlier had suggested and to which Claimants had agreed on May 26, 2009. When the Centre stated that it was going to seek this appointee's acceptance, on September 1, 2009, Claimants stated that their earlier acceptance was no longer in effect and that they were opposed to Respondent's attempt to have Professor Bucher's designation replaced upon its unilateral initiative.

11. On October 13, 2009, the Parties were informed that the Chairman of the ICSID Administrative Council had appointed Professor Andreas Bucher as the President of the Tribunal. On October 16, 2009, the Parties were further informed that Professor Bucher as well as Sir Ian Brownlie and Professor Pedro J. Martínez-Fraga had accepted their respective appointments and that accordingly, the Tribunal was deemed to be constituted and the proceedings to have begun on that date.

12. In view of the first session of the Tribunal that was envisaged to be held in Paris on December 16, 2009, the Parties submitted an agreement on multiple issues listed on that meeting's provisional agenda. By letter dated December 10, 2009, the Tribunal offered additional suggestions for the Parties' consideration. As the Parties were making



progress in resolving outstanding issues, the meeting in Paris was cancelled, based on the expectation that agreement would be reached on the outstanding issues listed on the provisional agenda within a few days between the Tribunal and the Parties.

13. On January 3, 2010, Sir Ian Brownlie passed away. Pursuant to Arbitration Rule 10(2), the proceeding was thus suspended and the Argentine Republic was invited to appoint an arbitrator.

14. On February 26, 2010, the Argentine Republic appointed Professor Campbell McLachlan QC, a national of New Zealand as arbitrator. On March 8, 2010, the Centre informed the Parties that Professor McLachlan had accepted his appointment and that therefore, in accordance with Arbitration Rule 12, the proceeding resumed the same day from the point it had reached at the time the vacancy occurred.

15. On March 18, 2010, Claimants filed with the Centre a Proposal to disqualify (“Propuesta de Recusación” or the “Proposal”) Professor McLachlan as Arbitrator pursuant to Article 57 of the ICSID Convention. The same day, the Centre confirmed receipt of the Proposal and declared that in accordance with Arbitration Rule 9(6) the proceeding was suspended until a decision on the Proposal for disqualification was taken.

16. On April 16, 2010, Respondent filed a submission in response to the Proposal. Invited thereupon to make his own statement on the matter, if any, Professor McLachlan submitted such statement by letter dated May 5, 2010. The Parties all filed a further response to this statement on May 14, 2010.

17. Considering the Proposal for disqualification submitted by Claimants in accordance with Arbitration Rule 9(4), Professor Pedro J. Martínez-Fraga, Arbitrator, and Professor Andreas Bucher, President, decided on August 12, 2010 to dismiss the Proposal.

18. As of the date this Decision issued, *i.e.* August 12, 2010, the proceedings resumed. By letter of August 18, 2010, the Tribunal raised remaining procedural issues. By their respective statements of September 2, 2010, the Parties confirmed that all outstanding items had been clarified and agreed upon. On September 23, 2010, the Tribunal received the Parties’ joint Agreement on the issues included in the first meeting’s Agenda that had been convened for December 16, 2009, both in Spanish and in English. By letter of September 27, 2010, the Tribunal approved the Parties’ Agreement on the issues listed on the first meeting’s Agenda and declared the first session closed.

19. In accordance with the rules contained in that Procedural Agreement and within the time limits fixed therein and later amended in part, the exchange of written submissions started with the filing of Claimants' Memorial on the Merits dated January 27, 2011. The proceeding was then restricted to the examination of Respondent's objections to the jurisdiction of the Centre and the competence of the Tribunal. Each Party filed two submissions on this matter in 2011. A jurisdictional hearing was conducted in Paris on February 6-8, 2012.

20. The Tribunal's Decision on Jurisdiction was rendered on December 19, 2012. Based on the reasons given therein, the Tribunal decided:

1. To reject all of Respondent's objections and to assert that the Centre has jurisdiction and the Tribunal has competence over this dispute.
2. The determination and attribution of costs in connection with this Decision is reserved for a decision made by this Tribunal at a later stage of this proceeding.

This Decision is hereby incorporated in the present Award.

21. As a consequence of this Decision and pursuant to the Parties' Agreement on procedural issues, as amended from time to time by joint agreement, the Tribunal conducted the merits phase of this proceeding. Together with Claimants' first memorial included already at the jurisdictional stage, the Parties filed submissions as follows:

- Memorial on the Merits dated January 27, 2011
- Counter-Memorial and Counter-Claim of the Argentine Republic dated May 29, 2013
- Reply on the Merits and Answer to the Counterclaim dated November 15, 2013
- Rejoinder on the Merits and Counter-Reply of the Argentine Republic dated March 25, 2014

Each Party filed supporting documentation together with the submission to which it related. The Parties' submissions were presented in Spanish and completed by a translation in English. A select number of the attached documents and legal authorities were provided in English, either as originals or as translations.

On October 1, 2014, Respondent filed a request for production of documents, identified through three separate lists, relating to (1) documents Respondent quoted but omitted to present as annexes to its Rejoinder; (2) documents of a general nature, mostly relating to the economic and social circumstances in relation to the provision of water and sewage service in the Argentine Republic; and (3) documents apparently missing on Claimants'

file and/or quoted by their Witnesses or Experts but not submitted. After an exchange of statements between the Parties, the Tribunal granted Respondent's request by letter of October 22, 2014, considering that a party should not be prevented from having access to documents that were omitted so as to create a surprise if such documents were presented shortly before the hearing.

Claimants provided the documents it was requested to submit (3rd list) by letter dated November 3, 2014, to the extent they were available. Respondent made the documents it suggested to submit (1st and 2nd list) available on its website at the same date.

In a further request dated November 3, 2014, Respondent asked for the production of the Operator Agreement between CABB and AGBA of December 6, 1999. Claimants filed this document by letter of November 7, 2014. Respondent was also requesting that Claimants provide information as to whether they had entered into an insurance agreement in connection with the investment in AGBA. Claimants replied that they had not signed any such agreement, except for those imposed by the terms of the bid.

22. The hearing on the merits was conducted in Paris on November 24-28 and December 1-4, 2014. The following Witnesses had presented written statements and were examined on that occasion:

- Carlos Cerruti, presented by Claimants
- Eduardo Quijada, presented by Claimants
- Arnaldo Facchinetti, presented by Claimants
- Gustavo Dáscoli, presented by Claimants
- Martin Bes, presented by Respondent
- Juan Antonio Hernando, presented by Claimants
- Guillermina María Beatriz Cinti, presented by Respondent
- Horacio Seillant, presented by Respondent
- Carlos Sergio Cipolla, presented by Respondent

23. The following Experts had presented written statements and were examined on the same occasion:

- José Luis Inglese, presented by Claimants
- Emilio J. Lentini, presented by Respondent
- Prof. Dr. Barry Eichengreen, presented by Respondent
- Leonardo Giacchino and Richard E. Walck, presented by Claimants
- José Pabo Dapena and Germán Coloma, presented by Respondent
- Prof. Dr. Ismael Mata, presented by Respondent
- Prof. Dr. Alberto B. Bianchi (Second Opinion), presented by Claimants
- Prof. Dr. Bernardo Kliksberg, presented by Respondent

- Prof. Dr. Benedict Kingsbury, presented by Respondent

Prof. Dr. Barry Eichengreen and Prof. Dr. Benedict Kingsbury, both presented by Respondent, were examined through videoconference. All other Experts were examined in Paris.

24. In addition, a few Witnesses and Experts had submitted written statements but were not examined before the Tribunal. Expert Alejo Molinari, presented by Respondent, submitted two statements but was not able to join the hearing. Witness Eduardo A. Ratti, presented by Respondent, submitted a statement but was not called to appear before the Tribunal. The experts from the Universidad Nacional de General Sarmiento (UNGS), presented by Respondent, submitted a report but were not called for cross-examination; Respondent waived its call to have them examined before the Tribunal. Claimants did not object to the Tribunal considering the witness testimony of these experts without their appearance at the hearing.

25. The second part of the hearing was devoted to the presentation of the Parties' closing statements. At the end of the hearing, Respondent and Claimants declared that they had no remaining objection in respect of the conduct of this proceeding since this Tribunal's constitution.

26. The hearing held in Paris was recorded and a transcript was prepared both in Spanish (hereinafter: TR-S) and in English (TR-E). A jointly revised version of the transcript was provided in February 2015. Copies of slides used by the Parties during their statements were submitted to the Tribunal at the hearing.

27. Complementary documentation was filed after the hearing in compliance with decisions made on agreed terms by the Tribunal at the close of the hearing and further stated in the Tribunal's letter of December 5, 2014, as follows:

- English translations of a number of exhibits were submitted by Claimants and/or Respondent on February 6, 2015, which were identified on a list prepared by the Tribunal at the hearing and attached to the said letter.
- Submissions supported by reports of the Parties' respective experts providing a valuation of the Concession for 2000 and the first quarter of 2001, and for July 2006, respectively, taking into account three variables: (1) the cost of funding, (2) collectability (realisation rate), and (3) expected profit. These submissions have been submitted by Leonardo Giacchino and Richard E. Walck for Claimants and by José Pabo Dapena and Germán Coloma for Respondent, both dated March 30, 2015.

28. In the said Tribunal's letter, the question was left open whether the Parties, after receipt of these submissions, might wish to consult in view of future work, either jointly or through separate reply-reports. Noting that no consultation in view of work to be done jointly did occur, the Tribunal accepted Respondent's proposal made by letter dated June 2, 2015, to accept a possibility for each side to react to the report filed by the opposing party by letter dated June 24, 2015, thus not retaining Claimants' proposal contained in their letter dated June 11, 2015 not to call for new reports but eventually to hold a new hearing. The Tribunal included the possibility to proceed with the same exercise in respect of the counter-claim raised by Respondent. The Tribunal maintained this directive in its letter dated July 7, 2015, when replying to Claimants' objections raised in their letter of July 3, 2015. It further reserved the possibility of a second and additional exchange of experts' submissions in reply to the filings envisaged in the Tribunal's letter of June 24, 2015. This further exchange was twofold: The valuation and regulatory experts submitted briefs on July 30 (for Claimants) and 31 (for Respondent), 2015, followed by a further reply by Claimants' experts filed on September 30, 2015 and by Respondent's experts on November 13, 2015.

29. In light of these numerous submissions, the Tribunal will retain short designations for each report, as follows:

- The Reports of Leonardo Giacchino and Richard E. Walck, presented by Claimants, are designated as Giacchino/Walck I, II, III, IV and V, referring each to its respective filing on January 27, 2011, November 15, 2013, March 30, July 30 and September 30, 2015.
- The Reports of José Pabo Dapena and Germán Coloma, presented by Respondent, are designated as Dapena/Coloma I, II, III, IV and V, referring each to its respective filing on May 29, 2013, March 25, 2014, March 30, July 31, and November 13, 2015.

The Tribunal adopts the same method in relation to all other statements of witnesses and experts, which are designated by the name of their author, completed by the addition of "I" or "II" (or "III" in case of Expert Bianchi), depending whether their statement was filed together with the first or the second submission of the respective Party in relation to the proceeding on the merits. The report of the experts from the Universidad Nacional de General Sarmiento (UNGS) is designated by the name of this University.

30. As agreed at the end of the hearing, Claimants and Respondent prepared, respectively, post-hearing briefs both dated March 31, 2015.

31. On August 24, 2012, the Parties filed with the Tribunal declarations regarding their costs incurred respectively in this proceeding in relation to its jurisdictional phase. On February 29, 2016, they further filed the same kind of declarations in respect of the

merits phase of this proceeding, followed by a short brief of Respondent on the matter of allocation of costs, submitted on March 11, 2016, that caused Claimants to file a further reply on March 18, 2016.

32. The Tribunal had deliberations on December 5, 2014 and on January 19-21, 2016.

33. The Tribunal declared the proceeding closed on August 17, 2016.

B. The dispute in short terms

34. Summarized to its shortest expression, the dispute submitted to this Tribunal relates to a Concession for water and sewage services to be provided in the Province of Greater Buenos Aires. It was granted in early 2000 to Aguas Del Gran Buenos Aires S.A. (AGBA), a Company established by foreign investors and shareholders, including Claimants in the present proceeding. Claimants assert that they faced numerous obstructions on the part of the Province's authorities, which rendered the efficient and profitable operation of the Concession extremely difficult. The Concession was running into deadlock when Argentine suffered its economic crisis beginning in mid-2001, culminating in the emergency measures taken in January 2002, including a conversion of 1:1 between USD and Argentine Peso at a time when the Peso had depreciated by more than two thirds of its value. AGBA's numerous requests for a new valuation of its tariffs and for a complete review of the Concession all failed in front of the Province's lack of any serious commitment to bring the required renegotiation process to a successful end. Political reasons related to the fate of other concessions finally caused the Province to declare AGBA's Concession terminated in July 2006. This was just the final step of a long process of persistent neglect of AGBA's shareholders' interests on the part of the Province, comprising several violations by the Argentine Republic of Articles III, IV and V of the Spain-Argentine BIT.

35. Claimants' Prayer for Relief is stated in their Memorial on the Merits and has been amended in their Reply on the Merits and Answer to Counterclaim as follows:

“A) As regards the complaint filed by CABB and URBASER:

1. A declaration that the Argentine Republic breached the provisions of the Bilateral Investment Treaty executed between the Argentine Republic and the Kingdom of Spain on October 3, 1991 and, in particular, the following obligations of the referred Treaty: Article III.1 on the obligation to protect foreign investments and the prohibition to adopt unjustified or discriminatory measures; Article IV.1 on the obligation to afford fair and equitable treatment to the referred investments; and Article V, which forbids any illegal and discriminatory expropriation of foreign investments and imposes the obligation to compensate the investor in the event of expropriation or any other measure of similar characteristics and effects.

2. An order for the Argentine Republic to compensate CABB and URBASER for all damages caused by the referred breaches and, consequently, to pay the following amounts:

2.1 USD 152,798,862 (ONE HUNDRED FIFTY TWO MILLION, SEVEN HUNDRED NINETY EIGHT THOUSAND EIGHT HUNDRED AND SIXTY TWO U.S. DOLLARS) to URBASER S.A.

2.2 USD 163,619,810 (ONE HUNDRED SIXTY THREE MILLION, SIX HUNDRED NINETEEN THOUSAND EIGHT HUNDRED AND TEN U.S. DOLLARS) to CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BIZKAIA UR PARTZUERGOA.

2.3. The interest accrued on the amounts mentioned in items 2.1 and 2.2 above at a compound interest rate of 15% (FIFTEEN PERCENT), to be counted from November 15, 2013 until the effective payment.

3. An order instructing the Argentine Republic to make any additional compensation as may be required to remedy the damages caused to the Claimants, as deemed just and adequate by the Tribunal.

4. The mandate for the Argentine Republic to bear the costs of this arbitration, including the fees payable to the ICSID, the fees and costs incurred by the Arbitral Tribunal and all legal costs, experts' fees, and any other expenses incurred by the Claimants in this proceeding under the concept of full compensation.

This request for relief and payment of interest contemplates any amounts resulting from the evidence produced in this arbitration, as deemed appropriate by the Arbitral Tribunal.

The Claimants hereby expressly reserve the right to supplement, add to or amend the claims asserted in this Memorial, according to the circumstances considered in the course of the arbitration proceeding, pursuant to Article 46 of the ICSID Convention.”

Alternatively, Claimants fully reiterate their requests stated in their Memorial on the Merits of January 27, 2001, retaining the damages and interest amounts as established in said Memorial.

“B) As regards the counterclaim presented by the Argentine Republic, we hereby request that it be fully dismissed by the Arbitral Tribunal, with an award against Respondent for all costs and expenses arising therefrom, in line with the principle of full compensation.”

36. Respondent denies all claims submitted to this Tribunal by Claimants. Respondent rejects all of Claimants' allegations in relation to purported violations of the Concession Contract on part of the Argentine's authorities, all of which are in any event not under the

jurisdiction of this Tribunal. The difficulties the Concession was faced with were in large part grounded on AGBA's and its shareholders' deficient management, most expressly demonstrated by their incapacity to proceed efficiently in collecting bills from the network's users. In addition, and even more importantly, the Concession was fundamentally undermined by the investors' failure to perform their obligations when it was confirmed that nothing efficient had been done to provide even minimal investment for the first years of operation, with resources either from third-parties or from the shareholders themselves. After one and a half year of operation, AGBA was already compelled to declare its incapacity to fulfil its undertakings in view of the expansion of the network. This situation having never been remedied, even with the assistance of the Province during a renegotiation process conducted over more than a year, there remained no other solution than to declare the Concession Contract terminated. The Argentine Republic raises a Counterclaim based on Claimants' alleged failure to provide the necessary investment into the Concession, thus violating its commitments and its obligations under international law based on the human right to water.

37. Respondent's Prayer for Relief is stated in both of its Counter-Memorial and Rejoinder Submissions on the Merits and in its Post-Hearing Brief, which contains the latest amended drafting requesting that the Tribunal:

- “(a) dismiss each and every claim submitted by Claimants;
- (b) allow the Counterclaim submitted by Argentina and award damages, plus pre-award and post-award interest, as from the moment the harm was caused to Argentina until the time of actual payment;
- (c) grant Argentina any other remedies the Tribunal may deem fair; and
- (d) order Claimants to pay for all costs and expenses arising from these arbitration proceedings.”

## **II. The Concession Area**

38. The Parties' submissions both outline the historical development of the drinking water and sewage services in Argentina that led to a large process of privatization, part of which covered the Concession area attributed to AGBA. The main elements are as follows.

### **A. The situation before privatization**

39. Before the 1980s, Argentina's Federal Government provided drinking water and sewage services through the *Obras Sanitarias de la Nación* (OSN). When the funding



from the federal budget became subject to severe restrictions, the services provided by OSN went into great difficulties. On January 1, 1980, the Federal Government promoted the decentralization of these services to the provinces, some of which in turn transferred services to the Municipalities. These transfers were not made up by an increase in provincial funding, with the effect that no adequate solution was given to the need for service improvement and expansion of the water and sewage networks.

40. In July 1996, a Report of the Interamerican Development Bank (IADB, or *Banco Interamericano de Desarrollo – BID*) (CU-9) described the legal, institutional, operational and economic situation of the drinking water and sewage sector in Argentina as traumatic<sup>2</sup>. The infrastructure of the service was extremely poor. The quality of the water provision service decreased considerably and treatment plants were overburdened, which contributed to a significant aggravation of the environmental pollution problem.

#### B. Privatization promoted at the national level and in the Provinces

41. Argentina promoted private-sector involvement since the early 1990s because only the private sector had the technical and financial capacity required to make the substantial investment necessary for improving the provision and expansion of services. The private sector was expected to secure expand coverage, quality and efficiency levels and to provide access to much larger parts of the population than before.

42. At the national level, incentives were implemented to create the required certainty and confidence for private and foreign investors. Starting in 1989, major changes were introduced, basically as the result of Law No. 23697 of September 1, 1989 (the Economic Emergency Law) and Law No. 23760 of December 7, 1989 (the Tax on Assets Law), providing in particular for equal treatment between national and foreign investors, suspending the “buy-national” system, abolishing the tax on excess profits, and a guarantee for the right for investors to return their investment and the profits earned to their own country. Double taxation agreements and treaties for the promotion and protection of investments were concluded. In the early 1990s, the Argentine Republic signed several BITs, including the one with Spain on October 3, 1991. On May 21, 1991, the Argentine Republic signed the ICSID Convention. The Argentine Republic set up the *Agencia de Desarrollo de Inversiones* (ADI - Investment Development Agency) which in 2006 began operating as *Agencia Nacional de Desarrollo de Inversiones* (NADI - National Investment Development Agency). Thus, an extremely favorable legal framework was set up in order to promote capital inflow. Claimants submit that this created confidence in foreign investors and CABB and URBASER in particular.

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<sup>2</sup> “La situación jurídica, institucional, operativa y económica que exhibe el sector de agua potable y saneamiento en Argentina es actualmente traumática.” (p. 142).

43. The process of privatization included, in particular, the public service companies, to which OSN belonged. OSN was one of the first large companies to be privatized. The first feature of the transformation of the company was the segregation of the service provision roles from its roles of regulation and control. The second feature was the definition of new goals for service management and the creation of a regulatory system that would lead to the incorporation of private-sector initiative.

44. The privatization of OSN by the Government was based on a contract representing the largest concession in the world, covering an area of about 280,000 hectares with a population of about 9 million. On December 9, 1992, the Concession was awarded to the consortium led by French companies Suez Lyonnaise des Eaux and Vivendi, which set up *Aguas Argentinas S.A.* to become the concessionaire. The concession contract was signed on April 28, 1993. Suez, AGBAR and Vivendi instituted an ICSID arbitration that was registered on July 17, 2003 (ARB/03/19). On March 21, 2006, the Argentine Government revoked *Aguas Argentinas*' concession (Decree No. 303/06, CU-19). Thereafter, *Aguas y Saneamientos Argentinos S.A.* (owned 90% by the State and for 10% by the workers of former OSN) took over the service.

45. Upon taking over the transferred services in 1980, the Provinces opted for different alternatives for their operation. Certain Provinces chose to transfer service management to lower jurisdictional authorities. Others placed them under the purview of a provincial agency.

46. The Province of Tucumán was one of the first Provinces to set in motion the privatization of its water and sewage services. On December 26, 1994, the concession was awarded to the *Aguas del Aconquija* consortium, whose majority stockholder was *Compagnie Générale des Eaux*. The contract was executed with *Aguas del Aconquija S.A.* on May 18, 1995. The concessionaire gave notice of termination on August 17, 1997, a month before the grantor issued a decree declaring the early termination of the concession, on September 10, 1997. On October 7, 1998, the service was taken over by state entities. *Aguas del Aconquija S.A.* and *Compagnie Générale des Eaux* filed for ICSID arbitration (ARB/97/3)<sup>3</sup>.

47. In the Province of Santa Fe, a concession was awarded on August 30, 1995 to a consortium lead by the *Lyonnaise des Eaux S.S.*, currently SUEZ. The company *Aguas Provinciales de Santa Fe S.A.* was set up by the members of the consortium and signed the contract as concessionaire on November 27, 1995. In May 2005, the concessionaire

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<sup>3</sup> An Award of November 17, 2000 dismissed the claimants' claims, but was then partially annulled by a Decision of July 3, 2002. The re-submitted case ended by an Award of August 20, 2007 (known as "Vivendi II," CUL-6), which found that the Argentine Republic had violated the principles of fair and equitable treatment and that the Argentine Republic had taken unlawful expropriation measures; the Republic was ordered to pay USD 105 million. A request for the annulment of the Award was dismissed through the decision of August 10, 2010 (CUL-7).

requested the early termination of the contract. This was done in January 2006 and the services thereupon transferred to Aguas Santafesinas S.A., mostly composed of stockholders from the public sector. Aguas Provinciales de Santa Fe S.A. and members of the consortium filed an ICSID arbitration (ARB/03/17)<sup>4</sup>.

48. In the Province of Mendoza, the main service provider was *Obras Sanitarias de Mendoza*. In June 1998, the services were transferred to a consortium lead by Saur International and Azurix-Enron. The concession contract was terminated on September 27, 2010 and the service taken over by a state-owned corporation. Azurix filed an ICSID claim that was registered on December 8, 2003 (ARB/03/30); the proceeding was discontinued on June 18, 2012. Saur filed a claim that was registered on January 27, 2004 (ARB 04/4). An Award was rendered on May 22, 2014; an annulment proceeding is pending.

49. In the Province of Córdoba, a concession was awarded in April 1997 to a consortium lead by Suez-Lyonnaise des Eaux, which set up *Aguas Cordobesas S.A.* A request for ICSID arbitration was registered on July 17, 2003 (ARB/03/18). In December 2005, the government approved the renegotiation of the contract. The arbitration ended on January 24, 2007, when Suez and AGBAR left the concessionaire.

50. In the Province of Catamarca, the water concession was awarded to a consortium composed of Fomento de Construcciones y Contratas (FCC) and Vivendi, which set up *Aguas del Valle S.A.* The concessionaire and the Province agreed to terminate the contract in December 2004. On April 1, 2008, a state-majority-owned company took over the service.

51. In sum, the 1990s saw privatization of drinking water and sewage services extended from the Federal Government to the Provinces, where foreign-owned companies played a significant role. Later on, a reverse process developed, when services were then taken over by state entities. Many of the foreign investors involved in these events have decided to resort to the dispute-resolution mechanisms provided for in the applicable BITs.

## C. The bidding process in the Province of Greater Buenos Aires

### 1. *Region B*

52. The Province of Buenos Aires has an area of 307,571 km<sup>2</sup>, which accounts for 8.2% of the total area of the Argentine Republic. The Greater Buenos Aires area includes the city of Buenos Aires and the Buenos Aires Suburbs. The Province's capital is the city

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<sup>4</sup> The arbitration lead to a decision on liability of July 30, 2010 finding that the Argentine Republic had failed to fulfill its obligations to provide fair and equitable treatment to the investors, and dismissing the state-of-necessity argument (CUL-8).

of La Plata. Prior to 1980, Obras Sanitarias de la Nación (OSN) managed the main systems in the Province of Buenos Aires, whereas *Obras Sanitarias de la Provincia de Buenos Aires* (OSBA) served the rest of the provincial territory. OSBA later became the General Administration of Sanitation Work for the Province of Buenos Aires (AGOSBA).

53. In 1996, the Province of Buenos Aires initiated a privatization process of the drinking water and sewage services provided by AGOSBA, and it enacted for this purpose Law No. 11820 on July 17, 1996 (CU-21, R-62). The Law was divided into two parts, *i.e.* the “Regulatory Framework for the Provision of Drinking Water and Sewerage Services” (Exhibit I) and the “Particular Conditions Regulating the Concession of Sanitation Services under Provincial Jurisdiction” (Exhibit II). Article 3 of the Law authorized the awarding under a concession for up to 30 years of the services rendered until that time by AGOSBA. A new entity was created to act as the regulatory agency: *Organismo Regulador Bonaerense de Aguas y Saneamiento* (Buenos Aires Water and Sanitation Regulatory Agency – ORBAS), thus creating a distinction between the Grantor and the authority in charge of the controlling and regulating the concession contract.

54. For the purpose of privatization, the service rendered by AGOSBA was grouped into regions to differentiate separate business units. The territory, which comprised 56 districts, was divided into three regions, A, B, and C, the last one of which was in turn split into four sub-regions (C1, C2, C3 and C4). The concession holder was the Province of Buenos Aires. The concession zones were defined in Annex 6 to the Bidding Terms and Conditions (CU-23, RA-59) that had been approved by Provincial Decree No. 33/99 of January 15, 1999 (CU-24, RA-61) as amended by Provincial Decree No. 1177/99 (RA-80), adding Annex 13 (RA-59).

55. The bidding process was carried out through a dual envelope system, divided into the submission of a prequalification bid (Envelope 1) and the submission of an economic bid (Envelope 2). The bidders were required to have a qualified operator with adequate experience and technical and financial capacity. The invitations to bid were issued on January 25, 1999 and circulated nationally and internationally. Seven entities, respectively consortia, submitted their pre-qualification bid (Envelope 1). All of them were accepted, on April 6, 1999, and invited to submit their economic bid (Envelope 2). Four of them did so. The economic bids were submitted for different combinations of three areas. CABB and URBASER bid for regions A and B, while no bidder bid on region B alone. Region A and sub-regions C1, C2, C3 and C4 were all awarded to the bidding consortium consisting of Azurix Agosba SRL and Operadora de Buenos Aires SRL (both indirect subsidiaries of Azurix). These Regions became Concession Zone 1, comprising 54 districts. The bidders set up *Azurix Buenos Aires S.A.* (Azurix) that became the concessionaire. The award was made on a concession fee of ARS 438.5 million (Decree No. 1695/99 of June 22, 1999, RA-81). The Province declared the termination of the concession contract on March 15, 2002. On March 13, 2002, the company *Aguas Bonaerenses S.A.*

(ABSA) was established and charged with providing sanitary services in Zone 1 (Decree No. 517/02 of March 13, 2002, CU-211, RA-241, which was ratified by Law No. 12989 on February 11, 2003<sup>5</sup>). A request for arbitration was filed on September 19, 2001, and the proceeding concluded by an Award rendered on July 14, 2006.<sup>6</sup>

56. As no bidder had submitted for region B alone, a new date for submissions for bids for region B was fixed. The only bidder for region B was a consortium consisting of CABB, Sideco Americana S.A., Impregilo SpA, and Iglys S.A., a subsidiary of Impregilo SpA. Resolution No. 256/99 of September 9, 1999 (RA-82) pre-awarded the region to the consortium, and Decree No. 2907/99 of October 18, 1999<sup>7</sup> confirmed the pre-award. Region B covered 7 districts, *i.e.* Escobar, José C. Paz, General Rodríguez, Malvinas Argentinas, Merlo, Moreno, and San Miguel. Finally, Region B was awarded to this consortium on December 7, 1999. It became Concession Zone 2. Takeover took place on January 3, 2000.

## 2. *Bidders' information*

57. When the Concession for Region B was awarded to AGBA, its population of about 1.7 million were mostly low-income inhabitants, of which only 35% had drinking water services and only 13% had sewerage services. The target to be reached within the first five years of the Concession was 74% for drinking water and 55% for sewage services.

58. The Province had engaged Schrodgers Argentina S.A. ("Schrodgers") as advisor for the privatization of AGOSBA. Its main task was to submit to potential investors a report indicating criteria such as investments, credit risks, and geographical location ("Schrodgers Report," CU-10, RA-174, 262). The Report mentioned that representatives of AGOSBA would prepare a series of presentations, while the Government had set up a data room in the city of La Plata. Section 2.4 of the Bidding Terms and Conditions further stated, in relevant part, that the Participants shall have access to the available information concerning OSBA and the Service, that the Privatization Commission shall coordinate with the Participants visits to the facilities and plants, and that in the data room the Participants shall have access to the necessary documentation for consulting purposes. In addition, the Privatization Commission may issue Information Notices. It was further provided, in Section 2.5, that the Participants may ask questions and request clarifications and that the answers will be communicated to all Participants by means of Circulars. This, however, was subject to a reservation as follows:

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<sup>5</sup> Exhibit 232 to Giacchino/Walck I.

<sup>6</sup> *Azurix Corp. v. Argentine Republic*, ICSID/ARB/01/12 (CUL-13, ALRA-132). An annulment request was dismissed on September 1, 2009 (CUL-14, ALRA-56).

<sup>7</sup> Exhibit 70 to Giacchino/Walck I.

“The Privatization Commission will attempt to answer all the questions that are presented to it. However, if due to the quantity or complexity of the questions submitted this is not possible, the agency is authorized to answer only those questions that it considers to be of greatest general relevance, and the Participants will not be able to formulate any claims if their questions are not answered.” (footnote omitted)

59. Section 1.5.2 of the Bidding Terms and Conditions provided that the submission of bids implied that the Bidder acknowledged that he is fully responsible for the sufficiency of his Bid, that he has done all investigations necessary to ensure that his Bid is complete, and that he had sufficient access to the information necessary to properly prepare the Bid.

60. In the instant case, the Parties disagree significantly regarding the conditions and the operability of the network as it existed at the time of the bid and before Takeover. These matters will be dealt with throughout this Award. What follows here below only relates to some important aspects concerning the services as they were presented in 1999 when the bidding process was ongoing.

D. AGBA as the Concessionaire

61. The Bidding Terms and Conditions laid down the obligation to set up a corporation with the exclusive purpose to take over the Concession. The operator was required to be the holder of at least a 20% interest in the capital and voting rights of the concessionaire. 10% of the stock went to those employees who decided to enroll in the employee stock ownership program (PPAP).

62. Pursuant to the established requirements, the bidders set up *Aguas del Gran Buenos Aires S.A.* (AGBA) on December 2, 1999 (CU-25), with a capital stock of USD 45,000,000, fully subscribed and paid for by AGBA's stockholders, including the 10% covered by the PPAP. Even though URBASER had not been a member of the consortium submitting the bid, it became the holder of stock of AGBA shortly after the Company was set up, and prior to the concession Takeover. URBASER S.A. subscribed for and acquired shares of AGBA's stock both directly and through Urbaser Argentina S.A., its 100% Argentine affiliate, and Dycasa S.A., another member of the same group. Following this addition, the capital stock was divided between URBASER (27.4122%), CABB (20%), Impregilo (42.5878%) and PPAP (10%).

63. On December 7, 1999, AGBA entered into the Concession Contract with the Province of Buenos Aires and paid the fee of USD 1,260,000. It also paid fees to the Financial Advisor in the amount of USD 1,236,788. AGBA thus became the Concessionaire for the provision of the running water supply and sewage public services in region B (Zone 2) of the Province of Buenos Aires. It took over the service on January 3, 2000.

64. The Tribunal notes that this Concession gave rise to this arbitration as well as another proceeding initiated by *Impregilo* and an Award dated June 21, 2011.<sup>8</sup>

E. Characteristics of economic and social life in the Concession area

1. *Overview*

65. The Experts from the Universidad Nacional de General Sarmiento (UNGS) have examined, based on data collected between 2001 and 2010, the environmental and social situation of Region B, which is located in the north of the Buenos Aires Metropolitan Region. They note that a significant portion of the population does not have running water network services or access to a sewer network. Most of those people have adopted their own household solutions through individual wells and the construction of cesspits. However, not all of them can have adequate and sufficiently deep wells so that they can reach the deeper aquifer that is less contaminated. This means that the health and environmental problems are more serious for the lower-income population, living in a situation of extreme personal and social weakness. They are exposed to a high sanitary risk due to the deficiencies and the lack of water and sewer services. In Region B, the population having the highest environmental sanitary risk is settled mainly in areas peripheral to the urban centers of Merlo, Moreno and Escobar, and it is widely extended in José C. Paz, Malvinas Argentinas districts and the west of San Miguel district.

66. Respondent states that the Province needed Region B to be awarded to investors willing to expand drinking water and sewage services in one of the most neglected areas of Argentina with the poorest coverage. The districts of the Province of Buenos Aires have the highest poverty levels. In some districts under the Concession, people below the poverty line were about 56.6%. From the 1,6 million people of the Concession area in 1998, only 565,000 had drinking water supply service (135,000 users, 35%) and 215,000 sewerage service (60,000 users, 13%).<sup>9</sup> Expert Lentini notes that these coverage levels were among the lowest in the urban and sub-urban areas of Argentina<sup>10</sup>, while Expert Kliksberg observes that they were significantly below the main rates of most Latin American countries<sup>11</sup>.

67. Region B was a disadvantaged area given that the Concession comprised population percentages with Unsatisfied Basic Needs (UBN) over the average in the area. Such condition is admitted when one of the following factors is given: (1) crowding in rooms, (2) inadequate housing, (3) no indoor flush toilet, (4) young children not attending school,

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<sup>8</sup> *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of July 21, 2011 (LARA-77, CUL 126). An application for annulment was dismissed on January 24, 2014.

<sup>9</sup> Expert Lentini I, para. 31.

<sup>10</sup> Lentini I, para. 32.

<sup>11</sup> Kliksberg I, para. 27.

(5) low subsistence capacity. While the precise figure varies from one observer to another, percentages near 25 seem closest to reality.<sup>12</sup>

68. Studies undertaken at the time indicated a lack and/or poor quality of drinking water, floods, inadequate solid waste collection, atmospheric pollution and soil degradation. Non-access to drinking water and sanitation was one of the main causes of high percentages of disease in the population, with greater impact on young children. There is a strong relation between social problems and environmental issues.

69. The imperative need to expand the drinking water and sewerage services was one of the main purposes of the Concession and a high risk to be taken by the party to be awarded the Concession. The high UBN levels and the low service coverage levels required the Concessionaire to execute an important investment plan aimed at increasing service coverage percentages at full speed. The performance of the tasks made it essential for the Concessionaire to obtain financing.

70. Claimants do not object to the presentation of these characteristics of economic and social life at the time of the bidding process. They submit that they provided the adequate remedies to the population's low coverage in drinking water and sewage services. Indeed, in the first two years of the concession term, AGBA doubled the number of served users. In the first year of the Concession, AGBA exceeded the goals and commitments it had undertaken. By late 2000, AGBA had fulfilled the goal set for the first five-year period in terms of water pressure normalization, and it had expanded the network by adding 50,000 users, reporting a total of 158,000 users by late 2000. In 2001, AGBA fulfilled the work plan to the same extent as the Grantor had fulfilled its own commitments. Even though the Province had not fulfilled its obligations to build the UNIREC plants, AGBA expanded the network with the inclusion of another 31,000 users by late 2001. This totalled 83,800 new connections in the first two years of the Concession, as compared to the 66,500 new connections that were required. In short, within this period, AGBA fulfilled its contractual obligations. It invested over 45 million USD in that effort.

## 2. *During 1998-2002*

71. Respondent explains that as from 1998, the living conditions of Argentine nationals seriously deteriorated. Despite the efforts made by the Argentine Republic to mitigate the crisis, its consequences were inevitable. The 1998-2002 period was characterized by

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<sup>12</sup> The Report of the Universidad Nacional de General Sarmiento indicates an average figure of approximately 23% (para. 61). For Expert Kliksberg, the ratio is almost one fourth of the population (I, para. 30, 89). Witness Hernando noted 23,2% (TR-E, Day 3, p. 36/24-25). In its letter of July 17, 2001 (CU-135, RA-192), AGBA acknowledged that the Concession related to "an area characterized socioeconomically by an UBN index of approximately 25% and an unemployment rate that is substantially higher than Argentina's average unemployment rate."



the gradual deterioration of the State regarding compliance with safety and health duties. The increase in violence and the feeling of fear in the population were evident. The consequences of the crisis were inevitable, not only at an economic level, but also at a social and institutional level. The dramatic events of December 2001 led to a critical sanitary situation with effects that still persist.

72. Since the beginning of the recession, over 50% of the population fell below the poverty line and over 20% was indigent.<sup>13</sup> The amount of individuals that fell below the poverty and indigence lines during the last decade slowly increased from 1998 to 2002. Poverty and indigence indicators reached the highest levels in Argentine history, reaching in October levels of 54.3%, respectively 24.7% of the urban population. One fourth of the population could not access the minimum food to ensure their survival. As of October 2002, three out of four children under 18 were below the poverty line, while 42.7% were indigent. In the country, there were more than 2.7 million children who did not receive the necessary calories to carry out “moderate activities.” The situation was more serious in the provinces.

73. By October 2001, the unemployment rate was 18.3% and six months later it reached 21.5%, representing more than 3 million individuals, to which 2.5 million underemployed individuals are to be added. Underemployment reached a peak of 21.5% in May 2002. In June 2002, Argentina was the country with the fourth highest unemployment rate in the world. Nominal wages were significantly reduced and continued to decrease.

74. The measures taken at that time by the Argentine Government and the Provinces were necessary given the essential nature of the water and sanitation provision. The poverty conditions of the Concession area and the necessary access to drinking water and sanitation have to be considered when evaluating the provision of services by AGBA. The difficult conditions that the Argentine Republic was facing were aggravated in the area in which the Concession was located, which was one of the poorest areas in the Province of Buenos Aires. The depression caused severe social damage, putting the basic stability levels of the Argentine society at risk.

75. Claimants do not object to this presentation of the difficulties inherent in the economic and social life at the time when the emergency measures were taken. They submit, however, that when the Province pesified and froze service tariffs within its territory in early 2002, it drastically and definitively impacted the economic-financial equation of the AGBA Concession. Moreover, in 2003, the Province changed the Regulatory Framework with the effect that AGBA was facing a completely different scenario, which no longer

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<sup>13</sup> Cf. Kliksberg I, para. 73.

allowed it to satisfy the basic commercial parameters of the Concession. Thus, the Concessionaire was no longer in a position to satisfy adequately the needs of the users of its services within the Concession area.

### III. The Regulatory Framework

76. The basis of the legal regime applicable to the Concession is Law No. 11820 of July 17, 1996, as amended by Law No. 12292 of April 21, 1999 (CU-21, RA-62). This law contained as its Exhibit I the Regulatory Framework for the Provision of Drinking Water and Wastewater Public Services. The Framework was meant to govern “the collection and purification, transportation, distribution and sale of drinking water, treatment, disposal and sale of wastewater, including also industrial effluents that the regulations in force allow to be discharged into the sewage system” (Sec. 1-I). The Framework covered, with one exception of no relevance in the instant case, the whole territory of the Province of Buenos Aires (Sec. 2-I). The Framework sought to establish terms to unify the provision of the service by the different providers for the Province (Sec. 4-I). Exhibit II of Law No. 11820 contained the Particular Regulatory Conditions for the Concession of Provincial Jurisdiction Sanitary Services. Pursuant to Section 4-II, the sanitary public service must be provided under “conditions that ensure its continuity, regularity, quality and widespread nature.” For this purpose, the public service concession system was to be used. Law No. 11820 thus opened the door for the granting of a concession over the services therefore provided by AGOSBA. As a measure to attract foreign investors, a 30-year term of the Concession was adopted (Sec. 3). The Concessionaire was ensured of its exclusive right in the Concession, with a single exception, subject to the approval of the Concessionaire, under which Users could set up services under their own management (Sec. 3-II, lit. d).

77. The *Buenos Aires Water and Sanitation Agency* (ORBAS, also called the “Agency”) was designated by Law No. 11820 as the Enforcement Authority of the Regulatory Framework (Sec. 2 and 3-I) and the authority in charge of regulating and controlling the Concessionaire and the services it was providing (Sec. 2 and 11-II). ORBAS coordinated its activity with the Executive Authority or Branch of the Province (the “Grantor” or the “Granting Authority”) through the Ministry of Public Works and Services (Sec. 2). Its structure was further determined by Decree No. 613/99 of March 12, 1999 (CU-38). Later on, Provincial Decree No. 743/99 ordered a merger between ORBAS and a Water Authority, creating thus a new entity called *Organismo Regulador de Aguas Bonaerense* (*Buenos Aires Water Regulatory Agency*, ORAB).

78. The Concession Contract was attached as Annex 13 to the Bidding Conditions and Specifications of the Bidding Competition (hereinafter the “Bidding Conditions”) approved by Decree 33/99 of January 15, 1999<sup>14</sup>. As stated in Sections 1.2 and 1.3 of the Bidding Conditions, three sources of law were thus applicable: Law No. 11820 containing the Regulatory Framework, the Bidding Conditions (including its Annexes and Circulars), and the Concession Contract attached to those Conditions and signed on December 7, 1999. Because of their close interconnection, these three documents are also designated as making up the Regulatory Framework of the Concession in the instant case. Further, Section 1.10 of the Concession Contract contained a more elaborated list in the following order of precedence: 1. the Regulatory Framework, 2. the Terms of Reference, 3. the Bid, 4. the Contract and the Decree approving such Contract, and 5. the rules and regulations issued by the Regulatory Agency. The reference to the Regulatory Framework must include Exhibit II of Law No. 11820, which is referred to through Sections 1.2 and 1.3 of the Bidding Conditions. The application of these sources of law is stated as being “without prejudice” to the provision that “the Bidding Competition will be governed exclusively by Argentinean legislation” (Sec. 1.3).

79. The Regulatory Framework provided in Sections 4-I and 5-I the general goals for the regulation and the quality of the water and sanitation services in the Province. The set of quantitative and qualitative goals that a Concessionaire must attain and which are part of the Concession Contract and the plans approved by ORBAS was contained in the Service Optimization and Expansion Program (POES) (Sec. 2-II). The service must be provided “on conditions that ensure its continuity, regularity, quality and widespread nature” (Sec. 4-II). The Concessionaire “must expand, maintain and renew, whenever necessary, the external networks connected, and provide the service on the conditions set out in Section 4-II, to all properties inhabited and located within the Service and Expansion Areas pursuant to the appropriate POES”; this shall be mandatory for the provision of drinking water (Sec. 7-II). Maintenance had the meaning that the concession property shall be kept in good state of repair to be ensured by the Concessionaire who shall perform regular replacements, dispositions and acquisitions, including any upgrades as required (Sec. 45-II).

80. The general objectives of ORBAS were to exercise police power with regard to sanitary services, ensuring that the provisions of Law No. 11820 were fully complied with in terms of quality, continuity, security and expansion of services and rational use of resources, protecting public health and the environment across the territory of the Province (Sec. 19-I(a)). It was also incumbent upon ORBAS to propose to the Executive tariff policies and systems, having regard to the protection of the interests of the community (Sec. 19-I(b)).

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<sup>14</sup> Four different English translations have been provided to the Tribunal (CU-37, Exhibit 22 to Giacchino/Walck I, AR-28 and 60). The Tribunal uses Exhibit CU-37 in this Award.

81. ORBAS had the power to control and to regulate the Concessionaire and the services it provided (Sec. 11-II). In so doing, it must ensure service quality, the protection of the community's interests, control, supervise and verify compliance with the rules in force and the Concession Contract (Sec. 13-II). More particularly, it shall have the power and obligation to comply with and enforce the provisions of the Concession Contract (Sec. 13-II(a)), to approve the POES (e), to control that the Concessionaire is complying with the POES approved and the investment, operation and maintenance plans proposed by the Concessionaire (f), to verify whether any tariff revision and adjustment are required (j) and to submit, as the case may be, to the Executive Branch for approval the new tariff schedules and prices (k), to impose on the Concessionaire the penalties set forth in the Concession Contract if it fails to comply with its obligations (n), to control the Concessionaire in terms of the maintenance of the facilities used for providing the service (p), and, in general, to do any such other act as may be necessary for the fulfillment of its duties and the objectives of this Regulatory Framework, and applicable regulatory and contractual provisions (u). ORBAS had to fix for each particular case the deadlines required for achieving the goals set (Sec. 5-I(3)).

82. In furtherance of the goals assigned to it, ORBAS' missions and functions included the assessment which was the most convenient supply alternative according to the sanitary service requirements in the mid- and long-terms (Sec. 20-I(b)), to ensure a reasonable and equitable tariff system (d), to intervene in and resolve disputes arising from service-related issues (g), and, in general, to do any such act as may be necessary for the fulfillment of the objectives as provided by the law, and of the applicable legal and contractual provisions (n).

83. Law No. 11820 provided for the appointment of a Technical Operator (Sec. 14-II). The CABB was designated for exercising this function.

84. The Law contained a list of the Concessionaire's duties and powers (Sec. 15-II), which were detailed in a much more elaborated way in the Concession Contract. Under the Law, the Concessionaire had – without prejudice to the duties not mentioned here – to carry out all tasks for the proper provision of services (lit. a), to prepare service operation, improvements and expansion plans (lit. b), to make proposals to the ORBAS related to the tariff system (g), to manage and maintain the assets used for providing the service (h), to collect tariffs for services rendered (m), and to submit annually to the ORBAS a detailed report on the activities carried out and the activities planned for the year and on the fulfillment of the POES (o).

85. Correspondingly to the Concessionaire's duties, Law No. 11820 provided in Section 20-II that Actual Users (residing within the Service Area) had the right to require the Concessionaire to provide the service pursuant to the quality and continuity standards set out in the Law and in the Concession Contract, and to demand performance from the

Concessionaire in the event of failure (lit. a), to bring an administrative claim to ORBAS when the service level is lower than the level required (b) and to report to ORBAS any irregular conduct or omission by the Concessionaire (i), to receive advanced notice of scheduled service interruptions (d), to complain to the Concessionaire in the event it fails to comply with the POES and the goals set (e). Potential Users living in the Expansion and Remainder Areas (Sec. 19-II) had the right to receive general information about the services provided by the Concessionaire and to complain to the Concessionaire in the event it fails to comply with the POES and goals set (Sec. 21-II).

86. Law No. 11820 contained in its Exhibit II a chapter IV setting the fundamental rules and requirements in respect of service quality and a chapter VII on the tariff system. This is a matter of concern and dispute between the Parties and will be examined more specifically in relation to the allegations put forward in respect of purported violations of the Regulatory Framework (*infra*, Chapter IV) and further be analyzed in more detail to the extent they relate to the salient features of the Concession and thus have an impact on the consideration of the claims before this Tribunal (*infra*, Chapter V).

87. Provision of services was meant to be provided jointly, in such a manner that sewerage systems are not installed if the drinking water systems are not installed; any expansion work shall provide for collection and treatment (Sec. 23-II). The annual report filed with ORBAS (Sec. 15-II, lit. o) shall be certified by financial auditors appointed by the Concessionaire and approved by ORBAS (Sec. 25-II). Section 26-II contained the requirements in relation to the service levels to be reached and maintained, which were further to be specified in the Concession Contract. The definitions of the Law relate to service coverage, drinking water quality (based on standards further determined in Exhibit A), water pressure, continuity in supply and minimal service interruption, treatment and quality of sewage (further specified by the standards contained in Exhibit B). The Concessionaire had to receive and reply to complaints of Users. Failure to comply with service-levels stated in Section 26-II shall entitle ORBAS to apply the penalties provided for in the Concession Contract. The regular reports to be submitted by the Concessionaire to the ORBAS (Sec. 15-II, lit. o) had for its main purpose to submit to the Agency the program for attaining and maintaining the service levels pursuant to the Concession Contract in conformity with the definitions contained in Section 26-II of the Law (Sec. 23-II). In certain exceptional cases and for practical reasons not attributable to the Concessionaire, the ORBAS may state a deadline for providing the services at lower quality levels (Sec. 23-II *in fine*).

88. The tariff system had to satisfy a number of general principles that have to be identified and to be evaluated in order to reach a balance. This became a matter of debate already at an early stage of the life of the Concession. The main requirements for the system, pursuant to Section 28-II of the Law, were that it aims at the rational and efficient use of the services and of the resources involved (lit. a), it allows for a consistent balance

between service supply and demand (b), it addresses sanitary and social goals directly connected with the service (c) and it provides for prices and tariffs that shall aim at reflecting the economic cost of providing the drinking water and wastewater services including the Concessionaire's profit margin and incorporating the costs incurred in the required basic infrastructure under the POES (d). The Law also provides for shifting the fixed rate tariff system to metered consumption (Sec. 28-II, lit. a, 29-II, 31-II, 33-II).

89. As provided for in Section 30-II, the Concession Contract had to set the tariff charts and the prices applicable to the service. An ordinary review of such settings was scheduled for any five-year term, starting on the second five-year term, and it had as basis the determination of the existence of changes in the goals or the capital expenditures provided for in the POES. Extraordinary reviews shall be those deriving from singular changes introduced into the proportional incidence of costs on the tariff, substantial and unforeseen changes in the service provision conditions or in the quality standards, justified changes in the relationship between asset investments and service operation costs, and in case another system is proposed which makes it possible to attain increased efficiency and implies a better application of the principles of the tariff system. Nevertheless, such a review could not be used as a means to punish the Concessionaire for past benefits obtained from the operation of services, nor shall it be used to balance out any deficit derived from enterprise risk or to account for inefficiencies in the provision of services (Sec. 12.3.1).

90. The collection of payments for the services was the Concessionaire's responsibility. It included a possibility for legal enforcement, within the limits contained in the Law, its Regulations and the Concession Contract (Sec. 33-II, 37-II, lit. c). The payment for the service provided was due by any owner or possessor of a property (Sec. 37-II). Some exemptions and subsidies did apply (cf. Sec. 36-II). The Concessionaire was authorized to interrupt service provision in the event a User was late in paying the bills, pursuant to guidelines contained in Section 34-II of the Law. These directions required in particular that consideration be given to public health and a minimal delay and advanced notice be granted; it was further stated that ORBAS may order the Concessionaire, "in unforeseen and extraordinary circumstances and based on a justified decision, to suspend the interruption temporarily."

91. The scheduling of the services to be set up and provided was governed by master guidelines contained in the POES. This matter is developed in detail in the Concession Contract and will be further analyzed as one of the important features of the Concession and the dispute dividing the Parties in the instant case (*infra*, Chapter V). Pursuant to Section 38-II of the Law, the Concession Contract had to provide for five-year POESs for the entire concession period. Those running from year one to five shall be compulsory. ORBAS had to approve regular POES plans when they were submitted as projects by the Concessionaire. Such project had to state "the expected investment amounts, objectives

and goals to attain pursuant to the Concession Contract.” In case ORBAS did not approve such a plan and the Concessionaire did not accept the proposed changes, the provision on dispute resolution contained in chapter XII would apply.

92. The POES relating to a particular period and approved by the Agency were binding upon the Concessionaire and a failure to comply with them deemed a serious fault (Sec. 39-II). However, it was further provided that plans could be amended through a justified resolution of ORBAS which does not alter the Concession equilibrium, upon a request of the Concessionaire or ORBAS and provided that there were extraordinary and duly justified reasons.

93. The provisions of Law No. 11820 were implemented and amended with multiple specifications in the Concession Contract. With regard to the services to be established, Chapter 3 of the Concession Contract contained a long list of all tasks inherent in the provision of services in compliance with the conditions set forth in the Regulatory Framework. The foregoing presentation of the Law also provides a summary of the essential content of the Concession Contract, and therefore the necessary background for examining the Parties’ allegations regarding the performance of the Concession Contract, where most of its provisions will be mentioned and explained. This examination is found in the next two chapters.

#### **IV. Claimants’ Allegations on Violations of the Regulatory Framework**

##### **A. Summary**

94. Claimants explain that AGBA and the investors suffered important violations of the Regulatory Framework at an early stage of the Concession and that these violations quickly began to affect the Concessionaire’s capacity to receive a return from providing services. These breaches hindered and even prevented AGBA’s collection of income on account of the services it provided and caused a significant increase in the Concessionaire’s costs.

95. Such breaches are listed by Claimants as follows: (1) Through the Real Estate Records errors they refused to correct, the Grantor and the Regulatory Agency deprived AGBA of its right to charge the previously-defined tariffs; (2) as a result of the delays in the construction of the UNIREC plants, they kept the Concessionaire from expanding the service as planned and from receiving tariffs as derived from such expansion work; (3) through their entirely unsupported interpretation of the Regulatory Framework, including the Contract, they denied AGBA its right to charge the connection fee and work fee; (4) they burdened the Concessionaire with the costs of delinquent collections, while increasing the bad debts level by preventing the implementation of coercive measures that were

legally and contractually provided for; (5) by refusing to allow coefficient increases that were provided for in the Contract, with no regard to their inconsistent conduct in the assessment of POES fulfillment, the Grantor and the Agency froze the service tariffs; and (6), as a result of their tolerance of unlawful or irregular actions by third parties, they kept the Concessionaire from exercising its rights. Claimants rely in support of their allegations on the Reports provided by their Experts Giacchino and Walck, which will not be referenced below for each item.

96. Claimants thus contend that by implementing the above-described actions or by failing to act in other cases in which they were required to do so, the Grantor and the Agency breached the most fundamental premises underlying the Concession. The Concessionaire could not bill the tariffs as provided for in the Regulatory Framework; as to its stockholders, they lost any possibility of earning a fair and reasonable profit and they suffered a detriment to their investment and got the possibility of recovering it threatened. This notwithstanding, the Concessionaire's situation was made even worse by the adoption of the emergency measures, which caused the loss of the investment.

97. Respondent observes in this respect that Claimants provide a description of a great number of alleged breaches of contract by the Province and ORAB, whilst omitting to mention that the *Impregilo* Tribunal found that there were no such breaches. Quite to the contrary, the *Impregilo* Tribunal observed that "AGBA, during the first five-year period, failed significantly to carry out its undertakings in regard to investments and the expansion of water and sewage services." Respondent adds, subject to further developments reported later, that not only was AGBA's management insufficient, but that moreover, numerous breaches resulted from the lack of investment.

98. Respondent also states that all claims put forward by Claimants are purely based on the Concession Contract. In regard to them, AGBA initiated legal proceedings before local courts, challenging all administrative acts that had allegedly affected it, and all major decisions of the authorities of the Province of Buenos Aires relating to the Concession.

99. Respondent understands that Claimants try to deny any responsibility and to hide the lack of investment and their inability to collect bills behind a strategy of contractual misconduct on behalf of the Agency and the Grantor, which culminated in the suspension of the POES investment. Respondent recalls that the *Impregilo* Tribunal noted that soon after the beginning of the Concession there were clear signs that AGBA would not fulfill its obligations. Respondent submits that the summary of the exchange of letters at that time provides useful insight: in its letter of May 17, 2001 (RA-183, CU-173), AGBA invoked the delinquent conduct of users in the face of their service payment obligation and the impossibility of obtaining financing to request the review of the contract and to temporarily suspend the expansion targets; it did not invoke any of the alleged contract breaches Claimants now allege. In the letters dated July 17, 2001 (RA-192, CU-135) and



August 15, 2001 (RA-193), AGBA reiterated the request to renegotiate the Contract and to suspend the POES, but in referring only to the Province's economic situation. The Reply of the Province, given in letters from May 30, 2001 (RA-184) and July 23, 2002 (RA-185) was that collectability was a business risk and that it was precisely because of the difficulties in financing that the Province had called upon the private sector to provide the water and sewerage services. Respondent recalls that notwithstanding the measures taken by the Province to accommodate the concerns of AGBA, the Concessionaire persisted in its deficient non-compliance behavior. Respondent replies to Claimants' allegations in detail in its submissions, relying in large part on the two Reports on Technical Issues provided by its Expert Molinari, which will not be referenced below for each item.

100. The Tribunal understands that the matter is divided into a series of disputes that caused numerous exchanges between ORAB and AGBA, as illustrated extensively in AGBA's submissions of September 13, 2001 (CU-210), December 27, 2001 (CU-175), June 28, 2002 (CU-104, 118), January 13, 2004 (CU-184), and in ORAB's reply in Resolution No. 25/03 of September 17, 2003 (CU-69) and in the letter of July 23, 2002 of the Undersecretariat for Public Services (RA-185). Before considering the substance of the allegations, the legal scope of the dispute needs to be clarified.

#### B. Scope of the dispute

101. The Tribunal wishes to clarify at the outset that it will avoid, when possible, comparing the Parties' positions in the instant case to the findings of the *Impregilo* Tribunal. The *Impregilo* case does involve both AGBA and the Concession. This Tribunal, however, is called to reach its own and independent judgment. The facts, evidence, and legal arguments brought before the *Impregilo* Tribunal were not the same as those submitted here.

102. Claimants introduce their allegations in their Memorial on the Merits under the heading of "Violations of the Regulatory Framework By the Grantor and the Regulatory Agency."<sup>15</sup> There is no allegation or statement in relation to the rights and obligations based on the BIT. Similarly, the conclusions in respect of the numerous violations under examination refer to "Violations of the Regulatory Framework"<sup>16</sup> and not to any breach of a provision of the BIT. The main focus of the whole presentation is to identify a number of actions or omissions committed by the Grantor and/or the Agency, which "breached the most fundamental premises underlying the Concession"<sup>17</sup>. As fundamental as all these alleged breaches are in Claimants' opinion, they are not described, neither individually or collectively, as breaches of the BIT.

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<sup>15</sup> Memorial on the Merits, before para. 171.

<sup>16</sup> *Ibid.*, subtitle before para. 316, followed by paras. 316-318.

<sup>17</sup> *Ibid.*, para. 318.

103. This is further confirmed by the fact that most of the allegations made in respect of violations of the Regulatory Framework are not completed by an evaluation of damages resulting therefrom. The revenue that Claimants contend AGBA had been deprived of is in most parts not specified while it is said to have been “significant.” As to the *Impregilo* Award, Claimants state that it was not as clear cut as contended by Respondent, and that it considers the failure to deliver the UNIREC plants to be a relevant fact.

104. Claimants present a whole set of alleged breaches of the Concession Contract as a basis for an allegation of violations of the fair and equitable treatment standard and of the prohibition of discriminatory and unjustified measures, as contained in the BIT. Nevertheless, it must be recalled that Claimants themselves have strongly affirmed that they were not presenting to this Tribunal claims arising out of purely contractual disputes. This limitation must be observed.<sup>18</sup>

105. Therefore, if the Tribunal nevertheless takes under review Claimants’ allegations on violations of the Regulatory Framework, this is done only in view of potential indirect effects of some of such allegations when it comes to consider alleged breaches of the provisions of the BIT and, in particular, of the standard of fair and equitable treatment. This also means that the Tribunal will not take the position of a judge called upon to consider contractual disputes. It will take account of such disputes and the alleged acts or omissions involved to the extent only that they may have an impact on the analysis of the allegations made in respect of the provisions of the BIT.

106. Claimants, however, when arguing their allegations on violations of the Concession Contract and in response to Respondent’s reaction that these are purely contractual matters, seem not be willing to accept that these alleged breaches cannot amount, somehow automatically, to breaches of the BIT. Indeed, Claimants argue that the Grantor and the Regulatory Agency committed material breaches of the Regulatory Framework. They further say that these breaches had a negative impact on the Concession, from the early stages. And they conclude as follows:

“In addition to being breaches of contract, they were also violations of the Regulatory Framework under which the Claimants had invested. *Therefore*, they constituted a violation of the fair and equitable treatment obligation under the Spain-Argentina BIT.”<sup>19</sup> (emphasis added)

However, it does not follow that an allegation of a violation of the Regulatory Framework (even if successfully established) gives rise to a breach of the BIT.

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<sup>18</sup> Cf. Decision on Jurisdiction, paras. 221-223, 236-238, 251-254.

<sup>19</sup> Reply on the Merits and Answer to the Counterclaim, para. 219.

107. Claimants invoke Judge Brower's concurring and dissenting opinion in the *Impregilo* case. It is said that for him, the Province's failure to deliver the UNIREC plants, its interference with AGBA's ability to collect work charges, the Province's deliberate delay, and its failure to reinstate AGBA's right to cut off service to non-paying customers should have been included as instances of unfair and inequitable treatment of claimant under the BIT. All together, these elements reveal a "behavior pattern" in the form of unreasonable legislative and regulatory burdens, all acts that transcend the boundary of mere "contractual violations" and constitute in fact substantial and undue interference with claimant's investment. However, the *Impregilo* Tribunal was not convinced that such breaches had occurred. This does clearly not allow any conclusion upon the presence of a "behavior pattern," which is, in any event, not a concept with a legal meaning relevant under the fair and equitable treatment standard.

108. In sum, the legal scrutiny of Claimants' allegations can be circumscribed by three circles. The first circle relates to the content and the interpretation of the provisions of the Regulatory Framework. The second circle refers to the margin of interpretation and the extent to which the Grantor's and the Agency's regulatory power covered decisions that the Concessionaire may not have anticipated under the literal reading of the legal framework, while it had to anticipate them as the exercise of the authorities' competence under the Contract and Argentine law. The third circle is then left for allegations that may, while presented as contractual disputes, become relevant when the scope of the guarantees contained in the BIT are to be more closely examined. The question relevant for this Tribunal in front of Claimants' allegations on violations of the Regulatory Framework is therefore whether any of these purported breaches reaches the level of that third circle.

### C. Claimants' allegations reviewed

#### 1. *The Zoning Coefficient*

109. Claimants report that before the privatization of the water service, certain subsidies were applied to some users, consisting of coefficients having the effect of lowering the value of the bills. The Concession Contract did not provide for such subsidies to be applied by AGBA. When it issued its first bills, AGBA dispensed with the Zoning Coefficients. ORAB issued Resolution No. 3/00 on January 24, 2000 (CU-39) ordering AGBA to reinstate the application of these coefficients, relying on Annex Ñ of the Contract, which stated that the tariff may not exceed the tariff determined in the last billing prior to the Takeover. ORAB's interpretation of this provision had the effect of linking the tariff to the bill, although the applied coefficient was not contained in the rules relating to the tariffs. ORAB dismissed AGBA's challenge by Resolution No. 80/00 of October 2000 (CU-40).

110. Respondent explains that shortly after the Concession Contract became effective, AGBA issued bills without properly considering the tariff regime established in Annex Ñ to the Contract. The Concessionaire understood that the Contract did not provide for AGBA's application of subsidies in force upon Takeover and that it could thus no longer apply coefficients whose effect was to lower the value of the corresponding bills. Through ORAB's Resolution No. 3/00, AGBA was ordered to re-bill those users whose bills have shown a price variation as compared to the last bill issued by AGOSBA before Takeover and thus to comply with the provisions of Section 4a-1 of Annex Ñ.

111. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. Resolution No. 3/00 instructed AGBA not to disregard Section 36-II of Law No. 11820 ordering the Concessionaire to comply with the subsidies in force at the time of the execution of the Concession Contract (lit. a). The same principle is stated in Section 4a-1 of Annex Ñ by reference to the tariffs applicable before and after Takeover. Moreover, Claimants do not include the effect of not continuing the imposition of such zoning coefficient in their damage valuation, accepting that any damage resulting from the coefficient was mitigated when ORAB allowed the recategorization of users in 2002. In addition to being purely contractual, this renders the issue moot.

## 2. *Vacation time salaries accrued prior to Takeover*

112. Claimants explain that pursuant to the Bidding Terms and Conditions, AGBA took over the personnel employed by the previous concessionaire (AGOSBA). Such personnel had accrued salaries on account of vacation days due for a period preceding AGBA's Takeover that were to be settled by AGBA, which then demanded reimbursement by AGOSBA and gave notice thereof to ORAB, for a total amount of ARS 96,570.75. The vacation pay claimed by AGBA was for the period accrued while AGOSBA had been in charge of the service, but for vacation time actually enjoyed after Takeover. AGOSBA denied payment through Resolution No. 18/02 of January 29, 2002 (CU-46), and AGBA's appeal (CU-47) was not successful (Resolution No. 237/03 of December 2003, CU-48).

113. Respondent's view is that labor regulations applicable to the sector provided that vacation time cannot be compensated in money and has to be enjoyed in due time and manner. The enjoyment of holidays paid through the salaries was mandatory and could not be replaced by a payment of money. Because there was no benefit of paid holidays to be recovered, no amount was to be recovered from AGOSBA. Respondent points to Article 15.2.1 of the Concession Contract providing that the Concessionaire agrees to be bound by all employee-related obligations imposed by applicable laws, regulations and the collective bargaining agreements. If the Concessionaire disregarded the laws and regulations that were applicable, it could not seek to recover from AGOSBA any payments it wrongly made.

114. The Tribunal notes that this is a purely contractual dispute and that Claimants do not argue otherwise. Section 14-II of Law No. 11820 provides as follows: “The employment conditions governed by the collective bargaining agreement applicable to AGOSBA workers shall apply.” The same rule is to be found in Article 15.2.1 of the Concession Contract. Claimants have not demonstrated that at the time holidays could be compensated by the payment of money and that therefore AGBA settled accrued payment obligations created before Takeover and to be recovered pursuant to Article 15.2.2 of the Concession Contract. The claim is therefore based on most uncertain grounds as a matter of contract law and far away from any consideration of a breach of the BIT.

### 3. *The determination and application of tariffs by AGBA*

115. Claimants contend that many obstacles to the application of the right tariffs by AGBA came up on different occasions, under different circumstances. They explain that at the time of Takeover, billing was done through a fixed-rate tariff method, with the idea that it would be replaced progressively when the metered service was implemented. Tariffs were determined by the provisions of Annex Ñ to the Contracts and Circulars No. 27A, 44A and 58A (CU-49-51), based on rules as follows: (a) The applicable tariff was to be determined on the basis of data from the real estate records. (b) Six categories were established, depending on the value of each lot, each category being assigned a two-monthly water volume of drinking water and a price per cubic meter. (c) For those properties for which no real estate valuation was available, the Concessionaire was required to perform an *ad hoc* valuation. (d) The tariff could not exceed the one set at the last billing round prior to AGBA’s Takeover, unless there were more recent construction developments. (e) At the bidding process, the bidders were supplied with a copy of the real estate records and another of the register used by AGOSBA for billing purposes. (f) The sewage tariff followed the same criteria, but was arrived at by applying a coefficient to the values for the drinking water distribution service; this coefficient was 0.5, and then accrued by 0.1 in each year of the period between 2000 and 2004. In sum, this tariff system required that users were categorized for tariff purposes on the basis of a correct valuation of each respective property. This included an actual assessment of the constructions existing on each property, including the improvements undertaken by the owners since the last assessment.

116. Respondent’s presentation is similar, subject to a statement that AGBA had to gradually implement a metered service tariff regime. The tariff service regime determined on the basis of categories linked to the size of the constructions on the properties was thus transitional, applicable only during the period when the metered service was not yet established.

117. Claimants submit that based on Provincial Law No. 12397 (CU-52), the Province’s Real Estate Records Office’s database of 1958 was updated as per the year 1999.

The Province used the updates of the parcels' valuation for real estate tax purposes from 2000 onwards. Claimants note that the new valuations detected about 120,000 improvements in the properties, which were used by the Province to correct the real estate tax base. Claimants assert that AGBA was never provided with the information; therefore, it was denied any chance to apply the tariffs based on those valuations, which means that it was prevented from applying higher tariffs to those higher-income users that had improved their properties.

118. Claimants further state that the new valuation as approved by Provincial Law No. 12397 became law on December 30, 1999, at a date prior to Takeover, which means that they constituted a pre-existing situation. Therefore, pursuant to the Concession Contract (Sec. 4a-1 of Annex Ñ), it was the updated valuation that AGBA should have used for billing purposes. On February 26, 2001 (CU-53, RA-87) and April 10, 2001 (CU-54, RA-89) AGBA requested to be authorized to use the updated parcels' valuation for real estate tax purposes from 2000 onwards, as this was done for tax purposes on the basis of ORAB Resolution No. 15/00 of March 17, 2000. This request was denied by ORAB.

119. Another discrepancy was mentioned in a Note that AGBA submitted on February 19, 2002 to ORAB (RA-90) and reiterated on April 23, 2002 (RA-260), which explained that AGBA had found 15,500 pre-existing users that had not been correctly categorized. AGBA requested rectification. These users had been included in the real estate tax valuations supplied during the bidding stage. They represented a substantial portion of users when compared to the 80,200 customers on AGOSBA's database.

120. ORAB requested more information on June 28, 2002 (RA-91) and decided thereafter through Resolution No. 74/02 of December 12, 2002 (CU-55, RA-92) that AGBA had to reconcile the billing records received from AGOSBA with those supplied by Circular No. 58(A) and assign to the users of the Concession area such range as may be applicable based on the tax assessment of the properties in the cases listed in the Annex attached to the decision. Claimants recognize that a significant number of users could thus be regularized; however, the said Annex failed to include 2000 incorrectly categorized users and it failed to reflect vacant lots that were actually built-up properties.

121. Claimants submit that said Resolution entailed a drastic deviation from the contractual provisions. It implemented for the users listed in the Annex a different tariff system, each tariff being individually determined by the Regulatory Agency, as specifically stated in the Resolution. AGBA never got to learn the valuation criterion used by ORAB. This entailed an incorrect application of Section 4a-1 of Annex Ñ to the Contract, which provided that the tariff to be applied shall not exceed the tariff determined in the last billing prior to Takeover, provided no new developments had occurred. The cases to which the Resolution applied were those incorrectly valued in the real estate records and

inconsistent with AGOSBA's user register. AGBA never wanted to apply to these properties a tariff different from the one resulting from Annex Ñ. It only wanted to assign these properties to their respective correct categories. So, when the billing changed, there was in fact no change at all in the tariff-system applied. In any event, the correction could also have been covered by the "new developments" reservation in the quoted clause. The damage caused to AGBA became worse when ORAB instructed the Concessionaire to prepare a commercial plan that would address, *inter alia*, the situation of users to be temporarily excluded "due to a verified insufficiency of income." The plan was approved on March 13, 2003 through Resolution No. 5/03 (CU-56). The exclusion of such users was done under the responsibility of the public authorities, not by the Concessionaire.

122. Respondent confirms that in February 2001 AGBA requested to be allowed to re-categorize real estate listed as vacant land but in which constructions had been made on the basis of the new valuation of real estate performed in 2000 by the Provincial Land Registry pursuant to Regulation No. 15/00. In February 2002, AGBA requested from ORAB the recategorization of 15'200 users and to inform whether their tax assessment had been adjusted. ORAB admitted AGBA's request and accepted that AGBA was provided with the necessary information. It was not delaying a solution as Claimants contend.

123. In December 2002, ORAB issued Resolution No. 74/02 which addressed each and every claim submitted by AGBA. This Resolution allowed the Concessionaire not only to reconcile the register in Circular No. 58A with the billing register submitted by AGOSBA, but also to calculate the amounts AGBA was entitled to receive from January 2000 to December 2002. Since the beginning, the measures adopted by the Regulatory Authority aimed at regulating the proper operation of the Concession. It allowed including as billed new users those holding properties being served without being billed. Thus, ORAB allowed AGBA to meet the first-year goals set forth in the POES.

124. At the time of the bid, bidders were provided with information circulars, including Communication No. 16, which made reference to "non-registered services" and a breakdown of AGOSBA's services. This document included a digital plan and a breakdown of the services that had not been registered, further indicating that the figures included were just estimates (RA-251).

125. Respondent further recalls that the Tribunal in *Impregilo* did not find that the alleged inaccuracies in the databases handed over and subsequent correction of errors can be regarded as a misuse of public power.

126. The Tribunal notes that this is a purely contractual dispute and that Claimants do not argue otherwise. Claimants complain that their "justified expectations" with respect to the tariffs to be collected for the services were negatively affected by the actions of

both the Grantor and the Regulatory Agency, which “were contrary to the tariff principles enshrined in the Regulatory Framework.”<sup>20</sup> They do not contend that this would mean that they had been subjected to unfair or unequal treatment at the level of the BIT standard.

127. The Tribunal observes that most of the discrepancies in the users’ categorization are of a limited impact on the overall operation of the tariff system and the ensuing revenue derived from the billing to users. In addition, while Claimants do not address the point, Respondent draws their attention to the fact that the corrections requested by AGBA were relevant for the non-metered system only that AGBA had to replace. Claimants recognize that Resolution No. 74/02 permitted to take the number of incorrectly categorized users down from 12,500 to 2,000 and that it allowed registering users that were served but not billed. Even if a deviation had occurred from the contractual provisions in respect of the users listed in the Annex to said Resolution, the reason was explained by the fact that the valuation made for tax purposes could not simply be converted into the categories of users defined in Annex Ñ for the purposes of setting the applicable tariffs. Therefore, AGBA had to prepare a commercial plan, which was done and later approved in Resolution No. 5/03. In sum, while it appears that some deviations occurred in the proper categorization of users, it appears most unlikely that any violation of the Concession Contract had occurred. The cooperative approach with which both entities – AGBA and ORAB – handled this matter does not point to any serious dispute.

128. It is true, as mentioned by Claimants, that after the approval of the commercial plan in March 2003 complaints were filed with ORAB by users, which caused the Agency to pass Resolution No. 20/03 on September 15, 2003 (CU-61), ordering an audit of the implementation of AGBA’s commercial plan, while simultaneously staying the application of Resolution No. 74/02 to any user who had filed a claim. For Claimants, this meant that the mere filing of a claim had the effect of preventing the Concessionaire to bill the author of such claim according to the contractual provisions. This submission is not entirely correct. AGBA was entitled to collect from these users part payments on account, equal to the amount of the last bill paid, pursuant to Section 28 of Annex Ñ, as explained in Resolution No. 20/03. For this reason and in the absence of any evidence on the impact Resolution No. 20/03 may have had on the billing to categorized users, the Tribunal must conclude that the suspension of Resolution No. 74/02 could not have more than minimal effects on the application of tariffs by AGBA.

129. In addition, the Tribunal notes that Claimants do not offer a quantified valuation of the harm they allege AGBA had suffered. The one exception to this is the amount of ARS 7,720,323 that has been calculated on both sides, by AGBA (letter of July 15, 2005, CU-58) and by ORAB (through its letter sent to the Province’s Undersecretary of Public

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<sup>20</sup> Memorial on the Merits, para. 202.



Services on April 14, 2003, CU-57). It represents the amount that AGBA was not permitted to bill to users, because ORAB limited retroactive charges to six months, as stated in the cases dealt with by Resolution No. 25/05 of September 27, 2005. Claimants explain that this was done so when users complained that they were billed although they did not deny that they had been provided the service. ORAB invoked in this respect Section 31 of Annex Ñ of the Concession Contract. Claimants consider this provision not applicable. The Tribunal notes that while this provision is pertinent to deal with users illegally receiving service without being billed, there are good reasons to accept that it was applied as well to other cases of not correctly billed users, at least by analogy.

130. Claimants accept that the Province had not recognized any obligation to pay the amount of ARS 7,720,323 and that the Undersecretary of Public Services stated that this matter was to be considered in the contract renegotiation. The matter was therefore recognized as a purely contractual dispute on a jointly agreed amount. Respondent notes that proceedings on enforcement of such claim remained available to AGBA. Therefore, the mere existence of such a dispute on an alleged right to payment of such sum of money does not amount to any unfair or unequal treatment under the BIT. Claimants do not submit otherwise. This conclusion does not vary in light of the fact that this amount was accepted as part of a deal resulting from the forthcoming renegotiation of the Contract following the emergency measures taken in early 2002.

#### 4. *Failure to deliver the UNIREC plants*

131. Circular No. 30(A) (CU-63, RA-270) provided that three wastewater treatment plants were to be constructed by the Office for the Coordination of the Reconquista River Project (UNIREC). Two plants were to be built in Las Catonas (Municipality of Moreno) and in Ferrari (Municipality of Merlo) within the Concession Area, while another one was outside this area (Hurlingham). In addition, the already existing Bella Vista Plant (Municipality of San Miguel) was chosen for an expansion project. All four plants were subject to a bidding process other than the one AGBA's stockholders were involved. The three plants in AGBA's Concession area were called the UNIREC plants. The Circular made a distinction between the design and construction phase (scheduled for 20 months) and the operation and maintenance phase (24 months).

132. Claimants explain that these were commitments relied upon by the bidders. The expansion plans were made in consideration of the availability of the effluent treatment plants. Claimants submit that in light of a bidding process started in June 1999, the plants were to be in operation in the first quarter of 2001. From then, they were to be operated for a period of 24 months at no costs for AGBA, as provided in Circular No. 30(A).

133. There is no dispute that on the two new plants (Catonas and Ferrari) works had not even started for the whole duration of AGBA's holding of the Concession.

134. Claimants submit that when the immense delay in the construction of the UNIREC plants became apparent, AGBA's expansion plans were seriously affected, as well as the expectations of the income arising from the network expansion dependent on the operation of these plants. The delays affected the building of AGBA's sewer networks and the corresponding extension of the service. The delay in the expansion of the Bella Vista Plant entailed the extension of an unsustainable situation of irregular wastewater dumping.

135. Claimants further explain that on August 17, 2000, AGBA requested ORAB to provide it with updated information of the UNIREC plants' process and to discuss the matter (CU-64, RA-232). Eight months later, when the plants were already supposed to be in operation, ORAB further requested by letter of April 17, 2001 that AGBA report to it on the reconditioning work and the commissioning in relation to the Bella Vista Plant, as if this had to be carried out by the Concessionaire (CU-65). AGBA replied on May 2, 2001 that this was a plant that should have been fully operational prior to ORAB's demand to the Concessionaire (CU-66). ORAB's only response was to send AGBA the information received from the President of UNIREC on July 10, 2001 (CU-67), where it was stated that under the actual economic and financial situation, it was not possible for the Province to commence the works.

136. For Claimants, this meant that the UNIREC's President acknowledged that the plants' situation was the responsibility of said unit and that the whole process had suffered material delays and was halted due to the impossibility to secure financing, as a result of the economic-financial situation of the Province. From the reactions received from ORAB, notably by a letter of November 12, 2001 (RA-239), it appeared that the Agency's intention was to have the Concessionaire taking over the works on its own expense. However, AGBA could not carry out works that were the subject of an ongoing bidding process. AGBA never took over the Bella Vista Plant. On October 23, 2003, ORAB accused AGBA of failing to fulfill the Contract provisions related to this plant, through Resolution No. 32/03 of October 23, 2003 (CU-68, RA-198, 214), which relied on Resolution No. 25/03 of September 17, 2003 (CU-69).

137. AGBA challenged Resolution No. 32/03 (CU-72, RA-199) and submitted a technical proposal for the reconditioning of the plant. On March 25, 2004, the Agency asked that the existing facilities at the Bella Vista Plant be emptied in order that their condition can be verified (CU-73). On September 15, 2005, the Water Control Agency of Buenos Aires (OCABA) – the new Agency succeeding to ORAB – advised AGBA that the rehabilitation and expansion work to be performed at the Bella Vista Plant will start on September 20, 2005 (CU-74). Claimants note that as a matter of fact, the works had not even started when the Concession Contract was declared terminated.

138. Claimants further observe that at the request of the Ministry of Infrastructure and Public Service (Resolution No. 84/06 of March 10, 2006, CU-75), OCABA issued a report, dated April 21, 2006 (CU-76), stating that the San Miguel sewage treatment plant was virtually non-existent, overlooking the fact that this plant had been out of operation since before Takeover by AGBA and that responsibility for works to be done had been placed with UNIREC. OCABA also contended that the plant was included in the list of assets submitted by AGBA upon taking over of the Concession. It was relied on an inventory, but this document could not be found in the file. Decree No. 1666/06, declaring the termination of the Concession, merely repeated the same statement. One month after that Decree, OCABA finally ruled on AGBA's challenge of Resolution No. 32/03 (Resolution No. 44/06 of August 8, 2006, CU-77).

139. Claimants contend that the Grantor did not just fail to fulfill the obligations undertaken by means of Circular No. 30(A), requiring the putting of the plants in active service at the defined date. It also tried to hold AGBA responsible for such breaches, taking the condition of the Bella Vista Plant as a reason for termination. Claimants also complain that Respondent focuses the discussion of the UNIREC plants on the Bella Vista Plant. But this plant was just one of the plants that had been placed under the UNIREC's charge as per Circular No. 30(A). The operation of the UNIREC plants would have allowed AGBA to serve an additional 378,000 users in the sewer system (98,000 in Ferrari, 200,000 in Las Catonas, and 80,000 in Bella Vista), plus 300,000 users who were not connected to this network but were served through septic pump trucks that discharged their loads into these plants. Claimants rely on Witness Quijada, explaining that AGBA had to interrupt work on projects to take wastewater to the purifying plants and to develop new projects in other areas of the Concession, thus causing a waste of time, given the fact that such a project needs at least five months to be workable.<sup>21</sup>

140. Respondent admits that during the time when a bidding process had to be conducted, AGBA proposed several measures to put the Bella Vista Plant into operation. The Regulatory Authority understood that the measures proposed by AGBA could improve the existing conditions and thus requested that UNIREC provisionally transfer the ownership of and control over the Bella Vista Plant to the Concessionaire, so that AGBA could begin the works in this plant (letter of August 14, 2001, RA-235). In response, UNIREC informed that the facilities of the Bella Vista Plant had never been transferred to it and that it had no records of them (letter of September 11, 2001, RA-236). Therefore, AGBA was informed by ORAB that the plant was not under the control of UNIREC but under its own control, since it had been transferred to the Concessionaire upon Takeover together with all assets referred to in chapter 7 of the Concession Contract and included in the inventory established under Section 6.4.1 of the Contract. Therefore, as the plant was under AGOSBA's control, it must have been transferred to the Concessionaire.

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<sup>21</sup> Cf. Quijada I, paras. 287-294, II, paras. 48-62; TR-E, Day 2, p. 28/7-30/12.

141. Respondent notes that given that the state of emergency was declared in the Province, UNIREC's contract to build the plants could not be executed. The Bank of Japan did not guarantee the disbursement of funds under the loan agreement, which is reason why the contract was suspended. Therefore, the Province decided to grant the permit requested by the Concessionaire to be able to implement measures for the purpose of improving the conditions of the Bella Vista Plant (ORAB's letter of September 28, 2000, RA-233). In its letter of December 13, 2001, AGBA denied that it had performed any reconditioning work in the plant, but stated that it had merely cleaned its input structures to improve the flow of the collection networks to prevent overflow (RA-197). On July 8, 2003, after it had conducted an inspection of the plant, ORAB issued Resolution No. 32/03 of October 23, 2003 (RA-198, 214, CU-68), stating that the Concessionaire had breached its obligations regarding the effluents of the sewage treatment plant and that such breach was subject to a fine. AGBA challenged such Resolution on the basis that they were not in control of the plant (RA-199, CU-72). ORAB recalled to AGBA that the sewage treatment plant had been transferred to it under the terms of Article 43-II of Argentine Law No. 11820, as it was one of AGOSBA's assets and that UNIREC's obligation to expand it did not change that.

142. The Tribunal observes that the focus of the Parties' debate is on the Bella Vista Plants' situation. In this respect, the Tribunal notes that a preliminary point should be addressed in respect of an alleged transfer of property of the plant. Respondent affirms that the plant had been transferred as all other assets upon Takeover to AGBA. It refers to Circular No. 73(A) that excluded from such transfer the personal home of the person in charge of the plant. This Circular has not been submitted to the Tribunal and cannot serve as evidence of the transfer of the whole plant to AGBA. Respondent's reliance on chapter 7 of the Concession Contract and on Section 43-II of Law No. 11820 does not assist Respondent's position either, as these legal sources do not identify each item being part of the assets allocated to the service of the Concession. Section 7.2 of the Contract seems to point in the opposite direction, stating that upon Takeover, the Concessionaire shall be transferred possession of all assets allocated to the Service owned by the Province and AGOSBA. Such "Service" includes any work required for service provision, including maintenance, rehabilitation and expansion work (Sec. 1.4). As far as the Bella Vista plant was concerned, Circular No. 30(A) charged UNIREC with these activities, which implies that this plant was not included in AGBA's scope of service and therefore not transferred into its possession and property.

143. The Tribunal cannot assess whether an allocation of the Bella Vista Plant to AGBA was contained in the inventory prepared by AGBA upon Takeover, as such document has not been filed with the Tribunal. Respondent refers to a letter addressed by AGBA to ORAB on June 22, 2001 (RA-238), which does not, however, contain such inventory; the letter is a mere cover-letter for submitting such documentation, that may have been annexed but has not been submitted to the Tribunal. Respondent's reference to

Annex L of the Contract does not help either, since the content of this Annex has not been provided, nor the text of Circular No. 73(A) to which it refers. Any transfer to AGBA seems most unlikely when considered in light of the final clause of Circular No. 30(A) that provided for the transfer of the plants to the Concessionaire upon completion of the project to be performed by UNIREC only and not before.<sup>22</sup> It seems that at the time ORAB was not of the view that the plant had been transferred to AGBA, when it wrote to the UNIREC President on August 16, 2001 (RA-235) whether “si puedo transferirse específicamente la planta depuradora de Bella Vista al Concesionario”.

144. On the other hand, Claimants’ position that UNIREC was in charge of the plants does not imply that a transfer of property to that entity had occurred. When asked by ORAB whether it could agree to a transfer to AGBA for the purpose of reconditioning the plant, UNIREC replied in its letter of September 11, 2001 to the Agency that the Bella Vista Plant had not been transferred to UNIREC and that no property of UNIREC was registered in this respect. This seems most likely correct given the fact that no works were undertaken on UNIREC’s part. Respondent further submits that due to the emergency situation, the work contract could not be subscribed. Therefore, in the absence of evidence of a transfer of the Bella Vista Plant either to UNIREC or to AGBA, the ownership was with ORAB pursuant to the provision of Section 29-I of Law No. 11820 stating that ORBAS shall own all such assets owned by the AGOSBA for the fulfillment of the objectives of the service. AGBA’s proposal to refurbish the Bella Vista Plant was therefore certainly connected to work to be done under the Concession in the neighborhood of the plant or even beyond, but it was not included in the Concession Contract’s scope because it was not, or, at least, has not been evidenced as an asset transferred to the Concessionaire.

145. The Tribunal notes that there is no dispute that the Ferrari and Catonas plants had not been constructed in the districts of Merlo and Moreno, respectively. On the basis of the evidence before this Tribunal, the expansion of the Bella Vista Plant was equally left under the Province’s responsibility in light of the impossibility to start the work initially envisaged for UNIREC. The performance of this work was contractually agreed through Circular No. 30(A) that is part of the Bidding Conditions and thus part of the Concession Contract. Nothing in the Parties’ submissions allows a conclusion that the failure to perform these works was caused otherwise than for the reason that the Province was unable to secure the required financing. This is a serious contractual breach, which will have to be further examined. The debate on the fate of the Bella Vista Plant will also be dealt with in relation to the decision on termination, where AGBA’s alleged failure of proper conditioning the plant has been mentioned.

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<sup>22</sup> It may also be noted that ORAB’s Resolution No. 7/01 of January 31, 2001 approved AGBA’s proposal for the first Five-Year POES, where it was stated that in respect of the San Miguel facilities, including Bella Vista, “reconditioning and expansion activities have been envisaged by the UNIREC” (page 41). It may be assumed that ORAB would have objected to this statement if the Bella Vista plant had been effectively transferred to AGBA.

146. The Tribunal understands that this is a purely contractual dispute and that Claimants do not argue otherwise. There is no reason to qualify the failure to perform this contractual undertaking otherwise than as a breach of contract. As such, the Province's lack of performance does not amount to a breach of a guarantee provided for in the BIT. As stated, the topic to be retained for further consideration is the alleged consequence of this lack of performance on the overall operation and expansion of the network, which may take the matter to a level that could allow the investors to raise an allegation based on unfair and unequal treatment under the BIT. However, doubts come up immediately in light of AGBA's statement in its letter of May 17, 2001 (CU-173, RA-183) that expansion work had been recently interrupted for reasons of low collectability, and that it requested expansion goals to be temporarily suspended. When expansion work was interrupted as a consequence of a failure to secure sufficient income, the missing UNIREC plants could not be the cause of impossibility to pursue expansion work.

5. *The prohibition of applying the connection and work fees*

147. Claimants' first allegation in this respect is related to the prohibition for AGBA to charge work fees. They explain that early after Takeover, AGBA started with work in neighborhoods that had never been served and where there was only buried piping. AGBA performed locating and turning those non-operational pipes into the system, fit for service provision. These actual service expansion works were provided for in the POES. Such work was to be carried out in the towns of La Guardi and Sarmiento, Primavera and Grand Bourg.

148. In reply to ORAB's letter of July 10, 2001 (CU-78), AGBA had explained in its letter of July 20, 2001 to ORAB that it had charged a work fee in some Municipalities only and that it was legitimate to do so (CU-79). The ORAB ordered AGBA to refrain from such service billing (CU-80, RA-98) and requested additional information (CU-81). AGBA provided the information and expressed ORAB's lack of authority to suspend the Concessionaire's billing by a letter dated August 22, 2001 (CU-82). After a further exchange of statements (CU-83-86, RA-99), the Agency passed Resolution No. 14/02 on February 12, 2002, ordering AGBA to refrain from issuing bills containing the work fee (CU-87, RA-95). It contained no ruling whatsoever about the applicability or inapplicability of the work fee, but merely mentioned that AGBA had not filed the requested information.

149. Much later, on August 6, 2003, ORAB made another request for information (CU-88) to which AGBA again replied (CU-89). On November 28, 2003, ORAB denied the challenge raised by the Concessionaire against Resolution No. 14/02 (CU-90, RA-100). On the one hand, this new Resolution No. 33/03 justifies the denial of the challenge, arguing that the Concessionaire had failed to supply the required information, while on the other hand, it acknowledged that ORAB had that information available. At that time,

AGBA had already added 15,000 users in the municipalities affected by the billing suspension.

150. Claimants submit that until the time of the Contract's termination, the work fee billing suspension had never been lifted, nor did ORAB provide the analysis it undertook to make on the basis of the information provided by AGBA. AGBA challenged the latest ORAB Resolution before the Courts. Getting paid such fee was essential to be able to fund the expansion works, which were provided for in the POES. AGBA was kept from collecting such fees by ORAB who had no authority to do so. The work charge was related to installations that were not in place or were completely unusable. The Grantor was determined not to allow AGBA to be paid the charges it was entitled to, amounting to the sum of ARS 963,160 for work charges in 2002.

151. Respondent points to the fact that the areas where AGBA wanted to bill such work charge had, in fact, water and sewage networks since the Province had installed them before Takeover. It was therefore not reasonable to allow to levy a work charge, which was an amount to be paid as a contribution to funding costs of the "expansion of the residential network built by the Concessionaire," as provided in Section 10 of Annex Ñ to the Contract. The allegations made by Claimants relate to this provision and are a typical contract dispute, which cannot involve any responsibility under the BIT.

152. Respondent explains that in early 2001, ORAB began to receive claims from users arguing that the work charge was being levied on users despite the fact that they lived in areas where the water and sewage works had been executed by the Province before Takeover. The amount was high, ARS 150 for water and ARS 250 for sewers, far above a monthly bill charge of ARS 6. The Town Council of José C. Paz complained that the work charge was billed to users in an area where 90% of the works had been performed by AGOSBA. ORAB requested that AGBA furnish detailed information on the works carried out. In response, AGBA only submitted a copy of the letter sent to the Concessionaire by the President of the Users and Consumer Committee of the Senate of the Congress of the Province of Buenos Aires and the response thereto (RA-97). Since this information was insufficient, the Regulatory Authority determined that until all information requested was received and analyzed, AGBA was not to levy the work charge (RA-98). Although AGBA sent several letters providing more explanation to ORAB, it never submitted the documents requested. In February 2002, ORAB's Technical Area determined that many of the works that AGBA put into operation had been built by the Province (RA-99). By Resolution No. 14/02, ORAB ordered AGBA to stop issuing bills applying the work charge to users living in the neighborhoods in question.

153. AGBA's appeal was rejected by Resolution No. 33/03. ORAB did not object to AGBA's right to levy the work charge when it performed expansion works pursuant to Section 10 of Annex Ñ to the Concession Contract. It requested AGBA again to submit

information proving the existence of investments and works relating to the expansion of the networks. Respondent notes that ORAB understood that these were not new but pre-existing connections. The Company never provided information demonstrating that the application of the work charge was appropriate. In February 2004, AGBA filed a legal claim against Resolutions No. 14/02 and 33/03 (RA-101). AGBA was never deprived of the right to collect the work charge, but simply the work performed had to be verified by ORAB in order to determine whether AGBA actually had the right to collect it. The collection right was never forbidden, but was only suspended awaiting the provision of information from the Concessionaire in order to allow the verification of the admissibility of the fee.

154. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. The work charge is an amount to be paid by the users when they are connected to the services for the purpose of contributing to “funding the expansion of the residential network built by the Concessionaire” (Sec. 10 of Annex Ñ of the Concession Contract). The dispute relates to the understanding of the terms “expansion of the network” in cases where a significant part of such work had already been done before Takeover. Witness Cinti stated that AGBA charged the work charge to many users for pre-existing work.<sup>23</sup> The dispute further relates to the proper information required from AGBA to get the ORAB’s approval for the billing of the work charge. The Tribunal understands that the provisions of Annex Ñ do not reveal the desired clarity to allow dealing appropriately with these issues. It also understands that AGBA’s insistence on billing the work charge was not supported by extensive information on the works done as requested by ORAB.<sup>24</sup> In any event, these matters are completely irrelevant for dealing with the dispute before this Tribunal as they are far away from any breach of the BIT.

155. As per their second allegation, related to the collection fee, Claimants explain that at the date of Takeover, the service provided in certain neighborhoods had serious deficiencies, as the condition of the existing connections was very poor, lacking the most fundamental technical standard. This infrastructure represented a substantial sanitary risk for the users. AGBA verified the situation a few days after the taking over of the Concession and set in motion the restoration of the existing basic facilities. It also performed a survey of the properties covered by these networks, which had not been authorized and for which no data were available from AGOSBA, on the basis of which AGBA could have started billing the users.

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<sup>23</sup> Cinti I, paras. 63-67, II, para. 43; TR-E, Day 3, p. 134/16-23.

<sup>24</sup> Witness Cerruti I, paras. 84-102, complains at length about ORAB requesting disproportionate amounts of information, however without providing information permitting the Tribunal to identify most of the content and the scope of such requests. The Witness extends far beyond his role when he concludes that ORAB’s requests had the purpose “to pursue its political ends by forcing AGBA to stop billing what was its lawful right, *i.e.* the Work Charge” (para. 103). Neither can the Witness have knowledge sufficient about ORAB’s “political ends” nor is he an expert on AGBA’s “lawful right.”



156. As per Resolution No. 44/00 of June 14, 2000 (CU-93), AGBA had to stay with ORAB's refusal to bill the connection fee in certain neighborhoods. Indeed, in a number of communities, AGBA was only entitled to bill users and get paid for the provision of services as provided for in Annex Ñ to the Concession Contract, exclusive of the connection fee. ORAB considered that in the communities identified on the list available to the bidders' service had been provided already by AGOSBA; this meant that they had to be part of the served area. ORAB acted reprehensibly as it only objected to billing the connection fee when AGBA had already completed a large portion of the works, even though it had been timely advised of the Concessionaire's intention and plans. When such objections were raised, the users were considered as served users, but could not be billed as from the Takeover onward because they were informed by AGBA that their connection needs first to be redone and completed. Through Resolution No. 51/01 of October 17, 2001 (RA-94), ORAB dismissed AGBA's challenge of Resolution No. 44/00, claiming that AGOSBA already provided the service but did it free of charge, which explains that these users were not included in this Concessionaire's database.

157. Nevertheless, Claimants submit that this position appears inconsistent, as the Agency had considered such connections as part of the service expansion works when approving the POES progress report for the first year of the concession term. As to works dating back to AGOSBA's time, their condition was so poor that new connections had to be installed and the defective, existing ones refurbished. This caused AGBA to incur material expenses. The Regulatory Agency had assessed the value of those works as expansion works in its analysis of the POES for the first year. The damages resulting from the prohibition on collecting those charges was \$ 3,362,000 for 2000.

158. Respondent explains that the Concessionaire was authorized to levy the "connection charge" on users every time a new residential connection was installed, as provided in Annex Ñ, Section 11. Claimants groundlessly contend that ORAB banned AGBA from levying such connection charge. When in April 2000, AGBA informed ORAB that it would begin to bill such charge to users who had been provided with service by AGOSBA but were not billed for it, this request was rejected by ORAB who reminded AGBA that it could request payment of such a charge from users only where a new residential connection was made. During the bidding process, the bidders were informed of the number of users that were not included in AGOSBA's user register but were being served nonetheless. Information Communication No. 16 contains a list of the amount of such connections (RA-251). AGBA nevertheless contended that the service that had been provided by AGOSBA was insufficient as to the quantity and the quality of the water flow, which had been the reason why they had never been included in the user register.

159. Respondent objects to Claimants' statement that AGBA was allowed to consider such users as new connections for the purpose of the POES. Such connections cannot be

considered as “new,” because they already existed when the service was taken over. Users could be billed for a connection charge only after installing a new home connection.

160. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. The connection fee is to be paid by users when they are connected to the network (Sec. 11 of Annex Ñ of the Concession Contract). The dispute relates to the understanding of the terms “connection” when service had been provided before Takeover, but the connection required being re-established when AGBA became the service provider. The Tribunal understands that the provisions of Annex Ñ do not reveal the desired clarity to allow dealing appropriately with these issues. While ORAB’s position seems rigid in this respect in many cases where a connection was in such poor condition that it was required to be redone entirely, it can also be argued that users listed as such qualify as being connected before Takeover with the effect that they could not be charged by AGBA for the same. In any event, it is beyond any doubt that these matters are completely irrelevant for dealing with the dispute before this Tribunal as they are far away from any breach of the BIT.

161. The Tribunal also notes here and will explain in the next Chapter that when the approval of the POES report for the first year was given, a number of works were qualified as service expansion works while as a matter of fact they were not. The decision made by ORAB in this respect had as its sole purpose to justify the approval of this report by a re-categorization of parts of the works. It had not the effect of re-attributing those works to the expansion works for other purposes, such as the determination of work and connection fees, which would have had direct effects on the users’ bills for which the POES could not serve as basis.

#### 6. *The obstacles to the implementation of the collection mechanism*

162. Claimants explain that the tariffs were the only source of income for the Concessionaire. It was therefore important for AGBA to be able to apply all the means and instruments approved in the Regulatory Framework to enforce the users’ payment obligations. It was essential to put into operation an efficient billing and collection process, as well as payment controls and effective means to act in front of delinquent or reluctant users. Claimants had invested in reliance on the effective instruments to secure high collection rates contained in the Regulatory Framework.

163. AGBA had to deal with a relaxed and permissive policy applied by the Province in the period before Takeover. Pre-existing users were those who were provided with service and listed on AGOSBA’s commercial database and thus billed for the service. The remaining users were provided with some kind of service provided by AGOSBA without ever be billed for it. It was necessary to implement a policy to make the users aware of the need to pay for the services they received.

164. Claimants contend that the repeated interference of the Regulatory Agency caused the Concessionaire's legitimate attempts to collect on the bills to fail repeatedly. In fact, the Agency defended delinquent users, thereby causing paying users to become frustrated, and further adversely affecting the collection rates for pre-existing users. ORAB's means to hinder the implementation of collection tools were, most notably: (a) prohibition of service interruption, (b) prohibition of instituting payment enforcement proceedings, (c) prohibition of requests to delinquent users for the reimbursement of certain private collection efforts, and (d) interference with the manner in which delinquent users were managed.

165. Claimants' first allegation in this respect relates to the prohibition for AGBA to interrupt service for users not paying their bills. Section 15-II of Law No. 11820 states that the Concessionaire has the power to proceed with service interruption on account of non-payment as provided in Section 34-II, stating: "The Concessionaire may interrupt service provision in the event a User is late in paying the corresponding bills, notwithstanding the applicable late charges and interest." Section 29 of Annex Ñ enshrined this same right. An exception applied whereby the Agency was allowed to order the interruption of services be suspended, but this only "temporarily" and "in unforeseen and extraordinary circumstances."

166. Acting through a constitutional summary action ("amparo"), a user in the Municipality of Moreno obtained a precautionary measure declaring that service interruption due to lack of payment was unconstitutional. AGBA filed a judicial appeal against such measure, which was partially allowed but not in respect of the suspension of service interruption to the petitioner. AGBA asked the authorities to take action (letter of July 30, 2001, CU-94, and of October 24, 2001, CU-95). It did so again by letter of January 11, 2002 (CU-96) when the Court extended the precautionary measure to all residents of the Municipality of Moreno (Order of December 27, 2001). The Justice of Peace rendered judgment on August 21, 2002, ruling that the service could not be interrupted in the Municipality of Moreno (CU-97). The Court of appeals affirmed on October 17, 2002 the latter's decision and the unconstitutionality of Section 34-II of Law No. 11820 (CU-98).

167. Through Resolution No. 56/02 of August 27, 2002 (CU-102, RA-204), AGBA and ABSA were instructed to suspend any notice in relation to interruption of service to (1) users in category 1 of non-metered service which were under poverty or extreme poverty conditions while the economic emergency persists and (2) retired people included in categories 1 and 2 of the non-metered service. In its Resolution, the Agency referred to the economic emergency, even though ORAB had not the authority to alter the Concessionaire's rights under the Regulatory Framework. AGBA received no compensation to make up for the losses it sustained as a result of the measure. In addition, the Province burdened the Company with the obligation of determining which users fit into the poverty

category. But AGBA could not comply with such an obligation. This resulted in the service interruption prohibition being extended to all users in Category 1, irrespective of their social and economic situation (as acknowledged by ORAB in its letter of March 18, 2004, CU-105), as well as to all pensioners in categories 1 and 2. Claimants contend that the Regulatory Framework cannot be relied upon to justify a measure that is in conflict with it. The authority of the Province as defined in the Regulatory Framework and the principle of the Concessionaire's risk cannot justify the Province's Resolution.

168. AGBA's challenge of Resolution No. 56/02 failed (Application of September 20, 2002, CU-103; Resolution No. 45/03, CU-111). On August 27, 2003, AGBA wrote to the Agency that its Resolution worsened the "non-payment" pattern to the detriment of AGBA, causing a loss of USD 26,179,281.26 for which it requested the Grantor's compensation (CU-106). ORAB replied on September 18, 2003 (CU-107) that the matter was covered by the company's risks and that the supply of water was essential for people's lives; it rejected AGBA's request again on October 9, 2003 (CU-109). On September 29, 2003, AGBA received a reply from the Minister of Infrastructure, Housing and Public Services that its requests were rejected (Resolution No. 636/03, CU-100).

169. Later, the New Regulatory Framework, as adopted through Decree No. 878/03 of June 9, 2003 (CU-125, RA-175), prohibited full service interruption and created the obligation of a "minimum and vital supply" which would be due to all delinquent users affected by "service interruption." This means that such interruption was substituted by a water flow reduction, which created a new discriminatory distinction between delinquent users subject to a water flow reduction and delinquent users who could enjoy the service in spite of not paying for it.

170. Claimants affirm that the measures adopted by the Agency and the Grantor had as their direct result an increase in delinquency rates. Users received the assurance that they would be supplied with a service, albeit reduced to a minimum, even if they failed to pay their bills, and they were ensured that they would not have to suffer an interruption of service. This had a negative impact on AGBA's income.

171. Respondent confirms that the ruling of the Justice of Peace sitting in Morena declaring the unconstitutionality of part II of Section 34 of Law No. 11820 had the effect that several municipalities decided to adhere to it. This remained so when the Court of Appeals of the District of Mercedes upheld the decision. On September 29, 2003, the Province's Ministry of Infrastructure, Housing and Public Services dismissed AGBA's request to intervene (CU-100).

172. Respondent adds that Resolution No. 56/02 was a transitional measure taken for the duration of the economic emergency. It did not intend to encourage users to incur debts, let alone to compromise AGBA's revenue.

173. Respondent submits that the limitations on the service interruption were applied in virtually all jurisdictions of the Argentine Republic. The interruption of the service in the context of the crisis would have been detrimental to AGBA and far from improving its collectability level, which was poor in 2000 and in early 2001. The suspension of interruptions of services was also the result of the fact that AGBA always showed an uncompromising attitude that directly influenced the right to water assured to the entire population and forced the State to act to prevent infringement upon such fundamental rights as the right to access to water.

174. Respondent recalls that it was explained to AGBA why it had been requested not to continue cutting off the service. This was mainly due to the economic situation that was being undergone as well as a series of claims filed by users. Claimants insist that cutting off the service would have the effect of encouraging delinquent users to pay their invoices. This argument is not correct, because it would have resulted in collectability problems getting even worse.

175. Respondent also notes that AGBA did not itself believe in the benefits of interrupting the service when it stated in its letter of May 17, 2001, before the emergency was declared, that given the fact that over 50% of delinquent users were concerned, “it would not be sensible to exercise these rights in a generalized manner, that is, beyond interrupting the service in a selective and specific manner” (RA-183, CU-173). The Concessionaire itself understood in this letter that it would not be advisable to use measures such as discontinuance on a widespread basis. In the Annual Report and Financial Statements of 2005, AGBA listed a great number of new approaches for pre-legal and personalized collection for some customers and for out-of-court collection for others (page 5). The Company also began working on improving the existing tools for the different types of collection for the purpose of facilitating and expediting such activities (RA-269, CU-32).

176. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. Claimants cannot deny that their alleged right to interrupt service to non-paying users was not absolute. AGBA was aware that ORAB had the power to issue directions and that one of the most important objectives was protecting public health and the environment across the territory of the Province (Sec. 19-I(a) of Law No. 11820). ORAB was authorized under the Concession Contract to direct the Concessionaire to suspend the interruption (Annex H, Sec. 60); it could also order the Concessionaire to temporarily discontinue the interruption under unanticipated or extraordinary circumstances (Sec. 62, lit. f). In its Resolution No. 56/02 (CU-102, RA-204) ORAB argued heavily that it acted in pursuit of a “universal public service as a right to which all the inhabitants of the province are entitled and safeguarding the rights provided for in the Constitution” and that it had to guarantee “the purpose of protecting underprivileged users.” By contrast, Claimants invoke their lack of income and see in this Resolution simply a measure caused by the emergency. This certainly does not represent the whole picture of the situation at

the time, when a considerable number of users in category 1 were no longer capable of affording the water and sewage service which was part of the support they were entitled to in respect of their health and life.

177. Moreover, while Claimants understandably insist on the application of the provisions of the Regulatory Framework, they must admit that they had no right to invoke a provision that was declared unconstitutional and that ORAB's mission was to ensure that such provision was no longer applied. Law No. 11820 did not anymore contain Section 34-II from the moment when it was established that this rule was in breach of the Constitution. When the Regulatory Framework declared Law No. 11820 applicable to the Concession, it did not include a provision of that Law that was not applicable because it was found in violation of the Constitution. One can also understand the situation otherwise and qualify the declaration of unconstitutionality as an amendment of Law No. 11820, which was included in the Concession Contract's definition of this Law (Sec. 1.2).

178. Even if one would admit that ORAB overestimated the seriousness of a pressure put by the Concessionaire by threatening non paying users with an interruption of service, Claimants' allegations have to be weighed against AGBA's position that insisting on interrupting services to non paying users was not an efficient measure in many individual cases and was not a policy to be implemented on a large scale. In light of the serious problem caused by the high uncollectability rate, pursuing a strategy of interrupting services to users with uncollected bills was certainly not a remedy with a great perspective of success. In this respect, Claimants' allegations appear excessive and unbalanced when compared to the broader picture of a Concessionaire not being capable of resolving the threat caused by the considerable number of unpaid bills. In any event, the matter represents a dispute in contractual terms and Claimants do not argue otherwise.

179. Claimants' second allegation in relation to the users' reluctance to pay their bills addresses the prohibition addressed to AGBA to institute payment enforcement proceedings. On April 20, 2005, ORAB, acting through Resolution No. 07/05 (CU-112), required the Concessionaire to prove to the Agency prior to instituting enforcement proceedings that it had complied with its obligations and duties under Section 3 of Provincial Law No. 13302. Such provision implemented a 180-day stay of foreclosures on a debtor's home when the relevant tax valuation was low and a 1-year stay if the debtor was unemployed. The Agency wanted to apply such provision, which was intended to protect housing rights, to the service provided by the Concessionaire, with the result that AGBA was kept from instituting enforcement proceedings for a period of 180 days and 1 year in the case of unemployed customers. This did not comply with Section 33-II of Law No. 11820 providing that the Concessionaire could seek judicial collection through a payment enforcement proceeding. In addition, this regulation shifted the burden of proof onto AGBA by requiring it to prove that customers were actually employed. AGBA challenged said

Resolution on May 5, 2005, and requested that its effect be stayed (CU-113). The challenge was never ruled upon and the said Resolution remained in force until the termination of the Concession Contract. This had the effect of further encouraging non-payment of service provided.

180. Respondent explains that Provincial Law No. 13302 (RA-205) was adopted for the purpose of protecting users living in their sole family home (with a value of not more than 90,000 pesos) and those unemployed upon enactment of the law on January 27, 2005. Provincial Law No. 13302 was applied to any public service and so all foreclosures were suspended. Legislators wished to protect the owners of a sole family home from the alleged refusal to reimburse collection expenses. ORAB was under an obligation to intervene in all matters relating to the activity of providers of drinking water and sewage services. This included granting protection to the users subject to Law No. 13302. AGBA's 2005 Financial Statement makes reference to such procedures.

181. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. Law No. 13302 did not apply before January 27, 2005 and was therefore of limited consequence for the operation of the Concession. Under the Concession Contract, the question may be raised whether AGBA could be instructed by ORAB to proceed with enforcement measures on the basis of the New Regulatory Framework contained in Decree No. 878/03, as stated in Resolution No. 07/05. This is a point of very minor importance. It may be thought that the new rules could be considered as an amendment or supplement to Law No. 11820, as defined in Section 1.2 of the Contract. The issue seems to be moot, because said provision is of a similar content as Section 33-II of Law 11820. In any event, this topic has no link to an alleged breach of the BIT.

182. Through their third allegation related to the collection of bills, Claimants refer to both Sections 26 and 30 of Annex Ñ to the Concession Contract and Section 42 of the Customer Rules (RA-102) as a basis for AGBA's right to recover the expenses incurred as a result of private collection of delinquent bills and to charge financial and late interest. Such obligation to pay additional costs constituted also an incentive for users to pay their bills on time. On January 7, 2002, AGBA requested ORAB to be authorized to bill delinquent users accordingly (CU-115). Such request was all the more indicated because of the material increase in the bad debt rate.

183. On October 31, 2002, ORAB denied AGBA's petition (Resolution No. 63/02, CU-116, RA-206), arguing that private collection efforts fall under the general service expenses that the Concessionaire could have estimated into its bid. However, the aforementioned provisions of the Contract allowed for separate billing of such costs upon prior authorization by the Agency. ORAB was invoking Section 1 of Annex Ñ, under which the users were not required to pay any amount "other than those resulting from applying

the Tariff System in connection with Service availability and provision.” Such tariff regime did not cover costs resulting from users’ failure to fulfill their obligations to make payment for the services provided to them.

184. In Claimants’ view, this is yet another situation causing an increase in the bad debt level and encouraging a “culture of non-payment.”

185. Respondent explains that the Regulatory Authority made such decision since it was in charge of exercising the police power over all sanitation services. Article 12 of the Concession Contract provides that no amendment thereto may be used as a means to compensate for deficits derived from the Concessionaire’s business risk.

186. Section 1 of Annex Ñ provides that users shall not pay the Concessionaire any amounts other than those resulting from the application of the tariff regime in relation to the availability and provision of the service. This means that users were not required to pay any amounts other than those expressly set forth in Annex Ñ to the Contract or those resulting from tariff reviews pursuant to the procedure provided for in Chapter 12. Therefore, it was impossible for ORAB to admit AGBA’s request, since the charge proposed derives from the principle of business risk.

187. Respondent also observes that the tariff regime set forth the interest rate applicable to late payments, which is a penalty imposed on users for non-payment of bills (Annex Ñ, Sec. 26). This means that the breach of the main obligation of users is penalized with the interest rate applicable to cases of delay in payment. Moreover, Section 30 of Annex Ñ is not applicable to AGBA’s request, since it relates to works that must be materially done by the users. AGBA was also informed that its request under Article 42 of the Consumer Rules was not retained because the collection of users’ payments was part of the Concessionaire’s service to be provided and of its business risk. In this respect, the bidders were aware of the service collectability percentages and the costs it would incur to enhance such collectability.

188. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. Late payment by users was to be compensated by interest, as provided in Section 26 of Annex Ñ. Beyond that, Claimants do not refer to a rule providing that the tariff regime would include, in addition, costs related to the collection of bills. In any event, this topic has no link to an alleged breach of the BIT.

189. In support of their fourth allegation in respect of collection of bills Claimants further complain that the Agency also tried to control the expressions used by the Concessionaire in its notices sent to non-paying customers. On November 17, 2003, AGBA was served with a letter from ORAB stating that the Concessionaire should pay attention to the language of its notices, given the anxiety and dissatisfaction they create, particularly



amongst the low-income population. Claimants contend that such letter was based on merely political views of the Regulator and interfered with the Concessionaire's legitimate actions. ORAB prevented the Concessionaire's use of tools given to it in the Regulatory Framework to secure collection on the service bills. ORAB's actions reduced AGBA's income and, in addition, caused an increase in bad debts. Thus, the Concessionaire was kept from exercising one of its basic rights, which is the right to secure collection of the amounts due for the services it provided.

190. Respondent denies that the Grantor and the Regulatory Agency interfered with the handling of delinquent users by prohibiting AGBA from using certain language in its notices to users. ORAB's intent was to assist AGBA and to avoid the population's dissatisfaction. It never intended to limit its right to collect unpaid bills. The intention was to cooperate and not to generate greater dissatisfaction among users due to the seriousness of the crisis being undergone at that time. Claimants' arguments that they were prevented from exercising their right to collect payment lack any ground.

191. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. AGBA had experienced some progress in improving its way of dealing with users reluctant to pay their bills. This included a change in the mode of expression of payment demands. There is no showing from Claimants why a recommendation of such a nature from the authorities would have prevented AGBA from improving its collection of bills, quite to the contrary. Raising such a claim before this Tribunal by (implicitly) arguing an alleged breach of the BIT is frivolous.

#### *7. The prohibition of accounting for changes in the tax burden*

192. Claimants explain that Section 9.4 of the Contract provided that the establishment of new taxes or the amendment or replacement of taxes or of their respective rates, after the presentation of the economic bid, had to result in an analysis of the impact on service tariffs and prices, except as far as income tax and value added tax were concerned. Section 9.2 identified all federal or provincial taxes that might affect the Concessionaire in relation to the tariff calculation, with income and value-added taxes as the only exceptions. The economic bid was, indeed, based on a given tax structure, and a change in such tax structure, subject to the two exceptions, would have to be passed through in the tariffs. This was intended to guarantee the economic-financial equation of the Contract.

193. Claimants contend that the Agency and the Grantor kept this from happening as they prohibited the pass through of certain increases in the rates of the taxes payable by the Concessionaire. Amendments were introduced that increased the Concessionaire's tax burden beyond the levels the bidders and URBASER could have anticipated.

194. The first item mentioned by Claimants relates to Decree No. 176/99 of December 30, 1999 that suspended a lowering of social security employer contributions that had been adopted earlier. Claimants also note that Decree No. 814/01 of July 1, 2001 (RA-208) increased the employer contribution to the social security system. Respondent replies that the impact of both of these regulations was minimal and that Claimants do not provide any explanation showing that this was not the case.

195. Claimants add on their list of critical items Law No. 25413 of March 26, 2001 (RA-209), amended by Law No. 25453 (RA-267), which levied a new tax on credit and debit movements in checking accounts and similar transactions, the rate of which be increased over time hand in hand with the crisis it sought to remedy. Respondent replies that Claimants again do not provide evidence in support of such assertion. They did not object specifically to Respondent's position that the impact of the tax on bank account credits and debits was around 0.6%.

196. Finally, Claimants complain that the Provincial gross revenue tax was raised by Law No. 12727 of July 21, 2001, declaring the state of emergency in the Province, with the effect that for AGBA, the gross revenue tax rate went from 3.5% to 4.55% of its billings; this tax increase remained in place. Claimants emphasize that these tax changes represent evidence of the need for the tariff adjustment mechanism provided for in Section 9.4 of the Contract. They contend that AGBA advised the Agency of such circumstances through its letters of June 11 (CU-117) and 28, 2002 (CU-104, 118) and of August 29, 2003 (CU-119). Moreover, AGBA raised the issue again during the renegotiation process. However, it never got a reply, and it never received any sort of compensation for the ensuing losses.

197. Respondent observes that the Concessionaire did not request a tariff review. Claimants must accept that the letters they invoke did not contain any such request; instead, they complained about the detrimental effects of these charges and taxes on the Concessionaire's income. However, such complaints directed to discussions with the Grantor on the review of the Contract and its renegotiation. They do not relate to a lack of proper adaptation of the Contract under its own terms.

198. Regarding the increase in the gross income tax rate, it was a response to an emergency situation in the Province that was then applied nationwide. The issue was addressed in the renegotiation process initiated thereafter. The Concession Contract provided for the carrying-out of cost tariff reviews when the Concessionaire or the Regulatory Agency claimed an increase or a reduction in the cost indices of the Concession in excess of 3% (Sec. 12.3.5.1). All tax variations to which Claimants make reference are not in excess of 3%. The variation in charges and taxes did not reach such minimum level of 3% until the National Emergency was declared, and that explains why AGBA failed to request a tariff review for such concepts before 2002. Since the start of the crisis in 1998 and 2001, the

retail price index suffered an average decrease of 3.1%, which undoubtedly reduced AGBA's costs, compensating the tax variations. The tariff review would have taken account of this factor as well. As there was no sufficient impact, AGBA did not request such a review as there were no grounds. In addition, Claimants' valuation experts did not submit an estimation of the actual incidence of the tax variations.

199. Respondent adds that AGBA's letter in this respect was sent to ORAB in 2002 that is after the enactment of the Emergency law and amid the renegotiation process, where all cost and tax revisions were going to be revisited. In addition, the breakdown of the economic-financial equation occurred before the sharpening of the 2002 crisis and was caused by AGBA's mismanagement, as this resulted from AGBA's letter of May 17, 2001, where AGBA makes reference to extremely serious collectability problems and never mentioned the impact of the new taxes or charges. Claimants fail to make it clear that such claims were filed before 2002. This is significant, because during that year the renegotiation process started, giving AGBA the occasion to integrate this item in determining its position. This must have been done when AGBA submitted its proposal of June 2004. Claimants' claims in this respect are unjustified and must be dismissed.

200. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. While most of the increases in taxes and other rates were of a minimal impact, the increase of the gross revenue tax was above what may be considered as minimal. Nevertheless, Claimants exaggerate when complaining that the economic-financial equation of the Contract was altered significantly, while Section 12.3.5.1 of the Contract states that any debate on such a matter may take place only when an increase above 3% was observed. Claimants also fail to consider that Section 12.3.5 opens a possibility for tariff review due to changes in cost indices only, which do not include income tax (Sec. 9.2); income tax or value added tax were not a ground for an extraordinary review (Sec. 12.3.6.1 lit. b). The bidders and AGBA knew about this. Moreover, Claimants are not coherent in invoking a loss in revenue caused by various taxes and charges while AGBA did not take this alleged loss as a specific ground for a review of the tariff system. It can also be noted that ORAB did reply to AGBA's query in Resolution No. 25/03 of September 17, 2003 (CU-69), deferring the matter as cost variation to be examined in the applicable contract renegotiation. In this latter context, AGBA may have raised the matter, as Claimants contend, but when this was done, it was not in the framework of the then still applicable Concession Contract. It was introduced in view of the Concession's amendment or transformation based on the then prevailing new circumstances. In any event, this topic is far away from having any link to an alleged breach of the BIT.

8. *The implementation of the metering system*

201. Claimants explain that Section 29-II of Law No. 11820 provides that the tariff regime shall be aimed at the metering consumption and that the Concessionaire shall proceed with the transition from a fixed rate system to a metering system. Section 29-II further states that “the metered consumption tariff system shall mandatorily apply to all expansion works”<sup>25</sup>. As long as it is not implemented on other parts of the network, the fixed rate tariff system shall apply.

202. The Concession Contract required in Section 2.2.1 of Annex F the attainment of certain metering percentages within certain time limits, *i.e.* 40% meter systems for installed connections in Year 5, 70% in Year 10, and 100% in Year 15. Until such time as the metered system was implemented, the fixed-rate billing system was governed by Section 4a-1 of Annex Ñ, providing for six categories of properties, where each property in each category would pay the same price, irrespective of their actual consumption. Such were the basic rules the investors relied upon when they presented their bid. They took also into account the cross-subsidies resulting between the different property categories. Such cross subsidy was reflected in Section 28-II of Law No. 11820 as a “General Principle.”

203. However, ORAB disrupted that equilibrium by requiring AGBA to install meters in a different manner. In Resolution No. 85/00, approving the Customers Rules (CU-114, RA-102), the obligation for the Concessionaire was created in Section 23 to the effect that meters were to be installed at the users’ request and that the Agency had to determine the price to be paid on that account. This caused a disturbance to the said “General Principle” and set a meter price below the actual costs. This regime had the effect of giving an incentive to request the installation of a meter to those users who were placed in the top categories, who could thus have their service bills go down. This distorted the system of cross subsidies. Accordingly, users in category 5, who paid 5.63 more times what users in category 1 paid, had an interest in turning to the metering system, whereas users in lower categories had not. Thus, there was no longer a compensation making up for the lower price paid by users in the bottom categories.

204. Claimants submit that within the time limits established in the Contract, the Concessionaire had the power to set the pace of the migration. Since the five-year plan was prepared by the Concessionaire, it was AGBA who determined the implementation of the

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<sup>25</sup> This provision is quoted as correctly mentioned in Claimants’ Memorial on the Merits (para. 282). However, the English version of Law No. 11820, as provided by Claimants (CU-21), does not include this sentence in Section 29-II. Both Spanish editions of the Law submitted by the Parties (CU-21, RA-62) contain the original version of the same sentence: “El régimen tarifario de consumo medido será de aplicación obligatoria en todas las obras de expansión.”

micro-metering system. The provisions of the Customer Rules required the Concessionaire to install meters for any user who so requested; this changed the system of implementation of the meters and disrupted the equilibrium. Thus, ORAB prevented AGBA from deciding which user categories would migrate first when altering the Concessionaire's rights in the Customer Rules. While Resolution No. 85/00 provided that the meter and installation costs would be borne by the requesting user, ORAB set a uniform price of ARS 86 - including VAT per unit (Resolution No. 49/01 of October 3, 2011, CU-122), which was 35% of the real costs, which AGBA submitted to be ARS 213.44 plus VAT per meter (letter of October 9, 2001, CU-121). This encouraged the customers in the top categories to request their early transfer to the metered system. And not even three months later, when the tariffs were pesified, the official meter price was pesified as well.<sup>26</sup>

205. AGBA raised an objection to Section 23 of the Customer Rules (letter of December 11, 2000, CU-123). ORAB did not reply, but merely mentioned the objection in instructing AGBA to approve certain user requests for the installation of meters (Resolution No. 23/03, dated September 17, 2003, CU-124). At that time, the Grantor had already enacted the New Regulatory Framework (Decree No. 878/03 of June 9, 2003, Section 52, CU-125), under which service metering was no longer an absolute target and subject to time limits to be determined in the relevant regulation, what never happened before AGBA's Concession was terminated in July 2006.

206. Claimants admit that AGBA installed just one meter. They contend, however, that the implementation of the metering system was part of a global scheme that was materially altered by the emergency and the measures taken thereafter. AGBA could not be expected to continue to perform the Five-Year Plan as if nothing had happened.

207. Respondent recalls that Annex F to the Contract provided for the complete installation of micrometers by the end of the Concession and that certain percentages of such deliveries had to be reached in certain periods. For the first 5 years, 40% of the connections should have meters installed. The Contract also provided for the progressive installation of a tariff regime appropriate for the use of micrometers.

208. By Resolution No. 85/00 of November 21, 2000, the Service Consumer Rules were issued, which governed the installation of meters (RA-102). Claimants' state that the issuance of this Resolution disrupted the equilibrium by forcing AGBA to install meters in a manner other than the one established in the Regulatory Framework. However, the Regulatory Agency did not amend the Contract unilaterally, but only regulated the

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<sup>26</sup> Witness Cerruti I, para. 218, explains that Resolution No. 49/01 of October 3, 2001 "unilaterally imposed" an "official price" and he further refers to a letter No. 251/01/VE of AGBA. He does not mention that the Resolution notes that AGBA had been invited to submit its proposals and that the price finally retained was the price suggested by AZURIX. He also errs in attributing to AGBA's letter the date of September 9, 2001 (before the Resolution), while the letter having the number he indicates is in fact dated October 9, 2001 (after the Resolution).

matter in compliance with Section 29-II of Law No. 11820 and the Concession Contract. Respondent also notes that Section 14 of Annex Ñ of the Contract provides that the POES fix the time limits in which the Concessionaire shall implement the metered drinking water consumption system. To the extent meters were not installed within the given time limits, the Concessionaire may only bill the users concerned for the minimum consumption indicated in 4a-2 of Annex Ñ to the Contract.

209. Respondent finds unconvincing Claimants' objection to the choice given to users to request the installation of a meter, with the effect of disturbing the cross-subsidization system set forth in the Contract. Indeed, this is what AGBA undertook upon execution of the Contract. As a matter of fact, such an effect did never occur because AGBA installed one meter only, whereas 60 applications remained pending.

210. Respondent takes note of Claimants' complaint about the "official price" of ARS 71.01 plus VAT for the anticipated installation of meters, while the Concessionaire submitted a price of ARS 231.44. The Technical Area of the Regulatory Authority analyzed AGBA's proposal and considered the market values and the work necessary to install the meters. On this basis, the Regulatory Agency found it appropriate to moderate the proposed values.

211. In the Annual Report and Financial Statements for 2004 (CU-31) and 2005 (CU-31, RA-269), AGBA stated that the placement of meters resulted in a billing increase. This means that at that time the benefits of measuring consumption were discovered. This demonstrates the contractual obligations' rationality, but it also sheds light on AGBA's management quality.

212. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. Claimants do not demonstrate on what basis ORAB had not been permitted to give priority to those users who requested meters to be installed. This could have had an effect of correcting slightly the system of cross subsidies between users of the various categories determined for the non-metered system. However, Claimants neglect to consider that this system was to be replaced by a metered system, the sooner the better, with the effect that these categories would no longer apply. Moreover, the small amount of meters actually installed or requested has no effect other than minimal in respect of such cross subsidies. Claimants also omit to consider that their argument is not supported by AGBA when it emphasized the benefits of measuring consumption in its Reports Financial Statements.

213. Claimants complain about the price retained by ORAB for the meters and their installation, however without providing the Tribunal with useful information on the evaluation of the relevant cost factors. Claimants' criticism must be compared to the fact that

AGBA's proposal of October 9, 2001 was submitted a week's time after ORAB had decided the matter in Resolution No 49/01 of October 3, 2001, where it is noted that AGBA, despite the invitations addressed to the Company, had not replied to the request. ORAB had indeed invited both AZURIX and AGBA to submit proposals with the purpose to adopt a uniform price in both concession areas in the interests of the users.

214. Finally, the Tribunal notes that when AGBA did not successfully install more than one meter, whereas under the POES thousands of them had to be added to the system, the effect on the average price of one meter has to be considered more seriously than Claimants did before this Tribunal. Claimants also fail to explain that Section 23.1 of the Customer Rules adopted in Resolution No. 85/00 (CU-114) provided for meters to be installed at the users' request for those only who were not served through installations designated by the actual POES, since in these latter cases no additional costs could be charged to the users (Section 23.1.1). Resolution No. 21/04 of July 8, 2004 (RA-273) that orders AGBA to serve those users who requested the installation of meters contains a list of 30 properties, not one more. Raising a claim in this respect before this Tribunal by arguing an alleged breach of the BIT is frivolous.

215. The Tribunal retains for further consideration in the next Chapter the requirement stated in Section 29-II of Law No. 11820 that meters had to be installed mandatorily in respect of all expansion works. Since it appears as an actual fact that one meter only was put in place, this would mean that either no expansion work had been done or that such work had been done but not completed by the installation of the required meters.

#### 9. *The water and sewage coefficients*

216. Claimants explain that under the Concession's tariff regime, sewage services were billed on a percentage of the value charged for the drinking water distribution service, as provided in Section 4 (b) and (c) of Annex Ñ to the Contract. Starting with a percentage of 0.5 of the value set for the non-metered water service, the Contract provided for a transition period during which this percentage increased to 0.6 in 2000, 0.7 in 2001, 0.8 in 2002, and to 0.9 in 2003, reaching 1.0 in 2004, provided that the Concessionaire met the POES goals (Section 4-c). At the same time, the overall coefficient for the Water and Sewage Service was set at 1.6 for 2000, 1.7 in 2001, 1.8 in 2002, 1.9 in 2003 and 2.0 in 2004 (Section 4-b).

217. Claimants submit that the approval of the POES for the first year was postponed without reason. They explain that on September 11, 2001, AGBA requested the application of the 0.7 coefficient for sewage service and 1.7 for the Water and Sewage Service, effective March 2001 (CU-127, RA-297). On October 17, 2001, ORAB denied the request (Resolution No. 52/01, CU-128), arguing that AGBA had not met the expansion pipe and reconditioning goals in the 2000-2001 period, referring to a technical report

stating that the Concessionaire had made enormous efforts in this respect, but further mentioning that the defined goals had not been completely met. ORAB's Resolution did not mention the opinion issued by its Technical Department on August 27, 2001 (RA-104), which admitted "an acceptable POES fulfillment level for the first year of the concession," further stating that the partial failures to comply with the annual sewer connection goal were not attributable to AGBA but were due to the technical impossibility to have the sewage treatment plants in place in the first year of the Concession.

218. When ORAB finally approved AGBA's 2000 Progress Report on December 5, 2002 (Resolution No. 69/02, CU-129), it further approved the sewage coefficient increase by Resolution No. 02/03 of January 7, 2003 (RA-115). In doing so, however, it did not approve the increase for March 2001 (0.7), but the preceding one (0.6). Thus, ORAB ruled in 2003 on a coefficient which the Contract had set for 2000. AGBA had to apply until February 2003 the original 0.5 coefficient, while the Contract defined a 0.8 coefficient for 2003.

219. AGBA notified ORAB that it was about to bill customers retroactively for the recently approved coefficient (0.6) since March 2001 (letter of July 25, 2003, CU-131, RA-116). The Agency denied the retroactive billing (Resolution No. 34/03 of November 28, 2003, CU-132, RA-117). It argued that AGBA was responsible for the late filing of its POES progress information, disregarding the fact that its Technical Department stated on August 27, 2001 that the level of POES compliance for the first year was acceptable (RA-104). AGBA's challenge of this Resolution, dated December 16, 2003, was dismissed by ORAB by Resolution No. 20/05 on June 15, 2005 (CU-133). On November 23, 2005, AGBA filed a court complaint that is pending (RA-119).

220. As regards the coefficients for 2002, Claimants submit that they should have applied since March of that year. However, they were never approved by the Regulatory Agency, as it held that the POES for year 2 had never been fulfilled. This is not correct, because this POES was suspended because of the extraordinary circumstances, such as the emergency, and due to reasons attributable to the Province, such as the failure to deliver the UNIREC plants. Thus, the refusal to approve the increase in the 2002 coefficients, which persisted throughout the entire life of the Concession, is entirely unjustified.

221. For 2002, the Contract's sewage coefficient was 0.8. Given the fact that the approved coefficient for 2001 was 0.6, AGBA requested an increase to 0.7 for 2002 (and for 0.7 for the water and sewage service). When ORAB's ruling on the 2001 POES was rendered on January 7, 2003 (Resolution No. 77/02, CU-137) and the POES deadlines thus suspended, AGBA requested the 2002 sewage coefficient increase (letter dated July 25, 2003, CU-134, RA-122). ORAB denied the request, arguing that the goals established for the second year had not been met (letter dated September 30, 2003, CU-138, RA-123). Thus, AGBA was kept from applying a coefficient increase that was provided for in the



Contract, in addition to seeing its tariffs already pesified and a New Regulatory Framework enacted that materially altered the ground rules for the Concession.

222. In sum, it was only in March 2003 that AGBA could apply a coefficient which should have been applied in 2000 (0.6). This situation remained unchanged until the end of the Concession, since ORAB did not approve any further coefficient increase. By that time, the sewage service tariff for category 1 (50% of the Concession) was USD 1.17 per month, while the coefficient initially anticipated was USD 6.08 per month, such difference not being inclusive of the inflation adjustment provided for in the Contract and not taking into account the effects of pesification in January 2002, which caused the value of the tariffs to go down by more than two thirds.

223. Respondent recalls that the Concessionaire could apply, on an annual basis and starting from the second year of the Concession, a water and sewage coefficient “provided that all POES goals have been met” (Annex Ñ, Sec. 4-b and c). In August 2001, the Technical Area considered that even though not all goals set in the POES had been met, more than the expected number of new connections required under the Contract had been reached. 60% of the required sewage connections had been performed. The Technical Area thus found that the POES fulfillment level was acceptable during the first year of the Concession (RA-104). In October 2001, the Technical Area determined that notwithstanding the approval of the POES for the first year, neither the goals set forth in the Concession Contract nor those provided in the POES or the minimum percentage set forth in paragraph 4 of Annex Ñ had been met (RA-105).

224. Respondent also objects to Claimants’ statement that ORAB delayed the approval of the sewage coefficient for the 2000-2001 period. The allegedly unjustified delay is due to AGBA’s own delayed action. Before the approval of the goals set forth in the POES, the Concessionaire had to file the required documentation and to seek its approval by the Regulatory Authority. The Concessionaire filed the Annual POES Progress Report for the first year of the Concession (2000) in July 2001 (AGBA letter of 17 July 2001, RA-192). On 11 September 2001, when this Report had not yet been approved by ORAB, AGBA requested the application of the 2001 coefficient both for water and sewerage services. Such request was rejected by Resolution No. 52/01, dated 17 October 2001, because the Concessionaire had not complied in full with the obligations undertaken under the POES (CU-128). Once the goals for the first year of the Concession were deemed approved by Resolution No. 69/02 on December 5, 2002 (CU-129), the admissibility of the coefficient increase for the sewage service was admitted by Resolution No. 02/03 of January 3, 2003 (RA-115). AGBA was the sole responsible for the delayed approval of the requests for the application of the sewerage coefficient.

225. Once it applied such coefficient, in July 2003, AGBA requested the retroactive application of ORAB Resolution No. 02/03. ORAB rejected this request on November

28, 2003, by Resolution No. 34/03 (RA-117), arguing that the delay in approving the first-year goals was solely due to AGBA's failure to submit the required information. An administrative appeal filed by AGBA against this decision was dismissed in July 2005.

226. AGBA based its request to apply the sewage coefficient for 2002 upon Resolution No. 77/02. The request was rejected by ORAB in its letter of 30 September 2003 (RA-123, CU-138) because the Concessionaire had failed to meet the POES goals for 2001. This position was reaffirmed by Resolution No. 38/03 of 28 November 2003 (RA-124) and based on the facts that (i) the suspension of the POES had been requested by AGBA, and (ii) it was based upon the impossibility of meeting the POES goals due to reasons attributable to AGBA. The company challenged the Resolution (RA-125). Since May 2001 the Concessionaire repeatedly requested the Contract's renegotiation and the POES's suspension. Such neutralization was temporary and implied no termination of AGBA's obligations, which were not complied with as regards the second year.

227. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. Claimants' basic position is that the approval of the POES for year 1 and the suspension of the POES for year 2 did not involve any complaint about an alleged failure of AGBA in reaching the goals retained in these POES and that therefore the respective coefficients allowing an increase in billing for sewage services and/or water and sewage services had to be applied. Claimants insist on the acceptance of these two POES by ORAB, while they pay little attention to the provisions of the Concession Contract that are applicable to AGBA's claim in relation to the increase of these coefficients. Indeed, in respect of the increase of the coefficient for sewage services, Section 4(c) of Annex Ñ states that it applies "provided all the Drinking Water and Sewage network expansion (Article 2.1 of Annex F – POES – to the Contract) goals and pipes revamping and reconditioning goals (Article 2.3 of Annex F – POES – to the Contract) for the previous annual period to which the increase applies have been attained." In respect of the coefficient for water and sewage services, an identical provision applied (Sec. 4-b). None of these provisions refers to the POES report of a particular year or to the approval of such report. These rules directly refer to the fulfillment of the minimum number of connections to be achieved for the drinking water network expansion and for the sewerage network expansion. The relevant figures are contained in Section 2.1 of Annex F of the Contract, under the heading "service expansion." These provisions say nothing about the approval of POES or the consequences of a refusal to approve a POES, which are matters dealt with in other provisions of the Concession Contract. Therefore, there exist major reasons in support of ORAB's position that the increase of these coefficients can be obtained only upon fulfillment of the specific parameters fixed for the expansion goals for drinking water and sewage services. Claimants do not sustain that they had reached these goals – a matter that will be further examined in the next Chapter. Claimants also invoke the failure to deliver the UNIREC plants and the emergency, however without any argument pertaining to the impact of these occurrences on the specific item of the alleged

applicability of these billing coefficients. Claimants must also accept that Section 4 (b) and (c) of Annex Ñ they invoke in support of the retroactive billing of the increase in the coefficient applicable to the sewage service is silent on this issue and thus left to the decision in this respect with the Regulatory Authority. In any event, Claimants' claim for the benefit of the billing coefficients provided for in Sections 4 (b) and (c) are nothing more than matters calling for the interpretation of the Contract and have nothing to do with any alleged breach of the BIT.

*10. AGBA's exclusivity in the Concession area*

228. Claimants explain that Law No. 11820 and Section 1.6 of the Concession Contract conferred upon the Concessionaire the exclusive right to provide the service within the Concession area. Section 5.6 of the Contract stated that the feasibilities granted by AGOSBA were to be approved by the Concessionaire in compliance with the standards applicable under the Concession. Section 3-II of Law No. 11820 made provision for an exception to the extent third parties were admitted to construct works, subject, however, to prior approval by the Concessionaire and technical approval of the works, and this in all cases. Upon completion, such works were to be transferred to the Concessionaire. This means that under the Regulatory Framework, the Concessionaire had the exclusive right to provide the service and construct the works required for that purpose.

229. On June 12, 2003, before the enactment of the New Regulatory Framework, the Federal Government and the Province of Buenos Aires entered into a "Framework Agreement" whereby they decided to undertake the works which AGBA's Contract described as "public works" (CU-139). The stated goal was to develop work that had been insufficiently advanced by the Concessionaire, including the construction of the former UNIREC plants, but also works that fell within the scope of AGBA's Concession. Further, through Resolution No. 2/06 of January 19, 2006 (CU-143), the Agency approved the Province's involvement for providing solutions to address the sanitary risk situation in the Municipality of José C. Paz, which requested the Province's intervention as a replacement of the current provider.

230. Claimants complain that through these agreements, the Federal Government and the Province divided up among themselves certain rights that belonged to AGBA. These works were to be awarded through a bidding process before the Province ordered the termination of AGBA's Contract. Taken as an example, the company that won the bid for the construction of sewer Mains and pumping stations in Merlo - Buenos Aires was awarded a contract for USD 52,969,860 (CU-142).

231. By approving the Grantor's actions, ORAB violated the exclusivity rights AGBA had been granted. The OCABA justified the Province's actions on the basis of Section 21-III of Decree No. 878/03, enacting the New Regulatory Framework, which required

completion of a renegotiation process that was never responsibly approached by the Grantor and never produced any results. AGBA addressed a challenge to OCABA Resolution No. 2/06 on February 3, 2006, which was denied by OCABA Resolution No. 32/06 of July 27, 2006 (CU-144), at a date when the decision to terminate the Contract had already been made and notified to the Concessionaire through Decree No. 1666/06. As to the renegotiation process, AGBA's proposals did not have the consequence that it was happily agreeing to the destruction of its exclusivity. It is also wrong to say, as Respondent does, that AGBA had lost its interest in its position as a concessionaire operating exclusively in the area, based on its letter of May 17, 2001. No announcement of such a kind was contained in said letter.

232. Respondent recalls that one of the main purposes of the Concession was to expand the provision of service and, in return, bill those users who were provided with new water and sewage connections. In this respect, exclusivity made sense, because it went in parallel with the expansion of service and the investment in the performance of works for such purpose. However, AGBA made very few investments in the Concession during the first two years, and by the time of its letter of May 17, 2001 it had lost all interest in investing in the service.

233. Respondent contends that Claimants' position is not compatible with AGBA's conduct when it was faced with projects involving third parties for the performance of work in the area. Claimants make reference to the alleged crushing of its exclusivity on the basis of the works to be funded by the World Bank. But they do not mention that AGBA was invited to join meetings relating to the projects (letters of January 29, 2004, CU-140, 141) and that it authorized such works and agreed on all details thereof by letter dated June 28, 2004 (CU-141). Moreover, these works, to the extent they were situated in the Concession area, were works that AGBA had not undertaken and that were to be given priority in light of the needs of the population.

234. Respondent also submits that during the renegotiation, AGBA requested that the Provincial Government be in charge of virtually all works. In its proposal of June 2004<sup>27</sup>, AGBA requested that the expansion works would be performed by the Province, that the Province would be in charge of the plants of Bella Vista and Alem and the investments required reducing nitrate levels, and that the Concessionaire's asset recovery is limited to 25% of the technical value. It was AGBA that requested that the Provincial Government make most of the investments through the channel of a trust fund and that this be done in accordance with the New Regulatory Framework. It is hard to understand how Claimants now insist on AGBA's exclusivity that it was prepared to give up when it proposed that the investments it had to make were to be taken over by the Province.

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<sup>27</sup> Exhibit H001 to Seillant I.

235. The Tribunal observes that this is a purely contractual dispute and that Claimants do not argue otherwise. AGBA's initial right to exclusivity under the Concession is certainly a fundamental principle. Such right implies as AGBA's obligation that it fully complies with the tasks attributed to it as Concessionaire. Without examining here the precise purpose and content of the letter of May 17, 2001, which was followed by others, it showed that AGBA was not willing or even able to achieve the overall goal of the Concession without assistance that it requested at the time from the Province through a process of reconsidering the terms of the Concession. It must have been the understanding of all parties involved at that time that AGBA was no longer insisting on its right to exclusivity as a key factor in the Concessionaire's strategy. In light of these elements, Claimants' position shows the existence of a dispute, but it does not show in any part what claim under the Concession Contract is raised in this respect. Any contractual complaint seems to be moot given the fact that in its note to the Province of June 28, 2004, AGBA agreed that a work plan would be prepared, as explained by Witness Facchinetti<sup>28</sup>. Before the Tribunal, Witness Facchinetti confirmed that an agreement was prepared and that upon the Province's request, AGBA signed in order not to lose a portion of the World Bank's financing and as a gesture of good faith in the context of a renegotiation.<sup>29</sup> The Witness added that he did not think that this agreement violated the exclusivity under the original Regulatory Framework, all the more so as AGBA had been charged with the conduct and operation of the projects.<sup>30</sup> In any event, Claimants' position has nothing to do with any alleged breach of the BIT.

#### *11. The Regulatory Agency's and the Grantor's inaction*

236. Claimants further complain that the Grantor and ORAB violated the Regulatory Framework by failing to fulfill their duties to the Concessionaire. An example of such inaction was the refusal to support the Concessionaire when it was disrupted by the Municipality of Merlo, which took a position hostile towards AGBA's operation of the Concession and launched a fining campaign for alleged water leaks in public spaces.

237. Similarly, ORAB remained passive in the face of certain acts of vandalism perpetrated against Concession facilities. Faced with such situations, AGBA took costly measures at its own expense. Claimants note that the Concessionaire repeatedly sought ORAB's involvement on the ground that such acts of vandalism were targeting Provincial assets set aside for the provision of public service. ORAB's reply was to transmit the matter to other services, with no effect, and to advise the Concessionaire to have all security measures taken in its facilities. In addition, the local authorities rerouted users' complaints to the Concessionaire, thus implicitly holding the latter responsible.

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<sup>28</sup> Facchinetti I, para. 24.

<sup>29</sup> TR-E, Day 2, p. 108/7-109/7, 110/1-3.

<sup>30</sup> TR-E, Day 2, p. 109/10-22.

238. The Tribunal observes that several extracts of the Regulatory Analysis of the Halcrow Report prepared in 2001 on behalf of the Inter-American Development Bank (IDB) in support of the examination of AGBA's application for a loan (CU-209) provide another picture. It is noted, as indicated by Claimants, that "organizationally and logistically ORAB has not yet settled down to the quasi stand-alone entity suggested by the Regulatory Law" (page 3). A number of positive remarks are added to this note of caution:

"Those Directors and staff are qualified in specific technical competencies and have experience, some highly detailed, of the assets involved in service provision and of administrative management systems used by the former province wide public provider." (p. 2)

"ORAB's duties are set out in the Regulatory law and there is no reason to believe that the staff would be unable to understand and interpret the regulatory requirements therein." (p. 2)

"The Regulator is entirely independent of AGBA and of AGBA's customers in financial terms." (p. 5)

"In their day to day activity, ORAB officials are demonstrating a proactive attitude as they exercise control of technical and customer related issues." (p. 8)

239. The Tribunal notes that Claimants' position is inconsistent when compared to this Report. In any event, Claimants' arguments are entirely unsubstantiated by evidence and shed no light on the nature of any claim raised in this respect. Arguing that a wholly unsupported contractual claim would reveal an alleged breach of the BIT is frivolous.

#### D. Conclusion

240. The Tribunal finds that in many instances Claimants have put forward allegations of breaches of the Regulatory Framework without identifying if or how they relate to an alleged violation of the BIT.

241. While some allegations are factual and Claimants do not frame them as claims themselves, all of Claimants' claims before this Tribunal are based on purely contractual disputes. The Tribunal will return to some of these items – such as the fate of the UNIREC plants, details of the performance of the POES, and the grounds invoked by the Province in its Decree No. 1666/06 on termination – as they arise in the examination of the alleged breaches of the BIT.

## V. The Salient Features of AGBA's Concession

242. The main areas of controversy in the instant case and in relation to the operation of the Concession are (A) the nature and the amount of the work that was actually done by AGBA in the drinking water and sewage service networks, (B) the difficulties in obtaining a sufficient level of collection on bills submitted to users, (C) the fulfillment of the goals to be achieved under the POES, (D) the investment required and actually made in support of the Concession, and (E) the contractual equilibrium and business risk.

### A. Categories of Work

#### 1. *Basic distinctions*

243. The work to be achieved under the Concession consisted of more than simply laying out water pipes and pumps, ensuring connections to the households, and providing for proper sewage. Taking account of the situation met by the bidders at the initial stage and during the running of the Concession by AGBA, three categories of works can be distinguished in respect of their operational nature and their financial impact upon the Concessionaire.

244. In a first category are to be mentioned the users that qualified as illegal users because they were connected to the network and took the advantage of its services but who were not billed and therefore never paid.

245. In a second category are to be found users not actually benefitting from any water or sewage service, but equipped with the required connections or located nearby such connections, mainly pipes and pumps that needed to be restored and activated for the purpose of adding these new users to the system. The work in this category consisted of reconditioning existing networks that had suffered over time and needed repair in order to allow for the provision of services to parts of the population that were not connected to the water and sewage services.

246. Finally, in a third category are to be found all works qualified as "expansion," which means, simply put, work in districts and/or territories where no service was available because of the lack of any equipment supporting water and sewage services.

247. It is to be assumed that, in general terms, the costs of works undertaken in respect of each of these categories is going upwards from one category to the other, starting with category 1 and ending with category 3. Accordingly, the financial involvement of the investor was different, less important in category 1 and increasing in respect of the other categories with the top being reached when expansion work was considered in districts

never provided before by any installation for water and sewage services. The Parties' have expressed divergent opinions in respect of the nature of works that had been undertaken by AGBA, with the effect that the corresponding divergence emerges when the amount of investment involved in the Concession is to be assessed. Therefore, it is necessary to clarify first the nature of the works that AGBA had undertaken to accomplish and the work that was actually achieved.

## 2. *Connection of illegal users*

248. Claimants submit that in the first two years of the concession term, AGBA doubled the number of served users. When the Concession for Region B was awarded to AGBA, its population of about 1.7 million was composed of low-income inhabitants. At the date of Takeover, only 13% of the inhabitants had water and 12% had sewers. By late 2000, AGBA had expanded the network by adding 50,000 users, reporting a total of 158,000. By late 2001, AGBA had expanded the network with the inclusion of an additional 31,000 users (as acknowledged by ORAB Resolution No. 77/02 of December 30, 2002, CU-137, RA-121). This totaled 83,800 new connections in the first two years of the Concession term, as compared to the 66,500 new connections the POES required.

249. Claimants do not discuss specifically in their briefs that a number of these new connections relate to users who were illegally benefitting from pre-existing works that AGBA undertook to regularize at the very beginning of the life of the Concession. Claimants' position in this respect is that this activity was comprised of AGBA's work establishing proper connections to the network of a number of users and households not yet connected and that these additions were considered by ORAB as expansion works in relation to the first year of the POES.

250. AGBA's letter of May 17, 2001 (CU-173, RA-123) stated in this respect that in addition to the 80,000 original users it had incorporated 80,000 users that were not included in AGOSBA's list of customers. AGBA complained that the non-collection rates of bills for the provision of the service to these users (used not to pay) reached a high level up to 70% or even 80% in some neighborhoods. AGBA told in this letter the Minister of Public Works and Services that this situation affected the Concessionaire's capacity to make the investments required under the expansion program.

251. Respondent takes issue with Claimants' characterization of the work and the size of the investment required to incorporate these users, as well as with their proper inclusion in the relevant statistics about AGBA's accomplishments, while there is no serious dispute about the existence of this category of users and their number.



252. Respondent notes that there is an important difference between the drinking water and sewerage services coverage alleged by Claimants and the coverage levels that had been registered previously. This difference was basically due to the number of users with pre-existing connections. These are the 80,000 users AGBA refers to in its letter of May 2001.

253. Respondent submits that when Claimants assert that at the time of takeover, 13% of the inhabitants received water services, and 12% received sewerage services, their statement is misleading, as the water coverage level was 35% and the sewerage level was 13%. Respondent explains that the difference between the first and second percentages lies in the fact that at the time of the bidding process AGOSBA had conducted and paid for many works before the privatization process. These works required the Concessionaire only to either activate the pre-existing connections or to regularize the situation of users illegally benefiting from these pre-existing works. In the latter case, these users were already receiving the service when AGBA took charge of the area. Therefore, when the Concessionaire refers to these “new users” in its letter of May 2001, their incorporation was not the result of expansion works, since almost no investments were made in connection with them.

254. Respondent also recalls that the Committee for the Privatization of AGOSBA indicated in its Communication No. 16 of April 16, 1999 (RA-251) that the difference between drinking and sewerage connections billed as of December 1998, on the one hand, and such connections as installed, on the other hand, was 83,474 for drinking water connections and 15,522 for sewerage connections. The relevant information was attached and available in the data room (RA-298, 299).<sup>31</sup> The first figure represents the difference between billed and installed drinking water connections; it is similar to the 80,000 users not included in AGOSBA’s registers that AGBA refers to in its letter.

255. Schrodgers Information Memorandum of 1998 refers to drinking water coverage level of 35% and a sewerage coverage level of 13% (CU-10). Respondent submits that the bidders must have been aware of the existence of these users having pre-existing connections. Indeed, the Consortium’s original Business Plan of June 1999 (also named shortly as AGBA’s Business Plan 1999, RA-265<sup>32</sup>) refers to a drinking water coverage level of 13.2%, and a sewerage coverage level of 12.0% for the year 1999. Given that Claimants make reference in their Business Plan to coverage levels that are inferior to those included in the Schrodgers’ Report, Claimants, as Bidders, must have been aware of the incorporation of users not registered by AGOSBA.

256. The Tribunal notes that there is no dispute about the approximate amount of 80,000 of users that were connected to the network and took advantage of it without being

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<sup>31</sup> See also Witness Cinti, TR-E, Day 3, p. 129/12-130/2, 173/22-174/22; Cinti I, para. 57.

<sup>32</sup> Also attached to AGBA’s letter of June 28, 2002 to the Governor of the Province (CU-104, 118).

billed by AGOSBA and included in its list of customers. This information was available to the bidders through the above mentioned communication of the Committee for the Privatization of AGOSBA.<sup>33</sup>

257. The dispute is about the proper inclusion of this number of newly incorporated users in the account of works done by AGBA in relation to the POES for the first year and in respect of the content and the nature of the approval given to AGBA's report on its accomplishment in respect of this POES and the decision to suspend the POES for year two. This will be examined further below.

### 3. *Reconditioning of existing connections*

258. Claimants further submit that upon taking over the service, AGBA found the Concession's network and, in general, the facilities of the Concession in ghastly conditions, even worse than expected from the available documents and the assessments made during the bidding process. Inglese Consultores S.A. – who became the Technical Auditor of the Concession in 2002-2005 – had experience about the prevailing conditions at that time, because they had served as experts at a time prior to the bidding process. They confirmed that the start-up of many connections demanded investments exceeding those that the bidders could estimate on the basis of the available information. The works performed and paid by the Concessionaire allowed connecting and providing the service to numerous households. This is why ORAB considered these to be expansion works when it declared to approve the goals reached in respect of the POES for year one.

259. Respondent submits that AGBA tended to postpone the execution of real expansion work; instead, during 2000 and 2001, it merely activated pre-existing connections, which was a way of making investments far below the amounts required to effectively expand the service. Expert Molinari explains that 91% of drinking water connections undertaken in the first year of the Concession (2000) refer to reconditioning of existing networks. They represent 71% during the first two years (2000-2001). If the first five-year period is taken as a reference, 117,639 (41.1%) out of the 286,272 connections undertaken result from reconditioning existing connections. In respect of sewer connections, the corresponding figures are 62%, 35% and 11.4%.<sup>34</sup> This shows that AGBA was taking advantage of existing networks, whose related investment was already made by third parties before Takeover by the Concessionaire.

260. Respondent states that AGBA's intention was not to make actual investments during the first years, but rather to concentrate on activating all pre-existing connections. AGBA's Business Plan in 1999 shows that the expansion of water and sewerage services

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<sup>33</sup> Witness Cerruti confirmed at the hearing that communication of information No. 16 was known to the members of AGBA's consortium; TR-E, Day 1, p. 184/7-16, 185/10-12.

<sup>34</sup> Molinari I, para. 133b.

during the early years resulted largely from pre-existing connections. AGBA's Business Plan of November 2001 indicates that actual expansion would not commence until after 2005, all services provided before consisting of activating pre-existing connections and densification (RA-211).

261. The Tribunal observes, here again, that the dispute is not seriously about the necessities to which AGBA was faced to recondition pre-existing connections. It has been explained to the Tribunal that this work of restoring old and/or poorly conditioned connections implied frequently an important amount of work, sometimes consisting of the complete replacement of pipes and pumps and other similar items. Explaining succinctly what he had written in his statements, Witness Quijada told the Tribunal at the hearing that unfit elements had been used for the underground piping, with the effect that AGBA had to take out the pipes, had to revise them, and had to see whether the material that had been used could withstand wear and tear and normal use. To a very large extent, the material did not offer the necessary guarantees for it to function properly. Sometimes, isolating elements and valves were missing. All of this work was on elements under the ground that were not visible and therefore could not be identified during the bidding process.<sup>35</sup> This state of affairs generated costs and called for financing that should not be underestimated. Nevertheless, it can be retained as a general observation that renovation would not require financing at the same level as expansion work that had to be started from scratch. This is also why the POES and AGBA's business plans adopted a distinction between these different items, as they are distinct in the nature and the amount of work required and, consequently, in respect of the investment to be served.

262. The Tribunal has noted that an implicit item of dispute is about the size and the importance of the work of reconditioning to be done under AGBA's direction. For Claimants, the network and the facilities were in a condition worse than expected from the available documents and the assessments made during the bidding process. They also point to Section 6.4.1 of the Contract giving AGBA a term of 12 months from Takeover to make an updated inventory.<sup>36</sup> For Respondent, more information in this respect would have been available if the Bidders had conducted a better due diligence. Moreover, Respondent states that Claimants had accepted the Concession as it was at the time of the bid and assumed the business risk it implied, as this results from Sections 1.5.2 and 2.4 of the Bidding Conditions. While opposing arguments have been exchanged between the Parties on this subject, there is no actual dispute about the size and the costs involved in such reconditioning work. The dispute is about the size of such work and its related costs in comparison to work characterized as expansion work, which involved undoubtedly investments of a larger size than reconditioning of existing connections.

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<sup>35</sup> TR-E, Day 2, p. 26/17-28/6, 44/19-45/12.

<sup>36</sup> Cf. Claimants' Post-Hearing Brief, para. 14, not considering that an inventory of the assets is different from an assessment for due diligence purposes.

263. The Tribunal also notes that while it certainly understands that it is difficult to conduct a detailed due diligence study relating to a network that is placed underground in very large parts, it should nevertheless be possible for an experienced contractor to obtain a reliable assessment of the situation by conducting investigations through the collection of samples and otherwise proceeding with appropriate testing. Thus, Witness Quijada explained to the Tribunal at the hearing that the technical review during the bidding process did not allow covering 180 kilometers of pipeline.<sup>37</sup> He visited the five water purification plants for the wastewater from the outside and well water facilities.<sup>38</sup> When asked whether he or his team did undertake any tests, he answered: “It wasn’t necessary to see what it was like.”<sup>39</sup> And he told about his assessment of the technical capabilities he was investigating for investment purposes: “It was a bad one. It was a bad, bad situation.”<sup>40</sup> Referring to the due diligence report submitted to the investors<sup>41</sup>, the Witness recalled: “I said that this was a significant problem and that a large investment was needed.”<sup>42</sup> In light of this statement, the Tribunal understands that the Bidders must have been aware of the size of the work to be undertaken and that the bad quality of the existing network did not come as a surprise once the Concession had been awarded. The Tribunal does not share the view of Engineer Inglese who told the Tribunal that it was possible only after one to three years to carry out an investigation allowing knowing what the situation of the facilities was.<sup>43</sup>

264. The issue that remains for further analysis is to determine what could be characterized as expansion work at the critical time of the first years of the Concession. Claimants contend that when approving the POES for year one and suspending the same for year two, ORAB considered reconditioning and maintenance activities to be expansion works. Respondent objects that expansion work required compliance with its own specific characteristics, including an investment of a considerable size far above the funding required for mere reconditioning and actually provided by the investors. This matter is further to be considered below.

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<sup>37</sup> TR-E, Day 2, p. 57/2-3.

<sup>38</sup> TR-E, Day 2, p. 59/2-15.

<sup>39</sup> TR-E, Day 2, p. 59/20. He later added, referring to his 30 years’ experience in wastewater: “after so many years of experience, there is very little that escapes your attention”; TR-E, Day 2, p. 63/8-9.

<sup>40</sup> TR-E, Day 2, p. 60/2-3.

<sup>41</sup> The Witness did not remember whether he wrote it himself; TR-E, Day 2, p. 62/16-24. This document has not been submitted to the Tribunal nor any other due diligence report made available to the bidding Consortium.

<sup>42</sup> TR-E, Day 2, p. 60/7-8.

<sup>43</sup> Cf. TR-E, Day 4, p. 172/17-173/13, 201/7-202/21, 208/18-209/9, 214/6-215/1. The Expert referred to his experience with the *Aguas Argentinas* concession. He had no actual knowledge of the situation because his functions as Technical Auditor of the AGBA Concession began only in February 2002. The Engineer noted that the network found at Takeover lacked mostly the necessary connections and systems for water provision and regulation, or the appropriate manholes and connections in the sewage system. Their start-up demanded investments greatly exceeding those estimated by the Bidders, which had only considered start-up adjustments for properly built and inspected networks. Cf. Inglese I, para. 32d.

#### 4. *Expansion work*

265. This highly contentious subject can be divided into three sub-topics: (a) the definition and the components of expansion work, (b) the actual expansion work undertaken by AGBA, and (c) the work qualified as expansion work under the POES. The focus hereafter will be on the first two items, which are basically factual in their nature. Further, while these topics are to be examined in respect of the full geographical scale of Region B, they will also have to be addressed more specifically in respect of the districts where the UNIREC plants were located.

##### a. The Parties' respective positions

266. Claimants' position is that these first two items are not relevant in light of the decisions made by ORAB. They note that Respondent argued that many of the works performed by AGBA were not actually service expansion activities, but rather maintenance activities for the existing network. Claimants contend, however, that nevertheless, the Regulatory Agency qualified these works as expansion works when it approved the POES for year one (2001) and suspended the POES for year two (2002). Claimants recall that the reconditioning of a large amount of not operating connections required a considerable amount of works. These works performed and paid by the Concessionaire allowed connecting and providing the service to numerous households. This was why ORAB considered these to be expansion works. In a nutshell, Claimants' position is that this having been so decided, there is no point in raising this matter again. More explicitly, Claimants state that:

“In sum, AGBA met the POES expansion goals for year one, while the goals for year two were neutralized, and the goals for year three *et seq.* were impracticable due to the destruction of the economic and financial equation of AGBA's Contract, worsened by the economic emergency and the pesification. Therefore, there were no expansion goal-related breaches attributable to AGBA.”<sup>44</sup>

267. Respondent does not deny that ORAB approved the POES for year one (2001) and suspended the POES for year two (2002).

268. By means of a letter dated May 17, 2001 (CU-173, RA-183), AGBA declared that expansion works had been interrupted and it requested the temporary suspension of the contractual expansion goals, stating further that it was not going to make the required investments. In fact, the Concessionaire had departed from its Business Plan by focusing on putting pre-existing connections in operation, thus postponing actual investment, mainly in the expansion of services. Subsequent facts confirm that AGBA did not wish to invest in such expansion of the service. The Business Plan of November 2001 (RA-

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<sup>44</sup> Reply on the Merits and Answer to the Counterclaim, para. 310.

211) suggested not performing genuine expansion works until 2003 and 2004. AGBA continued its stance not to invest following the declaration of emergency. It no longer merely avoided its obligations in terms of expansion, but also of maintenance. AGBA made it clear that practically the entire “expansion” was to activate existing connections. In the years following 2002, AGBA departed again and again from the original business plan regarding expansion investment. It confined itself to activating existing connections and thus postponing its obligations under the Contract.

269. Respondent insists that the main goal of the Concession was the expansion of drinking water and sewer service, which had very low levels in the Concession area. Region B featured high urban health vulnerability. As noted by Expert Molinari, the main problem was not service inefficiency but the complete lack of a water service, sewerage service, or both.<sup>45</sup> Expansion of drinking water and sewerage services was urgent and one of the chief goals of the Concession. With its May 2001 letter, AGBA left the Province in a tight corner. Termination would have meant calling for bids again, and being faced with a state of hopelessness in the population.

270. In response to Claimants’ position that AGBA’s work in view of restoring and reconditioning pre-existing connections was recognized by ORAB as work complying with the expansion goals under the POES for year one, Respondent affirms that in every case when users had their connection activated or their situation was otherwise regularized, their addition to the system did not result from expansion of works. The Regulatory Authority at that time deemed an expansion what was in fact essentially a commissioning process.

271. Expert Molinari explains that Claimants confuse rehabilitation and renewal works, which are performed on existing assets and do not account for service expansion, with actual expansion, which requires the construction of new facilities.<sup>46</sup> This difference results from the terms of Annex F of the Contract, Sections 2.1, 2.2 and 2.3. The restoration of drinking water and sewerage works which had already been constructed by third parties and were simply restored by Claimants when taking over the service cannot be considered either.

b. The Tribunal’s findings

272. The Tribunal will focus primarily on understanding what the Regulatory Framework and the Concession Contract provide about the notion of expansion works and expansion goals. Important elements can be found, indeed, in these legal texts, whereas, as a contrast, little is stated therein about restoring and/or reconnecting never-billed users and re-conditioning of service connections.

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<sup>45</sup> Molinari I, para. 74.

<sup>46</sup> Molinari II, para. 20.

273. Section 2-II of Law No. 11820 provides that:

“Expansion Area means the territory within the boundaries of the Concession Area in which plans for improvement and expansion of the services provided by the Concessionaire are approved. Upon fulfillment and execution of such plans, the Expansion Area shall become the Drinking Water and Wastewater Service Area, as appropriate.”

274. It results from this provision that the Expansion Area has to be distinguished from the Service Area, which is, respectively, either “the territory within which the drinking water service is actually provided” or “the territory within which the wastewater service is actually provided.” In Section 7-II again, the scope of service provision is equally divided between “the Service and Expansion Areas pursuant to the appropriate POES.”

275. Section 3-II of the Law states under the heading “Regime applicable to the area”:

“In the Expansion Area, the Concessionaire shall carry out the POES approved by the ORBAS in accordance with the mechanism provided for herein and in the Concession Contract. The ORBAS may likewise approve the POES not originally provided for, to the extent that this does not affect the relevant obligations of the Concessionaire under the Concession Contract.”

276. Section 13-II further states that ORAB has the power and the obligation to “publish any expansion plans” (lit. d). It is also ORAB’s task to approve the POES in the Concession Area (lit. e) and “to control that the Concessionaire is complying with the POES approved and the investment, operation and maintenance plans proposed by the Concessionaire to effectively meet service goals and expansion.” (lit. f) It is thus to be noted that here again, a distinction is made between service and expansion goals. A similar distinction appears in Section 15-II where among the Concessionaire’s duties and powers is mentioned its role “to prepare service operation, improvements and expansion plans” (lit. b).

277. Pursuing the same line, Section 19-II makes a distinction between “actual users” and “potential users,” the former being those “within any of the Service Areas” and the latter those “within the Expansion and the Remainder Area.” The rights of actual users are noted in a long list of items contained in Section 20-II, from which two are also attributed to potential users through Section 21-II, *i.e.* the right to receive general information about the service provided by the Concessionaire (lit. c) and the possibility to complain to the Concessionaire in the event there is proof that it fails to comply with the POES and goals set (lit. e).

278. Another group of provisions of Law No. 11820 relates to the content of expansion works. Section 23-II states as a general requirement that drinking water and wastewater

services shall be provided jointly, which means *inter alia* that “any expansion works shall provide for collection and treatment.” As has been mentioned above, Section 29-II states that “the metered consumption tariff system shall mandatorily apply to all expansion works.”

279. The Concession Contract relies on the definitions given by Law No. 11820. Section 1.2 begins with determining that the Expansion Area is the territory within the Concession Area defined as such in the Five-Year Plan; upon implementation and execution of the Five-Year Plan, the Expansion Area will become the Service Area. The latter area covers the “territory where the Service is effectively provided.” The duty to provide the service, *i.e.* to expand, renew and/or recondition the external networks applies to both areas (Sec. 3.4). Owners and persons in possession of or using real property located in urban areas within the Service Area are under a duty to connect to the network (Sec. 3.5).

280. The purpose of the POES is also divided into two parts, the objective being “to promote Service expansion in the Concession Area” and “to guarantee maintenance and improvement of the systems required for Service provision” (Sec. 5.2). Section 2 of Annex F devoted to the “goals” of the POES is similarly divided in a sub-section of “Service Expansion” (2.1) and another one on “Service Provision” (2.2), followed by a final part on “Revamping and/or Reconditioning of Pipes” (2.3). Sub-section 2.1 determined that the Concessionaire shall accomplish service expansion corresponding to the global coverage goals established in the tables contained in this part of Annex F. In respect of the drinking water network expansion, the figures for the sub-urban part of Region B were in minimum number of connections to mains for the first year 26,500 and for the second year 40,000; in a second table, the number of connections to mains was given for each district (with total amounts different from the first table, *i.e.* 15,300 and 30,900). As from the third year of the Concession, the network expansion coverage was given in percentages, starting for year three with 65% and then increasing on a regular pace (year 4: 70%, 5: 74%, 10: 82%, 15: 88%, 20: 92%, 25: 95%, 30: 95%). These figures are then completed by percentages defined as minimum goals per district, which are generally below the global goal applicable to the whole region. The introductory part of sub-section 2.1 explains that these percentages shall be calculated as the quotient between the values of population served and those of urban populations. The same type of presentation is used for sewerage network expansion, where the minimum number of connections for the region is 26,000 for the first year and 39,000 for the second year, followed by a list providing minimum numbers for each district. As from the third year, the global goal for the region starts with 40%, moving up the following years (4: 50%, 5: 55%, 10: 68%, 15: 80%, 20: 85%, 25: 90%, 30: 95%).

281. The provisions of Section 2.1 of Annex F are related to the increase coefficient applied to the water and sewage service under Section 4 of Annex Ñ. Such increase re-



quires that the network expansion goals and revamping and reconditioning goals determined by Section 2 of Annex F had been attained for the previous annual period to which the increase applies.

282. The first five-year plan proposed initially by AGBA on March 21, 2000 (CU-192) explained that in light of the coverage goals established in the Concession Contract, the Region is characterized as requiring a significant extension (“fuerte expansión”) of its services. Such expansion work shall be directed primarily to the sectors allowing a return on investment and thus strengthen the viability of the economic-financial execution of the Contract (page 64).

283. AGBA’s Report and Financial Statement for the year 2000 (CU-27) explains the concrete strategic objectives followed at that time, consisting of concession consolidation, increasing the customer portfolio and plans in detail the necessary investments for the service expansion required by the Contract. The consolidation consisted of repair and replacement of existing infrastructure, quality assurance of water supplied, quality of service provided and customer service and business management. The Statement does not account for actual expansion work undertaken, but it noted that planning and engineering tasks focus on the preparation of the POES for the first five-year period.

284. The charts provided at the end of AGBA’s March 2000 proposal show that the extension for drinking water will be over a total of 1712 km (divided from year 1 to 5: 314, 483, 613, 212, and 90). The corresponding figures for wastepipes to be added have a total of 2176 kilometers (split from year 1 to 5 as: 550, 481, 433, 471, and 241).

285. Another item relates to micrometers. The Tribunal notes that it was stated in the same proposal: “All new expansion works will feature their respective meters installed from the very beginning.” (page 30) It was further explained that 60% of the customers were to be provided metered services after the first three years and 100% after the first five years of the Concession (page 47).<sup>47</sup> The number of meters to be installed were 27,336 for year 1 (2000), 29,736 for each of years 2 and 3 (2001/02) and 15,268 for year 4 and again for year 5 (2003/04) (page 52). The draft notes that this pace will be observed until the Concession’s termination “since the expansions contemplate the simultaneous installation of meters and the construction of networks” (page 47).

286. For the extension of the drinking water service, AGBA’s proposal set a total of \$ 126,501,263 over the five years, an amount that is sub-divided in relation to each district. The Tribunal’s calculation of the total amount for all other works related to water service is \$ 77,769,531. Both amounts together are very close to the overall amount given

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<sup>47</sup> This must also be underlying Witness Cerruti’s affirmative answer at the hearing when he was asked whether the tariff regime for the metered system would be compulsory through the expansion area; TR-E, Day 1, p. 134/2-5. This can be correct only because any expansion required the installation of meters.

for the investment to be provided over the first five years that is \$ 204,555,794. It can also be read into these figures that the amount to be invested for expansion purposes is above 60% of the total investment. The corresponding figures for sewage services offer a similar view. The total costs for expansion are set at \$ 196,506,153 over the first five years, whereas other works, relating to treatment, renovation, reconditioning, and rehabilitation are scheduled for an amount of \$ 87,087,127.50, with the effect that the total amount devoted to sewage is \$ 283,593,280.50, from which close to 70% are reserved for expansion purposes. The overall total amount of investment was thus \$ 488,149,074.50.<sup>48</sup>

287. The figures retained in AGBA's final proposal that were incorporated in Chapter 5 of the first Five-Year POES as approved by ORAB (CU-193, RA-182) are different. The investment required for the "expansion of networks" in the water system represented a total of USD 35,239,300 and the corresponding amount for "expansion of collection networks" was USD 105,811,200. These figures can be compared to the total investment in the water system of USD 78,229,600 and in the wastewater system of USD 144,253,600. These two amounts together (with a smaller sum of USD 8,434,000 for investments not assigned by district) result in a grand total investment for the first five-year term of USD 230,917,300. The split per year 1 (2000) to 5 (2004) of this total amount is: 16,728,800 (1), 71,032,000 (2), 86,021,700 (3), 38,028,300 (4), 19,096,500 (5).

288. The Tribunal notes that in this POES the line reserved for the installation of micrometers is left blank. The explanation seems to be that the costs and the number and location of such meters had not yet been clarified. Annex II of Resolution No. 7/01 states indeed that: "Connections where micrometers are to be installed shall be adjusted to the data of the 2001 National Census, and their location shall be informed, broken down by year." (CU-193, RA-182)

289. The difficulties that did occur in the Concession's early lifetime in respect of the performance of expansion work will be addressed in the following sections of this Chapter. The Tribunal observes here that they translated into actual scheduling of AGBA's operation as early as the second part of 2001. AGBA reported already in its May 17, 2001 letter that such work had been interrupted.

290. AGBA's Business Plan of November 2001 (RA-211) shows for "Población y Metas de Expansión" that for each district, no figure is given in respect of "expansion," in both services for drinking water and sewage. This means that expansion work was scheduled as from year 2005 only. The chart on "investments" confirms: no investment is listed until and including 2004 for the drinking water system, and the same applies to the waste water supply.

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<sup>48</sup> Witness Hernando confirmed a total envisaged expenditure of \$ 488 million (TR-E, Day 3, p. 68/15-70/14). He added that "AGBA, of course, was not going to spend \$ 500 million in the first five years" (p. 69/14-17).

291. Another chart on “Demandas Técnicas” shows that the length of drinking water pipes remained constant at 1.726 kilometers until and including 2004, a first increase being indicated for 2005 with the effect of extending the length of the network piping to 2.459 kilometers. As the layout of pipes is a necessary part of expansion work, this chart shows that no such work was scheduled until 2005. The same observation applies to the length of wastepipes, which remained constant until 2004 with 930 kilometers, the increase starting in 2005 with an additional length of pipes of 317 kilometers.

292. The chart on “investment” does not provide for any amount for the installation of micrometers between 2000 and 2003. For 2004, an investment for \$ 1,507,200 is given, which increases to \$ 2,951,600 for 2005. As the installation of meters is a necessary requirement for the completion of expansion works (Sec. 29-II of Law No. 11820), this confirms at least until the end of 2003 that no such work was envisaged.<sup>49</sup>

293. At this stage, the Tribunal concludes that no or insignificant expansion work including the required extensions and layouts of pipes has actually been scheduled and undertaken by AGBA at the critical period between 2000 and 2004 and that the work indicated for 2005 on the Business Plan of November 2001 is uncertain and anyhow irrelevant in light of the events that happened well before that time in relation to Argentina’s crisis that also caused the crisis of the Concession. The Tribunal has not been provided with evidence that would oppose such a conclusion.

294. This conclusion leaves entirely open, for the time being and until further consideration of the Parties’ conduct in respect of the POES, the effect of the approval of AGBA’s report on the POES for year one and the neutralization of the POES for year two upon the nature and the amount of expansion work undertaken under a different qualification, as reconditioning or restoration of connections or similar type of work.

c. Expansion related to the UNIREC plants

295. Claimants complain that upon Takeover, the Concessionaire found several obstacles to service expansion. One essential among them was the Province’s failure to build the UNIREC plants. This failure altered the Concessionaire’s expansion plans because it had projected expansions related to the construction and connection of networks to those plants. The Tribunal understands that important work had to be undertaken for the purpose of building collectors allowing taking wastewater from the households to the purifying plants. This was unfeasible because the plants had not been built. This event was not part of the business risks and, therefore, cannot create any obligation for AGBA. In response to Respondent’s argument that AGBA should have changed its plans and made

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<sup>49</sup> Witness Dáscoli explained that in 2003 about ten meters were installed (TR-E, Day 2, p. 150/1-3, 152/24-153/6, 172/2-3). In 2005, 240 users were transferred to the metered system (Dáscoli I, para. 25).

projects, networks and connections for other available plants, Claimants refer to Witness Quijada explaining that such a change requires time for its preparation.<sup>50</sup>

296. Claimants' point is irrelevant. As explained above, AGBA had not scheduled expansion work until 2004. It told the Grantor in its May 2001 letter that it had interrupted expansion work. The alleged difficulties related to the need to redirect plans to develop and extend the network near the future UNIREC plants are therefore hypothetical. The line reserved for "expansion (UNIREC)" on the chart for "Población y Metas de Expansión" on AGBA's Business Plan of November 2001 (RA-211) has no number before 2006, showing that no work was scheduled until that time. Moreover, Claimants have not presented evidence demonstrating that expansion work was actually under preparation when the delivery of the UNIREC plants could be expected and caused costs that finally were suffered by AGBA for no avail. In any event, AGBA must have known at an early stage that these plants were not under construction and therefore were not available. There was thus time left for expansion work to be directed elsewhere, as this was explained by Witness Cinti at the hearing<sup>51</sup>, and this even in considering, with Witness Quijada<sup>52</sup>, that this may have implied a waste of time, taking at least five months to start new projects in other areas.

#### B. Collectability of bills for services

297. While the provision of water and sewage services was important for the population of Region B, it was just as important for AGBA to get its bills paid by the users and thus to obtain the return that allowed covering costs and provided profit enough to ensure further investments and a reasonable return for the investors. The ratio of collected to uncollected bills is in direct relation to the applicable tariff and to the costs associated with the provision of services through the network and the required funding. The estimation of the rate of the collectability of bills is one of the key elements for the determination of tariffs: if the actual collectability reached is lower than the one expected, the billing process based on the applicable tariffs does not provide sufficient return to cover the estimated costs and projected returns, and *vice-versa*. This also means that in case the same ratio declines, the expected return for the purpose of further investment declines in equal proportion, creating the need to find other sources for funding the work to be done. Finally, the expected rate of collectability further serves, in Claimants' view, as a forecast for the purposes of their damage valuation.

298. The Parties are deeply divided in respect of the numbers or percentages of uncollectable bills at the different relevant times of the Concession, and they are even more divided when the actual results of AGBA's collecting bills are to be explained.

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<sup>50</sup> Quijada I, paras. 287-294, II, paras. 48-62.

<sup>51</sup> TR-E, Day 3, p. 102/14-19.

<sup>52</sup> TR-E, Day 2, p. 28/7-30/12.

1. *Claimants' position*

299. Claimants submit that reputable experts confirmed that AGBA's estimated collection rates were realistic. The FIEL<sup>53</sup> study of October 2000 admitted a possibility of achieving a collection rate of 90% or higher<sup>54</sup>. A communication of COFES<sup>55</sup> of October 16, 2009 shows rates exceeding 90% in 2009 in several provinces in the Argentine Republic (CU-222). In one of the reports prepared by Schrodgers in 1998, a significant increase in collectability during the first years of the Concession was envisaged (18% in 1999, 20% in 2000).

300. Claimants deny the existence of a proportional link between low collectability rates and low income and economic resources of the population. A poor population may accept to pay an important part of their revenue for access to water. Therefore, the fact that Region B covered a larger part of low-income or poor people than other regions did not necessarily mean that larger uncollectability of water bills was to be expected. There is no truth in Respondent's assertion that the poverty index of the residents accounts for low collectability even as far as the basic service is involved. Affirming that low income levels translate into lower collectability is a mere assumption totally unfounded in reality.

301. Claimants state that they had invested in reliance on the effective instruments to secure high collection rates contained in the Regulatory Framework. They explain that the power to implement service cut-off and other coercive measures plays a highly important role in collection rates, as an undoubtedly valuable incentive. However, AGBA was deprived of the right to cut off the service shortly after the Concession started and in spite of the provisions of the Regulatory Framework. The Halcrow Report also underscored the relevance of service interruption (CU-209). This would certainly increase collection rates. The effectiveness of such a measure may vary in relation to the users' perception of the seriousness of the risk of cut-off of services. The COFES also noted that companies that use coercive measures get an increase in collection rates. Schrodgers underscored the power to interrupt service and stated that the bills should be instruments susceptible of court enforcement proceedings. This power was thus expressly mentioned in a document submitted during the Bidding Process.

302. Contrary to what Respondent seems to infer from AGBA's letter of May 17, 2001, AGBA did not doubt the effectiveness of service cut-off as a means to increase collectability. What it intended was to propose to the Grantor the implementation of other, less drastic measures, in particular in light of the number of 250'000 people concerned. AGBA stated that coercive measures would be more efficient for a shorter period, but that the Grantor may look for an alternative. It was critical, however, when AGBA was

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<sup>53</sup> Foundation for Latin American Economic Research.

<sup>54</sup> Exhibit 273 to Giacchino/Walck I.

<sup>55</sup> Federal Council of Sanitary Services Entities.

faced with an impossibility to implement coercive measures. If such prohibition is issued by the Grantor and the population becomes aware of it, the Concessionaire loses an incentive for payment.

303. Attributing low collection rates to the mismanagement by the Concessionaire is unfounded. Numerous and effective measures were implemented. It is also baseless to attribute low collection rates to AGBA's attempts to bill the work charge and the connection charge. AGBA was entitled to collect such charges. Further, the connection charge, which involved the higher amount, would be billed by the Concessionaire in up to 30 bimonthly installments, with the effect that the amount collected did not represent a special sacrifice to the user. AGBA introduced countless improvements to the Concession's commercial management. Halcrow confirmed the progress, stating that from the results of various measures, including customer attention services, an improvement in collection rates between 13 and 33 points was enabled, while it was also stated that a further increase would depend on the customer's perception of the severity of non-payment consequences (chapter 4.5). The Concessionaire's auditor, Inglese Consultores S.A., noted the satisfactory effects of customer attention tasks. The collection issues faced by AGBA were not derived from commercial mismanagement, but from other circumstances outside its control, which are, at least in part, directly attributable to the Grantor.

304. Claimants accept that collection is a topic that falls under the umbrella of business risk, but they contend that this risk was seriously affected by the economic and political emergency and the ensuing measures adopted by the Province. These consequences cannot be brought to bear on the Concessionaire and its shareholders. Experts Giachino/Walck have demonstrated that the forecasts on collectability used as the basis for the damage valuation are realistic. Claimants' Experts considered that the Argentine economic crisis would affect the Concessionaire's collection capacity for a certain duration. They delayed the achievement of the 90% collection rate until 2009. The resulting difference was allocated to the business risk and was not made part of a damage valuation.

305. Claimants further add that the collectability level forecasts submitted by AGBA in the course of the failed 2004 renegotiation process are not relevant. At the time, AGBA's Concession had been seriously affected by the economic emergency and the measures adopted by the Nation and the Province, which influenced the Concessionaire's investment capacity and collection rates as well. The rates included in the model used by AGBA for the renegotiation were not intended as final data. AGBA's working on the models requested by the Province in the renegotiation process did not imply an acknowledgment of any errors regarding the collection rates considered when it prepared the Business Plan. It was simply cooperating in good faith in order to reach an agreement.

306. The maximum collection rate the Respondent's Experts defended (66%) is lower than the maximum collection rates achieved by AGBA (84%). The data used by Giachino/Walck are supported by evidence, while the rates used by Respondent's Experts (ranging between 56% and 66%) are mere hypotheses.

## 2. *Respondent's position*

307. Respondent explains that before Claimants entered the deal, the Concession area had low collectability rates. For the Province, the average had been 69% in 1998 and 71% in 1999. In Region B, the historic collectability was even lower. Collectability was one of the five chief sources of risk of the deal, as Schroders had noted. While AGBA projected a collectability of 75% in 2000 and 78% in 2001, tariffs dropped in reality to percentages low as around 54% over the first two years. The figure was in January 2001 74%, but it went down to 55% in July and to 49% in January 2002.

308. To achieve a significant improvement in the collectability of services was a great challenge for AGBA. Most of the population had no water and sewer coverage; their social and economic conditions were more precarious than populations with coverage. It was however foreseeable that those users added to the water and sewer network were to be less likely to pay.

309. In its May 2001 letter, AGBA stated that it thought it could achieve better results with compulsory collection policies rather than peaceful business policies, but it stated in the same letter that it would not be wise to exercise such rights in a widespread manner, given the scale of households in arrears of payment. In said letter, the Concessionaire also referred to users' unforeseeable conduct, thus confessing its own doubts about the policy to be adopted. The greatest problem may have been due to users with pre-existing connections. In its May 2001 letter, AGBA did not mention that it intended to collect the work charge from newly registered users, which caused these users even more to resist payment.

310. Respondent notes that AGBA's 1999 Business Plan was prepared without taking into account historical average collectability values recorded by AGOSBA. These projections were in a range of 75% to 90%, about 20% higher than the ratio actually achieved in the first two years. The business plan was based on extremely optimistic assumptions in terms of income and collectability. This was acknowledged by AGBA in its letter of May 17, 2001, where AGBA mentioned uncollectability rates reaching 70% and in some neighborhoods 80%, qualifying them as "extremely high." Claimants' Experts' valuation disregarded these actual figures. It is not reasonable to apply the initial 75% collectability level used by AGBA in its 1999 Business Plan or the 84% submitted by AGBA to the Inter-American Development Bank (IDB). Claimants' Expert report contains collection estimations in terms of expected average values, but not observed data. When AGBA

itself estimated 67% collection averages on sales income, how can ex post valuations be made in adding up to 20% on actual recorded values? High levels of hypothetical collectability estimated by Claimants' valuers were never reached. Based on AGBA's Reports and Financial Statements for the period 2000-2005, Respondent's Experts show a historical collectability of 63%, based on the evolution of AGBA's Sales Income and the gross balance of the Sales Credit item (thus taking account of the collected and of the outstanding amounts).<sup>56</sup> The rates based on an initial figure of 56% and on a long term level of 66% are reasonable, adequate and consistent.

311. Respondent also contends that the Contract left no room for doubt regarding the fact that the collectability risk was assumed by AGBA. Respondent notes that it is accepted by Claimants that collectability falls under the umbrella of business risk. Both the Contract (Sec. 12.3.6.1 (d)) and the Regulatory Framework (Sec. 30-II) provide that decreases in collectability levels shall not be deemed unforeseen events. The consequences of collectability under AGBA's estimations are a cost AGBA must bear. Knowing that such estimations are exaggerated, its projections were unrealistic.

312. Respondent submits that there were clear signs that AGBA's business management was not adequate to reverse uncollectability levels. Examples in other services show the importance of active management. Interruption of the service that once was AGBA's preferred approach was not a suitable measure. AGBA had ruled out this measure as an alternative in mid 2001. It would have meant denying access to water to almost 250,000 people. This would cause social distress and in turn raise uncollectability even more. For Expert Lentini, there is a high correlation between users' capacity for payment and delinquency in public utility payments, particularly for water.<sup>57</sup>

313. AGBA had not been active. The figures of collectability attained show the failure of AGBA's business management in these early years, before the crisis emerged. AGBA always had a series of tools available to improve collectability, including the restriction of service, and never implemented them. AGBA's 2005 Annual Report is proof of its collection mismanagement, because it shows that it was finally only in that year that AGBA discovered the various tools to improve collectability. The list is long and shows how little had been done before. Witness Seillant explains that collectability had improved in 2004 and even more in 2005, when the unemployment rate began to decrease. Insofar as the tariffs did not increase, an improvement in collectability could be expected.<sup>58</sup>

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<sup>56</sup> Dapena/Coloma II, paras. 154-157.

<sup>57</sup> Lentini II, para. 90.

<sup>58</sup> Seillant II, para. 58.



314. Respondent finally recalls that all problems related to collectability took place before the emergency was declared. There is no liability that could be attached to the Province or the Regulatory Authority for this. Collectability had been a crucial point during the contract renegotiation.

### 3. *The Tribunal's findings*

315. On analysis, the Tribunal does not find that the evidence supports a wide range of difference in collectability and accordingly, it is unnecessary to resolve small differences in the figures estimated and actually achieved. When AGBA entered into the Concession, the relevant figures were those provided to the Bidders in the Schrodgers Report, with an average of 63%.<sup>59</sup>

316. AGBA recorded a significant decrease in collectability in its letter of May 17, 2001, explained by the addition of 80,000 users unwilling to pay because they were served previously by AGOSBA at no cost. The Bidders had been made aware of this category of users, and so had they been aware of the difficulties and the time it would take to make these users to join correctly the category of users who had not known any regime other than the one where bills arrive at a regular pace. Nonetheless, the enormous proportion of delinquent users must have been unexpected, in particular when it comes to observe “astronomical bad debt rates” as noted in AGBA’s letter of July 17, 2001 to ORAB (CU-135, RA-192). Moreover, AGBA’s letter of June 28, 2002 to ORAB (CU-104, 118) reports about 103,000 non-existing customers with a collectability rate of 33%, compared to 82,000 existing customers paying their bills at a rate of 75% (Annex A).

317. Claimants cannot blame ORAB for preventing AGBA from using coercive measures and in particular to proceed with cutting-off of delinquent users from the network. AGBA was perfectly aware – as the Bidders were – that a measure of such gravity was supplied with serious legal and regulatory restrictions that had to be observed. Claimants’ position is moot anyhow in light of AGBA’s own statements that measures of too much incentive force were counterproductive in many cases and could not be applied on a scale as large as the considerable part of the population that was resisting paying its bills.

318. AGBA explained in its letter of May 17, 2001 that the method consisting of cutting-off services to delinquent users had proved to be “clearly insufficient” and that AGBA was convinced that “persistent, pacific commercial policies of systematic and continuous persuasion would help improve the current collectability rates.” While such an approach would “take much more time” compulsory collection proceedings under the Contract may allow equivalent results “in much shorter periods.” The letter then abandons

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<sup>59</sup> Cf. the figures referenced in Dapena/Coloma I, para. 42.

this latter method, as it was “not advisable to use these mechanisms on a widespread basis,” other than to cut off the service in very specific cases, without resorting previously to alternative solutions. AGBA thus showed that its method of dealing with delinquent users was a failure and that it had to restart a softer approach for the future. This was clearly a result of poor operational skill covered by AGBA’s business risk.

319. Despite Claimants’ allegations denying AGBA’s deficiencies in successfully raising users’ payments to a significant extent, AGBA’s letter of May 17, 2001 admits a serious need for progress. AGBA’s management had understood the lesson from its inefficient proceeding with bills. Claimants’ Experts report that in 2004, it implemented a specific operation for poor neighborhoods, “which had promising preliminary results.”<sup>60</sup> AGBA’s Financial Statement of 2005 (CU-32) referred to new working guidelines for more fruitful strategies for collection, showing that AGBA was making progress on this point, albeit rather late.

320. Claimants’ allegation that the proposition that low income levels are causing lower collectability is an assumption “totally unfounded” is contradicted by their acceptance that the UBN factor plays a role; indeed, for this category of the population, there is just no money left for paying water and sewage bills. This is one element showing that despite Claimants’ assertion a parallelism between the two levels exists. Giving his opinion as an economist and not as an expert in water or electricity services, Professor Eichengreen told the Tribunal that “the incidence of default, how frequent non-payment is, will increase with the poverty rate, other things equal.”<sup>61</sup> The Tribunal notes that the tariff regime for non metered service distinguished between several categories of tariffs, the lowest tariff being reserved for the most low-level income users and the highest tariff for the richer people; this shows that the amount of charge put on users was modeled depending their income and thus certainly also in proportion to their willingness to sacrifice part of their revenue for water and sewage services. The Tribunal also understands Expert Lentini’s view that a tariff increase in a range offering compensation for the pe-sification would have resulted in an importantly increased uncollectability, pushing the Concession to an extremely dire economic position.<sup>62</sup>

321. The Tribunal further observes that one has to rely on the situation in AGBA’s Zone 2 independently from collectability rates obtained in other Regions and Provinces.<sup>63</sup> The expert studies Claimants invoke are of little relevance in the instant case. The FIEL study adopts a collection rate of more than 90% by comparison to the rate obtained by

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<sup>60</sup> Giacchino II, para. 147; AGBA’s Statement 2004, p. 3/4, CU-31.

<sup>61</sup> Cf. TR-E, Day 5, p. 185/1-19. Cf. also Expert Coloma, TR-E, Day 7, p. 27/9-32/12.

<sup>62</sup> Lentini I, paras. 159, 209. Cf. also Witness Ratti, paras. 43-47.

<sup>63</sup> Thus, Expert Lentini noted that Experts Giacchino/Walck take a collectability rate as “the quotient between the aggregate annual collection and the aggregate billing in the same period under consideration.” Expert Lentini observed that this ratio fails to reflect appropriately efficiency in the collection management; Lentini I, para. 128.

Aguas Argentinas S.A. in 1998 (pages 20, 29/30), holding the concession for Great Buenos Aires that is operating under an economic background manifestly different than AGBA's area. It is based on a reading of the Concession Contract taking no account of the regulatory measures applied to AGBA, and without considering the POES and its actual application (pages 24/5). Claimants also submit that rates of 90% are shown as applicable in various provinces in Argentina in a communication of COFES issued in 2009. This is not correct. What matters is the situation in AGBA's Concession Zone or in the Province. In this respect, the communication shows rates moving in a range of 81 to 87% in the years 2002 to 2008, with a drop by 10% in 2009.<sup>64</sup> These rates are those of the Province. When both Zones 1 and 2 could be compared, it is certain that AGBA's Zone 2 would have an average lower than in Zone 1.<sup>65</sup> A certified accountant mandated by Impregilo stated on October 2, 2009 that the rates were low in the period of 2000-2004 (2000: 48%, 2001: 60%, 2002: 57%, 2003: 56%, 2004: 64%) and then rose to 79% in 2005 and 84% in 2006.<sup>66</sup>

322. The Tribunal concludes that certainly, after AGBA had absorbed the entry of 80,000 historical users not billed before and after the recovery of Argentina's economy as from 2003, the collectability rates that were in 1999 at approximately 70% and then decreased by around 10% or in part even more in the period between 2000 and 2003, were growing to such extent that levels around 70% or more could be estimated as reasonable figures for the near future. This view corresponds to the indications given by AGBA in its Proposal for renegotiation of June 2004, based on figures relating to accumulated amounts on an average amount of 60%. A level of 65.7% was reported for 2005.<sup>67</sup> AGBA's Proposal recommended "moderate and gradual tariff increases, while the price for the service was held below its economic value."<sup>68</sup> AGBA was thus well aware of the risk to see collectability dropping again if the limited capacity of payment of the population was not taken into account.<sup>69</sup>

323. Based on the available information, it appears that AGBA had to a certain extent overestimated the amount of return from its bills. This was, as Claimants basically accept, part of the Concessionaire's business risk. It was therefore equally part of AGBA's risk to be faced with a higher demand for investment to be provided otherwise than through

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<sup>64</sup> Based on an information provided to AGBA on October 16, 2009 by the Federal Council of Sanitary Services Entities (COFES), the collection rates in the Province of Buenos Aires (covering Zones 1 and 2) went down from 87,4% in 2002 to 85,3% in 2006 and then to 81% in 2008, followed by a drop to 71,2% in 2009 (CU-222).

<sup>65</sup> One of the many specific factors to be considered is the failure to develop the metered system together with the expansion of the network. The Tribunal finds convincing Witness Hernando's observation, given at the hearing as his personal opinion, that the installation of meters increases the collectability because people thus are able to identify their bill with their own consumption (TR-E, Day 3, p. 37/10-38/10).

<sup>66</sup> Exhibit 305 to Giacchino/Walck II.

<sup>67</sup> Cf. Cerruti II, para. 77.

<sup>68</sup> Exhibit H002 to Seillant I, page 34 (not numbered).

<sup>69</sup> Cf. Lentini II, para. 69.

the return of revenue than the amount envisaged on the basis of an input of an over-optimistically assumed amount of resources collected through the payment of users' bills. As will be explained below, this overall assessment needs not to be detailed as to its precise impact on the demand for investment on part of AGBA and its shareholders. In any event, the Tribunal has not been provided with such details to a reliable degree. It is clear, however, that AGBA could not find, on its budget of resources provided through the users' payment of bills, a return sufficient to equal the expected portion of future investment based upon such return. This had the effect of increasing the demand to provide more investment taken from other sources. It also means that Claimants' valuation of their estimated revenue in the years after the crisis could not, in the first couple of years, be based on collectability levels above 70%. Any further increase that might have been expected in future years remains uncertain in light of the fate of the Concession and its termination.

### C. POES

324. The Parties agree that the Service Optimization and Expansion Program (POES) determined the Concessionaire's obligations. This program established the Concessionaire's quantitative and qualitative goals and included a Five-Year Plan, which became effective upon approval by the Regulatory Agency, as stated in Section 1.2 and the provisions of Chapter 5 of the Contract. The objective of the POES is to provide the expansion of the service in the Concession Area, and to ensure the maintenance and improvement of the system (Sec. 5.2). The goals specified in the POES were to be satisfied within the whole Concession period, but divided into successive periods of five years each, as further elaborated in Annex F of the Contract (Sec. 5.1). Such a plan could be amended upon extraordinary circumstances, at the Concessionaire's request, provided that the changes would not disrupt the Concession's equilibrium (Sec. 5.4).

325. The provisions of the Concession Contract are to be read against those contained in Law No. 11820, stating in Section 38-II that Five-Year POESs had to be established and that those POESs had to be approved. It also provided that the Concessionaire shall prepare detailed draft plans setting out investments amounts, objectives and goals set and to be achieved. Article 39 of Annex II states that the plans agreed upon shall be binding upon the Concessionaire and their breach shall be deemed a serious fault. The Concession Contract confirms that the POES, after their approval, shall be mandatory (Sec. 5.3) and that the failure to comply with is a ground for termination (Sec. 14.1.3, lit. b).

326. With regard to the drinking water and sewage services, the Concessionaire had to meet a global coverage goal, and it had to ensure that each district within its Region reached a coverage level at least equal to the minimum goal established for each of them. Thus, according to the coverage values fixed in Annex F (Sec. 2.1.1, 2.1.2), the POES for the 5<sup>th</sup> year of the first five-year period, the expansion goals for the drinking water network varied from 45% to 72% in the different districts, the global goal being set at 74%,

whereas the coverage expansion goals for the sewer network had variations from 34% to 70%, with an average goal of 55%.

327. Based on Section 38-II of Law No. 11820, the first five-year period was subdivided in five annual sections each indicating the goals to be reached for the respective year. For each year of this first five-year period, the Concessionaire had to submit a progress report seeking ORAB's approval. ORAB consulted for this purpose its "Technical Area," which was the service providing expert advice to the Agency.

328. Pursuant to Section 38-II of Law No. 11820, the projects for POES plans prepared by the Concessionaire shall state the expected investment amounts, as well as the objectives and goals to attain pursuant to the Concession Contract. Upon approval by ORAB, the plans provided for in the Concession Contract shall be binding upon the Concessionaire, subject to a later amendment based on extraordinary and duly justified reasons, and approved through a "justified resolution of the ORBAS which does not alter the Concession equilibrium" (Sec. 39-II, Sec. 5.4 of the Contract). In similar terms, Section 5.3 of the Contract provides that upon approval by ORAB of each Five-Year Plan drafted by the Concessionaire, "it shall become a Five-Year Plan and shall become an integral part of the POES, and its fulfillment shall be mandatory." When these provisions are read together, the understanding must be that the fulfillment of each Five-Year Plan was mandatory, whereas such binding force was not attached to the plans the Concessionaire had to prepare and to get approved for each of the first five years of the Concession.

329. Under Law No. 11820, the Concessionaire had to submit annually to ORAB a detailed report on the fulfillment of the POES (Sec. 15-II, lit. o). ORAB shall approve regular POES plans drawn up by the Concessionaire (Sec. 13-II, lit. e, 38-II).

330. The difficulties in performance that emerged as from 2001 in the Concession's life translated in goals not achieved as they should have been reached in compliance with the POES. AGBA's performance under the POES struggled even more when the economic crisis hit Argentina.

#### *1. Claimants' position*

331. Claimants explain that on March 21, 2000, AGBA filed its first proposal for the POES' first Five Year Plan (2000-2004) with ORAB (CU-192), followed by a final version on November 8, 2000, which was approved by ORAB on January 31, 2001 (Resolution No. 07/01, CU-193, RA-182).

332. AGBA' first annual POES progress report was then filed on July 17, 2001 (CU-194). It was approved by ORAB on December 5, 2002, stating that AGBA "has met the service expansion and quality goals of the first year of the concession" (Resolution No.

69/02, CU-129, RA-113). In reply to one of Respondent's objections, Claimants draw the attention to this statement qualifying the works performed as service expansion activities, and not as maintenance activities for the existing network.

333. A few days before the enactment of the Province's Emergency Law No. 12727 (CU-195, RA-164), the Concessionaire requested the temporary suspension of the first Five-Year POES, by letter of July 17, 2001 (CU-135, RA-192). In a further attempt to accelerate ORAB's decision making, AGBA wrote in a renewed request to neutralize the POES deadlines of August 15, 2001 (RA-193) referring to Law No 12727:

“It is further understood that if this situation constitutes sufficient grounds for contractual termination without fault, the same applies to a justified cause of delay in the execution of the works of the Expansion Plans.”

334. ORAB granted a suspension for the second year of the Concession (Resolution No. 77/02 of December 30, 2002, CU-137, RA-121), explaining that in light of the extraordinary events that had occurred, “the modification of the five-year plan for the second year of the concession is admissible.”

335. Claimants further note that AGBA submitted the POES progress reports for year 3 (2002), 4 (2003) and 5 (2005), but ORAB never ruled on any of them. In response to Respondent's argument that the suspension granted by ORAB for the second year of the Concession had not the meaning that the objectives applicable for that year two had not to be reached within the five-year term of the plan, Claimants note that AGBA's request to have these three subsequent POES neutralized had not been answered by the Agency. The national emergency was declared in year three (2002) with the effect that no breaches on part of the Concessionaire can be adduced.

336. Claimants conclude that there is no justification or point in raising a failure to fulfill the POES goals (as this was retained as a ground for termination) when fulfillment had been confirmed for year 1 and the POES suspended for year 2, without the Agency ever ruling on the same subject in the years that followed, due to the emergency situation. Claimants recall once again that the suspension of the 2001 POES was based on the “extraordinary circumstances calling for the modification of the five year plan” and given how the 2001 crisis was extraordinary, it must necessarily be recognized that the situation in 2002 was even more extraordinary. And the goals for year three and the following years were impracticable due to the destruction of the economic and financial equation of AGBA's Contract, worsened by the economic emergency and the pesification. Therefore, there were no expansion goal-related breaches attributable to AGBA. Moreover, no attempt was made to restore the contractual equilibrium, not even in a renegotiation process that the Grantor followed as a mere formality.

## 2. *Respondent's position*

337. Respondent's explanation of the events described above differs from Claimants' presentation basically in respect of the alleged failure of AGBA to perform the POES requirements under the Concession Contract at least until the end of the first Five-Year POES. In other words, Respondent's point is that AGBA's obligation to perform was never suspended, neutralized or otherwise rendered ineffective; it was merely differed in time. Moreover, AGBA's failure to perform according to the POES was due to its own inefficiency and poor management, further aggravated by the lack of sufficient funding. Respondent reports on these events with many details, supplied in most part by Expert Molinari.

338. Respondent refers to AGBA's letter submitted on April 12, 2002 regarding the Progress Report of the 2001 POES, whereby it stated that it "has complied with the goals of year 2001 and with the remaining obligations under the contract up to the limit of its objective capacity" (RA 120, CU-136). This letter made no reference to AGBA's breaches. It failed to mention that (i) it had not begun the works it had undertaken to perform since the first day of the Concession, (ii) UNIREC's failure to build the plants was not an obstacle to perform most of its obligations, and (iii) it was solely responsible for having failed to obtain the necessary funds to meet the POES goals.

339. When AGBA submitted on July 20, 2001 the POES Annual Progress Report for the first concession year (2000) (CU-194)<sup>70</sup>, it was shown that the Concessionaire had not complied with its obligations for the first Concession year. ORAB's Technical Area considered on August 27, 2001 (RA-104) that even though the Concessionaire did not comply with the requirements of the POES, strong penalties were to be avoided. Respondent submits that this showed the Province's good faith to continue with the service. It was a measure to the benefit of the Concessionaire, despite the fact that the breach level was approximately 40%. As a matter of fact (further explained by Expert Molinari), it was reported that in the first concession year (2000) global non-compliance reached 41.5% in drinking water expansion and 23.5% in sewerage services. AGBA also failed to comply with network renewal and/or reconditioning obligations. For the purposes of network expansion and connections, the Concessionaire used existing works, built by third parties as "illegal connections" and delay the construction of new works as much as possible. But ORAB allowed the Concessionaire to compute illegal networks as new connections. ORAB Resolution No. 69/02 (RA-113, CU-129) approved the "Annual Report of POES Progress" for the first year of the five-year plan.

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<sup>70</sup> Exhibit CU-194 only contains the cover letter. Exhibit RA-192 indicated by Respondent as containing AGBA's Report of July 17, 2001 (received by ORAB on July 20, 2001) in fact contains the Concessionaire's request for the temporary suspension of the first Five-Year POES, of the same date. Exhibit 91 of Giacchino/Walck I contains a number of distinct pages of the Report that do not allow a serious examination.

340. In respect of year one, 2000, Claimants cannot allege that the breach of the goals was a consequence of the Emergency. AGBA's breaches in that year plus AGBA's request to suspend the goals and to renegotiate both occurred prior to Emergency, which was concealed behind the declaration of the state of Emergency. Claimants cite ORAB's Technical Report dated August 27, 2001 as evidence of compliance with the goals provided for in the POES. However, the file that contains this report affirms that the Concessionaire failed to comply with the goals provided for in the POES for the first year.

341. When ORAB's Resolution No. 77/02 of 30 December 2002 (RA-121, CU-137) suspended the POES terms regarding the service expansion and quality goals for the second year (2001), it added that such goals shall be adjusted. The suspension was admitted for the reasons invoked by the Concessionaire in its request of July 17, 2001, *i.e.* the public situation of economic emergency, but not on the basis of those mentioned in AGBA's letter of May 17, 2001. The Resolution No. 77/02 stated that AGBA requested the neutralization of the POES deadlines based on the notorious economic emergency situation. Thus, after admitting its true problems (low collectability and difficulties to access financing) and grounding the suspension of the goals and the renegotiation of the Contract on them, AGBA subsequently modified its motives and used the Emergency as an excuse instead of its internal problems.

342. In water matters, the Concessionaire reached a 45.06% delay over the first two years. As for sewerage, it accumulated a 59.01% delay as against the total number of wastewater connections to be served under the POES. This delay would have to be offset between the 3<sup>rd</sup> and the 5<sup>th</sup> year. When the Province analyzed AGBA's filings on compliance with POES for the second year, it did not impose any penalties. ORAB explained in the Resolution that the purpose of the suspension did not amount to ignoring the goals undertaken to be achieved by the Concessionaire, whereas the failure to achieve these goals shall not amount to be regarded as breaches for the purposes of the imposition of fines on the Concessionaire. The meaning was not to dispose of the goals for the five-year period taken as a whole. ORAB instructed the Concessionaire to adjust the goals with the involvement of the Granting Authority. The intention was to compensate the goals within the five-year period. However, as of September 30, 2003, the Concessionaire had yet to submit the goal adjustment proposal. No proposal at all was even submitted until the Contract was terminated. The POES goals for year two had to be adapted within the framework of the adaptation procedure for public service contracts (Law No. 12858 and Provincial Decree No. 1175/02) on the understanding that they had to be compensated within the first five-year period. This was stated in Resolution ORAB No. 77/02 and shows that the Province and the Regulatory Authority acted in good faith and to the benefit of the company.



343. As for the third year (2002), Respondent states that given the fact that the suspension of the POES, as accepted in Resolution No. 77/02, was limited to the second year of the concession, the Concessionaire had still to offset the unmet goals of the previous year. In terms of water, AGBA registered an expansion of only 22,102 connections, out of the 82,240 connections scheduled. This translated into an overall delay of 73.1% for the third year and an accumulated delay of 56% during the first three years. In terms of sewerage, the delay for the second year was 70.6%, accumulating for the first three years at 54%.

344. In the fourth year (2003), the Concessionaire had to increase the number of connections to be made, so as to recover the overall goal for the first five years. The drinking water network expansion reached an annual deficit of 98.5%, with an accumulated deficit for the four years of 48.7%.

345. In the fifth year (2004), the situation became worse. The Concessionaire failed to meet the annual goal in all 7 municipalities served, ending with a five-year delay in total connections of 51.8%. Regarding sewerage, the delay reached 61.3% in relation to all connections scheduled for the first five years.

346. The growth of residential connections had a deficit that finally barely reached a third of what was agreed upon in the first Five-Year POES. Concerning the sewer network, its growth was only a quarter of what was agreed upon. This shows that AGBA's breach of the commitment to expand services assumed in the POES was systematic and started in the first year of the Concession. ORAB refrained from applying sanctions to AGBA, and it did so until termination of the Contract. For Expert Molinari, this was so because such sanctions would have worsened the financial situation of the Concession. Nevertheless, the measures taken and the support provided to AGBA did not render the Concessionaire in compliance with its obligations. It is worth mentioning the breaches AGBA committed during the time of its Concession. For the facilities in water networks, the breach reached 84%, and it was practically total for the entire sewer network.

347. Respondent also notes that the Concessionaire never submitted the second POES five-year plan.<sup>71</sup>

### 3. *The Tribunal's findings*

348. The Tribunal acknowledges that the POES determined the key elements of the operation of the Concession and of the performance by the Concessionaire under the Contract. It also recognizes that the number of connections and the respective percentages of work were indicated in Annex F as minimum values that the Concessionaire was at liberty to pass.

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<sup>71</sup> Molinari I, para. 248.

349. The Tribunal admits the overwhelming evidence that as from the first year (2000) the goals set up in the POES had not been reached as a matter of fact. The percentage of failure varies between 40 to 50%, increasing in the second part of the first five-year period due to the events resulting from the economic crisis and the emergency and the lack of sufficient funding. The issue to be further considered is whether these failures to reach the approved goals are to be attributed, in full or in part, to the Concessionaire.

350. Respondent has provided the Tribunal with AGBA's POES progress reports for year 3 (2002), 4 (2003) and 5 (2004) to ORAB, as Annexes to Expert Molinari's first Statement. It has not received evidence that the Agency ever ruled on any of them. Claimants note that AGBA's request to have these three subsequent POES reports neutralized had not been answered by the Agency.

351. Engineer Inglese, AGBA's Technical Auditor, reported that he submitted to ORAB three Certification Reports for these three years, where he stated that the Concessionaire had decided that no report on expansion works be made in the relevant period had to be seen in light of the economic situation, the failure by UNIREC and later ENOHSA<sup>72</sup> to build the sewage treatment plants, and the condition of the network built at the time of Takeover. Therefore, the issuance of progress reports had been suspended and the role of the Technical Auditor limited to confirming to ORAB that the Concessionaire had all relevant information available and that his report confirms "the reasonableness of the information submitted, without considering neither its consistency with reality nor the suitability of the process to collect and process such information, and thus not being a Certification in terms of Article 6.3 of the Concession Contract."<sup>73</sup> Engineer Inglese explained at the hearing that the task of the Technical Auditor was to certify that the information the Concessionaire was collecting and supplying to the Regulator was correct; the Auditor had not to pass judgment on compliance.<sup>74</sup>

352. The situation was thus that the progress report for year 1 (2000) was approved, the Five-Year POES for the second year (2001) suspended and the same POES either neutralized in fact or no longer considered as effective for the three remaining years (2002-2004). This situation is to be examined in respect of the fulfilment of the goals the Concessionaire had undertaken to reach. In the event of non-fulfilment, the legal position of the parties to the Concession Contract becomes an issue.

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<sup>72</sup> National Entity for Sanitation Hydric Works

<sup>73</sup> Quote from the Report for year 5 (2004), cf. Inglese, p. 27, and para. 36 with extracts from the reports for years 3, 4 and 5. The Tribunal understands that the Engineer's observation that the issuance of progress reports had been suspended is not correct; rather the reports were presented in a different form than those for years 1 and 2.

<sup>74</sup> TR-E, Day 4, p. 206/9-208/1.

353. ORAB Resolution No. 69/02 declared that the Concessionaire had met the annual percentage undertaken in Annex F of the Contract. Whether the new connections reported in the Resolution represent expansion or rather reconditioning work cannot be understood on the basis of a mere reading of the Resolution. It is stated, however, that the purpose behind the expansion goals set forth in the Contract is to release the service for its use and therefore increase the number of users and that therefore the corresponding connections may be counted as part of the minimum numbers indicated in Articles 2.1.1 and 2.1.2 of Annex F. The confusing point in this reasoning is that reconditioning and restoring the network also adds new users to the system. The Resolution seems not to be based on a clear and comprehensive definition of expansion work. It released AGBA from any responsibility in respect of compliance for the first year of the Concession, and it waived any risk for sanctions in this regard. The Resolution does not and cannot remove the actual facts nor can it amend or rectify the undertakings adopted by the Concessionaire in the Five-Year POES.

354. Claimants' position does not observe that Resolution No. 69/02 stated that AGBA's report was analyzed pursuant to Sections 6.5.1 and 6.5.2 of the Concession Contract and that the Agency did so in compliance with Section 13-II lit. g of Law No. 11820. This latter provision states that the Agency's role is to "analyze and give its opinion on the annual report." Neither this provision nor the corresponding rules of the Contract declare that the Agency's function is to express an approval in respect of goals undertaken in the Five-Year POES. Such an approval is not envisaged by Law No. 11820, stating nonetheless the Agency's duty to control that the Concessionaire is complying with the POES. If delays in fulfilling the POES are observed, they are subject to sanctions under Section 13.2.5.5 of the Contract. The Agency can also choose another option to absorb the Concessionaire's failure to fully comply with the POES, which is to proceed with an amendment of the Five-Year POES on the basis of Section 5.4 of the Contract. Neither one of these directions had been taken. ORAB's approval of AGBA's first report and its resolution that the Company met the service expansion and quality goals of the first year (2000) does not remove the expansion goals as defined in the first Five-Year POES, which remain the mandatory target for the Concessionaire and for ORAB under Section 5.3 of the Contract.

355. Together with its 2001 Annual Report on the Progress of the POES, AGBA submitted again on April 12, 2002 (CU-136, RA-120) that it requested the immediate commencement of the renegotiation specified in Article 3 of Law No. 12858, further recalling that the emergency events called for adjustments of the POES pursuant to Article 39-II of Law No. 11820 and Section 13.3 of the Concession Contract referring to a situation of acts of god or force majeure. AGBA concluded its letter:

“Consequently, this Concessionaire considers that it has complied with the goals of year 2001, and with the remaining obligations under the contract up to the limit of its objective capacity, since such compliance was hindered or prevented due to the Granting Authority’s breach or to serious alterations of the conditions in which the Contract should have been and should be performed, as a consequence of actions taken by the Government which are beyond the Concessionaire’s control.”

356. In its Resolution No. 77/02 of December 30, 2002 (CU-137, RA-121), ORAB acknowledged that “the grounds alleged by AGBA are reasonable because extraordinary events have occurred and, therefore, the modification of the five-year plan for the second year of the concession is admissible.” It added that such annulment “must be for a limited period and coincide with the second year of the concession.” And it was specified that such annulment “does not entail any changes in the goals to be achieved by the Concessionaire, but the adjustment of their execution.” Therefore, “it is necessary to reschedule the works agreed still pending execution.” AGBA was informed that accordingly Annex I of the Resolution contained the percentages representing the extent of compliance with the expansion and quality goals for the second year of the Concession. It is to be noted that this Annex provides for both the drinking water network expansion and for the sewage network expansion two tables containing, respectively, the figures for the “2001 Goals” and the “2000-2001 Accumulated Goals.” This shows that the goals for 2000 were still considered as to be met under the Five-Year POES despite the approval of the first year progress report of AGBA for year 2000. An extract of the percentage figures relating to the accumulated goals for the first two years of the Concession reads as follows:

Districts:	Drinking water network expansion - compliance with POES goals 2000-2001	Sewage network expansion - compliance with POES goals 2000-2001
Escobar	93	3.5
General Rodríguez	36	49
José C. Paz	36	0
Malvinas Argentinas	16	0
Merlo	83	99
Moreno	68	64
San Miguel	32	100
Total Area	51	54

357. The coverage targets that have been calculated by Respondent’s Experts on the basis of the POES are for water service: 34.41 (2000) and 46.29% (2001), and for sewage: 18.78% (2000) and 27.65% (2001).<sup>75</sup> The reading of an extract of AGBA’s report for 2001 provides an increase in water connections of 52,806 (resulting in coverage of 25.1%)

<sup>75</sup> Dapena/Coloma I, para. 61, table IV.

in 2000 and 31,082 (31.6%) in 2001, and for sewage connections of 20,758 (16.8%) in 2000 and 7,313 (18.1%) in 2001.<sup>76</sup>

358. ORAB confirmed its ruling in Resolution No. 25/03 of September 17, 2003 (CU-69), noting that regarding the coverage goals of the second year (2001) “unfulfilled percentages must be revised with the intervention of the Granting Authority through the procedure for the renegotiation of public service contracts established by Law No. 12858 and Decree No. 1175/02” and that “the stay of POES terms for the second year of the concession does not imply a waiver of the goals committed by the Concessionaire.” The target was repeated in the Grantor’s letter of September 30, 2003 (CU-138, RA-123). Witness Cinti stated at the hearing that “the Concessionaire had to submit a plan as to how it thought it was going to recover those goals, or at least say something about those goals.”<sup>77</sup> However, this “was never done by the concessionaire.”<sup>78</sup>

359. The approval of the progress report for year 1 (2000) had the purpose of releasing AGBA from any objection of non compliance of its obligations in relation to that year. This had in particular the effect that no penalty could have been awarded and that no ground for termination of the Contract could have been based on an argument stating that in fact, the required goals had not been reached. However, this situation did in no way remove the fact that the goals as defined in the POES had not been reached. Witness Cinti stated that what was done was minimal investment to reconnect and to maintain pipelines, but it was not network expansion.<sup>79</sup> She noted also that the Resolution declared the expansion goals as deemed to be achieved, but nothing was said about whether the investments for that year were achieved.<sup>80</sup>

360. For the same reason, there is no point for Claimants’ contention that work that actually served the reconditioning or restoration of parts of the network could qualify as expansion work because such work had been determined as a goal to achieve under the POES for year 1 (2000). When ORAB declared the progress report in respect of this year as approved, this in no way affected the nature of the work actually undertaken, which had to be determined in compliance with its own contractual definition. Therefore, in approving work for reconditioning and restoring the network, ORAB did not transform this work into expansion work when it did not comply with the definition of expansion goals under the provisions of Law No. 11820 and the Concession Contract, which definition necessarily governed the first Five-Year POES. This definition could not be changed by a Resolution of ORAB, which had no power to do so.

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<sup>76</sup> Exhibit 94 to Giacchino/Walck I.

<sup>77</sup> TR-E, Day 3, p. 142/10-13.

<sup>78</sup> TR-E, Day 3, p. 142/16-17, and further p. 154/13-21, 182/7-12 ; also Witness Seillant, TR-E, Day 4, p. 32/16-33/24, 96/23-25.

<sup>79</sup> TR-E, Day 3, p. 130/20-23, 135/5-137/3 ; Cinti I, para. 62.

<sup>80</sup> TR-E, Day 3, p. 164/18-20.

361. For the purpose of revising the POES beyond the year 2001 the Province submitted a draft for a Memorandum of Understanding (MOU) to be concluded with AGBA in June 2001 and taking effect in its provisions on rescheduling of works under the POES on December 31, 2001 (“Protocolo de Entenedimiento - Borrador,” undated)<sup>81</sup>. It was noted in the introduction:

“A year having elapsed as from the privatization process and there being no consistency between the objectives set and the principles laid down by the regulatory framework and the concession agreement, it is necessary to define objective criteria in priority investments that guarantee not only minimum conditions to current users, but also the expansion of the service in the most vulnerable sectors as far as health is concerned.

In accordance with the terms and conditions of the Concession, Concessionaire is liable for the provision of the service, while the Concession development requires the presence of the Provincial State, in its capacity as Conceding Authority, and the necessary participation of municipalities, which shall contribute their knowledge in furtherance of such measures as may be adopted so as to solve local service issues.” (Tribunal’s translation)

362. According to this draft, objective criteria should be established that would allow prioritizing investments required for the users with the most urgent needs. It was therefore proposed to set up a working committee<sup>82</sup> that would establish a revision of the goals established in the POES in a way “to prioritize the most pressing investments,” while “alternative mechanisms shall be considered so as to speed up service expansion works and define the funding methods thereof.” Such an agreement would have rendered the Five-Year POES no longer applicable and commuted into a revised version. However, this Memorandum has not been executed.<sup>83</sup> Therefore, the original Five-Year POES remained in force.

363. The legal and contractual framework prevented ORAB from further suspending or neutralizing the goals retained in the POES until the end of the first five-year period. The POES relevant for that period was mandatory for the Concessionaire, and as well for ORAB, subject to a procedure for change under Section 5.4 of the Contract, which had not been engaged. Therefore, AGBA’s performance obligations remained the same as they were when the first Five-Year POES had been approved. For the years 2002 to 2004 the situation thus remained the same, including the period when renegotiation was under

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<sup>81</sup> Exhibit 229 of Walck/Giardino I, referred to in para. 295.

<sup>82</sup> This proposal was also contained in the Undersecretary of Public Services’s letter of May 30, 2001 (CU-174, RA-184).

<sup>83</sup> AGBA’s letter of September 13, 2001 (CU-210) explains that the Company had agreed upon the draft Protocol with minor modifications and expected its formal execution. However, AGBA was not summoned by the Undersecretary until August 7, 2001, when, rather than signing the Protocol, AGBA’s representatives were informed that since the Granting Authority was negotiating with AZURIX, they did not consider it convenient to make any formal advancement in the execution of the Protocol with AGBA.

way and one of the options was that the Province would invest in expansion because AGBA was not able to do so.<sup>84</sup>

364. The Tribunal understands Claimants' view that a 30 year duration of the Concession allows more easily than a shorter period to face and to absorb difficulties and economic crisis that are usually of a temporary nature. It also allows a strong initial investment to be recovered and turn into profit over the time. However, Claimants had entered into a Concession that split its performance requirements in five-year sections provided with a POES that had mandatory character.

#### 4. *The performance under the POES in the districts with UNIREC plants*

365. Claimants note that AGBA was prevented from developing expansion work in the districts where the UNIREC plants were located because the Province did not proceed with the constructions under its own responsibility. When approving the POES progress for year 1 in Resolution No. 69/02, the Regulatory Agency noted that the wastewater plants were not available and that this prevented the Concessionaire from connecting new users to the service.

366. Respondent explains in this respect that the UNIREC plants represented 35% only of the sewerage drains; the other 65% were plants owned by AGBA. During the first two years, the Company failed to perform the amount of connections required under the POES, but out of the ones actually performed, 20,293 were performed in the districts of UNIREC plants and only 7,778 in the districts under the Concessionaire's charge. This total of 28,071 constructions has to be compared to the 68,490 connections undertaken by the Concessionaire for the same period. From this latter amount, only 9,902 were located in the basin under UNIREC's charge. When these 9,902 users are set aside, the company should have performed 58,588 connections that were its exclusive responsibility. As it made 28,071 only, it failed to connect 30,521 users in the districts where no UNIREC plant was located. Moreover, from the 28,071 connections actually made for the second year of the Concession, 23,961 already existed and were only restored. This means that AGBA generated 4,110 true connections only.

367. Respondent concludes that these figures demonstrate that there was no obstacle for AGBA to proceed with work exclusively or at least more intensively in districts where no UNIREC plant was scheduled to be constructed. In addition, Claimants should have taken into account that these plants had a construction time not less than 2 years and a half. So, even if construed in time, AGBA's focus on performing connections mostly in the districts of the UNIREC plants did not represent an effective strategy.

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<sup>84</sup> Witness Dáscoli, TR-E, Day 2, p. 164/10-14, adding that at that time it was impossible for AGBA to contribute equity or to obtain third-party capital (TR-E, Day 2, p. 165/13-19, 176/16-18, 177/13-18).

368. The Tribunal observes that the number of 30,521 unconnected users shows that there was a clearly sufficient amount of work to be done by AGBA in order to improve significantly the performance goals set up in the POES. It cannot be said that the delay in the construction of the UNIREC plants prevented AGBA from achieving an amount of new connections sufficient to meet the goals of the POES.

369. When reading AGBA's first proposal for the Five-Year POES of March 21, 2000 (CU-192), the Tribunal understands that the Company was well aware of the need to cooperate with the work undertaken on the Province's charge.<sup>85</sup> Even when assuming, in light of Witness Quijada's explanations, that it was not so easy to suddenly modify the geographic target of the expansion work as it was scheduled, this difficulty, if it was actually experienced, would have had its origin in AGBA's management. In light of the time scale given in Circular No. 30(A), and the difficulties AGBA encountered in its own search for third party funding, it must have been a sign of caution not to give priority to work to be done in the districts with the UNIREC plants.

370. Therefore, the Tribunal concludes that the Province's failure to proceed with the construction of the UNIREC plants does not justify AGBA's failure to meet the targets fixed in the POES.

##### 5. *The undertakings for investment retained in the POES*

371. There is common ground that the POES retained for each relevant period the amount of investment required from the Concessionaire. AGBA's Business Plans also contained estimated amounts for investment, covering the 30 year duration of the Concession. On the basis of the Business Plan of 1999, which was part of the bidding documentation, the accumulated investments for the first five years was USD 264,882,600 million and the total amount including year 2029 USD 713,964,500 million.

372. Resolution 7/01 of 31 January 2001 (CU-193, RA-182) approving the first Five-Year POES established the construction schedule, listing investments for the "Water System," "Sewerage System" and "Other Investments." In Chapter 5 on "Technical Areas," the total amount for the first five years was USD 230,917,300, including 78,229,600 for the water system and 144,253,600 for the wastewater system.

373. The investment undertaken and actually performed is the matter of the next section. In relation to the POES, subject of this Section, the item to be examined is the legal

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<sup>85</sup> "Given the problems in the area, water and sewage service expansions will keep pace with the solutions obtained for water supply and sewage treatment in the case of the obligations undertaken by the Provincial Government at the time the bidding process took place." (page 64)



relevance of the amounts for investment retained in the POES, which was elaborated on the basis of a draft prepared by the Concessionaire and submitted for approval to ORAB.

374. Section 5.3 of the Concession Contract establishes, implementing Section 39-II of Law No. 11820, the mandatory character of each Five-Year Plan. It further provides that the “efficiency improvement index” means in respect of financing the indication of the “fulfillment of proposed Investment commitments,” and in respect of “investments” references to the “level of each type of Service or activity,” with “indication of estimated implementation term.” The Five-Year Plans “shall establish investment amounts, goals and objectives to be fulfilled pursuant to the terms and conditions established in the Contract.” Similarly, it is provided that the plan “must contain a clear and individual classification of capital investment costs and operational, administrative and commercial costs.”

375. This means that each Five-Year POES, once approved, becomes binding upon the Concessionaire in all of its relevant parts, including the investment amounts (Sec. 1.8, 5.3).

376. After it had received AGBA’s letter of July 17, 2001, complaining about the negative effects of the crisis on its applications for loans from the IDB and the Banco Provincia, ORAB asked AGBA in its letter of September 26, 2001<sup>86</sup> to specify “la composición precisa del financiamiento de las obras comprometidas en el POES para al primer quinquenio (capital propio y de terceros).” AGBA’s reply letter of October 10, 2001<sup>87</sup> explained that on the basis of the Mandate Letter of February 20, 2001, signed by IDB and by AGBA and its shareholders, IDB accepted to consider participating in a secured loan to AGBA, subject to satisfactory results of the Bank’s analysis of the financing program and of AGBA. The maximum amount envisaged was USD 165 million, divided in a A-Loan of USD 52 million and a B-Loan of USD 113 million to be funded on a co-financing basis with other commercial lenders. This loan would cover approximately 70% of the total investment of USD 235 million required by the first Five-Year POES, the remaining 70 million being provided by AGBA’s capital of 45 million and by income from other sources.

377. If, in a particular five-year period and based on justified circumstances, certain works could not be performed or if those executed did not require an investment as high as fixed in the applicable plan, the amount due by the Concessionaire is nevertheless the amount retained in the Five-Year POES.

378. On the other hand, an investment retained in one or more of the POES for each of the first five years is not mandatory, because such character is attributed only to a Five-

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<sup>86</sup> Exhibit 183 to Giacchino/Walck I.

<sup>87</sup> Exhibit 184 to Giacchino/Walck I, to which the Mandate Letter is attached; see also Exhibit 113 to Giacchino/Walck I.

Year POES as a whole (Sec. 5.3). This means that the Concessionaire is not committing a contractual breach if it does not provide for the funding envisaged for one of these particular years, provided it complies with the investment target set for the end of the first five-year period. This ultimate goal sets certain limits on any differed accomplishment of works not achieved within the yearly program initially envisaged. Indeed, the complete network conditioning and expansion has to move forward on a regular pace and does not tolerate that works would become accumulated in excessive proportions.

D. Investments

379. The Parties do not dispute that the Concession awarded for Region B called for an important effort to invest heavily in the network and the provision of services by AGBA.

380. The dispute is about the amount actually invested from Takeover until the termination of the Concession Contract, and correspondingly, about the efforts that had been undertaken or, more importantly, that should have been undertaken to provide the required amounts of investment to AGBA in support of the performance of the Concession Contract.

381. The Parties' respective positions were far away one from the other from the beginning of this proceeding.

382. In their Request for Arbitration, Claimants stated as follows:

“As regards this arbitration, URBASER and CABB's main investment in the Argentine Republic consists in ownership of shares, either directly or indirectly, which account for 47.4122% of the capital stock of Argentine company AGUAS DEL GRAN BUENOS AIRES S.A. (AGBA), as well as other investments related to the same project, which shall be described in detail in due time during the arbitration proceeding.” (page 17)

383. In sum, Claimants' initial submission was that they had provided the prize of their shares as their “main” investment, which means that any “other” investments must have been significantly below the amount paid for the shares. The costs of the total shareholding was explained as representing USD 45,000,000.

384. Respondent, on the other hand, refers to the amount for investment determined in the first Five-Year POES (CU-193, RA-182), *i.e.* USD 230.9 million, and to the projections retained in AGBA's Business Plan of 1999 (RA-265) for the whole 30 years of the Concession, which cumulated at USD 713.9 million.

385. For the purpose of introduction, a first and very vague result from this information indicates that the amount of investment to be provided is considerably higher than what Claimants admitted as the investment they actually made. This provides a first idea about the size of the difference dividing the Parties' positions.

386. The first step will be to identify on the basis of the Parties' statements and the evidence the amount of investments actually provided by Claimants.

387. The next step serves to determine the sources of possible funding for the Concession, which will be divided in main topics, mostly relating to the Concession's income, third party lending and to complementary equity funding by AGBA's shareholders.

1. *Claimants' initial investment*

a. The shareholding in AGBA

388. Claimants explain that the minimum capital requirement for the Concessionaire was USD 45 million, as stated in Annex I of the Concession Contract. In proportion to their shareholding of 27.4122% for URBASER and 20% for CABB<sup>88</sup>, Claimants' investment in AGBA's shares amounted to USD 12,335,490 for URBASER and USD 9,000,000 for CABB, both amounts totaling USD 21,335,490. In comparison to these payments, 10% has to be added to cover 10% of the stock to be transferred to the employees free of charge for the purpose of implementing the employee stock ownership program (ESOP or PPAP). This explains the total amount of investment provided by Claimants: USD 23,706,000.<sup>89</sup> The capital of USD 45,000,000 was paid in by two main installments in 2000 (22,499,979) and 2001 (21,265,481), followed by two smaller amounts in 2002 (501,298) and 2003 (733,242).<sup>90</sup>

389. Respondent recalls that Claimants allege that their investment consisted in the acquisition and subscription of shares in the Argentine company AGBA.

390. However, as far as CABB is concerned, Respondent contends that this Company made no investment in the Concession and that Claimants have failed to make any such demonstration. Respondent relies on the Basque Court of Accounts' statement that the Consortium's budgets included no allocation of funds to complete said acquisitions. Moreover, CABB's General Meeting decided on February 22, 1999 that "under no cir-

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<sup>88</sup> Decision on Jurisdiction, para. 29; AGBA's letter of March 31, 2006 (CU-254).

<sup>89</sup> Claimants' Post-Hearing Brief, paras. 4, 32; TR-E, Day 9, p. 133/23-134/4.

<sup>90</sup> See AGBA's Reports and Financial Statements of 1999 to 2003 (CU-26-30) and AGBA's Proposal for renegotiation of June 2004 (page 8, not numbered), Exhibit H002 to Seillant I.

cumstances will funds from the Consortium be allocated to the Company to be incorporated in the event it is granted the concession contract.”<sup>91</sup>

391. The Informal Joint Venture Agreement submitted by Claimants (CU-257) did not imply the transfer of CABB’s shareholding and together with the Audit Report it can only be interpreted as confirming that CABB made no contribution to AGBA. The first clause (1.1) of said Agreement establishes that “the consideration owed by CABB by virtue hereof shall be fulfilled by allowing the Participant to share in the economic results obtained from CABB’s share in 11.11% of the Group.” It also provides that “to this end, the Participant undertakes to make all contributions CABB may be responsible for as a result of its 11.11% holding in the Group” (clause 2.2). Finally, it is established that “CABB shall allocate all disbursements made by the Participant under this Agreement to capital contributions to the Company and to the Group. These disbursements may also be allocated to related expenses or to any other financial obligations arising from the Activity and owed to the Group or its partners” (clause 4.1).

392. CABB’s obligation to reimburse the contributions made by participants is limited to the profits or losses it may obtain as a shareholder of the Concessionaire (cf. clause 6.3). The Agreement concludes that at the time of final liquidation of the account, the agent shall reconstitute the Participant’s contribution, after deducting, where appropriate, any losses suffered by CABB in the Activity that were not previously reimbursed to the Participant, or after adding any profits, capital increases or surpluses that may have been obtained in the Activity (clause 7.1).

393. Respondent concludes on this point that the Informal Joint Venture Agreements entered into by CABB were not mere agreements to finance the contributions it was required to make in order to share in AGBA’s Concession. They constituted a transfer of risks associated with the participation of CABB in the Concession Contract as shareholder. Any profits or losses resulting from said participation were directly transferred to Participants. This means that CABB made no investment whatsoever in the Concession.

394. CABB’s lack of investment is also relevant because of the method used by Claimants to calculate damage. Indeed, a third of the amount claimed by Claimants results from what they call the cost or asset-based method, which depends on the capital contributions of each of the investor groups to AGBA. In this case, however, CABB made no capital contribution. The contributions recovered by Claimants cannot be classified as investments.

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<sup>91</sup> Cf. Decision on Jurisdiction, para. 287.

395. Respondent recalls that it could only review the Informal Joint Venture Agreement submitted by CABB after its Rejoinder on Jurisdiction.<sup>92</sup> It was only after the content of said agreement was revealed that Argentina could confirm that the alleged investment did not meet the requirements considered essential by ICSID Tribunals in order to determine that an investment exists. In this regard, three elements are required: (a) contribution; (b) risk; and (c) regularity of profit and return. None of these elements are present in this case with respect to CABB's shareholding in AGBA.

396. As stated in the Informal Joint Venture Agreement and the Audit Report, CABB made no contribution whatsoever. According to the provisions of said Agreement, CABB incurred no risk and it obtained no profit and return, since any profit or return that may have been obtained through CABB's shareholding would have been transferred to its participants and not to CABB.

397. For all these reasons, the Tribunal should dismiss Claimants' claims relating to the alleged contributions made by CABB as shareholder of AGBA. The grounds for this dismissal could be either the lack of competence or the inadmissibility or lack of merit of the claims.

398. URBASER S.A.'s claim for its holding in URBASER ARGENTINA S.A. should be considered illegitimate because it infringes Argentine Law. The latter company was subject to dissolution under Argentine company law since it was a company with cross shareholdings. The incorporation of a company through the reciprocal holding of shares shall be void. It shall be dissolved by operation of law (Art. 32 of the Argentine Corporations Law). URBASER ARGENTINA S.A. holds 1.0687% of AGBA, 2% of which is held by Transportes Olivos S.A.C.I.yF., 98% of which, in turn, is held by URBASER ARGENTINA S.A.

399. This is a case of infringement, which is punishable by the automatic dissolution of the company where the unduly contributed capital is not reduced within a term of three months. Without prejudice to the requirements of good faith, the BIT circumscribes its scope of protection to the "investments made in accordance with the legislation of the country receiving the investment." This means that the Tribunal has no competence over the alleged investment of URBASER ARGENTINA S.A. and, even if it did, a claim with respect to this shareholding cannot be admitted as a matter of substance, since this company is void under Article 32 of the Argentine Corporations Law.

400. The Tribunal sees no reason to diverge from its Decision on Jurisdiction that qualified CABB's acquisition of shares in AGBA as an investment notwithstanding the fact

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<sup>92</sup> Cf. *Ibid.*, para. 300.

that the funds serving for such acquisition were provided by other entities that participated indirectly in CABB's profits and losses associated with its shareholding in AGBA.

401. As far as the second objection to the Tribunal's competence in relation to the alleged investment of URBASER ARGENTINA S.A. is concerned, the Tribunal observes that it had not been raised by Respondent in the jurisdictional phase of these proceedings and is therefore questionable in light of Arbitration Rule 41. The same objection is however equally submitted as "a matter of substance," since this company is allegedly void under Article 32 of the Argentine Corporations Law. In this respect, while Respondent asserts that URBASER ARGENTINA S.A. was subject to dissolution under Argentine company law since it was a company with cross shareholdings, it does not supply any evidence that such dissolution actually took place. Respondent admits that such dissolution did not become effective by the sole operation of law when it notes that such dissolution cannot occur before a term of three months elapsed during which the unduly contributed capital had to be reduced. No evidence has been supplied in this respect either.

402. The amount of the acquisition of shares in AGBA to be retained for present purposes does not include the 10% allocation for the Employee Stock Ownership Plan (ESOP). According to Section 2.8 of the Contract and further specified in Annex E, the shares reserved for the ESOP represented 10% of AGBA's initial capital and they were allocated to employees transferred to the Concessionaire who decided to join the ESOP. ESOP shares entitled their holders to elect a member to the Board of Directors of AGBA and one auditor. The shares included in the ESOP were not considered as an investment for the purposes of determining the content and scope of the POES (cf. Sec. 5.3). Indeed, they were reserved for a category of AGBA's employees and not allocated to the service or to AGBA's contribution to the network.

403. The fee of USD 1,260,000 that has been paid by the Concessionaire to the Province is equally not part of the investment that went into the network. This was an amount allocated to the Province at the time of execution of the Contract that was equal to the price offered by the successful bidder in the bidding process for the Concession Area. As confirmed in Section 1.8 of the Contract, this amount is different from the investments required to implement the POES. The Province had to give priority to the Economic Bid that maximized the income to be collected as a result of the award of the Concession (cf. No. 4.2.2 and 5.2.2(c) of the Bidding Terms and Conditions).

404. On March 10, 2000, AGBA indicated that the net value of the companies holding all shares in AGBA was approximately USD 1,200 million.<sup>93</sup> The respective figures had to be provided by the shareholders to the company for the purpose of calculating their total minimum net worth of USD 160 million, which was to be determined in proportion

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<sup>93</sup> Letter to ORAB, CU-232.

to their respective non-transferable stockholding in AGBA.<sup>94</sup> This was the only method for evaluating the economic strength of the Bidders. Witness Cinti confirmed at the hearing that these were the financial requirements serving the verification of the Bidders' capability of providing the necessary investments.<sup>95</sup> The Province had no doubt about the financial capacity of the Bidders<sup>96</sup> and Claimants note that this is "totally beyond dispute."<sup>97</sup> Nonetheless, there was no security for financing and investment.<sup>98</sup>

405. Witness Hernando further recalled that Bidders were not required to offer a guarantee for financing the required investment.<sup>99</sup> Expert Lentini explained at the hearing that the Province had to ensure during the bidding process that the consortium had the financial capability to cover the financing structure under this business.<sup>100</sup> He admitted that the Province had to trust the bidders and to rely on good faith.<sup>101</sup> In his written statement, he explained that demanding financial capacity had the purpose of securing that insolvency did not become a ground for the failure to perform works and to comply with the investment plan.<sup>102</sup> He also mentioned that the respective amount for Region B was the highest amount required from the Bidders, in comparison to the other Regions.<sup>103</sup> He further drew the conclusion from this high amount that "the lack of financing contributions to AGBA's service cannot be based on a financial capacity question and it should be considered as the shareholders' voluntary decision."<sup>104</sup>

b. Other funds provided initially by the shareholders

406. Claimants do not contend that they invested amounts from their own sources above the initial shareholder contribution. They admit that the tariffs were the only source of income for the Concessionaire, to the extent that no third-party funding had been obtained.

407. Respondent focuses more particularly on the first years of the Concession, when AGBA made practically no investment in the Concession and further informed in its May 2001 letter that it would not meet its investment obligations. This was a period when AGBA committed its first expansion-related breaches that were previous to the emergency measures. As from 2002, AGBA's breaches were almost absolute as it did not even carry out the minimum necessary maintenance work, which is why expenses made were

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<sup>94</sup> Cf. Section 3.13 of the Bidding Terms and Annex 7.

<sup>95</sup> TR-E, Day 3, p. 177/4-178/16.

<sup>96</sup> Respondent's Closing Statement, TR-E, Day 9, p. 105/1-9.

<sup>97</sup> Claimants' Post-Hearing Brief, para. 34.

<sup>98</sup> Cf. Expert Mata, TR-E, Day 8, p. 107/5-110/2.

<sup>99</sup> Hernando, para. 24.

<sup>100</sup> TR-E, Day 5, p. 48/7-11, 136/14-138/1.

<sup>101</sup> TR-E, Day 5, p. 48/15-49/24.

<sup>102</sup> Lentini II, para. 118.

<sup>103</sup> TR-E, Day 5, p. 122/12-123/6 ; Lentini I, para. 43.

<sup>104</sup> Lentini II, para. 26 ; TR-E, Day 5, p. 138/2-22.

minimal and were covered with the income obtained. In sum, investments made by AGBA were non-existent as from the very moment it was awarded the Concession.

2. *Third party funding*

a. Claimants' position

408. Claimants accept that there existed a need to resort to external financing. The failure to obtain the funds required by the successful involvement in the Concession is explained by Claimants by reasons not related to AGBA's and its shareholders' efforts but based on external factors, mainly related to the Province's and the Grantor's behavior and to the economic crisis. It is submitted that these factors caused the Inter-American Development Bank (IDB) not to provide a credit in an amount of about USD 165 million, and also explains why the Banco Provincia refused to provide the requested bridge loan of 40 million. Claimants thus assert: (i) AGBA's shareholders were fully diligent in their management of financing; (ii) those who invested in AGBA had realistic and legitimate expectations that the financing would be obtained; (iii) the formal request for financing was made as soon as the Grantor approved the first Five-Year POES; (iv) the Province failed to support the Concessionaire throughout the process to obtain financing and it took also action which brought about skepticism among IDB officers; (v) the doubts the IDB had were directly related to the Province's non-performance regarding the UNIREC plants; (vi) the possibility to obtain external financing was significantly affected by the economic emergency; and (vi) the Grantor prevented access to financing once the worst stages of the crisis were overcome, by artificially maintaining the emergency situation and rejecting any possibility of effective renegotiation of the Contract with AGBA.

409. Claimants explain, relying on Witness Hernando, that the Bidders had started dealing with financial entities even before Takeover. After that, contacts were made through AGBA and a process of diligence and review was engaged with the IDB. The formal request could not be filed until the first Five-Year POES was approved; such plan stipulated the investment to be financed. This was done in February 2001 and, according to the deadlines put forward by the IDB, AGBA's financing could have been closed by early September 2001. However, this process was delayed due to reasons beyond AGBA's and the shareholders' control.

410. The abstract statements made by Witness Bes are pointless. The deadlines were shorter than those that are described as being usual by M. Bes. The events in the case of AGBA did not follow what seems to be the ordinary schedule according to Mr. Bes, and he had no intervention in respect of AGBA's request.

411. While the negotiation was still in progress in March 2002, as stated by Witness Hernando, it was interrupted, at a certain point and without express notice, in light of the



emergency declared in the Province. The distrust brought about by the Regulator, along with the crisis being suffered in the Province and leading to the declaration of emergency in July 2001, destroyed any chance of financing. However, this was not due to the lack of diligence or ill management by AGBA or its shareholders.

412. Mr. Hernando also gives an account of the contacts made with the *Banco Provincia*, which started in January 2001 and were aimed at obtaining a bridge loan agreement to be executed in May of that year.<sup>105</sup> Contacts and communications took place but they were subsequently interrupted, without any formal resolution of the Province.

413. Claimants note that the prospect of obtaining the required financing from IDB were serious. The application for financing by AGBA to the IDB fell within the kind of projects to which the IDB used to pay attention and, on account of the amount involved, it fitted among the loans ordinarily granted by such organization. This is why the IDB accepted to sign a Mandate Letter with AGBA and its shareholders. Multilateral credit organizations had a special interest in projects for the water sector; IDB had approved such a program in October 1998. If the program failed this was due to the lack of support to the privatization process by the new Argentine Government, as this had been mentioned by the IDB. Claimants' Experts also explain that in taking an average amount of loans granted by the IDB, as USD 96 million in 2008, this does not exclude that some loans might be of a much higher amount, exceeding the 165 million requested by AGBA.

414. Claimants submit that with regard to the concerns expressed by IDB's advisor Halcrow, it appears that the denial of the loan was not unlinked to the actions of the Grantor and the Regulator. In his "Draft Report," the advisor (i) was worried by the fact that ORAB was also the Regulator of the AZURIX concession, which was of a much bigger size, taking most of the Regulator's attention; (ii) had doubts about the Agency's autonomy (being accessible to political and other pressures); (iii) is concerned about ORAB's capacity to perform efficiently; and (iv) he estimated that some assumptions in AGBA's Business Plan are unrealistic, in particular in relation to the UNIREC plants.

415. Claimants further explain that the Regulatory Agency's lack of expertise and independence discouraged financing entities and that this had an unquestionable influence in the IDB's refusal to grant the financing to AGBA's Concession. The evidence supplied in this respect in the Reply Report of Experts Giacchino/Walk shows that the degree of professionalism and independence of the Regulatory Agency is an element that is especially valued by financing banks, and that such element failed in the case of ORAB/OCABA.

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<sup>105</sup> Cf. Hernando, para. 46.

416. Claimants also contend that financing was refused to ABA (a subsidiary of AZ-URIX) by the Overseas Private Investment Corporation (OPIC) due to problems with ORAB, which were explained in a report issued by the firm Hazer & Sawyer in that case. The report indicated a fair number of serious issues with ORAB, making particular reference to various resolutions with regard to the billing to non-metered service users. This report influenced the rejection of the financing request expressed by OPIC in September 2001.<sup>106</sup>

417. Claimants also state that the lack of support for the financing by *Banco Provincia* was undoubtedly affecting the decision taken by the IDB. The Grantor had not provided support to AGBA before that Bank. The disregard of the Province in respect of these negotiations had an influence on other organizations before which the financing request had been submitted.

418. Claimants affirm that the emergency had direct incidence on the impossibility to obtain financing. It also mentions that Respondent excused its non-completion of the UNIREC plants upon the frustrated chance to obtain financing due to the crisis. However, Claimants do not admit what they qualify as an excuse offered by Respondent about the impossibility of performing works for the UNIREC plants. Claimants do not deny that financing falls under the scope of business risk. What is important in their view, nevertheless, is the fact that there was such an alteration in the circumstances that the business risk became distorted when elements which were totally unrelated to prudent expectations affected such risk.

419. Finally, Claimants submit that the long term of the Concession would have enabled access to financing, had the economic-financial equation been restored. When taking account of the duration of the Concession over 30 years, the restrictions to external financing which might be due to the crisis would have remained for a limited term. After 2002, funds returned to the country, including finance from the IDB. Thus, had AGBA's Concession been properly renegotiated after pesification and the approval of the New Regulatory Framework, AGBA and its shareholders might have resorted to external financing and would have been able to make the relevant investment so as to achieve the expansion goals arising from such renegotiation. The refusal of the Grantor to adjust the terms of the Concession under a serious renegotiation process, and the ensuing termination, definitively precluded financing for the Concession and made it impossible to perform the investments which would have allowed the Concessionaire and its shareholders to achieve the expected results.

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<sup>106</sup> Cf. Giacchino/Walck I, para. 263, with the report under Exhibit 195; TR-E, Day 6, p. 172/20-25, 173/13-17.

b. Respondent's position

420. Respondent explains that the Concessionaire's responsibility to obtain financing is a feature of large-scale projects. Such a project requires an initial outlay of resources and a subsequent net inflow of funds. In AGBA's Concession, the necessary financing was a basic condition. AGBA's original Business Plan provided that in order to meet its investment obligations, the firm would obtain initial financing for USD 183.6 million through indebtedness. The plan did not specify the creditor to guarantee such financing. Upon the beginning of the Concession, AGBA had no sources to finance investment by getting into debt with third parties; it merely stated in the Business Plan that it would obtain it.

421. The Argentine Republic submits that obtaining the necessary financing was the Claimants' sole and exclusive responsibility and that at the time the concession commenced, AGBA had not secured third-party financing. According to Respondent, there is no evidence to prove that the impossibility to obtain financing was caused by the economic crisis or by regulatory issues. Regardless of the true cause of AGBA's failure to obtain the IDB loan, the evidence is that there was not much likelihood of such financing being approved.

422. Respondent observes that no evidence has been presented showing that any failure to obtain financing resulted from the financial crisis or regulatory issues. On the contrary, the evidence produced shows that the possibility to obtain a loan for the required amount would prove difficult. The average amount of financing for water and sewerage projects by the World Bank and IDB was less than 100 million. AGBA requested, from the IDB exclusively, USD 165 million, which is 72% above the amount granted as an average in the sector in 1998. Chances to get a loan as requested by AGBA were scarce, even prior to the bidding process and the crisis. Requesting a loan in October 2000 was showing a lack of diligence, because in such a case, approval of the loan was not reasonably to be expected within the first semester of 2001, but only by mid-2002. This shows that the failure to obtain financing was not related to the crisis or to regulatory issues.

423. In the request contained in its letter of May 17, 2001, AGBA invoked the users' defaulting behavior and the impossibility of obtaining financing for works it had undertaken to carry out. In this letter, the Concessionaire did not mention the economic crisis or improper acts by the Grantor.

424. The grounds for denying loans requested by AGBA must also be assessed. As far as the IDB loan is concerned, the Draft Report prepared by Halcrow Consulting (CU-209) is instructive. It was noted that delays in the construction of plants by AGBA occurred, which affected the expansion of the network and ensuing increase in the number

of users (page 17). It was said that the Business Plan proposed by AGBA was “unrealistic,” in particular as to timely commissioning of the sewage treatment plants and the expansion of the sewage network (page 18). Therefore, AGBA’s capital disbursement program could be delayed (p. 44). The IDB noted, in a letter to AGBA of June 7, 2001 (RA-240), that aspects which required assessment included the very ambitious coverage expansion goals, doubts regarding the willingness of users to pay the work charge, and a need to clearly define the economic and financial equilibrium of the Concession.

425. Concerning the bridge loan requested from *Banco Provincia* (BAPRO), AGBA required a USD 40 million loan. The denial of the loan was due to (i) inconsistencies in the request since the works undertaken to be carried out up to 2004 in the amount of USD 233,600,000 had no closed financing structure, and (ii) there being serious doubts that AGBA would obtain outside financing being sought.<sup>107</sup> The report also noted the potential insufficiency of the security offered, compared to the requested amount and considering the low level of annual income (reported as of ARS 15,004 per year 2000), and further assuming that the loan requested from the IDB was not agreed to. An internal memorandum of the same Banco Provincia of March 5, 2001 (RA-243) stated that the shareholders of the company were not willing to grant security for the loan requested from BAPRO, because they had doubts as to the viability of the business in light of the low collectability levels reached by AGBA.

426. To sum up, Respondent states that (i) the necessary financing to fulfill the commitment to invest was never secured by AGBA; (ii) AGBA undertook to obtain financing from the IDB, as well as a bridge loan from BAPRO, without contemplating a contingency plan; (iii) the IDB and BAPRO identified substantial risks inherent in the project, and the denials of loans entails its position concerning its payment capacity. Respondent reiterates that the obtaining of the finances to perform the works was AGBA’s sole responsibility.

c. The Tribunal’s findings

427. When looking at the initial stages of AGBA’s application to obtain a loan from the IDB and a bridge loan from the Banco Provincial, the Tribunal observes an inconsistency when Claimants state, on the one hand, that in February 2001 they had good reasons to expect to be granted an important loan from IDB in September 2001 and subsequently a bridge loan from the Province’s Bank, while, on the other hand, they wrote to the Province (AGBA’s letter of May 17, 2001) that they were no longer going to invest and requested the opening of discussions on the renegotiation of the Concession.

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<sup>107</sup> Report of the Deputy Manager of Investment of BAPRO of March 15, 2001 (RA-178).

428. In light of AGBA's letter of May 17, 2001, AGBA and its shareholders must have been aware of the situation caused by the lack of funds to support the required investment in the Concession. At that time, the first Five-Year Plan had been approved and retained an amount of USD 230 million to be invested. Moreover, two weeks earlier, on March 5, 2001 (RA-243), AGBA received from the Banco Provincial a memorandum stating the Bank's refusal to grant a bridge loan that was not guaranteed by AGBA's shareholders and would in any event not be paid out before the IDB loan had been granted.

429. AGBA's and its shareholders' doubts must have been even more plausible when Claimants' expectations to obtain financing from IDB are looked at more closely. When Claimants explain that an important financing program in the water sector had been approved in October 1998, this by no means has the effect of providing with any more chance to get similar approval in 2001. When they state that the average amount close to 100 million does not exclude granting AGBA's application for more than 150 million, this appears theoretically correct, but it must be understood that AGBA had certainly less chance to receive the amount requested than a lower amount. Claimants and their Experts provide an account of hopes and speculation, which is not supplied by any tangible evidence. By contrast, the key elements retained by the IDB and the Banco Provincial are most explicit about their analysis of the negative perspective for success of AGBA's Concession.

430. Pursuant to the Mandate Letter signed by AGBA and its shareholders on February 20, 2001 (and attached to AGBA's letter of October 10, 2001)<sup>108</sup>, the financing structure that was retained as the basis of IDB's mandate to further consider participating in the senior debt financing of AGBA's 2001-2003 investment program provided for a loan in two tranches: an A-Loan of up to USD 52 million to be funded by the IDB, and a B-Loan of up to 113 million to be co-financed by other commercial lenders.

431. The IDB had ordered a due diligence study, which resulted in the Halcrow Report. Before a meeting in Buenos Aires on June 19, 2001, IDB shared with AGBA the results of a preliminary review in its letter dated June 7, 2001 (RA-240). A number of important items had been identified as critical or detrimental to the loan requested under the actual circumstances. Some extracts are sufficient to understand that there was no hope for getting a loan such as requested by AGBA:

“The goals for expanding the coverage seem very ambitious and may adversely affect the financial feasibility of the project.”

“The IDB wishes to express its concerns over the possible consequences of abruptly going from a non-metered tariff regime to a metered tariff regime in an environment as that of AGBA's concession.”

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<sup>108</sup> Exhibit 184 to Giacchino/Walck I.

“The IDB has conducted a preliminary review of the contract and has identified areas in which it considers that adjustments and clarifications are required.”

“The IDB notes that the contract grants significant powers to the ORAB and that it may exercise broad discretion without following pre-set procedures or deadlines.”

“The Bank believes that the tariff adjustment provisions of the contract do not adequately reflect the automaticity which tariff adjustments for inflation should have.”

“Chapter 12 ... is neither sufficiently clear in its concepts nor provides procedures and deadlines to be met by the parties in order to exercise their rights and powers under this chapter of the concession contract. Particularly, the Bank considers the need to clearly define the concept of economic and financial balance of the concession and that it must be in force “all times.””

In conclusion, emphasizing the weight to be given to the remarks provided, IDB told AGBA “that these issues are of utmost importance for the optimal operation of the concession.” This must have had the meaning that without the changes thus implicitly required, IDB would not further proceed with the application for a loan.

432. Expecting a close of the negotiations with the IDB in September 2001 appears totally unrealistic in light of the fact, as reported to the Tribunal by Witness Hernando, that when after a meeting in Washington in October 2001 the IDB stopped all dealings with AGBA and in relation to Argentina generally<sup>109</sup>, it had only concluded one of three areas of the diligence process (the part on the regulatory framework) that had started in March 2001.<sup>110</sup>

433. The Tribunal is reluctant to accept Mr. Bes’ Statement in his quality as a Witness, in light of his former occupation as advisor for Argentina and his limited knowledge of the actual facts relating to AGBA’s request for a loan from the IDB. However, the Tribunal considers reliable Mr. Bes’ information that an application for a loan of the size requested and comprising for more than two thirds resources from commercial lenders external to the IDB required a period for processing of at least 20 months. Therefore, an approval of the loan could have been expected at best by mid-2002. In other words, in order to reach approval in mid-2001, processing would have had to start in October 1999, not in October 2000. Mr. Bes stated before the Tribunal that the IDB letter of June 7, 2001 (RA-240) “was turning on red lights” and that from then the loan did not go forward and

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<sup>109</sup> TR-E, Day 3, p. 49/8-13, 23-24.

<sup>110</sup> TR-E, Day 3, p. 47/2-48/4 ; Hernando, para. 44. Claimants maintain the target of September 2001, “or even a month before,” in their Post-Hearing Brief (para. 40), not considering Witness Hernando’s statements on IDB’s due diligence and on AGBA’s failure to provide for a B Loan Arranger, as explained below.

never went up to the IDB's Board of Directors.<sup>111</sup> There is no need to have this information confirmed by a witness: it flows from the mere reading of the letter and the fact that no loan was ever granted by the IDB. Information given to the Tribunal also reflects simple good sense when Mr. Bes stated that when considering financing a project like AGBA's loan, "you have to understand that you have full financing for this project," "you cannot break it up in pieces." For a loan of this nature, IDB had to make sure that the investment has full financing, which means "financial backing to finance the whole project" and that "credit eligibility is associated to the creditworthiness of the sponsors, and that is associated with their equity."<sup>112</sup> Of course, a loan institution will not finance parts of a project when other parts are not financially secured. Thus, when recalling that AGBA had no equity to support expansion works and that the shareholders were not prepared to provide for funds from their own or from third parties other than the IDB, there was simply no prospect for any future of the project of a loan from the IDB.

434. The memorandum of the Banco Provincial of March 5, 2001 (RA-243) concluded that the reaction to the scenario underlying the request for funding was "más improbable y pesimista." It was noted that AGBA's shareholders were not available for providing a guarantee for the requested loan and that the repayment through AGBA's income was not sufficient. An internal report to the Manager of the Bank of March 15, 2001 (RA-178) explained that the uncertainties in respect of the outside financing and the inconsistencies in the presentation of a project calling for an investment of over USD 233 million while the company's resources were limited to the income derived from the services in an amount of 15 million in 2000 called for a negative response. The lack of certainty to obtain funds to repay the requested bridge-loan was crucial in this respect.<sup>113</sup>

435. Claimants try to burden the Province and the Agency with the responsibility for the failure to obtain the IDB loan. Their view is that the denial of the loan was "not unlinked to the actions of the Grantor and the Regulator"; they refer to the Halcrow report that mentions as hypothesis that he had "concerns" or was "worried" about ORAB's efficiency in respect of its activity as regulator. While this may have been a concern for the Bank's advisor, it is not more than a vague and hypothetical assumption. A simple reading of the main passages of the Report shows that Halcrow's doubts about the availability of the loan were much more closely related to the actual operation of the Concession and AGBA's efficiency. Claimants do not add supporting evidence for such a broad allegation of ORAB's unprofessional handling of the Concession (with the exception of their allegations directed to specific breaches of the Concession Contract, which are, as demonstrated in Chapter IV above, mostly unfounded). There is no basis for stating that the

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<sup>111</sup> TR-E, Day 2, p. 198/10-11, 201/11-13.

<sup>112</sup> Cf. TR-E, Day 2, p. 196/16-197/6.

<sup>113</sup> Witness Cerruti explained at the hearing that the bridge loan was rejected immediately by the Bank, through a telephone conversation; TR-E, Day 1, p. 170/10-11, 175/3-5, 12-19. The Bank then suggested preparing a project financing for a portion of the project, which was then also rejected. TR-E, Day 1, p. 168/10-15, 170/12-15, 173/14-15.

Grantor and the Regulator had undertaken “actions” detrimental to the approval of the loan.

436. AGBA’s Financial Statement for the year 2000 (CU-27) notes that in the months following February 2001, when the Mandate Letter with IDB had been approved, several meetings took place with representatives of AGBA, its shareholders and the IDB, in Washington D.C. and Buenos Aires. In June 2001, a high ranking mission from the IDB visited Buenos Aires, to which officers from ORAB and the Province were invited, while ORAB was present at the meeting, provincial authorities were not.<sup>114</sup> AGBA had not voiced any criticism when it recalled, in its letter to ORAB of July 17, 2001 (RA-192, CU-135), that “during the latest visit made by IADB officials to Argentina on June 19, the ORAB had the opportunity to participate in work meetings held in the City of La Plata to exchange views on different aspects of the Concession and the Contract under which it would be operated, after a series of evaluations and studies required to grant the loan.” AGBA repeated the same observation in its letter of October 10, 2001<sup>115</sup>, adding that the Undersecretary for Public Services also participated in those meetings and could thus take notice of the main concerns the IDB had in relation with the Concession.<sup>116</sup>

437. It is to be assumed that indeed, together with ORAB, the Grantor was also invited to the June 19, 2001 meeting with IDB.<sup>117</sup> However, it has not been explained what the role of the Province’s representative would have been at such occasion. Of course, as Witness Cerruti explained before the Tribunal, “the IDB would have welcomed the presence of representatives of the province,” these representatives being thus provided the opportunity “to hear the IDB’s questions and observations.”<sup>118</sup> However, these observations could have been made available to the Province otherwise than through the presence of its representatives at the meeting. Witness Cerruti did not explain what AGBA expected more precisely from their presence, nor did he consider any other role for the Province’s representatives than to hear what IDB had to say. He added at the hearing: “the grantor ... was not present and didn’t help.”<sup>119</sup> The Witness explained that no minutes were taken and that he did not recollect that notes had been taken<sup>120</sup> as one would expect from an important meeting devoted to the evaluation of a loan of this size.

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<sup>114</sup> Cerruti I, para. 44.

<sup>115</sup> Exhibit 184 to Giacchino/Walck I.

<sup>116</sup> The same information is contained in Annex A of AGBA’s letter of June 28, 2002 to ORAB (CU-104, 118).

<sup>117</sup> Witness Cerruti, TR-E, Day 1, p. 119/11-14, Day 2, p. 4/5-8, 5/9-11. In their Post-Hearing Brief, Claimants assert that a request to attend this meeting was contained in AGBA’s May 17, 2001 letter (para. 64). This is not true. No meeting was mentioned therein. The letter did not go further than to request that “the Grantor actively cooperate in the negotiations currently being held with the IDB for funding.”

<sup>118</sup> Cf. TR-E, Day 1, p. 119/18-22.

<sup>119</sup> TR-E, Day 1, p. 153/13-16.

<sup>120</sup> TR-E, Day 2, p. 4/17-5/6.



438. Witness Cerruti explained before the Tribunal that the financing committee representing AGBA's shareholders defined the policies to be adopted by AGBA, which received the instructions.<sup>121</sup> The same committee went to deal with the IDB, or "did whatever they had to do with the IDB."<sup>122</sup> The committee operated therefore within the closed circle of its members. There is no evidence before this Tribunal that the committee did or intended to establish relations with the Province or ORAB in order to solicit their involvement in the negotiations with the IDB. It appears therefore highly unrealistic to expect the Grantor's support through a simple invitation to a meeting where nothing on the policies pursued by the shareholders and AGBA was to be discussed.

439. The Tribunal also notes that if the Province or the Agency should be blamed for not having shown sufficient interest in AGBA's negotiations this would at least require that these authorities had been consulted and associated to the on-going exchange of views with the IDB and the Bank of the Province. The Tribunal's file does not contain documents evidencing such efforts. The May 17, 2001 letter requested the Grantor's active cooperation "in such aspects as may be within the scope of its powers"; these powers were limited given the fact that sufficient funding was the Concessionaire's responsibility. The Mandate Letter had been concluded between AGBA and its shareholders and the IDB. IDB's indicative working timetable did not mention any involvement of public offices (CU-312). The letters of February 5 and 6, 2001 that served AGBA to inform the Bank of the Province about the negotiations with the IDB did not refer to ORAB or the Province, nor were they copied to these entities (CU-314, 315). Correspondence from the Province indicates that until mid-2002, the available documents (including a translation in Spanish of the Mandate Letter) were still not sufficient to allow a positive opinion.<sup>123</sup>

440. In the same vein, Claimants' assertion that the Regulatory Agency's lack of expertise and independence caused the IDB's refusal to grant the financing to AGBA's Concession, is not supported by any evidence.<sup>124</sup> When Claimants affirm that the lack of experience of the Regulator (ORAB) was an event outside business risks which clearly affected AGBA's possibility to obtain financing, they offer no demonstration showing that such experience was missing and that this was the cause for the denial of the requested credit. The Tribunal also retains that neither the IDB nor Banco Provincia refer to any loan having been denied by action taken by the ORAB of the provincial or federal government. The Tribunal further notes that the Halcrow Report (CU-209) cannot serve as evidence on this point, because it provided in the parts submitted to the Tribunal (3 and 4) a regulatory and a technical analysis and not a financial valuation. It does not connect ORAB's activity to efforts made in order to obtain external funding.

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<sup>121</sup> TR-E, Day 2, p. 17/22-18/6, 19/10-12.

<sup>122</sup> TR-E, Day 2, p. 18/4-6, 20/1-4.

<sup>123</sup> Letters from January, April 11 and May 13, 2002: Exhibits 185, 188 and 187 to Giacchino/Walck I.

<sup>124</sup> Claimants' Experts cannot serve either, as they simply state that "the Province did nothing to support AGBA's loan application" (Giacchino/Walck II, para. 38) without referring to any fact, document or other evidence.

441. Claimants rely on concerns raised in the context of the AZURIX Concession. ORAB was the Regulatory Agency with authority over both AZURIX's and AGBA's Concessions. This mere coincidence is no proof to support an argument that therefore, IDB was affected in its assessment of its loan to AGBA by any concern about ORAB.<sup>125</sup> In any event, Claimants' presentation that the lack of commitment of ORAB was one of the main factors causing the rejection of the OPIC loan to AZURIX is not correct. OPIC's letter of September 21, 2001<sup>126</sup> does not mention such failure. It indicates a lack of clear definition of ORAB's role and responsibility and stresses the absence of progress regarding the core issues related to tariff setting and capital expenditures; therefore, it was precluded from moving forward with a potential financing.

442. Claimants have introduced many arguments to explain that the Grantor and the Province and external factors related to the economic crisis had caused AGBA's application for credit to fail. They do not accept, however, that the success of receiving funding from third parties was AGBA's business risk and responsibility. Claimants must accept that their contention that AGBA would be enabled access to financing had the economic-financial equation been restored in the long term of the Concession does not explain nor justify the failure to provide for the necessary funding in the first years of the Concession.

443. AGBA's failure to provide the necessary investment through third party funding had its origin back at the time when entering into the Concession. The Bidders' Business Plan of June 1999 provided for an investment of USD 264 million over the first five years. The investors were therefore aware of the need to undertake the first steps required for obtaining such financing immediately after the day of December 7, 1999 when they were awarded the Concession, to the effect that a first part of such resources was made available as from the start of the Concession's lifetime. This did not happen.

444. Witness Hernando explained that CABB conducted studies for financing already before the call for bids. Institutions as the Bilbao Bizkaia Bank, the Santander Bank, the Instituto de Crédito Oficial, the International Finance Corporation and the World Bank showed interest in the project.<sup>127</sup> In the result, the finance committee made up of representatives of AGBA's shareholders did not pursue debt financing from these banks.<sup>128</sup> This committee thought that it was most appropriate to ask for the IDB loan.<sup>129</sup>

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<sup>125</sup> Conversely, Respondent's reference to the Decision on Liability rendered on December 29, 2014 in the case *Hochtief AG v. Argentine Republic*, ICSID/ARB/07/31, para. 321, accepting that Argentina was not liable for the failure to secure an IDB loan, is not decisive in this case when nearly no comparison with the complete sets of facts is possible.

<sup>126</sup> Exhibit 295 to Giacchino/Walck II.

<sup>127</sup> Hernando, paras. 29-31; TR-E, Day 3, p. 20/16-21/6.

<sup>128</sup> TR-E, Day 3, p. 21/7-23/10.

<sup>129</sup> TR-E, Day 3, p. 23/7-10.

445. At the hearing, the matter had also be put before Witness Cerruti was asked whether he could confirm that AGBA and its shareholders had made efforts to secure funding well before approaching IDB. The Witness, who was responsible for operating relations with IDB<sup>130</sup> did not confirm. As he explained, AGBA prepared a Business Plan and an Information Memorandum soon after Takeover.<sup>131</sup> Simultaneously, AGBA's shareholders appointed a financing committee, which set out to explore the capital market in early 2000.<sup>132</sup> It was then in October 2000 that the IDB formally agreed to evaluate the possibility of funding AGBA's expansion plans.<sup>133</sup> It must be concluded from this statement that contacts with other institutions were not successful or pursued.<sup>134</sup> Witness Cerruti further notes that in January 2001, AGBA's Business Plan and the Information Memorandum were delivered to the IDB for consideration. The Mandate Letter was executed only after ORAB's approval of the first Five-Year POES, in February 2001.<sup>135</sup> This timeline shows that contacts with the IDB were made as from October 2000, before the approval of the POES. AGBA applied for a bridge-loan from the Bank of the Province "around early 2001."<sup>136</sup>

446. Claimants did not allege any attempt to secure external funding when Argentina was on its way to recover from the worst scenario of the crisis and the emergency. The first positive and optimistic signs began in 2003.<sup>137</sup> AGBA seems not to have been on the forefront for quests for funding through loans from international institutions, while it was requesting from the Province the opening of renegotiations that would allow putting the Concession back on solid ground. This may be explained by its strategy in the renegotiation to have the investment in the network charged to the Province and monitored through a trust fund. Nonetheless, loans were available. In 2003, a national program was set up to start in early 2004 for the construction of four wastewater treatment plants and the main collection networks running in the nine districts around the Reconquista River in Greater Buenos Aires, comprising five districts of AGBA's Concession Area. On the national level, the investment was for ARS 275.7 million, made out of a loan from the Investment and Foreign Trade Bank (BICE). The Province took responsibility for the construction of another part of the network to serve 870'000 inhabitants that were to be incorporated to the wastewater service, covering an investment of ARS 160 million from loans granted by the World Bank, budget funds and revenues accumulated in the infrastructure trust

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<sup>130</sup> Cerruti I, para. 42.

<sup>131</sup> Cerruti I, para. 39.

<sup>132</sup> Cerruti I, para. 41. The Witness confirmed at the hearing that this committee was composed of the chief financial officers (CFO) of AGBA's shareholders' parent companies; TR-E, Day 1, p. 141/1-8.

<sup>133</sup> Cerruti I, para. 42.

<sup>134</sup> Cerruti I, para. 41, mentions the European Investment Bank (EIB) and the World Bank's Private Sector arm (IFC). He completed at the hearing by explaining that IFC representatives made a brief visit to Buenos Aires in mid-2000 ; TR-E, Day 1, p. 142/7-22. To the Witness's knowledge, no loan was ever granted by EIB or IFC in 2000 and 2001 ; TR-E, Day 1, p. 144/1-11.

<sup>135</sup> Cerruti I, para. 43.

<sup>136</sup> Cerruti I, para. 48.

<sup>137</sup> Cf. Eichengreen, para. 27; TR-E, Day 5, p. 177/22-178/10.

fund held by the Province.<sup>138</sup> By letter from the Ministry for Infrastructure, Housing and Public Services of January 29, 2004 (CU-141), AGBA was invited to join a meeting to consider the progress of work to be undertaken in the districts located in AGBA's Concession Area.

447. It may also be remembered that the 115 million B-part of the IDB loan required the selection of a B Loan Arranger, as provided in the Mandate Letter (No. 4). For that purpose, the Company had to select one financial institution, after consultation with the IDB. The Arranger will then carry out its due diligence jointly with the Bank, serving for the selection of the commercial lenders. Pursuant to the Indicative Timetable (CU-312), the identification of such an Arranger had to be made after 4 weeks of "desk review" within a period of two weeks, followed by the selection of the Arranger in the last 8 weeks of the program. However, Witness Hernando told the Tribunal at the hearing that he had no record of a bank identified by AGBA as the B lender.<sup>139</sup> There were contacts with Banco de Santander and the Banco de Bilbao Bizkaia, "but there was never any formalisation of operations with either one of these two banks."<sup>140</sup> He remembered that such selection was mentioned in conversations with the IDB at meetings in Washington and in Buenos Aires, "but nothing formal came out of this."<sup>141</sup> At the time, such "formalisation could not be proceeded either with the IDB or with any other commercial entity."<sup>142</sup> The Tribunal concludes from this information that based on the date when the Mandate Letter was signed on February 20, 2001, and the Indicative Timetable, the B Loan Arranger should have been identified in the first week of April and selected in the two months following the third week of April 2001, which brings the count close to the date when the letter of May 17, 2001 informed the Province that AGBA was not successful in funding the Concession. This failure thus included the failure to provide for the B Loan Arranger that was a required step to further proceed with an application for the IDB loan.<sup>143</sup> In its letter of July 17, 2001 to ORAB (CU-135, RA-192), AGBA recognized that it was in an "impasse" in this respect, with the effect that the closing of the whole operation became impossible. This also allows the conclusion that Claimants and their Experts<sup>144</sup> com-

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<sup>138</sup> Cf. public announcement of August 20, 2003 (CU-71).

<sup>139</sup> TR-E, Day 3, p. 32/9-11.

<sup>140</sup> TR-E, Day 3, p. 32/11-15.

<sup>141</sup> TR-E, Day 3, p. 32/19-21.

<sup>142</sup> TR-E, Day 3, p. 33/6-8.

<sup>143</sup> In reply to a question from Claimants' Counsel, Witness Hernando confirmed that the IDB never said that the fact that they were not giving a loan was due to the fact that there was nobody to finance the B side of the loan; TR-E, Day 3, p. 41/4-7. No useful conclusion can be drawn from this statement: the approval of the IDB Board of the Loan and of the B Lenders was scheduled in a period of six weeks after the first 16 weeks of inquiry had passed (end of June 2001), but Witness Bes has stated, without being contradicted, that the project never reached the level of an assessment by the IDB board. No specific answer was to be expected for the reason that negotiations did not come to a close; as the Witness said, they were interrupted (TR-E, Day 3, p. 33/8-9, 49/8-10, 23-24).

<sup>144</sup> The Experts (Giacchino/Walck I, para. 167) express the view that the IDB loan process was not finished in 2001 because it started too late (after ORAB delayed the approval of the first Five-Year POES). They

pletely fail in their submissions attributing the lack of funding from the IDB to the behavior or professional skill of the representatives of the Grantor or the Regulatory Agency.

448. In any event, even if it were assumed that AGBA had undertaken its best efforts to successfully apply for a loan from the IDB, and failed for reasons not attributable to it or to its shareholders, and that it had reason no longer to search for funds at a time when a policy shift occurred towards the Province's sharing investment responsibility, such a situation does not dispose of AGBA's overall responsibility to provide for the necessary funding under the Concession Contract.

### 3. *No increase of shareholders' investments*

449. Claimants do not deny that they did not secure additional or complementary financing above their initial shareholding and taken from their own resources in order to supply AGBA with the necessary funds to improve the financial support required for the development of the network. Claimants' Expert Walck confirmed at the hearing that in their model, after the initial 45 million, no additional capital contribution by shareholders before the end of the Concession at year 30 was considered.<sup>145</sup> When AGBA was faced with the reluctance of international lending institutions to provide loans, AGBA did not, as Witness Hernando told at the hearing, ask its shareholders to provide for more funds.<sup>146</sup>

450. Respondent observes that at no time did Claimants consider the possibility of investing funds of their own in view of the lack of financing.

451. Very little information was given by Claimants in their briefs about the actual involvement of the shareholders and their representatives in the financial part of AGBA's operation. From the evidence before the Tribunal, it must be concluded that the denial of providing additional funding was total and categorical.

452. Such negative behavior went as far as to the AGBA's shareholders' refusal to offer security for the bridge loan of USD 40 million requested from the Banco Provincia in early 2001. This was one of the main points noted in a memorandum of this institution submitted to AGBA's attention on March 5, 2001 (RA-243), following a meeting with Mr. Cerruti and Mr. Blanco, representing AGBA. The Bank's assessment had as its basis the lack of any additional funding from the shareholders and the insufficient expectations

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admitted at the hearing that they had no knowledge about the documentation that had been submitted to the IDB (TR-E, Day 6, p. 94/15-17, 97/2-4, 20/21, 141/19-22, 186/21-187/14). They were not aware of the IDB's due diligence process that was not finished in October 2001 and they had not asked for it (TR-E, Day 6, p. 188/4-20). They did not mention either that AGBA had failed to designate the B Loan Arranger in order to secure the B Loan.

<sup>145</sup> TR-E, Day 6, p. 76/14-21.

<sup>146</sup> TR-E, Day 3, p. 80/10-13.

for funds derived from AGBA's income based on the services provided to the users of the network.

453. The shareholders must have known that at the early stages of the Concession's operation, their own financial resources were the only way to ensure the required investment. Indeed, Claimants affirm that the formal request could be addressed to the IDB not before February 2001 when the first Five-Year POES was approved. When assuming optimistically, with Claimants, that IDB's loan could be finalized by early September 2001, there remained a financially uncovered period between the date of Takeover on January 3, 2000 and the expected supply of the IDB loan, when the shareholders' capital was AGBA's only resource, given the refusal of Banco Provincia to advance a bridge loan before IDB's loan was confirmed. This period extended to most part of the two first years of the Five-Year POES, for which an accumulated amount of investment of USD 87,760,800 had been retained. This indicates that an important amount of funds was required from AGBA for which no other source than the shareholders' own funding could be envisaged.<sup>147</sup>

454. It is common ground that the financing of the project was intended to be split approximately between debt and equity in a ratio of 70% debt to 30% equity. In relation to the overall amount of USD 730 million, such an equity part amounts to 219 million and in relation to the five-year period, the investment of 230 million would have allowed for 69 million in equity. All of these amounts are significantly higher than the shareholders' subscription of 45 million. Witness Hernando explained that the initial forecast was that the remaining equity to be provided would be made up from the sales to the users; these forecasts matched with AGBA's business plan and with the POES.<sup>148</sup> Had the forecast not been met, there could have been further inflow from the shareholders or new loans.<sup>149</sup> However, further capital contributions from the shareholders have not been foreseen and have not actually been made.<sup>150</sup> The reason for this was, in the Witness's view, the same as that leading the financial institutions not to give any new loans, based on the dramatic change in the economic situation in Argentina and the fact that possibilities for recouping the investment at the time were minimal or non-existent.<sup>151</sup>

455. Asked to be more specific in respect of further equity investments of the shareholders in their Company, Witness Hernando explained that the Concession in the year 2002 had collapsed; the economic equilibrium had completely been disrupted, to such extent that "it would have been pointless for the shareholders under those conditions to

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<sup>147</sup> It may also be recalled that the collectability of bills was at the time so poor that no income from the users could be taken into account for the purpose of further investment into the network.

<sup>148</sup> TR-E, Day 3, p. 72/14-73/13, 75/3-20. Claimants observe that AGBA expected to obtain the remaining 20.9 million through service provision (Post-Hearing Brief, para. 32).

<sup>149</sup> TR-E, Day 3, p. 73/14-16.

<sup>150</sup> TR-E, Day 3, p. 73/19-74/4.

<sup>151</sup> TR-E, Day 3, p. 74/5-13.

even envisage capital inputs.”<sup>152</sup> Witness Hernando’s explanations showed two gaps: first, an IDB loan of an amount of 165 million would not have allowed covering the debt ratio of 70% in respect of an expected investment amount of 540 million for the first 15 years of the Concession.<sup>153</sup> Second, in the absence of further funding from the shareholders, the 30% equity ratio could equally not be met on the mere basis of the Concession’s income as this was initially projected.

456. The policy choices adopted by CABB (opposing as from 1999 any funding from its own) and in the provisions of the Shareholders’ Agreement, where funds from the shareholders were given low priority, were manifestly incompatible with the undisputed need for an important and early input of funds in the Concession. The shareholders acted in conformity with the directions determined in their Agreement, irrespective of AGBA’s ensuing impossibility to fully comply with its undertakings under the provisions of Annex F of the Concession Contract and the consequential difficulties to catch up with the forthcoming first Five-Year POES. This situation aggravated heavily when it appeared in 2001 that external funding was hardly and finally impossible to obtain, in light of the crisis and in considering the shareholders’ abstention to provide support from their own, through direct funding or guarantees.<sup>154</sup>

457. The collectability of bills was at the time so poor that no or very little income from the users could be taken into account for the purpose of further investment into the network. This is why AGBA explained in its May 17, 2001 letter that “these extremely high uncollectability rates have objectively affected the Concessionaire’s capacity to make the investments required under the expansion program.” While this is taken as a fact, it is certainly wrong under the prevailing conditions of the Concession Contract. The letter explains this when insisting on the need to continue successfully negotiations with the IDB. It adds another inconsistency when remaining silent about any shareholders’ contribution. Both these resources for funding would have largely made up the temporary drop of collectability for which the letter has no other explanation than the incorporation of 80,000 users not billed by AGOSBA. AGBA’s letter does not address the matter of shareholding contributions directly.

458. More light could have been given on the shareholders’ position if the Tribunal had received more information about the effective application of the Shareholders’ Agreement dated July 12, 1999 (CU-268). The Agreement provided that the shareholders formed a Group, governed by a Board of Directors with members who were also part of the Board of Directors of AGBA (Sec. 5.1.1). This Board shall meet before AGBA’s

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<sup>152</sup> TR-E, Day 3, p. 74/20-75/2.

<sup>153</sup> TR-E, Day 3, p. 75/21-76/5.

<sup>154</sup> Expert Walck told the Tribunal at the hearing that to his knowledge, AGBA had no viable financing alternative in the fall of 2001 and that he was not aware of any bank financing obtained by AGBA in 2000 and 2001 (TR-E, Day 6, p. 80/7-20).

shareholders' or Board of Directors' meeting in order to establish the vote of the shareholders' representatives in AGBA's bodies (Sec. 5.1.1). In addition, an Executive Committee was constituted for the purpose of conducting the regular business (Sec. 5.2), including a mission to "supervise every aspect of the general management of The Company [AGBA]" (Sec. 5.2.2 (f)).

459. In relevant parts, this Agreement stated that the financing resources that shall be used to meet AGBA's financing needs shall be, with the following priority: (a) Third-party financing not guaranteed by the shareholders, (b) negotiable obligations or other debt security of AGBA, (c) third-party financing guaranteed by the shareholders, (d) fund contributions by the shareholders as reimbursable loans, (e) capital contributions under the conditions set forth by the Board of Directors of the Group (Sec. 4.3.1). In the event AGBA fails to timely obtain the necessary resources or through other alternatives, the shareholders shall make any necessary fund contributions to ensure the normal performance of AGBA's obligations under the Concession Contract (Sec. 4.3.3, 4.3.5). One first information can be derived from this legal structure in relation to the Concession's financing in the years 2000 and early 2001: at that time, external bank lending was a serious option and based on the priority given to such funding by this provision of the Agreement (lit. a to c), no contribution from the shareholders (lit. d and e) was necessarily envisaged.

460. The fact that the investors were unable to secure funding from a third-party lender did not relieve them from their obligation to meet the investment obligation. If this could not be obtained by debt financing, it would, irrespective of the priorities set forth in the Shareholders' Agreement, have had to be found by equity contributions from the investors, including Claimants. Either way, both sides agree that there would have had to have been a substantial initial investment, and that this was not forthcoming.<sup>155</sup>

461. The Group's Board of Directors shall exercise a great number of tasks as listed in Section 5.1.3. In particular, it shall set the business, economic and financial policy of AGBA (a), approve the policies regarding the relationship with the Grantor and/or Government Branches (b), approve projects concerning contract renegotiations, requests and claims (c), approve AGBA's budget, the investment plan and the works progress schedule (d) and the POES (f), and it shall also approve the determination of the fund contributions necessary to guarantee the normal provision of services and the execution of the works

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<sup>155</sup> Cf. Claimants' opening statement at the hearing: "Obviously that situation would require substantial initial investments, but the concession was going to be a 30-year concession. So after an initial difficult time, there would be several years of operation that would make it possible to compensate for the initial sacrifices." TR-E, Day 1, p. 10/16-20. And Respondent's Expert Coloma: "At that time, it was very difficult to obtain third-party financing. So whoever was willing to come into this concession had to have their own financing, at least for the first three or four years." TR-E, Day 7, p. 152/14-18. And further: "If they had to meet the investment plan, they would have needed additional financing. The 45 million are not enough for the 87 million for the first two years." TR-E, Day 7, p. 156/21-23.



under the Concession Contract (II), as well as the terms, conditions and currencies in which each of the shareholders shall furnish and/or provide direct financing (n). Decisions shall in general require a majority of at least 50% of the owner interest in the Group (Sec. 5.1.4). In matters related to POES, a positive vote of the attending CABB representative was required, subject to the possibility of submitting the issue to an *ad hoc* Tribunal (Sec. 5.1.5). A decision on termination or substantial amendment of the Concession Contract required a majority vote of 90% at first call, while 50% was sufficient after a second call of meeting (Sec. 5.1.6).

462. Finally, the Agreement stated that its provisions “shall materially prevail” for the parties of the Group over any provision of AGBA’s By-laws. The same guideline applied to the decision-making process:

“The PARTIES compromise their political rights as shareholders of the COMPANY and through their respective representatives in the Board of Directors and Shareholders’ Meeting to implement the decisions made by the GROUP’s Bodies.” (Sec. 6)

The structure the shareholders thus had established through the Shareholders’ Agreement and the creation of AGBA was that decisions made beyond the level of regular daily business were also decisions made by the bodies representing the group of shareholders in their internal relations.

463. Claimants explained the provisions of the Shareholders’ Agreement for the first time in their Post-Hearing Brief. They note that the Agreement sets forth “a commitment by the shareholders to provide AGBA with funds.”<sup>156</sup> This was done for the purpose of “doing all things necessary to finance the operations of the Concessionaire”; when further observing that the shareholders’ commitments “were honored as long as possible,” AGBA’s shareholders contribution is noted.<sup>157</sup> Having mentioned the events that occurred since 2001 and the lack of support of the Grantor and the Province in the process of renegotiation, it is concluded that this “made it advisable for AGBA’s shareholders to exercise utmost caution, making additional capital contributions conditional upon the conclusion of the renegotiation which was abruptly disrupted by the Grantor.”<sup>158</sup> The ultimate conclusion was that the shareholders found them to be in the same situation that rendered external financing impossible and that this “would stop them from making capital contributions.”<sup>159</sup>

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<sup>156</sup> Post-Hearing Brief, para. 50.

<sup>157</sup> *Ibid.*, para. 51.

<sup>158</sup> *Ibid.*, para. 51.

<sup>159</sup> *Ibid.*, para. 52.

464. Claimants omit to mention that AGBA's commitment to provide the necessary investment according to the Five-Year POES did not allow any margin to make it conditional or subject to "utmost caution" as Claimants argue in their Brief. Claimants do not note the inconsistency of their statement that only the conclusion of the renegotiation would allow them to envisage an additional capital contribution, while they were supporting AGBA in reaching an agreement for a new Concession that would shift the burden for the investment to the Province, with the effect that no further contribution from AGBA's shareholders would have been required.

465. Witnesses Cerruti and Hernando had mentioned the existence of a financing committee composed of representatives from AGBA's shareholders. Witness Hernando noted that this committee was created for the purpose of "entrusting the concessionaire with the financing"<sup>160</sup> and "provide guidance in connection with the financing."<sup>161</sup> This Witness was also able to provide the names of its members: Mr. Zucchini for Impregilo, José Zornoza and Carlos Reyero for Urbaser, and José Ignacio Llaguno on behalf of CABB.<sup>162</sup> He confirmed that the members of the committee represented AGBA's three shareholders,<sup>163</sup> and explained that they were in particular in charge of obtaining a loan.<sup>164</sup>

466. The presentations of Witness Cerruti offer little transparency about the operation of the shareholders' role in governing AGBA. The Witness wanted the Tribunal to believe that he did not remember the members of the financing committee appointed by AGBA's shareholders<sup>165</sup>, except one, Dr Zucchini on behalf of Impregilo<sup>166</sup>, while he authored a witness statement affirming that he "was responsible for the relations between the financing committee and AGBA"<sup>167</sup> and further told the Tribunal that he was involved with the financing of the company's plans in Argentina, at least in part<sup>168</sup>. Witness Cerruti's main explanation was that he was not a member of this committee and did not participate in its meetings. And while policies were determined by the committee, he had no role in this regard.<sup>169</sup> He took care of some meetings in respect of their organization and ensuing correspondence, and when policies were defined by the committee, they were communicated to AGBA through its vice-president.<sup>170</sup> Similarly, while the Witness testified that

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<sup>160</sup> Hernando, para. 11.

<sup>161</sup> TR-E, Day 3, p. 21/17-18.

<sup>162</sup> TR-E, Day 3, p. 23/13-19. The identity of these individuals has been confirmed in Claimants' Closing Statement, TR-E, Day 9, p. 142/4-11. On Mr. Llaguno's role, cf. further Claimants' Post-Hearing Brief, para. 26.

<sup>163</sup> TR-E, Day 3, p. 80/20-21.

<sup>164</sup> TR-E, Day 3, p. 80/24-25-81/1-11.

<sup>165</sup> TR-E, Day 1, p. 141/1-12; Day 2, p. 16/21-17/6.

<sup>166</sup> TR-E, Day 1, p. 141/13-16; Day 2, p. 17/4.

<sup>167</sup> Cerruti I, para. 42, statement confirmed at the hearing, TR-E, Day 1, p. 144/12-17.

<sup>168</sup> TR-E, Day 2, p. 7/14-16.

<sup>169</sup> TR-E, Day 2, p. 17/7-18/23.

<sup>170</sup> TR-E, Day 2, p. 18/17-23, 19/10-17.

the financing committee met with IDB representatives in early October 2001 in Washington DC<sup>171</sup>, he could not remember any details of the meeting and whether or not Halcrow's observations were taken into account, further declaring that: "I wasn't present, or in any case I cannot remember."<sup>172</sup> Witness Cerruti provided little information when questioned about the capital contributions expected from the shareholders. He recognized that AGBA's accounts showed that in 2001 the shareholders' contributions were still pending, and that this full equity contribution was for USD 45 million, representing 30% of AGBA's funding<sup>173</sup>, but he told the Tribunal not to be in a position to offer the figure relating to the expected loans representing 70% of this same funding<sup>174</sup>. This overall scarcity of information appears rather surprising on part of a manager in charge of the finances of the Company.

467. The Tribunal finally observes that the payment of CABB's fees as AGBA's Technical Operator was based on the contract concluded between these two parties. It does not elevate to a dispute governed by the jurisdiction of this Tribunal. When consulting AGBA's Financial Statements, it can be recognized that CABB received only parts of its fees, keeping the remainder as AGBA's liability. This matter was resolved through the corporate process of decision making, with CABB's participation. No responsibility of ORAB or the Province is involved in this respect.

#### 4. *The income arising from the Concession*

468. One of Claimants' main line of argument in this proceeding is related to the failure of the Province to allow and to support AGBA's efforts to be afforded substantial increases in tariffs and AGBA's measures directed to raise the collectability rate for the bills to be paid by the users.

469. These difficulties did certainly affect the prospects for recovery of costs that AGBA and its shareholders had as from the beginning of the life of the Concession. The situation then became literally incurable when it had to be acknowledged that no further funding from third parties could be obtained, while AGBA's shareholders were not prepared to increase their own financial involvement in the Concession.

470. Respondent recalled that a positive value of the Concession for Region B required investment management and commercial management. The absence of bidders for Region B was a sign that no positive fee for the risk and return allocation was expected.

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<sup>171</sup> Cerruti I, para. 45.

<sup>172</sup> TR-E, Day 1, p. 155/8-14.

<sup>173</sup> TR-E, Day 2, p. 15/21-16/1.

<sup>174</sup> TR-E, Day 2, p. 16/10-17.

471. Respondent sees conclusive evidence that the Concessionaire only restored works and made no extensions in the fact that during the first two years of the Concession, the Concessionaire had planned to invest \$ 152,639,661 but based on the variation of its balance sheet, it only invested \$ 13,267,632, that is to say, 8.9% of the amount expected.

472. The Tribunal notes the discrepancy between the amounts of investment determined for the first two years in the POES (16,728,800/2000, 71,032,000/2001) and the increase in assets reported in AGBA's Report and Financial Statements of 7,446,322.81 for 2000 and 11,543,373.83 for 2001.<sup>175</sup> (CU-27, 28)

473. The situation thus must have been that for further investment into the network no more funds were available other than the amounts obtained from the users through the payment of their bills. In other words, AGBA continued with its investment to the extent it had available "funds of its own."<sup>176</sup> Explaining this mode in the broader context of the Concession, Expert Lentini stated that a positive operational result as a financing profile in the first years of the Concession was not sufficient; the fulfillment of the investment plan required financing coming from funds that were foreign to the exploitation of the service. This was the financial structure of the Contract.<sup>177</sup> Claimants' Experts are on the same line in other words: the Concession could have been successful without debt financing but then the revenue requirement would become higher.<sup>178</sup> If the income cannot be increased, external resources are required.

474. The Tribunal also notes that AGBA prioritized work in sectors enabling the Company to obtain a higher return on the investment, as this had been stated in its March 2000 proposal for the first Five-Year POES (CU-192). ORAB corrected in its comments in Resolution No. 60/00 of July 21, 2000<sup>179</sup> that this could not be the only priority, without considering the minimal numbers of connections and percentages to be achieved under the Contract.

475. This also explains Claimants' insistence on collecting fees above the contractually admitted amounts for the purpose of funding supplies to the network and in particular to fund expansion works. One important request in this respect was the work fee AGBA wanted to be collected in relation to work that did not respond to the requirements set out in the Contract for expansion work.

476. Based on such actual equation of the financial operation of the Concession, deprived of any external funding (through third parties or the shareholders), nothing is left

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<sup>175</sup> The discrepancy was noted by Respondent's Expert Lentini (TR-E, Day 5, p. 118/1-16) and confirmed by Claimants' Expert Walck (TR-E, Day 6, p. 72/7-74/19).

<sup>176</sup> AGBA letter of June 28, 2002 to ORAB, Annex A (CU-104, 118).

<sup>177</sup> TR-E, Day 5, p. 96/13-20.

<sup>178</sup> Walck, TR-E, Day 6, p. 154/18-20.

<sup>179</sup> Exhibit 111 to Giacchino/Walck I.

to deviate from the main characteristic of the Concession, for which the fixing of tariffs and the ratio of collectability of bills directly determined the amount for further investment available to AGBA.

477. AGBA's letter of May 17, 2001 informed the Province of the drop in collectability experienced in the first year of the Concession until May 2001. AGBA also announced the non-availability of further and outsourced funding, implicitly assuming that complementary shareholders' contributions were not to be expected. The letter also addressed the matter of tariffs, albeit indirectly through a request for renegotiation of the Contract, which would have had certainly as one of its objectives to increase the amount of return and profitability of the Concession. Under these conditions, AGBA did not state otherwise then affirming that the Concession became unviable, subject to its renegotiation.

## 5. *Overall assessment*

### a. Claimants' position

478. As stated above, Claimants do not deny that AGBA did not obtain the loans it requested from IDB and the Banco Provincia and did not show that it tried to obtain funding from other institutions. They argue in this respect that the Grantor and the Province did not offer their support during these negotiations and that as from the mid-2001 the emerging crisis in Argentina did not allow any access to third party funding. On the other hand, Claimants do not deny either that they were not providing funding from their own, a position taken or confirmed as from AGBA's May 2001 letter. This also explains Claimants' conclusion that the tariffs were the only source of income for the Concessionaire.

479. Claimants accept that the Concession Contract is based on the Concessionaire's responsibility to supply the required investment. It objects however that AGBA and the investors could not be blamed for not providing funds in as much as the Province and UNIREC did not supply either the necessary funds for the erection of the UNIREC plants. And once the crisis had emerged in mid-2001, the financial disruption of the country flowed over into the Concession and made any provision of external funding hopeless.

480. As from AGBA's letter of June 17, 2001 (CU-135, RA-192), AGBA and its shareholders shifted their position to relying more and more exclusively on the economic crisis and its consequences upon the economic and financial equilibrium of the Concession. The focus was thus even more than in the May 17, 2001 letter on the need to renegotiate the Concession. Claimants also contend that their investment undertaking as stated in the POES had no longer any relevance to the extent that the first year POES was approved by ORAB, the second year plan suspended and all later POES not be put in operation.

b. Respondent's position

481. Respondent repeats numerous times that the Concessionaire undertook in the Contract the duty to make "all the necessary investments to execute the POES and guarantee the proper provision of the service" (Sec. 1.8). The reasons invoked by AGBA in May 2001 were the "unforeseeable" uncollectability level recorded and the difficulties to obtain financing. However, in light of Section 13.1 of the Concession Contract, the business and financial risks invoked do not deserve the non-compliance with contractual obligations.

482. The required investments, as outlined in the POES were related to the low water and sewerage coverage in region B, 35% and 13% respectively. The risk of having insufficient income with new customers was based on a population living in a low-income area, which resulted necessarily in low collectability levels. Such a major investment of about USD 730 million throughout the Concession demanded financing on its own or from third parties.

483. The complete lack of bids in the first call for Region B demonstrated the high-risk feature of the Concession. This feature required significant investments that depended on the access to financing at a time when obtaining such access was difficult. The refusal to provide financing by the IDB and Banco Provincia shows that the Concession had become nonviable. Claimants fail to provide a direct answer to this topic.

484. AGBA substantially stopped investing and meeting goals required in the POES at least since early 2001. Claimants rely on a valuation based on the basic premise that AGBA developed all agreed-upon investments and the Concessionaire reached high levels of collectability – a situation different from what actually took place and this before the emergency measures were adopted in January 2002. AGBA's Concession was very explicit in terms of mandatory compliance with the PEOS.

485. Respondent also notes that the Bank of Japan did not secure the disbursement required for the UNIREC plants given the suspension of payments of the Province, but this happened after the Emergency was declared in the Province in July 2001. AGBA's situation was different; its problem was collectability and it was already evidenced in the third quarter of 2000, as stated in its letter of May 2001.

486. Respondent qualifies as irrelevant Claimants' contention that in the long term, AGBA would have been able to access financing and that the lack of financing was a temporary situation. Claimants admitted the breakdown of their economic-financial equation prior to Emergency, in the letter sent May 2001. AGBA was not in actuality willing to complete the works undertaken and for that reason was encouraging the creation of a Trust Fund. It also made projections of collectability levels which rendered the business

unfeasible. Respondent notes that Claimants failed to mention that AGBA was incapable of obtaining financing between 1999 and 2001 that is prior to the declaration of emergency. And in May 2001, AGBA announced this incapacity. The proper course of action was for AGBA's shareholders to provide the required funds to fulfill their investment obligations.

c. The Tribunal's conclusion

487. The overall flow of the Parties' arguments cannot divert from the basic characteristic of the Concession, which puts the responsibility to provide for the required investment exclusively on the Concessionaire.

488. As a matter of fact, it is equally clear that AGBA did not receive the required amounts for the investments it had undertaken to supply, be it from third parties, and in particular from the IDB and the Banco Provincial, or be it from the shareholders themselves. Given AGBA's responsibility, there is no point in Claimants' contention that the Province or the ORAB were in any way withholding the required support to AGBA's efforts to be successfully awarded the requested loans, which were envisaged for a high amount of above 200 million.

489. There is no doubt either that AGBA's strategy of providing funds into the network exclusively through the income taken from the billing of services (according to the principle of "neutrality") was insufficient to keep the Concession viable in the absence of external complementary funding in the first years of the Concession when the billing collectability from the users was low and no expansion work undertaken that would have permitted the collection of work charges.

490. The Tribunal notes that Claimants do not seriously object to the assessment that AGBA failed to obtain third-party funds as this was expected upon Turnover, and that their financial involvement as investors was kept close to the minimum of paying their part on the shares of AGBA.<sup>180</sup> The Tribunal understands that as from AGBA's letter of June 17, 2001, AGBA and its shareholders shifted their position in relying more and more exclusively on the economic crisis and its consequences upon the economic and financial equilibrium of the Concession. Moreover, Claimants' contention is that their investment undertaking as stated in the POES had no longer any relevance to the extent that the first year POES was approved by ORAB, the second year plan suspended and all later POES not be put in operation.

491. Nevertheless, Claimants cannot escape the conclusion that the approval of the first year plan and the neutralization of the second one were of little importance as a matter of

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<sup>180</sup> Claimants' Experts have explained that beyond year 1 they were working on projections and did not test their models against actual facts (TR-E, Day 6, p. 157/12-21).

law given the fact that these plans were not mandatory. The POES that was binding upon AGBA was the first Five-Year POES, covering the years 2000 to 2004. Despite the economic difficulties leading to the crisis starting in the middle of 2001, this Five-Year POES was not suspended or amended and therefore still applicable until the end of that period. AGBA was far from reaching the target of investing USD 230 million by the end of 2004. In any event, this high amount could not be funded at that latest moment. In order to be of effective use, it had to be funded in substantial parts well before that date, in order to proceed on time with the required work and to reach the target fixed by the end of 2004 in that respect. It was understood and confirmed by Witness Hernando<sup>181</sup> that – contrary to the actual facts – the expenditure would have to be front-loaded, requiring spending more money earlier in the life of the Concession.

492. For ORAB as well, it was clear by 2003 that AGBA simply did not have the money to fund a project of the kind contemplated under the Five-Year POES, and that it was not going to have it as a result of changes in Argentina in the near future. When Witness Cinti as former representative of ORAB was asked at the hearing whether she knew that, the answer was simply: “Yes.”<sup>182</sup>

493. At this juncture, the fact to be retained is the lack of supporting funds brought into the Concession by AGBA and its shareholders either from third parties or from the investors themselves.

#### E. Contractual equilibrium v. business risk

494. While Claimants emphasize “contract equilibrium” (1), Respondent favors the phrase “business risk” (2). The Tribunal will show that both concepts can be combined and that the rights and conditions set up in the Regulatory Framework and the Concession Contract ultimately must prevail (3). This approach also applies to the tariff regime and its adjustment (4). Finally, the difficulty of providing sufficient funding appears again as the main disturbing element in the early lifetime of the Concession, before and during the crisis that hit Argentina in 2001 (5).

##### 1. *Claimants’ focus on contractual equilibrium*

495. Claimants explain that the closest reference to the notion of “contractual equilibrium” is the “financial economic equation of the Concessionaire” as stated in Section 12.4.1 of the Concession Contract. Both expressions refer to the same principle, usually contained in such kind of contracts. References to the concession’s equilibrium are common. Professor Mata refers to “The Balance of the Concession Contract”<sup>183</sup> and to “a

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<sup>181</sup> TR-E, Day 3, p. 63/11-64/1.

<sup>182</sup> TR-E, Day 3, p. 189/18-25.

<sup>183</sup> Mata I, paras. 209-221.



renegotiation process to set out a new contractual balance”<sup>184</sup>. Witness Seillant mentions “the company’s operation equilibrium” as an objective of the renegotiation process.<sup>185</sup> “Equilibrium” is inherently built into concession contracts. The draft of a Memorandum of Understanding referred to during the renegotiation was based on such equilibrium.<sup>186</sup> The primary text of such draft was made by the Province.<sup>187</sup> It contained a definition of such concept.

496. This principle was part of the applicable Regulatory Framework. Section 39-II sets forth that the POES plans may be amended in such a way that the “Concession equilibrium” is not altered. Section 5.4 of the Contract states that the Five-Year POES may be amended to the extent such amendment “does not affect the equilibrium of the Concession.” Section 14.1.2 of the Contract also contemplates equilibrium in a case of *force majeure*. The substantial point is that equilibrium goes to the foundations of the Concession and the Contract upon which it relies. It also interferes with the determination of tariff levels (Sec. 12.1.1.) and tariff reviews (Sec. 12.3).

497. Respondent notes in this respect that Claimants cannot cite any article of the Regulatory Framework in support of such an alleged principle of equilibrium of the Concession. The most similar reference to such a concept is Section 12.4.1, but when quoting the concept of “economic-financial equation of the Concessionaire,” Claimants cite a fragment of Section 12.4.1 only, omitting to mention that this sub-section also explains that the provisions of Section 28-II of the Regulatory Framework shall be complied with in all cases, and that any variation will be subject to the provisions of Section 12.3 of the Contract. Section 12.3.1, relating to General Principles applicable in this respect, confirms in referring to the need to have the Concessionaire operate efficiently and to the business risk assumed.

## 2. Respondent’s focus on business risk

498. Respondent recalls several times that the Contract stated expressly that the Concession was based on the principle of business risk. The risk assumed stems directly from the legal framework applicable to the Concession, as this is clearly stated in Section 13.1 of the Contract, stating as follows: “The Concessionaire assumes the responsibility for the Concession and all legal, technical, economic and financial risks associated thereto.” These risks were not concealed. The Consortium established by the claimant companies agreed to the scope of the terms and conditions of the Bid. Witness Cinti explains that the

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<sup>184</sup> *Ibid.*, para. 341(14).

<sup>185</sup> Seillant I, para. 114.

<sup>186</sup> Protocol de entendimiento, December 1, 2004 (CU-331).

<sup>187</sup> October 2004, Exhibit H010 to Seillant I.

submission made by the Consortium showed a great interest for the award of Region B so that it could be inferred that it was aware of the specific features of zone B.<sup>188</sup>

499. It was expressly provided that AGBA's Concession was ruled by the business risk principle, which means that the consequences of the risks assigned to the Concessionaire were not to be absorbed by the Grantor or by the users of the service. As stated by Expert Mata, the scope of the business risk must be assessed on a case-by-case basis through the analysis of the Concession Contract and the applicable framework.<sup>189</sup> The concept of financial equilibrium invoked by Claimants was subject to the principle of business risk. ORAB Resolution No. 25/03 of September 17, 2003 (CU-69) noted that:

“[T]he concept of financial equilibrium of the contract cited by the company fails to account for the principle of business risk expressly set out in Section 13.1 of the Concession Contract.”

500. The bidding risk assumed by AGBA comprised all the information and data on which the Bid was based, as provided in Nos. 1.5.2, 2.4 and 3.3.3 of the Bidding Terms and Conditions. It consisted in collecting, during the life of the Concession, the income projected in the Bid through the payment of the tariff by users. This included, among others, (a) the correct estimate and projection of user demand; (b) the efficient management of tariff collection; (c) the fulfillment of the investment commitments undertaken in the POES. The applicable provisions in this respect are Section 30-II of the Regulatory Framework and Section 12.3.1 of the Concession Contract. The business risk assigned to AGBA also covered proper management. Expert Molinari recalled that the Concessionaire knew that it had assumed a very high technical and business risk, that it would have to invest large amounts of money and that the concession needed high-quality management for many years before the Concessionaire could reap the rewards of its efforts.<sup>190</sup>

501. The substantial investment plan agreed by the Concessionaire implied a high risk of income generation and a high risk of financing. The challenge of increasing the collectability level was a serious business risk of which AGBA was aware. Region B had a sanitation infrastructure deficit that was significantly higher than in other concessions. It was among the regions with the greatest population density and among the poorest areas of the country. AGOSBA's collection levels prior to privatization were very low. 37% of users did not pay their bills in 1999. The Concessionaire had to expect that the services to be expanded would reach a part of the population whose income was even lower than that of the already served population, with the effect that the collectability levels from the new users would be at least as low as those from AGOSBA's users prior to privatization.

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<sup>188</sup> Cinti II, para. 8.

<sup>189</sup> Mata I, para. 115.

<sup>190</sup> Molinari I, para. 3.

As the Concession was a business involving high risks, in an area of low income population and poor infrastructure, the Concessionaire had to face the challenge of obtaining the required financing to meet the duties undertaken. Bidders were aware of this and in the first bidding run no one of them made an offer only for Region B; and AGBA was aware of it when it offered only USD 1.3 million for Region B.

502. Claimants state that in Respondent's view, business risk encompasses everything: from the pesification to the freeze of tariffs. The Respondent interpret business risk as implying that the investor and the Concessionaire will bear all of the consequences arising out of any acts that might affect the Concession, whether they are foreseen or unforeseen, foreseeable or unforeseeable, including risks relating to acts resulting from a *force majeure* event. In Respondent's view, once the bid is submitted and accepted, the Contract signed and the investment made, all occurrences will need to be dealt with by the Concessionaire and the investors.

503. For Respondent, AGBA and its shareholders did not assume their business risk. They declared already in AGBA's letter of May 17, 2001 that the Company's capacity to make the investments required by the expansion program was affected and that it found itself incapable of achieving the goals of the Five-Year Plan. As from May 2001, AGBA acknowledged that the situation was so serious that it prevented it from complying with its contractual obligations, exclusively for reasons that were part of the business risk. As from that time, AGBA breached the Contract. AGBA's failure to comply with the POES began only 16 months after it had started to provide the service.

504. Respondent provides complementary information telling that since 1994, the rights of public service users gained constitutional status. And it notes that Claimants do not address nor challenge this statement.

505. Article 42 of the Argentine Constitution, as introduced in 1994, sets forth the principle of balance in the relationship between users and companies providing privatized public services (RA-216). According to this provision, users of goods and services have the right to the protection of their health, safety and economic interests, and the authorities shall provide for the protection of said rights, including the control of quality and efficiency of public utilities. Therefore, the rights of public service users are directly protected by the Argentine Constitution, and profits made by utilities are expected to result from the efficient operation in market conditions, as well as to bear a relation to the economic interests of users. In light of this constitutional protection, profits made by utilities must be reasonable, *i.e.* result from the efficient operation of the service in market conditions, and bear a relation to the quality of the service provided, the economic interests of the users and the reasonableness of the profits made throughout the life of the Concession. These provisions are in line with those contained in Articles 28, 36 and 38 of the Constitution of the Province (RA-289).

### 3. *The Tribunal's views*

506. The Tribunal agrees with Claimants that the concepts of contractual equilibrium and, more specifically, of financial and economic equation are fundamental principles governing the Concession Contract. It notes, however, that despite the references given by Claimants, this principle is more implicit than explicit in the Contract. Contrary to Claimants' argument, it does not appear in Section 14.1.2 on *force majeure*. The "financial economic equation of the Concessionaire" is stated in Section 12.4.1 in relation to a change in the tariff regime only. It is not used in the definition of tariffs that appears in Section 12.1.1, nor is it mentioned in Section 12.3 on adjustment of tariffs and prices.

507. More importantly, the Tribunal notes that concepts like "equilibrium" or "equation" have, by essence, multiple facets, which include, by necessity, the interests of all the parties and of all people involved in the Concession or concerned by the efficiency of its operation. All these interests are to be weighed one against the other. This view differs from Claimants' approach to have the concept of "equilibrium" and "financial economic equation" mostly used as a vehicle for supporting the Concessionaire's interests, which translate into the shareholders' profit.

508. This may be demonstrated in quoting Section 12.1.1, which is a provision in respect of which Claimants submit that the concept of equilibrium "interferes," however without being used as part of the text:

"The calculation of applicable tariffs pursuant to Article 28-II of Law 11,820 shall be based on the general principle that tariffs shall cover all operating expenses, maintenance expenses and service amortization and provide a reasonable return on Concessionaire's investment subject to efficient management and operation by the Concessionaire and strict compliance with the applicable service quality and expansion goals."

509. In this provision, the contractual equilibrium can be recognized as an equation where coverage of expenses and "reasonable return on investment" are on one side of the balance, while compliance with quality and expansion goals is on the other side. The investors' profit is thus part of the equation, subject to the Concessionaire's coverage for costs and expenses and full compliance with its undertakings for performing its duties.

510. Similarly, when Section 5.4 of the Contract is quoted as a provision supporting the protection of the equilibrium of the Concession in case of an amendment of the Five-Year POES, this cannot be done without stating that the provision also states that this applies "without prejudice to the provisions set out in Article 13-II of the Regulatory Framework," where ORAB is instructed that it "must ensure service quality" and also provide for "the protection of the community's interests."

511. Therefore, when the principle of equilibrium represents a balance, the investor's interest for "reasonable return" or profit must be put in comparison with the performance of the Concessionaire's undertakings under the Contract, which include an obligation to ensure the operation of the Concession despite the risks involved.

512. The Tribunal also agrees with Respondent that the business risk was an important element as from Takeover and throughout the lifetime of the Concession. The provisions of Section 13.1 of the Concession Contract, quoted in its first part above, leave no doubt in this respect. They are even more explicit in the sense that the concept of "business risk" is not used but spelled out in its specific parts, covering "all legal, technical, economic and financial risks."

513. The risk implied in the Concession included also the exercise of power by the regulator ORAB based on Law No. 11820 to control and to regulate the Concessionaire and the services it provided (Sec. 11-II). It had to ensure the protection of the community's interests, control, supervise and verify compliance with the rules in force and the Concession Contract (Sec. 13-II). It was vested with a general power to do any act as may be necessary for the fulfillment of its duties and the objectives of the Regulatory Framework, and applicable regulatory and contractual provisions (lit. u).

514. One additional point is to be mentioned here as an element of the contractual equilibrium as well as part of the Concessionaire's risks. ORAB's role consists of ensuring the Concessionaire's compliance with all quality and service goals determined in the Concession Contract and in large part in the POES. In so doing, ORAB must also, as mentioned above, provide for "the protection of the community's interests" (Sec. 13-II of Law No. 11820), which includes the "protection of the users' interests" (Sec. 4.3 of the Concession Contract). Additionally, ORAB was bound by all parts of the Argentine Republic's laws that prevail over the Concession Contract, and the Concessionaire is subject to this prevailing legislation as well. On the basis of the information provided by the Parties, this must include in particular the provisions of Article 42 of the Argentine Constitution to which Respondent refers.

515. This being said, the Concessionaire's shareholders are protected by a number of guarantees contained in the BIT, which will be examined later in this Award, in particular the clause on fair and equitable treatment. It may be noted here that to the extent the Bidders were aware of the regulatory provisions and powers retained in the Regulatory Framework and of overriding provisions of the Argentine Constitution, they were deemed to know that they will have to be enforced by ORAB and any other authority dealing with the Concession.

#### 4. *The tariff regime and review*

516. Claimants explain that the tariffs as provided by the Regulatory Framework offered the investor a number of guarantees that were relied upon by Claimants when they decided to invest. These were as follows: (1) The tariff would cover the costs of service provision plus the Concessionaire's profit margin; (2) tariffs could not be unilaterally changed by the Grantor to offset the Concessionaire's past profits; (3) tariffs could be reviewed upon substantial changes in the costs of the Concession or upon the occurrence of other supervening circumstances; (4) tariffs would be calculated in US dollars, despite the fact that they would be converted into pesos for billing purposes; (5) to determine the cost variations that triggered an extraordinary review, regard was had to U.S. price indexes; (6) tariff changes could not disrupt the Concessionaire's economic-financial equation; (7) if the Grantor decided to modify the tariffs in order to serve social purposes, it then had to adequately compensate the Concessionaire. All these principles gave Claimants' investment the essential security through a tariff regime guided by the price-cap principle.

517. Respondent recalls that tariffs were based on the principle retained at Section 12.1.1 of the Concession Contract, whereby the determination of the tariff level shall include the costs of the services, while allowing for a reasonable return on the investments made by the Concessionaire in a context of efficient management and operation, as well as of complete fulfillment of the quality and service expansion goals undertaken to be reached. In other words, the Regulatory Framework and the Concession Contract established that: (a) The tariff must be fair and reasonable, allowing the Concessionaire to cover all costs, as well as to make a reasonable profit; (b) in order to make such profit, the Concessionaire must efficiently manage and operate the service; (c) tariffs must aim for a rational and efficient use of the services supplied and of the resources used in said supply, as well as for the incorporation of the compulsory measurement system, allowing the tariffs charged to certain user segments to compensate the costs of lower-income users. These general principles establish that tariffs must be sufficient to cover service costs, subject to efficiency and business risk.

518. Respondent submits that the Contract established that tariffs were directly linked with the fulfillment of the investments committed by the Concessionaire. AGBA failed to comply with this requirement, and it failed as well to accomplish strict compliance with the applicable service quality and expansion goals, which was a serious limiting factor when considering tariff increases. The tariff regime was directly linked to the compliance with all these undertakings. The principle of fair and reasonable tariffs, well known to Argentine law and retained in the Concession Contract was subject to the "complete fulfillment of quality and service expansion goals undertaken to be reached," which includes the business risk that characterizes the Concession.

519. The Tribunal understands that the renegotiation of the Concession Contract and the adjustment of tariffs and prices have to be distinguished. In light of the requirements set for getting higher tariffs approved by the Agency, AGBA could have no expectation of an increase in tariffs in the near future in light of its overall failure to perform the undertakings contained in the various POES. A tariff review did not remove the Concessionaire's exposure to the principle of business risk (Sec. 12.3.1) or its strict duty of compliance with the applicable service quality and expansion goals (Sec. 12.1.1); it was subject to the fulfillment of the undertakings in respect of the investments required to implement the POES (Sec. 1.8). This also means that an approval of a one-year report or its neutralization did not have an impact rendering more favorable an eventual tariff increase. Changes in the goals established in the POES could have an effect only as from the second five-year term (Sec. 12.3.4). Moreover, the requirements set for the determination of the tariffs and their adjustment were so clearly connected to the undertakings of the Concessionaire under the Contract and the POES, respectively the "costs incurred in the required infrastructure under the POES" (Sec. 28-II lit. d of Law No. 11820) that AGBA and its shareholders could not expect to achieve through such an adjustment an increase in AGBA's income that would have allowed to compensate, at least in part, the failure of obtaining external funding.<sup>191</sup> Non-compliance with the POES was an important restriction to tariff increase.<sup>192</sup>

5. *The cause of the disruption of the equilibrium: investment v. crisis*

a. Claimants' position

520. The Argentine Republic itself alleged that the economic events that unfolded in Argentina since the second year of the Concession were exceptional in nature. This also means that the business risk assumed by the Concessionaire when it took over the Concession blew out of proportion when tensions arose as a result of the crisis.

521. Claimants object to all of Respondent's allegations in respect of the May 17, 2001 letter and contend that the focus should be on its terms. For Claimants, it is essential to note the following: (i) AGBA's submission centered on the "unforeseeable" nature of delinquency among certain service users, in particular those who had been served but not billed by AGOSBA; (ii) AGBA described the improvements the Concession had experienced over its first 16 months; (iii) AGBA insisted on the total unforeseeability of the collection data available; (iv) the Concessionaire approached the Province in an attempt to explore alternatives that would be more cautious than service cut-offs; (v) far from refusing to make new investments, AGBA emphasized the importance of those investments; (vi) AGBA stated that the high and unpredictable non-collection rates impacted

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<sup>191</sup> Cf. Witness Seillant, TR-E, Day 4, p. 11/22-18/15; Lentini I, paras. 172-175.

<sup>192</sup> Expert Lentini, TR-E, Day 5, p. 141/10-16.

on its ability to obtain crucial financing for the Concession and that the Granting Province's own Bank, Banco Provincia, had failed to support AGBA in its application for financing to the IDB; (vii) AGBA was not announcing a decision not to make the investments necessary to attain the goals under the POES; it was the opposite: it wanted to comply with all commitments and asked for the Province's support; (viii) AGBA presented to the Grantor the formulae under the Contract that would render its proposal viable; (ix) AGBA did not intend to get rid of the business risk, nor to transfer such risk; (x) AGBA proposed a joint analysis and a common search for solutions and alternatives. In sum, the letter showed the Concessionaire's good faith and honest conduct. It used the kind of language expected of someone whose firm intention is to carry out the Contract to the end of its term. It was intended to establish a Commission with the Grantor in order to jointly devise mechanisms to enable continued service provision under circumstances that greatly differed from those existing and foreseeable at the time of bidding.

522. Claimants further discuss the circumstances prevailing as of May 17, 2001 and the true motives and meaning of the letter. Claimants recall that the letter was sent after the Concessionaire suffered actions and inactions by the Province and the Regulatory Agency that seriously affected its revenue-making ability.

523. Firstly, Claimants affirm that the Grantor's and the Regulatory Agency's acts and omissions negatively affected the Concessionaire's generation of revenue, which in turn prevented the Concessionaire from attaining some of the Concession's goals. The circumstances that predated May 17, 2001 were as follows: (i) By means of Resolution 3/00 of January 24, 2000 (CU-39), the ORAB imposed the "Zoning Coefficient," with the effect that AGBA was required to grant certain users the subsidies that AGOSBA had previously applied, but which were not provided for in the Contract. (ii) Inconsistencies in the Real Estate Records kept AGBA from correctly classifying a considerable number of users who lived in properties where unreported improvements had been made; these improvements were taken into account to correct the real estate tax base. AGBA was never permitted to apply the reclassification retroactively. (iii) At that date, the Grantor had already reneged on its commitment to put the UNIREC plants in operation (scheduled for the first quarter of 2001). This had a negative effect on AGBA's expansion projects, but also set off a negative warning to financing agencies. (iv) The Grantor's passive attitude in protecting the rights of the Concessionaire was manifest since the early days of the Concession, *e.g.* when the Municipality of Merlo imposed groundless fines or when AGBA's service facilities were the object of acts of vandalism. These circumstances had a clear negative impact on the users' perception of the service. The Grantor had full knowledge of those circumstances and events even so they were not mentioned in the letter of May 17, 2001.

524. Secondly, the May 17, 2001 letter was written when the crisis of Argentina's economy already had begun. Several statements submitted by Respondent indicate that the



outbreak of the crisis occurred near the date when the letter was submitted. After the crisis had emerged, the Executive Branch of the Province issued Decree No. 1960/01, whereby the economic emergency was declared in the territory of the Province; this was done on July 12, 2001 (CU-309, RA-167, 187), thus showing that the beginning of the crisis can be situated in the second quarter of 2001. The fact that, on January 6, 2002, the Public Emergency Law No. 25561 (CU-145, RA-168) was enacted resulted from a crisis that had been suffered in the Argentine Republic as from the second quarter of 2001. Claimants also mention that when the Province definitely failed to honor its commitments regarding the UNIREC plants, this must have happened in the first quarter of 2001, when the plants were to be completed, because the final obstacle was the refusal of the Bank of Japan to guarantee the availability of funds because the Province defaulted on its debt. Moreover, when ORAB agreed to AGBA's request to neutralize the POES for the second year in July 2001, it referred to the economic emergency, "which makes this an extraordinary situation and is contemplated in the Concession Contract." Therefore, the letter of May 17, 2001 was not a mere expression of a desire by AGBA to shift the business risk. It was not an announcement by the Concessionaire informing that it would not fulfill the undertaken investment commitments. AGBA's letter intended to resolve the consequences arising from extraordinary circumstances, within the strict limitations imposed by good faith and the Contract.

525. Thirdly, Claimants explain that what AGBA sought to obtain with its letter of May 17, 2001 was obtained by AZURIX through the Memorandum of Understanding (MOU) signed on February 15, 2001.<sup>193</sup> The recitals of this MOU made express reference to the economic situation and to the need to create "a working mechanism for the purpose of generating viable alternatives." It seemed that there were good reasons to execute a similar agreement in relation to AGBA's Concession, which was operated in the same Province and in an area with even less financial resources. The Undersecretary of Public Services seems to have shared this concern when declaring in its letter in reply of May 30, 2001 (CU-174, RA-184) that "we agree to a work committee created by a memorandum of understanding enabling to introduce contractual amendments ..." Claimants contend that this letter and the reference to a MOU demonstrate that at the time of the letter, the Province was willing to revise the Contract. The Province did not have the impression that AGBA no longer wanted to perform the Contract. At the time, AGBA's letter was not construed as an acknowledgement of the impossibility to fulfill the Concessionaire's obligations. The Grantor recognized the occurrence of an extraordinary situation, but the request for a revision of the Contract collapsed due to the outcome of the concession with AZURIX, for which the resolution of the critical issues was still pending. This explains that when AGBA reiterated its position through letters of September 13, 2001 (CU-210) and December 27, 2001 (CU-175), this was to no avail.

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<sup>193</sup> Exhibit 230 to Giacchino/Walck I.

b. Respondent's position

526. Respondent recalls that in its May 17, 2001 letter, AGBA based its request on (i) the delinquency of users in connection with the payment of services; and (ii) the failure to obtain funds to carry out the works undertaken to be made. In respect of the first item, AGBA was aware of the fact that it had assumed a high collection rate and the availability of legal mechanisms sufficient to enforce service cut-off and collection of debts, while it came to understand that the implementation of such legal tools was clearly insufficient, unforeseeable and representing a substantial modification of the conditions taken in account at the time of submitting the Bid, to such extent that the consequence of such a situation had to be to discontinue expansion works.

527. The letter submitted by AGBA in May 2001 is proof submitted by Claimants themselves of the errors committed in the exercise of due diligence. AGBA mentions the unpredictability in terms of uncollectability and the difficulties in obtaining financing. At no point do they mention any measure taken by a public authority or by the Grantor or the Regulatory Agency in particular. URBASER and its Consortium appeared as entirely responsible for the errors committed.

528. By letter of May 30, 2001 (RA-184, CU-174), the Undersecretary of Public Services of the Province rendered a number of clarifications. As to the alleged collection problems, it was explained that the bidding process enabled the Bidders to request all information required to correctly prepare the Bid. It was stated in the Bidding Terms and Conditions (No. 2.4) that no claims based on defects or insufficiency of information provided would be admitted during or after the bid. It was also stated that uncollectability of bills was a business risk assumed by the Bidder. As to the financing, the Undersecretary stated that this was the main reason for which the Province had called the private sector for the concession of services. The Grantor Authority further stated that the risk assumed by the Concessionaire had been expressly contemplated in the Contract (Section 12.3.1)

529. The letter of May 17, 2001, shows that the economic-financial equation of the Contract had been altered long before the implementation of emergency measures. Witness Cinti submitted that the Province could have rescinded the Contract with AGBA by mid-2001 because of the Company's non-performance.<sup>194</sup>

530. By submitting its letter of May 17, 2001, AGBA proposed to enter into a Memorandum of Understanding that should be similar to that entered into with AZURIX. Expert Lentini explains that this request for renegotiation was made in reaction to the Awardee's expectations that had not been met, because of having underestimated costs, overestimated benefits and/or overestimated its management capacity.<sup>195</sup> Respondent adds that a

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<sup>194</sup> TR-E, Day 3, p. 93/15-94/4; Cinti I, para. 128.

<sup>195</sup> Lentini I, para. 164.

series of meetings were subsequently held between the Concessionaire and the Undersecretariat of Public Services, during which the business risk associated with the initial tariff regime was highlighted.

531. In its letter of July 17, 2001 (RA-192), AGBA reiterated the renegotiation request, but invoking this time the “serious economic and financial problems” existing after the issuance of Decree No. 1960/01. Later, by August 15, 2001 (RA-193), AGBA made the same request, making reference again to the economic situation of the Province and adding “our original request was made on 17 July 2001.” Thus, AGBA no longer invoked uncollectability and lack of financing.

c. The Tribunal’s findings

532. The Tribunal finds that it is not possible to identify at what precise moment Argentina economy was shifting into a “crisis” and, more particularly, at what time it could be said that such event actually affected AGBA’s Concession. From the communications exchanged between AGBA and the Grantor, it can be understood that this must have happened in mid-2001, around June/July.

533. The Tribunal also understands that this was not a sudden event without any cause perceptible before that time. As this has been explained by the Experts, Argentina was faced with growing economic difficulties as from the years 1998/1999, culminating in a phase of recession that in 2001 turned into a crisis. The fact that the rise of serious difficulties can be dated back to 1998/1999 has also been admitted by Claimants when they explain that the Argentine crisis that led to the emergency started in the final stages of former President Menem’s second term in office (mid-1998), when the recession that hit Argentina became deeper.<sup>196</sup>

534. The Tribunal’s focus must be to consider the effects of these events in Argentina’s economic life on the operation of the Concession and on AGBA’s situation as Concessionaire.

535. In this respect, the Tribunal notes that despite Claimants’ statement to the contrary, AGBA’s difficulties were not traced back to the crisis before it addressed its letter of June 17, 2001. The May 17, 2001 letter does not invoke expressly the country’s economic difficulties in support of AGBA’s request.<sup>197</sup> At that very moment, AGBA and its shareholders were still expecting to be granted the IDB loan by September 2001. When

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<sup>196</sup> Claimants’ Memorial on the Merits, para. 319.

<sup>197</sup> The letter makes reference to this situation when explaining the refusal by the Bank of the Province of the bridge loan, “which evidences the contraction of the local financial market within the current framework of high macroeconomic instability seriously affecting the financial and economic situation of Argentina, as is publicly known.”

Claimants argue that the May 2001 letter was already grounded on the crisis, they overlook that at the same time, they had still affirmed their optimism to obtain that important loan, which was definitively lost only later, during 2001, when the crisis' outbreak caused the IDB to stop lending money into Argentina.

536. The Tribunal understands that "crisis" meant a serious break in Argentina's economy that affected very negatively not only all economic, financial and industrial operators, but as well, and more deeply, Argentina's population. Claimants rightly say that the business risk assumed by AGBA when it took over the Concession blew out of proportion. The critical situation affected not only AGBA's involvement in providing and developing the Concession's services, but also its relation with the users and in particular its perspectives to increase their capacity and willingness to pay their bills.

537. Turning to AGBA's May 17, 2001 letter, the Tribunal once again stresses that its main lines of argument were (1) the unexpected amount of unpaid bills on part of a great number of about 80,000 users who had been connected before without being requested or pressed to pay their bills, and (2) AGBA's impossibility to provide for funding otherwise than through the income earned from the Concessions' services in the event that the IDB loan would not be granted. When reading Claimants' explanations, one understands that in fact, Claimants do not understand it otherwise. Claimants are right in stating that the content and purpose of the letter should not be seen too negatively.<sup>198</sup> Despite the difficulties it had experienced, AGBA expressed its willingness to improve collectability after exploring alternatives more softly to be applied than interruption of services. AGBA also confirmed the need for a substantial amount of investments.

538. The main conclusion was that AGBA was not able to timely achieve the goals set under the Five-Year POES and requested therefore the implementation of corrective mechanisms to be elaborated by a working commission to be created while the expansion goals under the POES were temporarily suspended.

539. While the proportion of dissatisfaction with the situation and of AGBA's ability to redress it may be a matter of appreciation, the core objective of the letter is clearly that the Concessionaire was at great risk of no longer being capable and willing to perform its undertakings without the Province's contribution granted through a newly negotiated Concession Contract.

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<sup>198</sup> From a much larger perspective, a request for renegotiation submitted 17 months after the start of a Concession with a lifetime of 30 years seems not surprising. A report of an advisor of the World Bank covering a thousands of concessions from Latin America during 1985-2000 shows that water and sanitation concessions had an incidence for renegotiation of 74.4%, which occurred on an average of 1.6 years after concession award. Cf. J. Luis Guasch, *Granting and Renegotiating Infrastructure Concessions*, Washington, D.C. 2004, page 13 (RA-248).

540. The Tribunal does not need to re-examine in detail what Claimants present as the Grantor's and the Agency's acts and omissions that negatively affected the Concessionaire's generation of revenue and that were somehow in the background of the May 17, 2001, letter although they were not mentioned therein. Claimants do not present any evidence that these circumstances had such an effect at that time. If they had such effect and were important for AGBA, the letter would certainly have had a different content. Most of these complaints have been examined as part of the numerous allegations on violations of the Contract that have been raised by Claimants and are mostly to be considered as having no ground on the basis of the Contract (such as the matter of "zoning coefficient" and "real estate records").

541. More important is the negative impact of the failure to put the UNIREC plants in operation. However, if this event had any negative effect on AGBA's perspective to proceed favorably with the Concession, AGBA would certainly have taken advantage to raise the matter in its May 17, 2001, letter. This would not have been consistent with AGBA's statement in the letter that the extremely high uncollectability rates had as their direct and immediate consequence that expansion works had been recently interrupted. Under these circumstances, the failure of the UNIREC plants' operation could not produce an impossibility to proceed with expansion work that the Concessionaire had interrupted anyhow and for other reasons.

542. The Tribunal observes that when the May 17, 2001, letter was written, the crisis, even when not yet blown up in front of anybody, was at least looming and reasonably expected to occur in a very near future in the minds of the country's economic, financial and industrial circles. Nevertheless, it must be stressed that the circumstances directly related to this major event for Argentina's economy were not invoked explicitly in AGBA's letter nor were they mentioned in AGBA's draft for a MOU. The two major obstacles that were put forward in the letter were, at that time, unconnected with the crisis, *i.e.* the drop in collectability and the insufficient amount of investment made available by then. Respondent rightly pointed to AGBA's correspondence where it is stated, in the letter of August 15, 2001 (RA-193) that the renegotiation request that was based on the crisis was made originally in its letter of July 17, 2001 (RA-192), no mention being made of the May 17, 2001 letter. This timing also corresponds to the issuance of the Province's Decree No. 1960/01, occurring on July 12, 2001 (RA-167, 187, CU-309), shortly before AGBA's July 17 letter and after the May 17 letter.

543. The fact that a Memorandum of Understanding (MOU) signed in February 2001 for the neighboring concession of AZURIX and opening a door for renegotiation was a serious incentive for AGBA to try moving forward in a similar direction. However, after a first positive sign given by the Undersecretary of Public Services in its letter of May 30, 2001, and in the Province's draft of a Memorandum of Understanding to be signed in

June 2001<sup>199</sup>, this tentative approach failed. AGBA was thus left with the difficulties it had voiced in its May 17, 2001, letter.

544. In this latter respect, the first matter of concern in relation to the required increase in collectability showed more optimistic results in the following years when AGBA moved away from its initial policy of cutting-off delinquent users towards more soft approaches offering positive incentives to users to comply with their duty to pay their bills.

545. The second difficulty was of a very different nature and impossible to resolve without financing obtained from third parties or provided by or through the shareholders. This was undoubtedly the Concessionaire's responsibility, and, as explained above, it failed in complying with this performance duty in an amount of such high proportion that reaching the goals fixed in the POES was a perspective far from reality. The Bidders had been warned by their own technical due diligence team. Witness Quijada told the Tribunal in this respect that he explained the bad situation of the network and further: "I said that this was a significant problem and that a large investment was needed."<sup>200</sup>

546. The need for important amounts of investment was, as explained, one of the main characteristics of the Concession as from its beginning. AGBA's policy to obtain sufficient funds from the income resulting from the payment of services by the users failed dramatically. The lack of external funding failed to compensate for the lack of internal income, which definitively rendered impossible the performance of the Concession Contract by the Concessionaire and the achievements of the goals of the first Five-Year POES. The May 17, 2001 letter's request to suspend the expansion goals temporarily was the immediate consequence of this situation, together with the ensuing proposal in the draft MOU to be signed in June 2001 to focus on urgent investments only.

547. This is not, however, a conclusion that covers the whole duration of the Concession until the time of its termination. The situation that existed at the time of the May 17, 2001, letter and beyond may have been redressed if the Argentine Republic had not suffered the dramatic events following the economic crisis starting in mid-2001 and leading to the country's emergency as from early 2002. This must also be considered.

## **VI. Fair and Equitable Treatment**

### **A. The law applicable to the merits of the claims**

548. Claimants submit that the basic provision on the law applicable to the merits of their claims is Article 42 of ICSID Convention, which has to be applied together with

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<sup>199</sup> Exhibit 229 of Walck/Giardino I.

<sup>200</sup> TR-E, Day 2, p. 60/7-8.

Article X(5) of the BIT. The agreement between the parties that is referred to in Article 42(1) of ICSID Convention is embodied in Article X(5) of the BIT. The applicable rules are thus: the principles and rights contained in the BIT, those contained in other treaties in force between Spain and the Argentine Republic, Argentine law, and the general principles of international law. Claimants note that the application of the provisions, principles and rights established in the BIT are essential to resolve the dispute. They also observe that the BIT is very similar to other BITs and even to the NAFTA Agreement.

549. Claimants further observe that, albeit they are not mandatory, the Guidelines on the Treatment of Foreign Investments are also to be considered (CUL-36). Their purpose is to promote investments. They are a complement to bilateral or multilateral treaties. Prior arbitration decisions, although they lack the force of precedents, determine general principles of law, which are sources of international law.

550. Claimants also note that Article X(5) of the BIT further refers to the domestic law of the host country. Claimants abided at all times by the applicable domestic law. This is why they ended up with a 47.4122% share in AGBA. The law of the Argentine Republic establishes that agreements are meant to be fulfilled. This principle was breached. The rates were frozen at one third of their value. Even after almost nine years, the situation has not been remedied. The application of domestic law has clear boundaries. The Arbitral Tribunal is not a domestic court, charged with the question whether the measures taken complied with domestic law. The issue is now whether they constitute a breach of the BIT. Claimants add, however, that the acts and omissions giving raise to these claims not only breached the BIT but also the National Argentine Constitution.

551. The rules and principles of international law represent another limit to the application of domestic law. Under Argentina's constitutional system, treaties prevail over domestic law. This had been acknowledged since a Federal Supreme Court of Justice decision in 1992.

552. In sum, Claimants contend that the BIT has been breached, as well as principles of international law, and further the domestic laws of the Argentine Republic.

553. Respondent also relies on Article 42(1) of the ICSID Convention and agrees that the agreement therein referred to is contained in Article X(5) of the BIT. Claimants accepted this provision by invoking the BIT in order to bring their claim. Therefore, the Tribunal must apply the BIT, Argentine law and the general principles of international law applicable to the particular matter.

554. Respondent contends, however, that Claimants' statement that the application of the provisions and principles of the BIT is essential to resolve the dispute is wrong.

555. Firstly, the Tribunal must apply international law. This entails applying not only the BIT, but also international law in general. A BIT is not a set of self-contained rules. This is precisely what Article X(5) states when referring to the provisions of international law, which include such provisions of international imperative law as may be applicable.

556. Secondly, Article X(5) establishes that the Tribunal must apply the law of the Argentine Republic. This provision implies the contracting parties' consent to decide controversies resulting from violations of other international law rules or the Argentine domestic law. Domestic law is the legal system to which the investor submits voluntarily. Argentine law has the essential function of defining which rights were vested in Claimants. General international law does not accurately define the concepts of contract, action, patent, etc. This is provided for by domestic law. These rights, once defined, are protected by certain rules of international customary and treaty law.

557. The BIT, Argentine law and general international law must be applied jointly and harmoniously. The Tribunal must apply these different sources of law in such a way that none of them nullifies the others. The freedom of the host State to enact or change its laws and regulations in the furtherance of general or specific policies is basically unaffected by BITs.

558. The Tribunal notes that Article X(5) of the BIT clearly states the principle that the claims submitted to this Tribunal are to be decided on the basis of the provisions of the BIT. This does not exclude, however, that certain particular matters that are relevant to the requirements related to claims brought under the BIT have to be determined in conjunction with ("and") other sources of law, as they are mentioned in Article X(5) and declared to be applicable "where appropriate." It may also be noted that on certain particular items, the BIT refers to national law, *i.e.* relating to the content and scope of the rights corresponding to the various categories of assets (Art. I(2)), and in referring to "investments in accordance with the legislation of the country receiving the investment," which means the domestic law of the State Party where the investment has been made (Art. II(1), III(1), V). It also refers to matters governed by general international law (Art. VII(1)).

## B. Article V of the BIT and the standard on fair and equitable treatment

### 1. *Claimants' position*

559. Claimants start by explaining that the duties set out in Articles III and IV of the BIT are closely intertwined. They regulate essential rights of the foreign investor, *i.e.* (i) the right of the investment to be free from obstruction by unjustified or discriminatory measures (see Art. III) and (ii) the right of fair and equitable treatment, such treatment



being no less favorable than that accorded by each Party to investments made in its territory by investors of a third country (Art. IV). These Articles are preceded by another one entitled "Promotion and admission," and they are all part of a BIT executed "for the Promotion and Reciprocal Protection of Investments."

560. Claimants recall that the successful privatization campaign in Argentina gave rise to a significant improvement of the public services to which the foreign capital was allocated. The Regulatory Framework set up by the Province was very attractive for investors. The requirement of protection as included in the fair and equitable treatment test was also applicable once the investments had been made. The fair and equitable treatment standard and the right to full protection and certainty must be viewed as a whole and cannot be interpreted in isolation. Such protection and treatment was precisely what Argentina has not applied to Claimants' investments.

561. The Regulatory Framework contained a set of guarantees designed to provide security to any diligent investor, including the necessary mechanisms to ensure that tariffs were reasonable and that, even faced with monetary crises, tariffs were maintained at adequate levels to cover for service costs and a rate of return, thus preserving the economic and financial equilibrium of the Concession. Claimants also recall that the Schrodgers' Report of July 1998 said that the key attractions of the proposed transfer of services to prospective investors include a stable and attractive investment environment in Argentina and the Province.

562. Claimants' claim in this proceeding is based on the fact that the good will shown by the State at the onset of the privatization process was not maintained throughout the lifetime of an investment made for the long-term. In the case of AGBA it was not applied either in the initial years after the signing of the Contract. Even before the so-called economic emergency, the Grantor and the Regulatory Agency had adopted measures that negatively affected the investment. When the emergency was declared, the Province chose to eliminate the tariff adjustment methods intended to adjust tariffs in times of crisis. The claim is based on the acts or omissions of the Argentine Government and the Province that perpetuated and aggravated the effects of the emergency on AGBA and its shareholders denying any possibility to restore the economic-financial equilibrium of the Concession.

563. Claimants were substantially deprived of the return on their investment before a tenth of the term of their investment had gone by. As a result of the measures that pesified tariffs at a USD 1 = ARS 1 rate and froze them, they lost any chance of obtaining the reasonably expected results that would have resulted from tariffs adequate to cover the costs and generated a reasonable return. Barely more than a year after these events they found themselves before a substantial amendment of the Regulatory Framework. The

New Regulatory Framework called for a renegotiation process, but this remedy was followed by the Grantor as if it were nothing than a mere formality, while it still maintained all the duties binding upon the Concessionaire. This situation was then aggravated by the termination of the Contract shortly after one fifth of the term of the Concession had gone by. With that, the situation became final and hopeless. Moreover, AGBA has clearly been discriminated when compared to ABSA.

564. The protection for fair and equal treatment under Article IV of the BIT is an absolute standard that applies to each investment in its own concrete situation. Unlike a national treatment or a most favored nation clause, it does not depend on the treatment accorded to other investments. The standard must be applied in absolute terms. The fair and equitable treatment standard is an objective standard that does not require bad faith on the part of the host State. It is not connected to domestic treatment. Such treatment might be admissible under domestic law, but this does not rule out a case of unfair and unequal treatment under the BIT. A State must accord such treatment to foreign investments even if its own nationals are denied such treatment. States must comply rigorously with the fair and equitable treatment duty.

565. Claimants also assert that the standard goes beyond customary international law and exceeds the scope of the minimum treatment standard. Today, in order to qualify an act as unfair and inequitable, it is no longer necessary for the act at issue to be done in bad faith or amount to an insult (as this was stated in the *Neer* case in 1926<sup>201</sup>). That minimalistic approach has been replaced by a flexible standard left to the discretion of the Arbitral Tribunal.

566. While the terms “fair” and “equitable” are somewhat vague, this does not mean that the standard as a whole is devoid of any substance. As stated by the *Mondev* Tribunal, what is fair and equitable cannot be judged in the abstract; it must depend on the facts of the particular case.<sup>202</sup>

567. Relying on several arbitral awards, Claimants point to the decision of the *National Grid* Tribunal, stating that the fair and equitable treatment standard protects the reasonable expectations of the investor at the time it made the investment and which were based on representations, commitments or specific conditions offered by the State concerned.<sup>203</sup> When applying this standard, the Tribunal is requested to consider the particular details of the guarantees offered at the time the investment was made and the unjustified and futile procrastination of the renegotiation process.

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<sup>201</sup> *L.F.H. Neer and Pauline Neer v. United Mexican States*, Award of October 15, 1926 (CUL-50, ALRA 200).

<sup>202</sup> *Mondev International Ltd v. United States of America*, ICSID/ARB(AF)/99/2, Award of October 11, 2002 (CUL-49).

<sup>203</sup> *National Grid P.L.C. v. Argentine Republic*, Award of November 3, 2008 (CUL-45, ALRA-219)

568. Although the situation in the case of the AZURIX concession was not as serious as for AGBA, the Tribunal dealing with that concession has concluded that the actions undertaken by the Provincial authorities reflect a pervasive conduct of the Province in breach of the standard of fair and equitable treatment.<sup>204</sup> The Tribunal also explained that this standard is an objective one, unrelated to the question whether the Respondent has any deliberate intention or bad faith in adopting its conduct. The standards agreed upon in the BIT presuppose a favorable disposition towards foreign investments, including a pro-active behavior of the State to encourage and protect it. In the *Azurix* proceedings, Respondent cited AGBA's Concession as an example of poorer performance compared to *Azurix*. AGBA was also forced, as *Azurix* was, to declare the termination of the Concession due to breach by the Grantor and, in this case as well, the Province sought to anticipate itself by terminating the contract on the grounds of alleged breaches by the Concessionaire. When comparing the circumstances relating to the operation of the two concessions, if the fair and equitable treatment standard was breached in the *Azurix* case, no other conclusion may be reached in the case of CABB and URBASER.

569. In the *Suez/Agbar/Interagua* case, the concession had been granted in 1995 in the Province of Santa Fe and was redeemed by the State in January 2006. In its Award of July 30, 2010, the Tribunal concluded that "the Province's actions in refusing to revise the tariff according to the legal framework of the Concession and in pursuing the forced renegotiation of the Concession Contract contrary to that legal framework violated its obligations under the applicable BITs to accord the investments of the Claimants fair and equitable treatment."<sup>205</sup> In the parallel case of *Suez/Agbar/Vivendi*, the same Tribunal came to the same conclusion, with the difference that the first breach of Respondent was fixed on January 6, 2002, when the emergency law was enacted.<sup>206</sup> The concession in this case was terminated in March 2006 and this triggered the termination of AGBA's concession three months later. In both decisions, the Arbitrator Nikken, writing a separate opinion, agreed that there had been a breach of the fair and equitable treatment standard, but considered that the renegotiation process itself did not entail such a breach.

570. The Tribunal seized with the *National Grid* case concluded quite similarly "that the Respondent breached the standard of fair and equitable treatment because: (a) it fundamentally changed the legal framework on the basis of which the Respondent itself had solicited investments and the Claimant had made them, (b) no meaningful negotiations took place for the two years that passed between the adoption of the Measures and the sale of Transener's shares by the Claimant." Despite the fact that this case concerns a different public service, there was a substantial amendment of the regulatory framework

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<sup>204</sup> *Azurix v. Argentine Republic*, ICSID/ARB/01/12, Award of July 14, 2006 (CUL-13, ALRA-132).

<sup>205</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID/ARB/03/19, Decision on Liability of July 30, 2010 (CUL-5, ALRA-239)

<sup>206</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, Decision on Liability of July 30, 2010, ICSID/ARB/03/17 (CUL-8, ALRA-240).

and a lack of a serious and realistic renegotiation process. The Tribunal took into consideration the special circumstances prevailing at the time in the Argentine Republic, and concluded that the investor cannot be completely isolated from the circumstances of the country in December 2001 and the following months. The Tribunal limited, however, the liability exemption to the time between January 6 and June 25, 2002.

571. Claimants then explain more specifically that one of the important signs of the concept of fair and equitable treatment is the principle of transparency and legitimate trust as one of the core elements. If a State has taken measures that may affect an investor, it must be analyzed whether they have an impact on the reasonable expectations of the investor.

572. The *CME* Tribunal stated that in this particular case the obligation of fair and equitable treatment had been breached “by evisceration of the arrangements in reliance upon with the foreign investor was induced to invest.”<sup>207</sup> In the *Metalclad* case, the Tribunal held that “Mexico failed to ensure a transparent and predictable framework” and that the circumstances demonstrate “a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.”<sup>208</sup> In the *Tecmed* case, the Mexican authorities refused to renew the authorization to operate two years after the investment had been made. The Tribunal found that the good faith principle required providing to international investments “treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.” The investor expects the host State to act “so that it may know beforehand any and all rules and regulations that will govern its investments.”<sup>209</sup> This Award has found an echo in the *Saluka* Award.<sup>210</sup>

573. If the *Tecmed* Award provided that transparency had to allow the investor to know in advance not only the rules and regulations but also the policies pursued by such regulations, it is clear that the Province and the Federal Government are far from offering such transparency. Claimants could not expect that the Concessionaire’s power to set tariffs consistent with service provision would be as seriously affected as it was. Later, they suffered the serious consequences deriving from the change in the Regulatory Framework whose acknowledged purpose was to provide legal coverage to state-managed companies. Finally, they were faced wholly unexpectedly by the use by the Grantor Province of the termination device, which served repossession or confiscation of the Concession, and which invoked alleged breaches based on no ground and for which the Concessionaire

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<sup>207</sup> *CME Czech Republic B.V. v. Czech Republic*, Partial Award of September 13, 2001 (CUL-56).

<sup>208</sup> *Metalclad Corporation v. The United Mexican States*, ICSID/ARB(AF)/97/1, Award of August 30, 2003 (CUL-57)

<sup>209</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID/ARB(AF)/00/2, Award of May 29, 2003 (CUL-58, ALRA-15).

<sup>210</sup> *Saluka Investments BV v. The Czech Republic*, Partial Award of March 17, 2006 (CUL-59, ALRA-137).

never received a single sanction. Thus, the Province used the legal instrument of termination for an entirely different purpose from that for which it was created.

574. Other Tribunals resorted to the *Tecmed* Award to see what is to be understood by transparency. One of them is the *Azurix* Tribunal.

575. Two other cases are *Suez/Agbar/Vivendi* and *Suez/Agbar/Interagua*. In the first case, the Tribunal emphasized the need to assess the investor's trust based on objective criteria. It noted that arbitral tribunals have increasingly taken into account the legitimate expectations that a host country has created. A "host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State." After analyzing the criticism made by the *MTD* Annulment Committee to the *Tecmed* Award, the *Suez/Agbar/Vivendi* Tribunal insisted on the need to ground the investor's expectations on Laws and regulations of the host country. This was all the more so of great importance as in the particular case, concerning an investment in the water and sewage system of Buenos Aires, Argentina "deliberately and actively sought to create those expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed to revitalize and expand the Buenos Aires water and sewage system." The same Tribunal concluded that the Concession Contract and the legal framework of the Concession "set down the conditions offered by Argentina at the time the Claimants made their investment," in such a way that they could have a legitimate, reasonable and justified expectation that "Argentina would respect the Concession Contract throughout the thirty-year life of the Concession." In this respect, it was noted that: "Like any rational investor, the Claimants attached great importance to the tariff regime stipulated in the Concession Contract and the regulatory framework."

576. If the companies that invested in Aguas Argentinas had legitimate reasons to trust in the continuance of the regulatory framework and tariff system under which they had invested, the same can be said, at least, about CABB and URBASER when they decided to invest in AGBA.

577. In reply to Respondent's submissions Claimants note that the scope that the Respondent ascribes to the standard of fair and equitable treatment is far narrower than that generally acknowledged. The Argentine Republic's position is that the FET reflects the minimum standard of customary international law. The threshold for finding that a breach occurred is high. In support of such position, the Respondent essentially relies on a partial and biased interpretation of developments in arbitration proceedings under Section 1105 of the NAFTA. Such interpretation is not correct, and even if it would, it would not be applicable to the Spain-Argentina BIT.

578. Under this BIT, the fair and equitable treatment standard is broader than the minimum standard of treatment. Several legal scholars have held that the fair and equitable treatment standard affords greater protection in cases as the one at hand and that fair and equitable treatment describes a higher standard that is additional to the customary law minimum standard. The existence of a privatization process and of a commitment to maintain a certain tariff level are generally underscored as conclusive elements to determine the existence of legitimate expectations formed by the investor with regard to the preservation of its rights. The failure to meet such commitments constitutes a breach of the obligation to afford the investment fair and equitable treatment.

579. The reference to the *BG Award* is entirely fitting.<sup>211</sup> The relevance of the offer of an attractive regulatory framework and of tariffs (denominated in US dollars) that secured a certain rate of return on investment is highlighted; and it is proven how the Argentine Republic violated those expectations through the pesification and, thus, breached its obligation to afford the investment fair and equitable treatment. As the Award explains, when the situation of currency devaluation materialized, Argentina fundamentally modified the investment Regulatory Framework that was meant to apply precisely in a situation of currency devaluation and cost variations. Thus, Argentina reversed commitments toward the investor when the latter relied the most on its legitimate and reasonable expectations of a stable and predictable business and legal investment environment.

## 2. Respondent's position

580. Respondent's basic stand is that the fair and equitable treatment standard reflects the minimum standard of customary international law. Fair and equitable treatment is not a new and autonomous standard of conduct. There is no conclusive evidence to the effect that such was the intention of State parties when entering into BITs. Arbitrator Nikken explains this in its separate opinion to the *Suez Awards* (ALRA-180).

581. The approach of placing the fair and equitable treatment standard on an equal footing with the minimum standard under international law has been adopted by various States and by decisions rendered by international courts and tribunals, as well as legal authors. This standard is closely related to the concepts of reasonableness and proportionality as established in the *Neer* case. The Tribunal in the *Glamis* case adopted the same position.<sup>212</sup>

582. Even though that standard reflects the state of the evolution of customary international law, the threshold for considering that there has been a violation of the standard remains high. Many tribunals have limited the standard to situations where the conduct of the host State was deemed to be, for example, grossly unfair or arbitrary. The acts that

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<sup>211</sup> *BG Group Plc v. The Republic of Argentina*, Final Award of December 24, 2007 (CUL-96, ALRA 218).

<sup>212</sup> *Glamis Gold Ltd v. United States of America*, Award of June 8, 2009 (ALRA-201, CUL-63).

give rise to a violation of the standard are those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.

583. Claimants are mistaken when they seek to give the decisions rendered by some tribunals the meaning of turning the fair and equitable treatment into something different from the standard designed by the States. Claimants' allegation that the fair and equitable treatment had become a "flexible standard left to the discretion of the Arbitration Tribunal" is extremely dangerous.

584. The *Tecmed* Award cited by Claimants has been the subject of serious challenges. So by the *MTD* Annulment Committee, stating that a tribunal which sought to generate from an investor's expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its power.<sup>213</sup>

585. In response to Claimants' arguments, Respondent explains that when a term used in a treaty has a given meaning which is recognized under customary international law, the reference to customary law is the "ordinary meaning" of that term. Thus, the ordinary meaning of fair and equitable treatment directly refers to the minimum standard of treatment under customary international law. The general rules on treaty interpretation allow the fair and equitable treatment standard to be placed on the same level as the minimum standard under international law. They also ban the incorporation of the expectations of investors and the stability of the regulatory framework into the fair and equitable treatment standard.

586. Fair and equitable treatment does not warrant a broad interpretation whose main purpose is the protection of the expectations of the investor. The latter concept is not mentioned in the BIT or in any other BIT signed by the Argentine Republic. Moreover, fair and equitable treatment does not amount to a guarantee of profitability for foreign investors. The reference to the "object and purpose" of the BIT does not allow a connection to be established between the fair and equitable treatment standard and the expectations of investors either. The BIT does not mention either the "legitimate trust" invoked by Claimants who fail to explain what they mean by that term.

587. Claimants object to the Argentine Republic's reliance the interpretation of the fair and equitable treatment standard under Article 1105 of the NAFTA-Agreement. Respondent maintains that the absence of a clarification as the one contained in NAFTA Article 1105 does not change the ordinary meaning of the terms as contained in treaties not containing such explanation. The fair and equitable treatment standard has also been

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<sup>213</sup> *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile*, ICSID/ARB/01/7, Decision on Annulment of March 21, 2007 (ALRA-205).

equated with that minimum standard by decisions made by international investment arbitration tribunals relying upon other treaties.

588. The fact that the standard reflects the evolution of customary international law does not mean that it includes the elements of fair and equitable treatment specified by Claimants, such as the expectations of investors or the stability of the regulatory framework. The acts giving rise to a breach of the standard are those which, when weighed against the given factual context, amount to manifest arbitrariness, discrimination, a gross denial of justice, or a lack of due process leading to an outcome which offends judicial propriety.

589. The incorporation of the expectations of investors into the content of the fair and equitable treatment standard is not derived from an interpretation which is consistent with the “ordinary meaning” of the terms “fair and equitable treatment.” As explained by Professor Kingsbury, treating “legitimate expectations” as almost a freestanding basis of liability is not supported by the text of most BITs.<sup>214</sup> The fair and equitable treatment standard does not require that the domestic legal system of the host State be kept unchanged. As stated by the Expert, the idea that legitimate expectations and therefore the fair and equitable treatment, imply the stability of the legal and business framework may not be correct if stated in an overly-broad and unqualified formulation.<sup>215</sup>

590. Respondent reiterates that fair and equitable treatment does not offer any guarantee of stability of the business investment environment. Bilateral investment treaties are not insurance policies against bad business. They were not designed to offer any guarantee of profitability to foreign investors. Arbitral tribunals must take care of the special situation of a government which has core responsibilities that continue and are not excluded by the BITs. Claimants expect the Tribunal to apply the fair and equitable treatment standard in isolation of the context in which the emergency measures allegedly contrary to that standard were adopted.

591. Claimants seek to invoke a right to the immutability of the Regulatory Framework. However, the fair and equitable treatment standard is not an insurance policy against bad business, and BITs were not designed to offer guarantees of profitability to foreign investors. As the *Total* Tribunal stated, the State Parties to a BIT do not by their signature relinquish their regulatory powers nor limit their responsibility to amend their legislation in the normal exercise of their prerogatives and duties.<sup>216</sup> As stated by the *Continental* Tribunal, the stability of the legal framework applicable to investments is not a legal

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<sup>214</sup> Kingsbury, para. 20.

<sup>215</sup> *Ibid.*, para. 24.

<sup>216</sup> *Total S.A. v. Argentine Republic*, ICSID/ARB/04/01, Decision on Liability of December 27, 2010 (ALRA-210).



obligation in itself for the parties to the BIT.<sup>217</sup> And the *EDF v. Romania* Tribunal concluded that the fair and equitable treatment standard does not imply the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life.<sup>218</sup> Accordingly, the *Parkerings* Tribunal held that save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.<sup>219</sup>

592. Claimants' attempt to have the fair and equitable treatment standard reduced to an absolute obligation to protect an investor's expectations as regards profits assumed under any circumstances, even in the case of negligence on the part of the investor itself or a third party, is contrary to reason and legally inadmissible. The *Total* Tribunal explained that the context of the evolution of the host economy, the reasonableness of the normative changes challenged have to be taken into account. It also held that the changes to the gas regulatory framework brought about by the measures taken have to be judged in the context of the severe economic emergency that Argentina was facing in 2001-2002. The *Suez* Tribunal ruled that one must not look single-mindedly at the Claimants' subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view: What would have been the legitimate and reasonable expectations of a reasonable investor about a proposed water and sewage concession investment that was to continue over a period of thirty years in Argentina, in view of the concession's legal framework and bearing in mind the country's history and its political, economic, and social circumstances? A suitable approach would be to strike a balance between Claimants' legitimate expectations and the Argentine Republic's power to issue regulations for reasons of public order. That was the approach followed by the *Saluka* Tribunal when stating that no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.

593. At the time of the bidding process, Argentina had always referred to the economic and social situation prevailing in the country in late 1999. The particular circumstances surrounding the Concession had been communicated to the Bidders, in particular through the Schrodgers Report. Thus, the Bidders were told that this was a high-risk Concession that required significant investments and had a low coverage level and very low collectability rates. It was also explained that the people to whom services were provided in this area had extremely limited financial resources and thus were severely affected by the economic, social and institutional crisis that struck the Argentine Republic. All these

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<sup>217</sup> *Continental Casualty Company v. Argentine Republic*, ICSID/ARB/03/9, Award of September 5, 2008 (ALRA-140).

<sup>218</sup> *EDF (Services Limited) v. Rumania*, ICSID/ARB/05/13, Award of October 8, 2009 (ALRA 209).

<sup>219</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID/ARB/05/8, Award of September 11, 2007 (ALRA-206).

risks were not only disclosed to the Bidders, but they were also evidenced by the lack of Bidders and the low sum for which the Concession was awarded.

594. The determination of a breach of the obligation of the fair and equitable treatment standard by the host State must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. It is understood that the investor can expect that the host State implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies. The evolution of the law of the host State is part of the environment in which investors act. International law recognizes that an investor accepts to become subject to the laws of the host State and it assumes the risk that there may be subsequent modifications to the regulations or that new measures may be adopted. The *Parkerings* Tribunal stressed that any businessman or investor knows that laws will evolve over time. The fair and equitable treatment standard requires good faith, transparent, reasonable treatment, free from arbitrariness and discrimination, and it does not protect any expectations that there will be absolute stability of the legal and commercial framework. The economic and social environment of a host State is relevant to such determination. In this regard, the State's leeway to issue regulations for reason of public order or interest is to be taken into account.

595. Even if alleged legitimate expectations of investors are to be included in the fair and equitable treatment standard, it cannot seriously be argued that the creation of the Investment Development Agency or the publication of its report gave rise to any legitimate expectations on the part of Claimants in this case. Those events took place years before the alleged investment, were not aimed at Claimants and did not contain specific commitments with regard to AGBA's Concession. Likewise, the statements of the President of the Republic cannot possibly create such expectations. In addition, they did not contain any specific commitment relating to Claimants.

596. Furthermore, Claimants maintain that since the legitimate expectations of Aguas Argentinas and AZURIX were allegedly frustrated, as held by the tribunals seized with their cases, this Tribunal must conclude that alleged legitimate expectations of Claimants in this case were violated as well. Claimants' conclusion lacks any legal basis and does not distinguish these arbitrations from the present one. The concessions were different from each other. In the first place, the time is different. The concessions relating to the different Aguas companies were awarded in 1993 and 1995, that is between 4 and 6 years before the Concession was awarded to AGBA. It was in 1998 when Argentina began to experience an economic recession. It was in that context that Claimants decided to make the alleged investment, in a region where the population had an extremely low socio-economic and educational level. Thus, the context of recession and the specific characteristics of the concession area show that Claimants' alleged expectations could not have been

the same as those that the investors of the other concessions may have had. What is different is in particular the fact that the characteristic feature of Region B was that it was a high-risk Concession, covering one of the poorest areas in Argentina. This was reflected in extremely low coverage levels of water and sewerage services. It was essential for the awardee to fulfill its obligations to expand the service and make investments in line with the goals and objectives set forth in the Contract. This was not the case in any of the other concessions. In addition, the Azurix arbitration did not involve the emergency measures. The termination of the contract took place almost at the same time as the declaration of emergency.

597. As Claimants recognize as well, this Tribunal has the duty to consider the circumstances of the instant case. In referring to Law No. 25561, Claimants do not maintain that it violated their legitimate expectations, but rather that it betrayed their “trust,” a situation which was aggravated by the unjustified delay in a renegotiation process that was never conducted seriously and with a sense of reality by the Grantor. The BIT contains no obligation to protect the “trust” of investors. In any case, it was the Province’s trust that was actually betrayed, as it trusted the Concessionaire to make all the required expansions and investments to improve the situation of the population in Region B.

598. As explained in the *Suez* case, there does not exist a principle of economic-financial equilibrium. And even if such principle had existed, the Concession Contract was disrupted by the Concessionaire in mid 2001, prior to the adoption of the emergency measures. The reasons invoked at that time were the “unforeseeable” uncollectability level recorded and difficulties to obtain financing. Given that the Concessionaire was never able to obtain the required financing, its expenses were lower than those originally provided for, since it did not have to repay loans it did not obtain. And as many of the required investments were not made, its costs were reduced. The drop in collectability, which was due to mistakes in management, also had an impact on the economic-financial equation of the Concession. The main costs of water and sewerage concessions are those relating to power and wages; these two items remained virtually unchanged after 2001. Therefore, any tariff increase would have translated into extraordinary profits for the Concessionaire, while the actual income of the users, and thus their payment capacity, decreased rapidly. In any event, one of the distinctive features of the Concession is the reference to “strict compliance with the applicable service quality and expansion goals” as stated in Section 12.1.1 of the Contract. This means that the tariffs were directly dependent upon the “strict compliance” with investment commitments. Therefore, AGBA’s aspiration to obtain significant increases in tariffs, after it had announced long before the outbreak of the crisis that it would not make the agreed upon investments was particularly inadmissible. Claimants also refer to an alleged guarantee regarding the denomination of tariffs in US dollars. However, the only reference to the invoicing of tariffs in Argentine pesos and its relevant conversion was contained in Section 20 of Annex Ñ, where it was stated that the exchange rate set forth in the Convertibility Law No. 23928 would be

applied, adding “or any other legal provision as may replace it as of the closing of the invoicing procedures.”

599. The crisis experienced by Argentina altered the conditions under which AGBA’s Concession had been awarded, which – in any event – had already been frustrated owing to AGBA’s announcement that it would not make the agreed upon investments in May 2001. In the face of the crisis, neither the Regulatory Framework nor the Concession Contract provided for appropriate mechanisms for maintaining or restoring the balance between the agreed upon contractual rights and obligations, or for safeguarding the rights of service users. As a result, a contractual renegotiation was required for the purpose of adapting the regime to the new economic and social context. Under those circumstances, linking the future evolution of tariffs to the exchange rate between Argentine peso and the US dollar (i) was inapplicable given the collapse of the convertibility regime and the dramatic devaluation of the Argentine peso *vis-à-vis* the US dollar, (ii) would have annihilated the fair and reasonable tariff principle, and (iii) would have severely harmed the Province, the Concessionaire and the users. As a consequence, the contractual provisions relating to the calculation of tariffs in US dollars, the adjustment based on foreign indexes, and tariff reviews, became obsolete and inapplicable due to the change of the economic system. Therefore, the restructuring of the Concession Contract was precisely aimed at maintaining and preserving the abovementioned principles of the tariff regime.

600. Claimants seek to argue that there was no proper renegotiation. This is incorrect. In spite of the breaches committed by the Concessionaire prior to the crisis the Province made its best effort to carry on with the renegotiation. The main goal during this process was to adjust the Concession Contract, to the extent possible and by mutual agreement, so as to preserve the provision of the basic drinking water and sewer services and the life of the Contract. Throughout the renegotiation process, the Province made significant efforts in relation to the economic-financial equation of the Contract, especially by refraining from sanctioning the Concessionaire for its breaches.

601. The Province included a detailed list of the grounds for termination of the Concession Contract in Decree No. 1666/06. The termination was thus justified and could not hurt Claimants’ legitimate expectations because it was implemented in accordance with the terms of the Contract. The fact that a number of water concessions were re-nationalized is not a mere matter of “politics” as contended by Claimants. As a matter of general experience, it can be said that part of the goals set in the privatization of water and sewage concessions were never met and this led to the termination of contracts. A report by the Inter-American Development Bank refers to the failure of water concessions in Latin America as being caused by Concessionaires committing condemnable acts during the performance of the contracts. Moreover, there is a global tendency to re-nationalize water and sewage concessions.

602. The Province had to guarantee the continuation of the basic water supply to millions of Argentines. The protection of this universal basic human right constitutes the framework within the Claimants had to frame their expectations and should still do so.

3. *The Tribunal's findings*

a. Extreme positions

603. The Tribunal finds appropriate, as a first step, to carve out extreme positions that are beyond any reasonable understanding of the fair and equitable treatment standard and not reflecting convincingly what belongs to largely prevailing opinions and case law.

604. On the one hand, there is no sufficient ground to assert that the many fair and equitable treatment clauses retained in so many BITs, including the BIT applicable in the instant case, have no other or additional purpose than to declare applicable the standard as retained under customary international law in the first half of the 20<sup>th</sup> century. In any event, Article X(5) makes clear that the fair and equitable treatment clause of the BIT must be understood by reference to general principles of international law. This includes a reference to the whole of international law and not to a specific part of it.

605. Even if reliance on customary international law should prevail, it would still have to be examined whether this law has not been progressively developed towards a broader standard of investor protection, based on the legal practice and *opinio juris* related to international investment law. Under customary international law, this was a standard applicable in the relations between States. When applied to investors, it has the potential of taking a different meaning. Nonetheless, a certain restraint is advisable in light of the fact that the sources of law governing the interpretation of the standard of fair and equitable treatment under the BIT, like any other provisions of this treaty, are those mentioned in Article X(5). This provision refers to general principles of international law; no further weight is given to investment arbitration practice as sources of law, which is compatible with the prevailing practice under the ICSID system that does not provide its Awards with precedential value.

606. On the other side of the spectrum, Claimants understand the fair and equitable treatment standard and its possible expression by terms like “legitimate expectations” as identical or coming close to the legal undertakings that are the basis of the investment made in the particular case. If such an approach would be adopted, the fair and equitable treatment standard would be commuted practically into the set of legal rights and obligations agreed upon between the investor and the host State or any other authority under its control. Respondent’s question as to the legal source of such an understanding is pertinent.

607. In the instant case, such position would have the effect of placing the investor's contractual rights deriving from the Concession Contract under the umbrella of the fair and equitable treatment clause. In this respect, Claimants' position is not free from any ambiguity. Indeed, while Claimants firmly stated that they are not claiming before this Tribunal contractual rights arising out of their involvement in AGBA, they also contend that they have legitimate expectations that their contractual rights will be protected and preserved. The fair and equitable treatment clause is not a guarantee for the contract's stability for the investor.<sup>220</sup> The opposite understanding would also enter in conflict with the generally shared opinion that an investment includes by definition a certain amount of risks.

608. Moreover, when Claimants' view would prevail, the "legitimate expectations" of the investor, based on what it decided as being pertinent for its choice to proceed with the investment, would become part of the conditions underlying the protection guarantee of a key provision of the BIT and, more significantly, part of the definition of the content and the scope of the host State's liability. The BIT's Contracting States would thus have their responsibilities under the treaty put at variance depending on the investors' view of what they thought to be the foundations of their decision to invest. Such a concept finds no support in the BIT applicable in the instant case or in most other BITs despite some marginal arbitral decisions affirming the investors' views as prevailing in light of the required "promotion" of foreign investments.

b. Positions lacking substance

609. In a second step, the Tribunal has to move away expressions and concepts that are supposed to convey a certain meaning of the standard, while in fact, they do not.

610. This is shown by the expression "minimum standard," which is ambiguous when the legal foundation of such standard is not identified simultaneously. Any standard is a "minimum" compared to any other "broader standard." Such term makes sense only when put in relation to the body of law capable of demonstrating the standard itself. Theoretically, any solution other than a standard identical to a "maximum" expected by the investor on the basis of the undertakings agreed upon in the particular case could be qualified as a "minimum." While this does not make much sense, there is no indication given by

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<sup>220</sup> While Claimants' tend to disagree with this observation and insist on their expectations to have AGBA's contractual rights preserved, a note of skepticism may nonetheless be added to their approach when reading once again AGBA's letter of May 17, 2001, where the Company insisted, in support of its request to have the expansion goals be temporarily suspended and in reliance on several legal authors, on the Government's power "to amend contracts to fulfill their purpose where circumstances change," in particular in the case of contracts having a certain significance, such as public service concessions, further quoting an author stating: "Public convenience calls for the amendment of contracts for the purpose of efficiently satisfying the public interest." Claimants' Expert Bianchi had not included this letter in his examination (TR-E, Day 8, p. 10/4-21, 41/11-46/13).

such expression on the way to identify such “minimum.” The term is devoid of substance to the extent one would seek to understand it in more concrete terms than just saying that the standard is to be leveled below a “maximum” of rights and expectations an investor could be attempted to claim. There is only little progress achieved either in stating that compared to such minimal level, the standard is deemed to be “broader.”

611. There is certainly room for accepting the idea that the fair and equitable treatment concept must refer or be related to the circumstances of the particular case. Each of the three words “fair,” “equitable” and “treatment” implies such a component. Nonetheless, with this in mind, the understanding of the standard is far from becoming useful. When Claimants explain that the minimal approach under customary international law has been replaced by a flexible standard left to the discretion of the Arbitral Tribunal, little progress is achieved for the purpose of identifying the content of such standard. Nothing more results from the advice given in many Awards that what is fair and equitable must depend on the facts of the particular case. The meaning of the requirement of fair and equitable treatment cannot be left for the exclusive discretion of the arbitral tribunal seized with a particular case. Such an approach would lead to arbitrary divergence between investor tribunals, which, while not avoidable in all cases, cannot be considered as an inherent objective of a fair and equitable treatment clause. It would also be in a striking contrast to the objective of creating a secure environment for investment protection.

612. The fair and equitable treatment clause requires therefore that at least a number of elements of a standard to be applied are to be determined in such a way that they imply a certain character of generality of a nature allowing application in investment cases generally.

c. Basics

613. The fair and equitable treatment standard must be objective, not based on personal opinions of the arbitrators or personal expectations of a party. Therefore, it must represent a source of law of a normative character upon which the Parties and the Tribunal can rely.

614. As the fair and equitable treatment standard is framed as an obligation of the host State, it creates rights for the investor upon which it can rely. These rights ensure the investor that it will not be faced with acts or omissions of the host State that are outside the range of fair and equitable treatment. This means as a corollary that events caused by the host State that are covered by the notion of fair and equitable treatment are not hurting the investor’s rights nor triggering a host State’s obligation.

615. The next step is therefore to determine the scope of events, acts or omissions on part of the host State that are not triggering an investor’s right for protection under the fair and equitable treatment standard and that it has to expect to be faced with. This is

why the interpretation of this standard is usually focusing on the legitimate expectations of the investor, covering all acts and omissions of the host State that are embraced by the fair and equitable treatment standard. The objective is twofold: On the one hand, the host State complies with its Treaty obligations as long as it operates within the range of events that the investor had to expect, and on the other hand, the investor relies on a BIT protection that events not to be expected will not occur, or, if they do, will trigger the host State's responsibility. While the Tribunal understands Respondent's objection that Article IV of the BIT does not allow an extensive interpretation covering the "legitimate expectations" of the investor, the argument is simply subject to the understanding and meaning of the term "legitimate."

d. The standard is not tied to one set of expectations

616. When considering that some kind of expectations on the investor's side must be covered under the protection of the fair and equitable treatment standard, such expectations cannot be identified as having one single meaning. If this were the case, it would necessarily mean that the investor's legitimate expectation would be equal to its own understanding of the rights as they are protected on the basis of the contract governing its investment. As stated above, this is not what corresponds to the meaning and the scope of protection of a fair and equitable treatment clause.

617. In a given situation, more than one solution can meet the threshold of being fair and equitable. There is a margin between the expectations derived from the contract and those that the investor had to envisage as still being in the range of being fair and equitable. This is why purely contractual disputes, whatever the solution applied to them, do not reach the level of becoming critical under the fair and equitable treatment standard when more than one solution or interpretation can be envisaged and none of them engages the BIT standard.

e. The standard encompasses the entire legal, social and economic framework

618. The mere focus on the investment contract is too narrow for another reason. The host State's commitments and, conversely, the investor's expectations, are not exclusively related to the investor's rights under the contract.

619. The investor's expectations, and their importance in the particular case, are usually measured on the basis of the contractual commitments undertaken. However, these contractual rights should not be considered in isolation. They are placed in a legal framework embracing the rights and obligations of the host State and of its authorities, subject to the protections provided in the BIT. In the Concession Contract in the instant case,



much emphasis is put on the regulatory power of the Regulatory Agency. AGBA's shareholders' rights and obligations are governed by the applicable law designated by Article X(5) of the BIT, which includes, where appropriate, the laws of the host State.

620. This legal environment was part of the legal framework governing the Concession and part of what the investors had to expect as being applicable to them and to their investment in AGBA. What matters, under the protection based on the fair and equitable treatment standard, are the modifications, disturbances and disruptions that allegedly occurred during the lifetime of the Concession and that are to be measured against the expectations the investors had at the relevant time under the coverage of the protection against unfair and unequal treatment.

621. Moreover, the host State is bound by obligations under international and constitutional laws. Therefore, the host State is legitimately expected to act in furtherance of rules of law of a fundamental character. The scope of such rules is broad. They cover the State's undertaking to promote and secure foreign investments. They also encompass fundamental principles like due process and acting in good faith. Such principles, and a number of others of a similar kind, are generally considered as part of the fair and equitable treatment protection. They are, in other words, comprised in the range of rules that the investor can legitimately expect as being protected as part of the fair and equitable treatment standard.

622. This means that the investor's interests are not to be identified as separate and distinct from the legal framework into which they have been placed upon entering into the investment. This includes, firstly, the respect for the rights and powers exercised by the competent authorities as provided for under the Concession Contract and the Regulatory Framework. Moreover, other obligations of the host State must prevail over the Contract and are therefore also part of the law applicable to the investment under Article X(5) of the BIT. In the instant case, this obligation relates to the Government's responsibilities under the Federal Constitution to ensure the population's health and access to water and to take all measures required to that effect. This was an important objective of the privatization of the water and sewage services, including the investment in this particular case. When measures had been taken that have as their purpose and effect to implement such fundamental rights protected under the Constitution, they cannot hurt the fair and equitable treatment standard because their occurrence must have been deemed to be accepted by the investor when entering into the investment and the Concession Contract. In short, they were expected to be part of the investment's legal framework. This does not mean that they are not subject to the fair and equitable treatment standard. The Government must exercise such responsibility in a manner that comports with the standard. The investor may not invoke the protection of its own interests as a prevailing objective, because these interests were part of a legal environment also covering core interests of the host State, as protected by sources of law prevailing over the Contract, based on international or on constitutional law. Recent investment arbitration practice reveals approaches that

are dealing in a more balanced fashion with the investors' and the host State's respective interests.<sup>221</sup>

623. The fair and equitable treatment standard is not focused exclusively on interests and expectations of a legal nature. It does include the actual social and economic environment of the host State, which is also part of the expectations the investor has to acknowledge when making its business decision.

624. In this respect, Respondent rightly recalls that the Province had to guarantee the continuation of the basic water supply to millions of Argentines. The protection of this universal basic human right constitutes the framework within which Claimants should frame their expectations.

625. ORAB's Resolution No. 56/02 of August 27, 2002 (CU-102, RA-204) provides a further illustration of a situation where AGBA's and its shareholders' expectations to have their contractual rights preserved had to be adjusted to prevailing concerns of public interests that a fair and equitable treatment standard cannot move away. AGBA was instructed to suspend any measure of interruption of services with respect to users under poverty and extreme poverty conditions while the economic emergency persisted. Faced with AGBA's resistance, ORAB had to explain the need and purpose of protecting public health under Law No. 11820:

“The provision of sanitation public service is essential to the life of the population; thus, failure to provide this service may bring about serious situations which put public health in jeopardy, consequently causing a sanitary risk and mostly affecting vulnerable sectors with an inevitable increase in marginality and social exclusion.

In this respect, the mandatory connection to the service established in Section 8-II of Law No. 11820 on the regulatory framework is intended to ensure a safe supply of drinking water, thus dispensing with alternative sources lacking any relevant control and not only protecting the health of the dwellers of the premises involved but also fostering any positive externalities for the social environment.

Notwithstanding the foregoing, in the pursuit of a universal sanitation public service as a right to which all the inhabitants of the province are entitled and safeguarding

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<sup>221</sup> Cf. *Electrabel S.A. v. Republic of Hungary*, ICSID/ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of November 30, 2012: “While the investor is promised protection against unfair changes, it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment.” (para. 7.77) Cf., in similar terms, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID/ARB/05/8, Award of September 11, 2007, para. 332 (ALRA-206).

the rights provided for in the Constitution, this Agency is expected to guarantee the fulfillment thereof.

Likewise, the purpose of protecting underprivileged users should be similarly guaranteed in order to ensure they can exercise their rights and access drinking water and wastewater public services, thus pursuing the general wellbeing of the population; such purpose proves essential to health care, the quality of life and the overall development of individuals and families.”

f. The investor’s protected expectations

626. In order to go beyond the threshold of violating the fair and equitable treatment standard, the acts or omissions to be considered must be of some importance. The rights and expectations of the investor must have been affected in essential parts. Mere minor disputes, like those identified in Chapter IV as purely contractual, do not meet the threshold of being unfair and inequitable, even if they had adverse effects.

627. Such important level of interest may result from the trust the investor had in promises and undertakings made by or on behalf of the host State in support of the investment and its promotion. When the host State’s representatives were aware or must have been aware that certain specific commitments or guarantees were decisive for the investor’s decision to proceed with the investment, the disregard or violation of such undertakings are generally to be considered as triggering the State’s responsibility under the fair and equitable treatment standard.

628. A subset of the respect for trust is the investor’s right to be treated with a certain transparency. While this requirement is often mentioned in arbitral decisions, and has certainly its value as a principle, its precise facets are unclear. The host State’s handling of matters in transparency cannot mean that it has to act under complete disclosure of any aspect of its operation. It rather means that in relation to a foreign investor, the authorities of the State shall act in a way to create a climate of cooperation in support of investment activities. Investors must have trust in the host State’s best efforts to sustain their operation on this State’s territory. Contrary to Claimants’ views, the requirement for transparency cannot have the meaning that the host State’s treatment of the investment is fixed once and for all at the very initial stage, and that the investor shall not suffer from any change of the circumstances in the lifetime of the investment for the reason that such event had not been transparent from the outset.<sup>222</sup> The investor is and must be aware of the State’s commitment to deal with situations and problems that may emerge over the

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<sup>222</sup> Claimants rely on documents of the United Nations Conference on Trade and Development (UNCTAD). It is stated there that fairness requires that the investor is informed about decisions before they are imposed and that the degree of transparency in the regulatory environment affects the ability of the investor to assess whether fair and equitable treatment has been made available in a given case (CUL-47).

time and were impossible to anticipate. The fair and equitable treatment does not provide for a standard according to which the investor would remain completely isolated and immune from the host State's endeavors to deal with such situations in complying with public interests. If the host State is hit, for instance, by an epidemic threat to the health of a very large amount of people, it has to take all measures required by the situation even if this implies hurting investors' interests, provided that the authorities proceed with deference to those interests and with the aim to restore their efficient preservation as soon as the circumstances so allow. What the fair and equitable treatment standard requires is that the basic expectations of the investor in respect of the fate of its investment are nevertheless taken care of by the host State when reacting to unforeseen circumstances. There is no bar for the host State to act accordingly merely because a situation of public concern emerged that was not transparent to the investor at the outset.

629. The threshold for a treatment not being fair and equal also results from its intensity or gravity, both factors being subject to variations in relation to the duration of their impact in the particular case.

630. An unfair or inequitable treatment of such importance must affect the investor's expectations in actual terms. The guarantee provided by the fair and equitable treatment standard protects the investor's rights and expectations in their content as they existed at the time the allegedly unfair or inequitable treatment occurred. When the expectations covered by the fair and equitable treatment protection originated at an earlier moment, they are protected only as long as they remained the same until the time such treatment had been applied. Fair and equitable treatment must be measured against the actual state of the investment prior to the treatment by the host State giving rise to the claim. It cannot be measured against a hypothetical state of the investment. Nor can damage be assessed as a consequence of a violation of an obligation based on the fair and equitable treatment clause when the measure taken had not produced effects corresponding to a decrease in the investor's assets or future income. In short, the investor's protection for fair and equitable treatment cannot make contracts better than they were, nor can it restore rights or expectations that the investor has waived or lost due to its own negligence.

631. Another illustration relates to a renegotiation subsequent to a major disruption of the contractual framework. Such a deal or the method to approach it may, under certain circumstances, violate the fair and equitable treatment standard. In such a case, however, this standard is to be reflected in light of the reasonable expectations of the investor in respect of the involvement of the host State in the negotiation and their possible outcome. It will not be measured in comparison to the expectations the investor had when entering initially into the contract, at a time it had no reason to think and consider the occurrence of such an event.

632. This also means that a measure that hurts the fair and equitable treatment standard if applied in the long run may not reach such standard of gravity if removed early enough before its effects extend beyond the range of what could still be acceptable as fair and equitable treatment. This is the reason why it is generally accepted that measures that represent unfair and inequitable treatment *prima facie* may no longer reach that threshold if negotiations were suggested and later conducted with the effect of removing or compensating for the consequences of the measures taken initially.

633. These matters are now to be examined further in light of the events that affected the Concession's life and that can be divided in three parts, relating to the immediate effects of the emergency measures taken in 2002 (VII), the attempts for renegotiating the Concession in 2003-2005 (VIII), and finally the termination of the Contract in 2006 (IX).

## **VII. The Emergency Measures and their Effects on the Concession**

### **A. The crisis**

634. It is common ground that the crisis that led to the emergency measures taken in early 2002 started in mid-1998, when the recession became deeper as a result of the Russian crisis of August 1998 and the devaluation of the Brazilian currency in early 1999. After October 24, 1999, the then-new President took harsh adjustment measures, including the January 2000 tax increase. Sovereign debt was asphyxiating the Government and increasing the fiscal deficit, raising the risk of a default on debt. In spite of the measures taken, bank deposits started to pour out in March 2001. In June 2001, the Administration sought additional aid from the International Monetary Fund. Nevertheless, the recession and the outflow of capital continued. Additional measures were taken in July and August, such as Law No. 25453, the "Zero Deficit" Law, and Law No. 25466, the "Protection of Deposits" Law. All indicators dropped in the second half of the year. Because of the increased outflow of money from the banks<sup>223</sup>, on December 3, 2001, Decree No. 1570/01 (RA-142) banned cash withdrawals of more than USD 250. The Decree also prohibited transfers abroad, other than those relating to foreign trade transactions. The administration made a desperate move to stop the threat of a bank collapse. What followed was a sudden restriction of liquidity, thus freezing trade and credit. Social unrest increased. A new appointed President announced Argentina's default on its sovereign debt. When another President was appointed one week later, on January 3, 2002, he promised to respect currencies.

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<sup>223</sup> Witness Ratti notes that in 2001, 25% of the financial system's total deposits were withdrawn. Withdrawals in US dollars caused an estimated 40% reduction in the country's international reserves (para. 12).

635. Claimants contend that the outbreak of the crisis is to be set around the date when AGBA submitted its May 17, 2001 letter to the Minister of Public Works and Services (CU-173, RA-183). Law No. 12757 of July 23, 2001 declared the state of administrative, economic and financial emergency in the Province (CU-195, RA-164). The Governor of the Province issued on July 12, 2001 a similar ruling in Decree No. 1960/01 (RA-167, 187, CU-309), stating that the power of the Executive Branch of the Province to terminate public contracts retaining obligations for the Government shall not extend to agreements entered into on account of the privatization process (Art. 3).

636. Respondent takes issue, once again, with Claimants' insistence that the crisis began in 2001 only. For Respondent, quoting leading economists, the crisis unfolded since 1998, and it had its peak in 2001. Since the second semester of 1998, Argentina's economy went into a long recession. Respondent's Expert Professor Eichengreen shares the view that "the Argentine economy was in recession from 1998 due to external factors, clearly."<sup>224</sup> Upon entry into effect of the Concession Contract (Takeover), the crisis had already affected the country for more than a year. AGBA's Report and Financial Statement for 2002 recognizes that as of 1998, the Argentine economy was in a recession (CU-29).<sup>225</sup> The Concessionaire could not consider it as unforeseeable. In any event, the consequences of the crisis are part of the corporate risk.

637. Respondent further recalls that one of the main measures taken to mitigate the crisis was the implementation of programs to cut public spending, starting with the tax reform of December 1999. During 2001, there was a new tax increase and a reduction of 13% in wages of government employees and retirees. The IMF highlighted the "substantial efforts by the Argentine government" (RA 138). The government stayed with a strong policy to maintain the convertibility regime. By the end of 2001, when the Argentine Executive was forced to limit the withdrawal from bank deposits and the IMF discontinued its support to the Argentine Republic, the crisis turned into collapse.<sup>226</sup> Five different Presidents were succeeding one another within two weeks. The consequence was an extremely serious social context, as well as countless social protests due to the increase in poverty and indigence rates.

638. The Tribunal has already explained, with respect to the background of the May 17, 2001 letter, that the precise moment when Argentina's economy turned into a crisis

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<sup>224</sup> TR-E, Day 5, p. 168/9-11; also Eichengreen, para. 12. He added that the Asian financial crisis in 1997 rendered international banks and investors more hesitant about buying emerging market debt (TR-E, Day 5, p. 180/2-4) and that the recession that Argentina experienced starting in 1998 contributed to the fiscal deficits that followed (TR-E, Day 5, p. 182/19-21).

<sup>225</sup> Prof. Eichengreen noted that "the level of debts was known to everyone concerned, including to domestic and foreign investors, as late as the year 2000" (TR-E, Day 5, p. 169/17-20).

<sup>226</sup> In the words of Witness Cipolla: "The crisis brought about the collapse of the political, economic, social, sanitary, education, labor and security systems, which are a fundamental cornerstone the government has the obligation to guarantee under any rule of law." (para. 29)

is of limited importance in the context of the operation of the Concession and of AGBA's situation. The difficulties which the Concessionaire faced were perceptible well before and recognizable in their first serious manifestations already upon Takeover. The serious drop in collectability was one of the consequences of the country's economic degradation that had seriously affected the population living in Region B. Another consequence was the difficulty in obtaining financing in amounts as important as to be expected at Takeover. Although Claimants may say that the hurdles they faced in that respect were manifest only once they were in a position to file their application with the IDB, they must accept that a reasonable Bidder must have launched all appropriate inquiries already before Takeover in order to be certain to meet the goals for financing it was fully informed about, although the first Five-Year Plan was not yet set up and approved.

639. After the outbreak of the crisis, AGBA was faced with more serious difficulties, and it stated so in its July 17, 2001 letter submitted to ORAB (CU-135, RA-192). AGBA announced "delays of the foreseeable terms for the disbursement of funds for the execution of Service expansion and infrastructure works," to such extent that "it has become unviable for us to carry through with the works agreed upon in the POES within the period stipulated for such purpose." Therefore, AGBA declared that it would not abandon expansion works but rather adopt an "adjustment of their execution time frames," without affecting "the quality goals and standards of the Service, which will be consistently rendered in full compliance with applicable Contract provisions." As the situation aggravated rapidly, AGBA added in its August 15, 2001 letter (RA-193) that:

"It is further understood that if that situation constitutes sufficient ground for contractual termination without fault, the same applies to a justified cause of delay in the execution of the works of the Expansion Plan."

In a further letter of October 10, 2001<sup>227</sup> AGBA reiterated the objective impossibility of proceeding with the expansion work within the terms adopted in the POES that it requested again to be neutralized.

#### B. The emergency measures

640. Claimants provide a detailed account of the emergency legislation issued at the federal and provincial levels, including the adverse consequences for the Concession. Respondent focuses on the institutional, economic, political and social dimensions of the crisis that created the most dramatic economic and social situation the Argentine Republic has ever endured, and further contends that the Concession was in a state of disruption well before the emergency measures were taken.

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<sup>227</sup> Exhibit 184 to Giacchino/Walck I.

1. *Claimants' views*

641. Claimants explain in respect of the “federal emergency” that since the early days of 2002, the Duhalde Administration started to enact a series of laws and other legislation, the most relevant were as follows: (1) The Law on Public Emergency and Exchange Regime Reform, No. 25561 of January 6, 2002, the Emergency Law (CU-145, RA-168), overturned the currency convertibility system for contracts entered into by the administration, and it invalidated any clauses providing for adjustments in dollars or other currencies, while establishing tariffs in pesos at the ARS 1 = USD 1 rate of exchange. The Law also opened the door to the renegotiation of public service contracts (Sections 9 and 10). (2) Decree No. 71/02 of January 9, 2002 (CU-146) established the new official rate of exchange at ARS 1.4 per 1 USD and regulated the pesification of debts owned by individuals and legal entities under the one peso = one USD exchange scheme. (3) Ministry of Economy Resolution No. 6/02 of January 9, 2002 (CU-147) ordered the rescheduling of deposits. (4) Decree No. 214/02 of February 3, 2002 (CU-148, RA-144), the “Financial System Reorganization” Decree, ordered the pesification of all obligations to pay a sum of money, whatever the origin or reason therefore. These measures created the so-called “asymmetric pesification,” under which all debts in the financial system were pesified at a 1:1 rate, while the financial institutions recognized foreign-currency deposits at ARS 1.4 per dollar. The Government covered the difference by issuing a bond.

642. Claimants add that on December 2, 2002, the Minister of Economy announced the release of the locked-in deposits. On December 28, 2006, the Supreme Court of Argentina endorsed the pesification.

643. Turning to the level of the Province, Claimants note that shortly after the enactment of Federal Law No. 25561, the Regulatory Agency extended its effects to the Province of Buenos Aires through ORAB’s Resolution No. 04/02 of January 11, 2002 (CU-149), whereby it ordered AZURIX and AGBA to bill service customers at the rate of ARS 1 = USD 1, even though the Province had not yet adhered to the provisions of Law No. 22561.

644. When AGBA notified ORAB that it will stick to the Contract provisions and apply the exchange rate of ARS 1.4 per US\$ and bill on this basis (letter of January 21, 2002, CU-150), ORAB replied immediately ordering AGBA to fully comply with Resolution No. 04/02 (letter of January 23, 2002, CU-151). This shows that ORAB acted as an instrument of the Grantor, complying with its instructions, although the application of Law No. 25561 had not yet been extended to the Province. AGBA’s challenge of ORAB’s Resolution No. 04/02 (CU-152) was denied by Resolution No. 06/03 of March 19, 2003 (CU-153), arguing that Law No. 25561 had amended the Convertibility Law No. 23928 and had also invalidated dollar-adjustment clauses. The Resolution did not mention that at the time the challenged decision was issued, the Province had not yet adhered to the



Emergency Law. It did so only by means of Law No. 12858 of February 28, 2002 (CU-154, RA-169). ORAB also failed to mention that when it issued Regulation No. 06/03, the Federal Decree No. 71/02 of January 9, 2002 had already been issued and established the new official rate of exchange at ARS 1.4 per 1 USD.

645. When the Province adhered to the Federal Emergency Law, other new laws and implementing regulations followed. Provincial Decree No. 1175/02 of June 5, 2002 (CU-171, RA-170) created a special committee for the assessment of the crisis' impact on public service tariffs and contracts. Provincial Law No. 13154 of January 19, 2004 (CU-155) validated Decree No. 878/03 and authorized the Executive to adapt the existing public service contracts, setting December 31, 2004 as the deadline.

## 2. *Respondent's views*

646. Respondent explains that by the end of 2001, when the effects of the measures taken earlier disappeared, the Argentine Republic was forced to urgently adopt a series of economic and social general measures to preserve public order and the integrity of the economy and society. After an abrupt devaluation of the currency, it was acknowledged that the monetary system which had been in force had come to an end (*i.e.* the convertibility regime between the ARS and the USD). By late December 2001, the Argentine Republic had to suspend the payment of its sovereign debt obligations to private holders.

647. By mid-December 2001, the President resigned and five others followed him within two weeks. A new President took office on January 1, 2002. Political leaders and representatives began to be severely questioned. Both the Argentine capital city and the provinces faced growing social unrest where massive protests took place. The Government's control over the territory was severely compromised.

648. Within this context, the State had to continue to guarantee one of the most basic human rights: the human right to water, together with the right to access sanitation services.

649. At the same time, social conditions deteriorated, and the country hit by a delicate social and institutional commotion. The social context was pressing and poverty rates increased. The worsening of poverty significantly affected the poorest areas of the Argentine Republic, such as the Metropolitan Area in the Province of Buenos Aires. Efforts had to be made to guarantee the exercise of the population's most basic human rights.

650. Claimants' argument that the measures taken were motivated by political reasons is groundless. The measures taken by the State were intended to preserve most essential human rights. It was the only option to mitigate the devastating effects of the prevailing situation. Any act by a public authority may be defined as political in a broad sense, and

it is reasonable that such act takes into account the needs of the population. There was an absolute uncertainty about the future sustainability of the country. Emergency Law No. 25561 was adopted on January 6, 2002. This law amended the Convertibility Law which established the one peso-to-one dollar peg (Law No. 23928 of March 27, 1991, RA-143). However, the devaluation of the Argentine Peso against the USD occurred before and independently of the measures taken.

651. The Emergency Law established general guidelines impacting on all the economic agents. It provided in relevant parts that for private contracts not linked to the financial system “dollar denominated obligations be converted into pesos at a rate of one peso to one dollar initially,” and it also provided for the renegotiation of both private and public contracts to adapt them to the new prevailing circumstances and the new foreign currency regime (Sec. 9 and 11). Some days later, on February 3, 2002, Presidential Decree No. 214/02 (RA-144, CU-148) established the mandatory conversion into Pesos of “all payment obligations of any kind or origin.”

652. The Province declared the state of emergency on July 12, 2001 (Decree No. 1960/01, RA-167, 187, CU-309), explaining the need to adopt urgent measures. On July 23, 2001, the economic emergency was confirmed by Law No. 12727 (RA-164, CU-195). One measure was a significant reduction of salaries paid to Governmental personnel. These cuts affecting people did not extend to AGBA’s tariffs.

653. On February 28, 2002, the Province passed Provincial Law No. 12858 (RA-169, CU-154), adhering to the provisions of the Federal Emergency Law. Article 1 authorized the Provincial Executive Branch to organize, restructure or adapt the regulatory system of public services, including drinking water and sewerage services and to create new forms of management to guarantee service supply. Article 3 ordered the Provincial Legislature to consider and approve renegotiated contracts. This need for legislative ratification reflects the essential public interests at stake.

654. By means of Provincial Executive Decree No. 1175/02, a Special Commission for the Evaluation of the Impact of the Crisis on Tariffs and Public Services Contracts was established. This shows an objective and professional attitude of the Province. Similarly, ORAB was flexible with AGBA and refrained from applying penalties for non-compliance with the POES, and this during the two years before the passing of the Emergency Law.

655. Claimants’ arguments with respect of ORAB’s Resolution No. 04/02 on the new exchange rate are irrelevant. They say that this Resolution was unlawful because the Province had not yet adhered to Federal Law No. 25561. The power to determine money value was with the Federal Government exclusively. The Federal Law was mandatory in nature

and no provincial law was required for adherence thereto.<sup>228</sup> Claimants' own expert, Professor Bianchi, acknowledges that the impact of emergency laws was "proportional to the crisis."<sup>229</sup>

656. After the measures had been taken, the Government had three challenges: rebuilding institutional authority, restoring the severely damaged social network and avoiding an even worse impairment of economic activity. In a complete unstable scenario, Argentine started to change its direction in the second quarter of 2002. Gradually emerging conditions to consolidate the economic recovery and political-institutional normalization could be observed starting in May 2003.<sup>230</sup> The IMF recognized the success of the emergency measures.

657. The impact of the crisis on social life was considerable.<sup>231</sup> Social investment was focused on food assistance and then extended to populations faced with other critical conditions. The damage sustained and other consequences of the crisis could not be restored in the first few years of formal recovery. The effects of the crisis are still present, for example, in lingering poverty and inequality.

### C. The impact of the emergency measures on AGBA's Concession

#### 1. *Claimants' views*

658. Claimants explain that the Emergency Law No. 25561 of January 6, 2002 (CU-145, RA-168), to which the Province adhered by means of Law No. 12858 of February 28, 2002 (CU-154, RA-169), introduced fundamental changes to the legal framework in which public service contracts operated in the Argentine Republic.

659. The Law eliminated the currency peg between Argentine pesos and USD by repealing certain sections of Convertibility Law No. 23928 that had established a currency peg between Argentine Pesos and USD at a 1:1 rate.

660. The Law also modified the tariff regime for public services: It eliminated USD-adjustment clauses and clauses providing for adjustments by reference to US indexes; and it ordered the mandatory conversion of said tariffs to Pesos at an exchange rate of one peso = one USD. Thus, the guaranteed monetary stability of tariffs through the calculation

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<sup>228</sup> Mata I, para. 290.

<sup>229</sup> Bianchi III, para. 41.

<sup>230</sup> Ratti, para. 31. Asked whether the recovery of the crisis started in 2003, Prof. Eichengreen told the Tribunal that this is when the GDP began to recover. On the other hand, unemployment was later to begin to recover (TR-E, Day 5, p. 177/22-178/9). This would mean that the poverty rate was later to increase and it was also later to decrease because there is a correlation between the two rates (TR-E, Day 5, p. 183/6-18). For Witness Cipolla, poverty rates reached 54% in Argentina in 2003 (para. 104).

<sup>231</sup> Cf. Cipolla, paras. 27-67.

in USD of costs to be reflected in those tariffs was eliminated, leaving the tariffs exposed to fluctuations in the peso-dollar rates. As explained in AGBA's letter to ORAB of June 21, 2002 (CU-104, 118), Law No. 25561 and the subsequent inflation had also the effect of diluting the initial economic value of the work fee and the connection fee to approximately 10 or 15% of their value. Moreover, Law No. 12757 of July 21, 2001 (CU-195, RA-164) had the effect of raising AGBA's gross revenue tax rate from 3.5% to 4.55%.

661. The emergency legislation authorized the Executive to renegotiate public service contracts, for which certain criteria were to be taken into consideration, including the impact of tariffs on the competitiveness of the economy and the distribution of income, investment plans, and the companies' profitability. Subject to such negotiation, the concession contracts and the concessionaire's obligations remained unchanged.

662. Hence, AGBA was suddenly affected by the Emergency Law and subsequent measures taken by the Provincial Government that eliminated the guarantees of tariff stability, doing away with their determination in USD and their review on the basis of U.S. price indexes, which caused its tariffs to go down to less than one third of their value and disrupted the economic-financial equation of its Concession Contract. The damage was greater because said changes were implemented without any sort of plan. It was also increased by the uncertainty the Provincial Government created by failing to meet the deadlines and obligations it had lead down in the Public Emergency Law and the measures adopted thereafter in connection with the renegotiation.

663. The first and most fundamental effect for AGBA was the instant and substantial impairment in the value of the tariffs. This reduction was caused automatically when the conversion of dollar-denominated tariffs into pesos had to be made at the artificial rate of ARS 1 = USD 1, in spite of the fact that the real rate of exchange was ARS 3 = USD 1. In addition, the emergency measures included the elimination of price adjustment clauses, which froze the tariffs and prevented them from being adjusted to reflect the increased costs. The effect was that the value of the tariffs was reduced by two thirds, since January 2002, and was kept unchanged until the day of termination of the Contract in July 2006. And this was done by a legislation that forbade the Concessionaire to suspend or alter the fulfillment of its obligations.

664. The Concessionaire was burdened with the full spectrum of effects of the emergency. The Grantor did not assume a portion of the effort by subsidizing the tariffs or by providing financial aid to the users and to the Concessionaire, nor did it allow gradual tariff increases as the economy recovered. The tariff pesification, along with the tariff freeze, materially disrupted the Concessionaire's economic-financial equation. The lack of fair and reasonable tariffs made it impossible to earn a reasonable return on the invested capital or even to recover that capital. In fact, the tariffs increased only later, when the service was handed over to ABSA.

665. The emergency situation became ongoing and permanent and was still in place as of the date of AGBA's Contract's termination. Many federal laws were enacted which successively extended the emergency end date. The same development occurred in the Province of Buenos Aires, through its Provincial legislation. The unlimited extension of the state of emergency had the effect that the emergency, which was supposed to be temporary, became *de facto* permanent. The Concessions' economic equilibrium was not restored either through the renegotiation process imposed by the emergency legislation.

666. The reality of the Argentine economy was different. The economic crisis ended in mid-2003, when the GDP increased and stood almost at its pre-crisis level.

## 2. *Respondent's views*

667. Respondent's presentation differs from Claimants' views, firstly, by insisting on the need for a renegotiation of contracts like AGBA's Concession Contract. It points to the provisions of the Emergency Law ordering the renegotiation of both private and public contracts to adapt them to the new prevailing circumstances and the new foreign currency regime (Sec. 9 and 11). On 28 February 2002, the Province of Buenos Aires passed Provincial Law No. 12858 (RA-169, CU-154) adhering to Article 8 of Federal Emergency Law No. 25561 (CU-145, RA-168), which authorized the Provincial Executive Branch to renegotiate or adapt the regulatory systems and contracts of public services, including drinking water and sewage services. Provincial Decree No. 1175/02 established the creation of the Special Commission for the Evaluation of the Impact of the Crisis on Public Service Tariffs and Contracts, in order to begin the renegotiation process (RA-170, CU-171).

668. Respondent also explains that the emergency measures consisting in the pesification was of a general nature and not directed specifically to AGBA's business or to other holders of public service concessions. Article 20 of Annex Ñ of the Concession Contract included a reference to USD in connection with the determination of tariffs. Services were billed in Argentine pesos and the relevant amounts were translated to USD at the exchange rate established in Law No. 23928 (Convertibility Law), or in "the legal provision that may have replaced it as of the date of closing of the billing processes." Therefore, the Concessionaire had no right for the preservation of the Convertibility Law or for the application of tariffs framed in US dollars, as this was explained in the Undersecretary of Public Services' letter of July 12, 2006 (RA-154, CU-167), further stating that Federal Law No. 12858 and Provincial Law No. 25561 did not imply a modification of the Contract.

669. Respondent further comments that faced with the economic, social and institutional crisis that hit Argentina neither the Regulatory Framework nor the Concession Con-

tract contemplated appropriate mechanisms to maintain or re-establish the balance between the contractual rights and duties assumed, or to protect the rights of service users. In this sense, linking the future evolution of tariffs to the USD-ARS exchange rate (i) was legally and economically impossible in a context of crisis, the collapse of the convertibility regime and the strong devaluation of the Argentine peso with respect to the US dollar; (ii) would have destroyed the principle of fair and reasonable tariffs; and (iii) would have had a serious negative impact on the Province, the service provider and users. A modification of the terms of the contracts was necessary, going beyond an ordinary or extraordinary tariff review process. This could not be achieved without a renegotiation of contractual terms. The adaptation of the Concession Contract was aimed at redressing the possible consequences of the crisis.

670. Turning to the Concession involved in the dispute in the instant case, Respondent also insists, secondly, on AGBA's breaches of the Concession Contract that had occurred well before the emergency measures allegedly hit the Concession. There was a disruption in the equation of the Contract if it were to have been fully complied with the goals of the Contract, before the crisis broke out and emergency was declared. In its May 2001 letter, AGBA announced the disruption of the financial economic equation. While in this letter AGBA informed of the suspension of goals due to problems attributable to AGBA itself, the Concessionaire's letter of July 17, 2001 changed the message in requesting the extension of the term within which to perform the promised obligations as a consequence of "the crisis." In this second letter, AGBA acknowledged that the Concession related to "an area characterized socioeconomically by an UBN index of approximately 25% and an unemployment rate that is substantially higher than Argentina's average unemployment rate."

671. Claimants attempt to disengage their responsibility for the failure to have executed the investments and to attain the set coverage goals, breaches that dated back a lot further before the Emergency was declared. AGBA's breaches are not attributable to the crisis. AGBA's breaches not only invalidate Claimants' claim, but also mean that the Province's and the service users' expectations were thwarted, with the effect that the Contract had to be terminated. On top of things, the Concessionaire was also ready to stop controlling water quality, with the obvious risks associated for the population's health.

### 3. *The Tribunal's findings*

672. The Tribunal understands that the pesification had an overall effect of cutting the tariff's value under the Contract by approximately two thirds. It also understands that the emergency measures must have had other consequences on a number of items on costs related to the network that have been debated between the experts, however not to an extent that would allow precise information to be retained by the Tribunal.

673. The Tribunal also finds that while the emergency was detrimental to the Concession's equilibrium, most importantly through its adverse effects on the tariffs scheme and the income obtained by AGBA through the users' payments, this situation did not cause the Concession to abate operation. The Concession had been in serious difficulties already in 2001, as demonstrated by a number of letters written by AGBA, drawing attention to an unexpected rate of uncollectability and the gap in providing for funding (letter of May 17, 2001) and thereafter to the outbreak of the crisis (letters of July 17, August 15, October 10, 2001). It had to be concluded from these letters that AGBA was objectively not able to proceed with the expansion work it had undertaken to achieve under the first Five-Year POES. It suggested therefore as an appropriate remedy to neutralize the POES and to concentrate work on maintenance and reconditioning, while expansion work, including metering, would be deferred for later when renegotiation would have taken place and successfully concluded.

674. Article 20 of Annex Ñ includes a reference to a USD exchange rate established in Law No. 23928 (Convertibility Law), or "any other exchange rate from time to time established by law to replace such parity in force at bill cutoff date"<sup>232</sup>. This does not cover under the Contract any economic consequences of any future change in convertibility, including changes that are detrimental to the economic equilibrium of the Concession. This finding can be compared to the conclusion of the *Hochtief* Tribunal that the pesification *per se* did not constitute a breach of the fair and equitable treatment standard.<sup>233</sup>

675. When the emergency measures were ordered and applied with immediate effect they had the consequence of aggravating AGBA's situation, but not to a point where the continuing operation under the Concession would have become impossible or unviable in a short or medium term. Undoubtedly, such a substantial sudden change in the exchange rate had a major negative effect on AGBA's net revenue, even if the effects on the Concession as a whole were not as dramatic as some of AGBA's correspondence with the Grantor and the Agency at the time suggested.

676. In fact, AGBA was still looking forward to overcome the difficulties it was faced with in considering the situation under a long term perspective, basically grounded on expectations related to the provision of external financing, the neutralization of the POES, and the rearrangement of the Concession through a renegotiation that was requested intensively and repeatedly.

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<sup>232</sup> At the hearing, Witness Cerruti confirmed the understanding of the terms of that provision, while also noting that it does not say "current exchange rate." TR-E, Day 1, p. 129/7-24.

<sup>233</sup> *Hochtief AG v. Argentine Republic*, ICSID/ARB/07/31, Decision on Liability of December 29, 2014, paras. 234-244.

677. When ORAB asked again, by letter of July 2, 2002,<sup>234</sup> for information about AGBA's financing in relation to the POES and documents in support of financing from the shareholders or lending institutions ("financiamiento por parte de los accionistas e instituciones crediticias"), AGBA repeated in its letter of July 8, 2002<sup>235</sup> its earlier letter of October 10, 2001<sup>236</sup> and further informed about the contacts that had been established with the IDB. It affirmed that with the amounts that had been envisaged for IDB's loan it would be possible for the Concessionaire to accomplish the works provided for in the first Five-Year POES and beyond, subject to the approval of AGBA's request for the neutralization of its terms. In this respect, the letter explained as follows:

"Efectivamente, de acuerdo con lo manifestado en el primer punto de la presente, el monto del préstamo es suficiente para cumplir con todas las obligaciones a cargo de Concesionario y no solamente con la inversiones del primer quinquenio; la referencia a este período obedece a que el mismo presenta un marcado pico de requerimientos de inversión y en el mismo, conforme a las proyecciones financieras efectuadas, se manifiestan las necesidades de desembolso del préstamo. Para mayor abundamiento y mejor ilustración, acompañamos copia de la cuenta de Pérdidas y Ganancias correspondiente al Plan de Negocios en base al cual el BID declaró la "elegibilidad" del proyecto como paso previo a la suscripción de la Carta Mandato antes citada.

Destacamos asimismo que esta condición está implícita en la propia estructura de financiación contemplada en la Carta Mandato, ya que siendo la principal fuente de repago del préstamo el flujo de ingresos futuros que se generen en virtud de la inversión objeto de la financiación, la suficiencia del préstamo para el total de obligaciones es condición necesaria, aunque no suficiente, para la consideración de la solicitud de financiamiento."

...

"En este sentido nos permitimos reiterar nuestra petición original, de neutralización de los plazos de ejecución de la obras comprendidas en el POES, hasta la normalización de la críticas condiciones que dieron lugar a nuestra nota 153/01/VE del 17 de julio de 2001, solicitando asimismo la mayor premura para su tratamiento, habida cuenta del considerable plazo ya transcurrido como así también del considerable agravamiento de las condiciones en que ha debido desarrollarse la Concesión, a raíz de los gravísimos sucesos que han acontecido en el País con posterioridad a nuestra presentación original."

678. The Tribunal concludes from AGBA's positions taken at the time when the emergency measures became applicable that these measures had not an immediate impact on the equilibrium of the Concession that was already in a difficult situation caused by the drop in collectability and the lack of funding (reported in AGBA's letter of May 17,

<sup>234</sup> Exhibit 189 to Giacchino/Walck I.

<sup>235</sup> Exhibit 190 to Giacchino/Walck I.

<sup>236</sup> Exhibit 184 to Giacchino/Walck I.



2001), further aggravated by the crisis's outbreak in mid-2001. The by far most important effect of the measures was the drop in income and, consequently, the slowing down of the pace of AGBA's investment in the network's assets. However, decrease in internal funding had not as its direct effect the decrease of the most expensive parts of AGBA's operation, because, at that time, AGBA had already interrupted expansion work, including metering, and was seeking the Grantor's agreement to neutralize the terms of the POES and restrict the scope of actual work to maintenance and urgent investments. Therefore, the emergency measures were not the cause of AGBA's inability to comply with the goals undertaken in the first Five-Year POES.

679. On the other hand, the cutting-off of the Concession's dollar-basis rendered certainly AGBA's economic and financial situation more vulnerable than it was before this happened. Faced with a serious decrease in internal revenue, AGBA was significantly more dependent on external funding (through third parties and/or its shareholders) than it was before. This had the effect of aggravating correspondingly its costs for obtaining and carrying on such finances and it had a further adverse impact on the shareholders' margin for reasonable profit arising out from their investment.

680. Viewed in isolation, the emergency measures appear as hurting the standard of fair and equitable treatment, as this has been observed by a number of other arbitral tribunals reviewing the effects of these measures on other investments. However, such an assessment must always be made in the light of the facts and circumstances of the particular investment.

681. The effects of the emergency measures on the Concession Contract, which can be equated approximately to a two-third reduction of the Concessionaire's income derived from the payment of the users' bill established by reference to the tariff regime based on the Contract have to be evaluated in light of the actual situation of the Concession at that time. Indeed, in 2002, the third year of the Concession, the Concessionaire was faced with a situation where it was well aware of its inability to meet the goals of the first Five-Year POES by the end of year 5 (2004). This could not only be projected on the basis of the actual figures relating to the goals reached in restoring and expanding the network, on the one hand, and the failure to obtain the required external funds, on the other hand. It was so determined in AGBA's own Business Plan, representing thus a planned failure to meet the undertakings under the Contract and the POES.

682. Under these circumstances, the loss of income due to the emergency measures made the situation worse than it was, but it was not the cause of the disruption of the financial economic equation of the Concession that had become a given fact already before the crisis seriously emerged in mid-2001, in light of AGBA's own admission in its May 17, 2001 letter. It was then established that the Company would not be going to meet the goals for work and investment it had undertaken in the first Five-Year POES by

the end of 2004, even if the emergency had not occurred. Nonetheless, the substantial loss of income caused by the pesification had a contributory effect to the disturbing conditions under which the Concession was operated at the time. Indeed, with the initial amount of revenue accumulated by the payment of the users' bills and without being handicapped by Argentine's economic crisis when searching for credit from international lending institutions, the Concession may have had a satisfactory future. The emergency caused a serious drop in income and it contributed to the cutting-off from external funding. However, it did not prevent AGBA's shareholders from providing resources to the Concession in compliance with AGBA's commitments for investment under the Five-Year POES. In addition, the emergency was associated with measures to accommodate the concerns of holders of public service contracts through their renegotiation.

683. Even assuming that the emergency measures could be seen in the context of this Section as a breach of the Treaty, it would still be necessary to consider whether, for the period of the emergency, any wrongfulness on the part of the Respondent State was precluded by reason of a suspension on the ground of the state of necessity.

D. The responsibility for the emergency measures (state of necessity)

684. The Parties discuss at length the impact of the exception based on a state of necessity under international law that would have, if admitted, the effect of precluding the wrongfulness of Argentina's conduct when adopting the emergency measures. On each side, the same issues are examined, albeit in opposite perspectives, reproducing sources chosen selectively in light of the respective arguments, in particularly arbitral awards that are far from representing a coherent direction in approaching the examination of this matter.

685. The Tribunal does not need to recall all the arguments and materials presented by the Parties. It will do so summarily and focus on those aspects that are important under the circumstances of the instant case. Before doing so, it wishes to state that the issues to be examined are of relevance only in case it would be concluded that under the circumstances of the instant case the emergency measures are wrongful, in full or in part, under the BIT that governs the relations between the Parties. This latter complex of questions will be examined later in this Award.

1. *Claimants' views*

686. Claimants begin by noting that because there is no provision in the Spain-Argentina BIT on the matter of "state of necessity," the Tribunal has to refer to Article 25 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts that codifies the state of customary international law in this respect and provides a valid

framework to analyse whether Respondent's plea can be accepted. This provision requires the fulfilment of conditions much stricter than defences based on the provisions of different bilateral investment treaties on which a number of arbitral awards accepting the state of necessity were based.

687. Various arbitral tribunals have held that the necessity plea must be applied restrictively; that all of the requirements must be met cumulatively; and that the State raising the plea is burdened with proving that all of those requirements have been satisfied with.

688. One of the conditions is that this defence may not be invoked if the State has contributed to the situation of necessity. Claimants refer to a number of Arbitral Tribunals that have found that Argentina made a decisive contribution to the crisis it seeks to rely upon in support of its necessity plea. It had thus been admitted that the crisis was caused by internal and external factors and that these factors were substantive and direct. Argentina was told that it has failed to show that it did not contribute to the situation of necessity on which it based its defence. Claimants point to the report prepared by Professor Eichengreen, Respondent's expert, recognizing that while external shocks contributed significantly to the economic difficulties, they do not completely exonerate Argentina's policy makers.<sup>237</sup> The cause of Argentina's disaster was the large and persistent excess of public spending over recurring revenues that led to unsustainable accumulation of public debt and ultimately to sovereign default that fatally undermined the basis for Argentina's financial and economical stability. Claimants assert that economists are in agreement as to the fact that external factors are not enough to explain the Argentine crisis, and that the country had a very high debt level. This confirms that Respondent's necessity plea cannot be accepted as the Argentine Republic substantially contributed to the situation behind it.

689. Another condition requires that the necessity can be invoked only if the act "is the only way for the State to safeguard an essential interest against a grave and imminent peril." Respondent fails to provide an explanation as to why the measures taken were the only way to safeguard essential interests against a grave and imminent peril, as required by Article 25 (para. 1 lit. a) of the Draft Articles. It is not enough to claim that there was a state of necessity. The invoking party must identify the specific manner in which each one of the State's measures was necessary as a result of the state of necessity. The existence of legal alternatives to the course of action chosen by the State precludes the necessity plea. This means that proving that the measures in question were effective is not enough. It must be established that those measures were the only possible ones and that there was no other one to allow the state of necessity to be overcome. The Argentine Republic has not demonstrated that the measures adopted with respect to AGBA were the only possible measures. Claimants contend that there were other alternatives that did

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<sup>237</sup> Eichengreen, para. 19.

not entail violating Respondent's international obligations, and, therefore, Respondent's necessity plea must fail.

690. Claimants submit that if Respondent really wanted to guarantee the right to water, there were other legal alternatives that it does not address, for example, granting subsidies to lower-income users or the service concessionaires, or measures in connection with the tariffs or the costs of the Concession. Respondent did nothing of the kind. Compensating the Concessionaire for measures like the tariff pesification and freeze might have been more onerous but could have allowed the State to fulfil both its domestic and its international obligations. Even after ORAB abandoned the currency parity, the dollar tariff provisions could have been maintained through the extraordinary tariff reviews, allowing the Concessionaire to request adjustments to tariffs in light of the circumstances.

691. As proof that the Province was capable of avoiding the detrimental effects of the emergency measures upon the Concessionaire, Claimants recall that the Grantor in fact adapted AGBA's Concession for the state-owned concessionaire ABSA, which, by means of an agreement dated April 7, 2005: was transferred funds in the amount of 60.5 million pesos; was exempted from the service investment and expansion scheme; was promised future contributions to secure a basic operating equilibrium; and was promised future tariff increases. If those funds did exist but were not provided to AGBA in order that it could adequately provide its service, this would entail a breach of the State's obligation to use all possible resources in order to guarantee the human right to water.

692. Because public funds were allocated and tariff increases granted to certain operators, while denied to AGBA, it is clear that the funds were being improperly allocated. Following the termination of AGBA's Concession, by means of Decree 3144/08, ABSA was granted substantial tariff increases, of 130% on average for water service and 180% on average for the sewage service. As these measures were actually taken, it is not true that those taken against AGBA were to be justified by the goal of protection the population and guaranteeing their access to water. They had the effect of causing losses to the Concessionaire and serious violations to the detriment of the investors, who were not required to financially cover obligations that lie with the State in its role as guarantor of the population's rights. Respondent failed to establish that the measures taken against AGBA were the only alternative to deal with the situation creating the state of necessity.

693. In a different perspective, Claimants understand another argument of Respondent as supporting the contention that the Argentine Republic was under a duty to safeguard the interests of the population through the emergency measures affecting the Concession's tariff regime, and, therefore, had no other means available in order to preserve these fundamental interests. Claimants note that Respondent seems to argue that the fulfilment of its obligations intended to safeguard the human right to water was incompatible with the fulfilment of its obligations toward the Claimants. Claimants deny that this is true.

Guaranteeing the human right to water is a duty of the State, not of private companies like the Claimants. They do not take issue with the fact that the Argentine Republic has obligations intended to provide drinking water and sewage services to its population.<sup>238</sup> What is inappropriate and is not provided for in any rule or legislation is that it is private companies, such as Claimants, who should have to undertake the costs of those State obligations. Invoking the human right to water will not aid Respondent in its attempt to exempt itself from any obligations towards the Concessionaire and the investors, as it is Respondent itself who must fulfil the burdens the right to water entails, as stated by the Committee on Economic, Social and Cultural Rights.<sup>239</sup>

694. Claimants further explain that Respondent has two kinds of obligations. These are its obligations regarding the population's right to water, and its obligations towards international investors. The Argentine Republic can and should fulfil both kinds of obligations simultaneously. Therefore, the Argentine Republic's obligations stemming from the human right to water does not operate as an obstacle to the fulfilment of its obligations towards the Claimants, nor does it mean that an alleged state of necessity will simply allow it to escape any commitment made to foreign investors.

695. Claimants also submit that even if it was accepted that a state of necessity exists, it is necessary to determine the time up to which the situation causing the state of necessity extends. Article 27 of the Draft Articles provide that if and to the extent that the circumstance precluding wrongfulness no longer exists, compliance with the obligation in question can be requested.

696. Claimants contend that once the situation of emergency has been overcome, the State is no longer exempted from responsibility for any violation of its obligations. Accordingly, all actions and omissions prior to December 1, 2001, and subsequent to April 27, 2003, would still be unlawful. Claimants conclude that even if the Argentine Republic's plea based on a state of necessity were accepted, the necessity situation could only be recognized until the end of the first half of 2002 or, as the case may be, until April 2003; any violation by the Province and the Regulator outside of that period cannot be excused in any way through the necessity plea.

697. Finally, Claimants invoke Article 27 of the Draft Articles, stating that reliance upon a circumstance such as the state of necessity does not, by itself, exclude the breaching party's duty to compensate the other for any damage thus caused. A finding of a state of necessity does not preclude the request for compensation as put forward by Claimants. Even if the state of necessity is hypothetically admitted, it cannot exempt Respondent from its responsibility towards the Concessionaire

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<sup>238</sup> Cf. UN General Assembly Resolution of July 28, 2010, A/RES/64/292 (CUL 185).

<sup>239</sup> Cf. General Comment No. 15 (2002), E/C.12/2002/11, January 20, 2003 (CUL-186).

## 2. *Respondent's views*

698. Respondent begins by stating that in the hypothetical case that the Tribunal should come to the conclusion that the measures adopted by the Argentine authorities amount to a violation of the BIT, the Argentine Republic invokes the defense of necessity under international law. The part of the population that resides in the Concession area was in an extremely vulnerable situation. The Argentine Republic could not take measures other than those implemented for the purpose of guaranteeing access to drinking water and ensuring the survival of the population.

699. Respondent quotes the report of the International Law Commission, stating that the state of necessity refers to “the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State.” This definition renders more explicit the corresponding ground for precluding wrongfulness in Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Respondent notes however that Article 25 of the Draft Articles is not a mandatory law and does not prevail over customary international law. In any event, the Argentine Republic has complied with its stringent requirements. Contrary to Claimants, Respondent submits that this provision is restrictive as it is worded and that, therefore, there is no room for an interpretation being additionally restrictive, above what the provision says for itself.

700. The “non-contribution” requirement that is so intensely stressed by Claimants cannot include any State contribution. A reasonable interpretation of this requirement is to be retained. The necessity defense is precluded only where the State had contributed to the principal cause of the necessity. The Argentine Republic made every possible effort to avoid the collapse. Not every state contribution to a situation of collapse is sufficient to rule out the possibility of invoking the necessity defense. The requirement was included in Article 25 of the ILC Draft Articles for the purpose of avoiding abuses.

701. During the eighties, prior to the adoption of the Convertibility Regime, Argentina experienced severe macroeconomic imbalances marked by a crippling debt, enormous fiscal deficits, and both inflationary and foreign-exchange volatility. The Convertibility Law was enacted as a measure of last resort aimed at curbing hyperinflation in Argentina. Relying on Professor Eichengreen’s expertise, Respondent explains that Argentina made considerable progress in the early and mid-1990s, in particular through privatizations. The Argentine crisis was caused by a series of external shocks that broke out in 1998. As from that time, the economy fell into a long recession. The parity became increasingly vulnerable to the point of being impracticable. The raising of US\$ interest rates between 1998 and mid-2000 had significant effects. The Argentine Republic introduced every reform and adopted every recommendation formulated by international institutions. Later

on, the IMF declared that it accepted responsibility for the wrong diagnosis and the erroneous policy recommendations given to Argentina between 1991 and 2001 (RA-221, 222). The Argentine Republic did not contribute to the state of necessity to the point of precluding such defense from being raised. The ILC Draft Articles prescribe that the contribution to the situation of necessity must be sufficiently substantial. If this restriction would not be considered, this would lead to the absurd situation where a State is prevented from invoking the state of necessity to safeguard the life of a population on the grounds that such State contributed even incidentally or peripherally to the state of necessity.

702. Respondent further submits that the measures that were adopted when the crisis reached its peak were the only way to safeguard essential interests against a grave and imminent peril. There was no other way to safeguard Argentina's essential interests. The social situation was particularly severe in the Metropolitan Region of the country, with the highest percentages of population with UBN (unsatisfied needs indicator, which measures structural poverty). The measures adopted by the Argentine Republic prevented the human right to water from being adversely affected and, with it, the right to an adequate standard of living, food and housing. A water price increase in those conditions would have been impossible to afford. For the poor, the tariff adjustment to the new dollar levels, and the inflation thereof, would have resulted in a desperate situation. Professor Kliksberg shows the devastating effects on the population that would have occurred if the tariffs had remained dollarized. The expense in water and sewers in districts of Greater Buenos Aires would have become 13.6% of the average total family income.<sup>240</sup> This would have been in a proportion that tripled the one set forth as reasonable by international organization in order to have access to water. "Raising tariffs as Claimants allege would have resulted in a massive violation of basic human rights for the indigent."<sup>241</sup>

703. Claimants' assertion that subsidizing low-income users could have replaced the measures actually undertaken is not supported by any evidence on the available State-budget for such purpose, ignoring the serious consequences that the crisis had brought about taxes that not only made it impossible to grant subsidies to utility services, but also restrained the possibility of providing inhabitants with assistance in satisfying their basic needs.

704. The pesification of contracts was considered by many prestigious economists as the only way to abandon the then existing fixed-exchange-rate system. As explained by Professor Eichengreen, the Argentine Republic was ultimately left with no choice but to repeal the Convertibility Law and depreciate the peso in order to halt the deflationary spiral and stabilize expectations.<sup>242</sup> The Expert concluded that the emergency measures were the only viable alternative, bearing in mind that other measures would have led to

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<sup>240</sup> Kliksberg II, para. 53.

<sup>241</sup> *Ibid.*, para. 58.

<sup>242</sup> Eichengreen, para. 26.

an even deeper economic and financial crisis. Failing to adapt contracts to the prevailing situation would have generated uncontrollable social tension. The economic crisis brought about an increase in unemployment, indigence and poverty levels, coupled with an unprecedented reduction in the population's ability to pay, which precluded many people from affording the then applicable tariffs. The policies implemented by the Argentine Republic until December 2001 were supported by international lending institutions, such as the World Bank and the IMF. Unlike other countries, the Argentine Republic did not receive any external aid to avoid or manage its crisis. On the contrary, on December 5, 2001, the IMF denied the release of funds in the amount of USD 1,260 million.

705. Respondent observes that Claimants state that the Argentine Republic attempts to justify the pesification only. This is not correct. The situation described in relation to the crisis not only justifies the pesification, but also the other measures closely related to the preservation of the Argentine Republic's essential interests. The serious nature of the crisis was acknowledged by Claimants themselves in July 2001 when AGBA used the terms "effects of the extremely serious economic and financial crisis of Argentina," and further stating that efforts to secure financing were made "in a context of ongoing recession and successive institutional crises."<sup>243</sup>

706. Argentina took a course of action that is expressly set forth in the BIT. It maintained public order, protected its essential security interests, preserved the essential human rights and the existence of the financial system. There is no obligation, either under domestic or international law, which may override Argentina's duty to guarantee the free and full exercise of the rights of all persons who are subject to its jurisdiction. Thus, the Tribunal must reject the claim by virtue of the application of the state of necessity defense.

707. Respondent further takes issue with Claimants' argument that even if the state of necessity defense was admitted, such situation would only be recognized until the end of the first half of 2002 or April 2003, when economic recovery took place. This is false. After the great depression, the negative trend was reversed, but this was far from resulting in the end of the crisis. The effects of the crisis arising in 1998 and worsening in December 2001 persisted upon the termination of the Contract. The Argentine State and society have not yet recovered from the collapse and there are numerous aspects of social and economic life that are still to be normalized.

708. The state of necessity releases the state from the obligation to provide compensation for a damage caused by an internationally wrongful act. Pursuant to Article 27 of the ILC Draft Articles, as soon as the state of necessity ceases to exist, the duty to comply with BIT obligations revives. This does not mean that the regime prior to the crisis will

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<sup>243</sup> Letter to ORAB of July 17, 2001 (RA-192, CU-135).



be restored, but that the obligations regarding treatment must be fulfilled in the new context.

3. *The Tribunal's findings*

709. The Tribunal acknowledges the Parties' reliance on the relevant provisions of the ILC Articles and it recognizes that they represent in large part general principles of international law as referred to in Article X(5) of the BIT.

710. The Tribunal observes that the crisis that led to the emergency measures was certainly caused by both external and internal factors. However, this is not sufficient to demonstrate that the Argentine Government made a contribution to the state of necessity of such a nature and importance that would preclude Respondent from invoking this defense.

711. For such a demonstration to be successful, it should be shown that the Government's acts were such that they either were directed towards a crisis resulting in the emergency situation that the country experienced in early 2002, or at least of such a nature that the Government must have known that such crisis and emergency must have been the outcome of its economic and financial policy.

712. The Tribunal understands that Argentina's own economic policies over several years prior to the crisis rendered the economy of the country vulnerable and that the country failed to exercise sufficient fiscal discipline and to adopt labour and trade policies compatible with its economic situation and the weakness of its currency.

713. However, this is an explanation for part of the difficulties encountered as from 2001. These difficulties had not as their necessary outcome the outbreak of the crisis and its peak in the emergency in December 2001. Economic policies evaluated as wrong as they allegedly were in the 1990s in Argentina were not of a kind that they could lead to a crisis and emergency of such a magnitude as it blew up in the second half of 2001.

714. This also means that an allegation stating that the Argentine Government substantially contributed to these events requires a showing of a link of causality between such conduct of Argentine's economy and the outbreak of the crisis.

715. If this had been so, the state of necessity must have been recognizable already before 2001 and in particular by the Bidders who entered into the Concession in early 2000. The fact that they accepted the Bid after examining all aspects that they considered relevant sheds clear light on the then prevailing situation of a country that was certainly facing difficulties, but to an extent far from preventing foreign parties with commercial interests to proceed with investments of considerable importance that they would have

never wanted to transfer into a country exposed to risks as they materialized in Argentina in 2001. Moreover, if the “internal factors” were of such a character that they were to be retained as the cause of the crisis, this should have been recognizable at the latest when AGBA’s letter of May 17, 2001 was written. This letter did not make any allusion to the crisis in respect of which Claimants contend that it has been caused by “internal factors” that must have existed well before that time, and thus were easily recognizable to AGBA and its shareholders if they had actually materialized.

716. Claimants rightly raise the point that a State cannot claim a state of necessity exception when it had available other means that would have permitted to avoid a violation of its obligations under international law. The argument, however, has to be taken in observing its reasonable proportions. The international obligations to be weighed against the Argentine Republic’s state of necessity are, in Claimants’ view, the obligations arising out of the BIT and allegedly breached. The emergency measures and the state of necessity associated with them were events of nation-wide importance. Therefore, the question whether “other means” were available has to be captured in both perspectives: the wide one, taking into account the needs of Argentina and its population nation-wide, and the narrower one of the situation of investors engaged in performing contracts protected by the international obligations arising out of one of the many BITs.<sup>244</sup>

717. Claimants have not addressed the first part of the question. Respondent has made more than a *prima facie* showing that the emergency measures taken were the only ones available to the Argentine Government at the time, taking into account the extreme economic, institutional and social disturbances suffered by the country and its population.<sup>245</sup> It would have been incumbent on Claimants to offer at least a serious indication as to the nature of other measures that had been available to the Government at that time. Claimants’ focus was exclusively on its own interests and the protection they allegedly derive from the BIT. Professor Eichengreen, Expert called by Respondent, explained to the Tribunal convincingly that

“Argentina had virtually no choice but to proceed with devaluation, suspension of debt service payments and the pesification of assets and liabilities. I find it hard to imagine that it could have proceeded otherwise. But if you force me to try, I would say instead the government would have attempted to implement even deeper fiscal

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<sup>244</sup> The natural gas purchase agreements for exportation purposes, which were originally denominated in US dollars, were excluded from pesification by Decree No. 689/2002; cf. Witness Ratti, para. 19. If it is argued that a further exclusion should have been made, the first thing to submit would be a comparison with this first exclusion. Claimants have not undertaken such analysis.

<sup>245</sup> Claimants support a strong interpretation of this requirement of Article 25, para. 1(a) of the ILC Articles. While there are good reasons to accept the application of rules of international law to investment disputes, some reservation is to be observed in respect of the ILC Articles that address the responsibility of States and do so together with the self-containment rule of Article 33, para. 2, stating that these rights arising from the States’ responsibility are “without prejudice to any right ... which may accrue directly to any person or entity other than a State.”

cuts, even larger tax increases and public spending reductions than it did. That would have deepened the recession, and I think in the end undermined the confidence of international financial markets in any case, and I think it would have run the risk of deeper social unrest. The recession was already three years old, the cuts in public spending that already been implemented were deep, and in a democracy there has to be public support for the measures taken.”<sup>246</sup>

718. Therefore, the Tribunal concludes at this juncture that there existed a situation of state of necessity as sufficient support for the emergency measures when promulgated in January 2002.

719. Claimants rightly submit that a state of necessity situation must come to an end. While the emergency measures were kept into force for many years and are allegedly still alive today, the necessity to do so has ceased to exist long before. In other words, when the emergency measures were justified by the fact that no other reasonably available remedy did exist, such argument supporting the state of necessity defense disappears as soon as alternative measures become available and are no longer in breach of the State’s international obligations.

720. Claimants accept that Argentina had two kinds of obligations. These are its obligations regarding the population’s right to water, and its obligations towards international investors. The Argentine Republic can and should fulfil both kinds of obligations simultaneously. In so doing, the obligations resulting from the human right to water do not operate as an obstacle to the fulfilment of its obligations towards the Claimants. Nonetheless, Claimants’ argument is too short. It does not resolve the conflict between the obligation to guarantee the Concessionaire’s right under the Concession and the access of the poor and vulnerable population to water when this cannot be ensured otherwise than by failing to comply with the host State’s obligations toward the Concessionaire.

721. There is no need to open at this juncture the debate on whether foreign investors have, under international law, an obligation to contribute on their part to the provision of drinking water to the extent this is required by the human right to water. It is entirely sufficient to note that AGBA and its Concessionaire must have been aware that they were indirectly bound by the fundamental right to water of the population of Region B due to the provision ordering ORAB to take account in its decisions of the “protection of the community’s interests” (Sec. 13-II of Law No. 11820), including the “protection of the users’ interests,” which are a concern based on Section 4.3 of the Concession Contract and in light of Article 42 of the Constitution.

722. AGBA had experienced and accepted that such a fundamental right, as well as a minimal respect for the health and social life of the people concerned, justified ORAB’s

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<sup>246</sup> TR-E, Day 5, p. 153/2-17; cf. Eichengreen, paras. 27-44.

intervention prohibiting AGBA to proceed with a broad policy of cutting-off users not willing or not capable to pay their bills.

723. In respect of the emergency measures and their impact of tariffs, the same legal structure is to be observed: the Government of Argentina and the Executive of the Province were under an obligation, based on Constitutional Law as well as on elementary policy of protecting the population's health, to preserve their access to drinking water.

724. The only means Claimants contend to be available at the time, were granting subsidies to lower-income users and/or adjustment of tariffs in a way that the Concessionaire's income was preserved. Such measures were contained in Annex B of AGBA's proposal for emergency measures of June 28, 2002 (CU-104, 118) submitting that with effect as from July 2001, the time frames for expansion, metering and pipe replacement and reconditioning goals were no longer valid. The proposal has been rejected by ORAB's Resolution No. 25/03 of September 17, 2003 (CU-69). Claimants, while arguing strongly about the failure of Respondent to even envisage or show interest in such measures, did not support evidence demonstrating how such measures could have been possibly implemented at the time of the crisis and the emergency.

725. The first proposal is hard to take seriously: how would it have been possible to provide subsidies when the State's and the Province's finances and budgets were in the centre of the crisis, coupled with serious difficulties to pay the public debts? How would it be possible to obtain a legislature's approval of a budget reserving special credit for users of a privatized water and sewage network, while no money would remain available for other needs of the population, which were to be met by other providers, not protected by a BIT? How can Claimants envisage and request subsidies taken from the state budget when AGBA had submitted, before the emergency broke out, that the crisis was such that the State was not capable to obtain funding from financial institutions even for the already budgeted and approved current expenditures?<sup>247</sup>

726. The comparison with the contributions provided to ABSA is not convincing. These payments served the Province's acquisition of shares and it improved indirectly ABSA's resources for its investment in the network. They were not designed to offer subsidies to low-income users or similar vulnerable people. According to Decree No. 757/05 of April 26, 2005 (CU-169) approving a Memorandum of Understanding signed with ABSA, in the years 2002 to 2004 a total of 60 million ARS was transferred to ABSA as capital contributions to cover performance deficits or to enhance the company's strength.<sup>248</sup> The amount of 20 million that was retained on the Province's budget for 2004

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<sup>247</sup> Letter of July 17, 2001 (CU-135, RA-192).

<sup>248</sup> Cf. further ABSA Accounting Statement of December 31, 2005, recording a capital increase of more than ARS 65 million (I), Exhibit 234 to Giacchino/Walck I.

was devoted to the subscription of shareholdings and/or equity interest of ABSA.<sup>249</sup> In order for AGBA to obtain direct subsidies from the Province, it would have been necessary to submit to the New Regulatory Framework.<sup>250</sup>

727. The second proposal is of the same vein. If an emergency measure had to be taken in order to relieve the population of Region B, or part of it, from the burden represented by the applicable tariff regime under the Concession, and if simultaneously measures had to be granted in order to ensure the Concessionaire's financial and contractual equilibrium, this would not have been possible without funds provided by the host State.

728. The third proposal would have had the effect of AGBA practically abandoning all expansion and reconditioning work. Such a solution had clearly no relation with the emergency measures but would have allowed AGBA to wipe out its delays in fulfilling the goals under the POES.

729. At the time when the emergency measures were taken and in the immediate aftermath, none of such solutions was possible or even seriously to be taken into consideration. This also disposes of Claimants' argument that the funds and numerous other advantages made available as from 2005 to ABSA, AGBA's successor after the Contract's termination, demonstrate that funds were available in order to compensate either the users or the Concessionaire for the losses resulting from the emergency measures. The support for ABSA was provided in 2005 and in following years, when in Claimants' own admission, the Argentine's economy substantially recovered from the crisis in 2001/2002. Moreover, ABSA was a state-owned company with a balance of interests very different from AGBA, and with sources of funding which did not include external contributions to the extent as this had been contemplated in the case of AGBA.

730. Claimants rightly observed that an extraordinary tariff review would have allowed preserving the dollar tariff provisions.<sup>251</sup> However, such a proceeding could not be envisaged under the Concession Contract in light of AGBA's failure to reach multiple parameters for performance of the first Five-Year POES. This is why the available alternative could only be a renegotiation of the Contract, allowing setting aside the frustrations experienced with the original design of the Concession.

731. Through Resolution No. 25/03 of September 17, 2003 (CU-69) AGBA was told by ORAB that several conditions had to be met before an extraordinary review due to changes of foreign price indexes could take place. As stated in Section 12.3.1, there needs

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<sup>249</sup> Law No. 13154, Section 46/47 (CU-155, RA-191).

<sup>250</sup> Seillant I, para. 63.

<sup>251</sup> Giacchino/Walck II, para. 8, affirm that ORAB could have used the extraordinary tariff review provision of AGBA's Concession Contract, but it did not do so. The Experts do not examine what might have been the reasons for such conduct.

to be a variation in the United States inflation index exceeding 3%. The Agency must determine whether there are enough grounds for a tariff review and if it decides so, a public hearing must be organised before the Executive Branch may approve or reject the review (Sec. 12.3.5.3). It was further noted that tariff reviews cannot be used to compensate deficits resulting from the business risks assumed by the Concessionaire (Sec. 12.3.1, and Sec. 30-II of Law No. 11820). This last obstacle has already been invoked in the letter of July 23, 2002 of the Undersecretariat of Public Services (RA-185).

732. A further alternative measure to accommodate the effects of the emergency measures was the availability of negotiations offered to the holder of public service contracts. Such renegotiation had a legal impact on both the emergency measures and on the Concession Contract. On the one hand, renegotiation was a remedy to violations of international obligations that may have been caused by certain emergency measures. In this respect, renegotiation was for the host State an obligation; such process constituted an alternative means to meet the policy-goals of the host State without imposing on the Concessionaire measures constituting a breach of an international obligation. On the other hand, renegotiation offered the Concessionaire an opportunity to get access to a new economic and financial equilibrium, with the effect of getting released from sanctions based on its failure in performing its duties under the Contract.

#### E. The requirement for renegotiating the Concession Contract

733. It is common ground that before the emergency measures were issued, the provincial emergency Law No. 12727 of July 23, 2001 (CU-195, RA-164) provided for the possibility of termination or renegotiation of contracts that gave rise to obligations for the Province (Sec. 3/4). Decree No. 1960/01 of July 12, 2001 (RA- 167, 187, CU-309) made in this respect an exception for agreements entered into on account of the privatization processes conducted by the Province. Both texts stated that in case of termination, compensation shall not include payments other than for actual damages.

734. Law No. 12858 of February 28, 2002 (CU-154, RA-169) and Decree No. 1157/02, dated May 13, 2002 (CU-171, RA-170) established at the level of the Province the renegotiation process imposed by Section 9 of Federal Law No. 25561 (CU-145, RA-168), setting several guiding criteria, which included the impact of tariffs on the economy and on income distribution, the quality of the services, and the companies' profitability. Section 10 of this Law stated that nothing in Section 8 (on pesification) and 9 (on renegotiation) "shall be deemed to authorize contractors or public service providers to suspend or modify their obligations under the contract." Provincial Law No. 12858 declared that the Province adhered to all three Sections 8, 9 and 10 of the Federal Law.

735. Section 1 of Decree No. 1175/02 created the Special Committee for the Assessment of the Crisis Impact on Public Service Tariffs and Contracts. Pursuant to Section 2,

this Committee had the task to prepare reports to determine the situation of each affected public service. Section 5 required the Committee to submit its findings within a period of 45 days. The tasks to be performed were principally: the adoption of measures to determine the incidence of the existing economic situation on the tariff structure and the contracts, the possibilities to ensure the continuity of public service and the users' economic interest, the determination of rules of conduct, the preparation of the technical reports and of reports explaining the situation of each affected public service, and the consideration of users' interests, investment plans and future business profitability.

736. Provincial Decree No. 2088/02 of September 10, 2002 (CU-172) ordered the concessionaires of public services to maintain the quality of the services established in the concession contract and supplementary legal provisions.

737. The Special Committee created by Decree No. 1175/02 achieved the elaboration of the New Regulatory Framework that was approved by Decree No. 878/03 of June 9, 2003 (CU-125, RA-175) and validated by Article 33 of Law No. 13154. This Decree established in Section 91 of the New Regulatory Framework a new obligation to renegotiate the contracts in relation to all drinking water and sewage services, within 180 days, with an aim to adapt these contracts to the new regulation. The New Regulatory Framework expressed the Province's decision to introduce material changes to such contracts and it was to be understood as targeting AGBA's original Concession. In this respect, Section 91 was important. It reads in relevant parts as follows:

“Within one hundred and eighty (180) days after the date to which this Regulatory Framework becomes effective, the Ministry of Infrastructure, Housing and Public Services shall set the terms and establish the duties and mechanisms so that all drinking water and wastewater public services in the Province of Buenos Aires conform with this Regulatory Framework, regardless whether these services are operated within the provincial or municipal jurisdiction or under an operation and administration agreement granted by the S.P.A.R.

In the case of sanitation public services provided within the provincial jurisdiction, the Ministry of Infrastructure, Housing and Public Services shall agree with the concessionaires on the adjustment of the respective concession contracts existing on the date this Regulatory Framework becomes effective to ensure that they conform with this Regulatory Framework.”

738. AGBA was thus experiencing the effects of the emergency measures while committed to comply with the Concession Contract (Sec. 10 of Federal Law No. 12858, as approved by Provincial Law No. 12858), with the only outcome for change submitted by Section 91 of Decree No. 878/03 in the form of negotiating an adjustment of the Contract based on the New Regulatory Framework.

## VIII. The New Regulatory Framework and the Renegotiation

739. On June 9, 2003, the Province issued Decree No. 878/03, approving the New Regulatory Framework (NRF) for the provision of the drinking water and sewage public service in the Province of Buenos Aires (CU-125, RA-175). The Decree was ratified by Law No. 13154 and amended by Decree No. 3289 of December 22, 2004 (CU-126, 168, RA-177) This Regulation had for its primary purpose to provide support to ABSA's operation as a public-law provincial entity for the concession in Zone 1, which had been initially awarded to AZURIX; this is explained in the Preamble of the Decree.

740. The New Regulatory Framework set the foundations for any future (new or renegotiated) concession contract and for public sanitation services. AGBA complained that it was subject to this new regulation as from the day of its entry into force. This was certainly so in respect of the renegotiation of a revised concession, but only insofar as that would have ultimately amended or replaced the Concession Contract applicable since 2000, which remained in force despite the emergency measures. While different proposals had been prepared and discussed, these renegotiations failed.

### A. The main elements of the New Regulatory Framework

#### 1. *Claimants' presentation*

741. Claimants start by recalling that the investors had relied upon Law No. 11820 and its supplementary regulations, on which the Bidding Terms and Conditions were based (Sec. 1.1 and 1.3.1), as well as the Concession Contract (Sec. 1.2). However, four years into the Concession, the Grantor substantially altered the Regulatory Framework. The NRF entailed a radical change in the ground rules and destroyed the private concessionaire's autonomy to make decisions and carry out works. The reason was to lay out the legal foundation for the operation of the water service by public-law entities like ABSA. The most relevant changes were as follows:

742. The NRF reversed the general principle tying the tariffs to the economic cost of service provision and the Concessionaire's profits. Section 28-II of Law No. 11820 provided that prices and tariffs shall aim at reflecting the economic costs, including the Concessionaire's profit margin and incorporating the costs incurred. The NRF gave priority to the "sustainable service" concept, with the effect that tariffs had to take account of the users' payment capacity. The NRF approached service sustainability from the user's perspective alone. Instead of having this criterion retained for the purpose of implementing subsidies for the benefit of those users who are in a difficult economic situation, the user's payment capacity was passed through into the tariff and shifted onto the Concessionaire. It frustrated any attempt by AGBA to secure the review of tariffs that had been pesified



and frozen since early 2002. When later the negotiations with AGBA had broken off, the Grantor identified in its letter of July 12, 2006 (CU-167, RA-194) as a cause “the incompatibility of the tariff increases requested by the company with the users’ payment capacity.” While accepting Respondent’s reply that this concerned only residential users who receive more than the minimum supply, Claimants argue that residential customers account for 85% of the total number of users; thus, the interruption prohibition had a major impact.

743. Other changes in the tariff regime were: (1) Any reference to the preservation of the Concession’s economic-financial equation was eliminated. (2) The Concessionaire’s right to tax stability was no longer mentioned. (3) The tariff was set in pesos, at a rate of ARS 1 = USD 1. (4) The rate of return was reduced, becoming a “reasonable return on Concessionaire’s investment subject to efficient management and operation” to be set by the Agency on “the average rate of return for the relevant activity in Argentina and for other activities or sectors involving a similar risk level.” (5) A social tariff to be borne by the Concessionaire was created. (6) The work fee was no longer recognized. These changes in the tariff regime entailed a material alteration of the Regulatory Framework under which the Concession Contract that became part of it was executed.

744. The NRF abrogated the Concessionaire’s exclusivity. Section 21 left to the Grantor’s discretion to grant a concession to a person other than the Concessionaire for works considered as “necessary” and which were not included in the master plan, the drafting of which was on the Grantor’s charge. As a result, the Grantor could disregard AGBA’s exclusivity. In response to a comment made by Respondent, Claimants accept that this power was already contained, on a more limited scale, in the Regulatory Framework, and was never exercised; this, however, does not mean that it might not be exercised in the future and constituted therefore a less favourable regime for AGBA.

745. The NRF implemented Government interference with the Concessionaire’s management. Section 42 required the Concessionaire to hire Argentine professionals to fill at least half of all managerial positions. Section 47 compelled the Concessionaire to secure the Grantor’s prior approval to make corporate decisions that were important for service provision. Such restrictions entailed a material violation of the Concessionaire’s rights and powers.

746. The NRF eliminated the right to interrupt service provision to residential customers to the extent that the provider had to guarantee a “minimum vital supply.” This had the effect of shifting onto the Concessionaire the costs of such vital supply.

747. The NRF required that income generated by the expansion tariff component shall be deposited in a special trust fund to secure the use of such tariff resource, thus limiting the Concessionaire’s rights to the disposition of such funds.

748. Section 35(h) of the NRF imposed upon the Concessionaire a new obligation to pay rights and royalties for the use of surface waters from rivers, water courses and ground water.

749. Claimants further complain that the NRF left substantial issues undefined, a situation that was never remedied, given the Grantor's and the Agency's refusal to engage in an effective contract adaptation process. The NRF failed to define such important items as the tariff regime, the master plan and the quality standards. It thus created the most absolute legal uncertainty over vital aspects of the concession, which was aggravated by the Province's reluctance to fulfill its contract adaptation mandate and its ambiguity in the application of this NRF to AGBA.

750. Claimants refer to their Experts' Valuation and Regulatory Report providing a quantification of the damage sustained as a result of such differences. The Experts explain that the NRF adversely affected AGBA's Concession.

751. Claimants concede that it may be true that certain aspects of the NRF did not modify the situation applicable to AGBA's Concession, as for instance, the prohibition of interrupting service provision upon non-payment. This does not mean, however, that the NRF was not less favourable than the original regime. They contend that Respondent had been acting in breach of the Regulatory Framework under which Claimants' invested, and the NRF just formalized that violation. This leads to the conclusion that the Regulatory Framework under which AGBA's Concession was to operate was modified and there was implemented a regime that was less favourable to the Concessionaire.

## 2. *Respondent's presentation*

752. Respondent explains that the New Regulatory Framework was created as a consequence of the socio-economic context and the prior declaration of public emergency by the Argentine Republic and the Province. Law No. 12858 provided for the adaptation of contracts for drinking water and sewerage services, and this could not be done without reconsidering the regulatory framework.

753. Provincial Decree No. 1175/02 of May 13, 2002, created a "Special Commission" (RA-170, CU-171). The Commission was intended to examine the condition of each of the public services. The Provincial Executive approved the conclusions of the Special Commission by means of Provincial Decree No. 689/03 of May 12, 2003 (RA-103), and further the NRF based on Decree No. 878/03 of June 9, 2003 (RA-175, CU-125).

754. In reply to certain arguments set forth by Claimants, Respondent notes that the exclusivity right of the Concessionaire was not revoked, since such right was guaranteed in Section 21(2) of Provincial Decree No. 878/03. Nevertheless, the Concessionaire could

not ignore that this exclusivity was not absolute. The Regulatory Framework permitted users in the remaining area of the Concession (where there was no service and no expansion planned) to build and operate services by themselves or through third parties. Respondent also recalls that in 2004, AGBA agreed to act as supervisor of the works to be performed by the Province with funds granted by the World Bank, thus affecting the exclusivity clause. When Claimants state that the new rules do not permit cutting off services to delinquent customers they are wrong. The NRF does allow such sanction, to the exception of a guarantee of minimum vital supply (Sec. 61-b). Another error relates to an imposition of fees for use of water resources. Provincial Law No. 12.257 empowered the Provincial Executive to charge such a fee (Sec. 43).

755. Respondent concludes by affirming that it cannot be said that the New Regulatory Framework itself has caused any damage to AGBA. Moreover, what Claimants never prove is how their detailed discussion about contract provisions can turn into claims under the BIT.

### 3. *The Tribunal's findings*

756. The Tribunal observes that Claimants' objections to the provisions of the NRF are of a basically contractual nature. In many respects, Claimants recognize in these provisions breaches they identify and allege as having been committed by the Grantor and the Agency under the then applicable regime of the Concession Contract. Claimants thus conclude that "the NRF just formalized that violation"<sup>252</sup>, implementing a regime that was less favourable to the Concessionaire. The Tribunal notes that Claimants' conclusion in this respect do not go beyond assertions like: "the NRF implemented a regime that was less favorable to the Concessionaire."

757. The Tribunal further notes that a number of solutions retained in the NRF and considered by Claimants as less favorable to AGBA have a hypothetical rather than an actual impact. AGBA was not actually threatened with a breach of its right to exclusivity. In the case of the project with the World Bank it agreed to cooperate. The NRF extended the right to interrupt service provision to residential customers above the category of users living with minimal vital supply; it has to be observed, however, that this extension touched upon users with an ability to pay higher than those living with the minimum, with the effect that service interruption had much less risk to occur. The introduction of a fee for the use of water resources could have been implemented under the Concession Contract as well and may have caused an extraordinary tariff review, thus allowing a solution similar to the one that would have been reached if AGBA had successfully negotiated a new regime under the NRF. The fact that the NRF left the Concessionaire with uncertainty in not regulating important parameters like the tariff regime and the quality standards is

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<sup>252</sup> Reply on the Merits and Answer to the Counterclaim, para. 234.

correct; however, Claimants do not take account of the possibilities for the Regulatory Agency to modify certain parameters retained in the Concession Contract and the Concessionaire's acceptance of future amendments of the Regulatory Framework. Thus, in this respect as well, Claimants' complaints remain uncertain in their dimension and effects upon the Concessionaire under a future concession to be agreed upon.

758. In sum, Claimants complaints do not go beyond disputes about their dissatisfaction with solutions adopted or about to be adopted under the "old" Concession Contract, and to which AGBA unsuccessfully opposed. Claimants do not mention that the Province's legislator, instead of adopting the NRF, could have merely modified, to the same effect, the actual Regulatory Framework. This Framework was not, indeed, immune from future modifications. It had the meaning of "Law No. 11820 as from time to time amended or supplemented" (Sec. 1.2). When Claimants nevertheless argue that the NRF did significantly and negatively affect the Concessionaire's rights and expectations, they do so for the purpose of supporting their assertion that they had been seriously affected by the Grantor's failure to conclude the process of renegotiation that AGBA was forced to conduct under the umbrella of the NRF. The Tribunal notes that Claimants do not address another problem, *i.e.* the need to remedy AGBA's failure to meet the POES's goals in particular in respect of the expansion goals and the investments. In this regard, the NRF offered serious relief, specifically through the power vested in the Executive of the Province to seek to raise funds in order to secure financially public service programs and to provide subsidies (Sec. 61).<sup>253</sup>

## B. No immediate application of the New Regulatory Framework to AGBA

### 1. *Claimants' position*

759. Claimants present the NRF's impact on AGBA with some variations. They recognize that the main purpose of the NRF was to get the privatized service back into state hands. In principle, the NRF only applied to ABSA. It did not apply to existing concessionaires, which had started their operations under Law No. 11820. Accordingly, the provincial lawmakers made provisions for a mutually agreed contract adaptation process. This was the purpose of Section 91 of the NRF, which set a 180-day period to complete that process.

760. On the other hand, the repeal order contained in Section 2 of Decree No. 878/03 did not make it better, providing that "Any provision that is inconsistent with this document is hereby repealed." It was impossible for AGBA's Concession to remain in full force and effect under a Regulatory Framework that had been abrogated. The NRF

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<sup>253</sup> Cf. the explanations of Witness Seillant, TR-E, Day 4, p. 121/7-123/3 ; Seillant I, paras. 43, 58-60.

changed the administrative structure. The Water Control Agency of Buenos Aires (OCABA) that came to existence under the NRF permanently referred to the NRF.

761. And the final confirmation was provided by the express mention of the NRF in Decree No. 1666/06 (CU-166), whereby the Contract was terminated upon reliance and quotation of that new framework. This is evidence that the Grantor and the Agency thought to apply the NRF to AGBA. If the termination was based on the NRF, how can it be argued that the NRF was not applied to the Concessionaire?

762. The Recitals of Decree No. 878/03 are clear evidence that the main purpose of the NRF was to promote new forms of providing service and that the new system contemplated the possibility of providing the sanitation public service through the State or public entities. The termination of the concession of AZURIX was expressly cited as an instance of such a shift from private-public service to pure public service.

## 2. *Respondent's position*

763. Respondent stresses that the provincial emergency legislation provided for the adaptation to the NRF upon the agreement of the Concessionaire. Thus, the law provided that the application of the NRF to AGBA depended on AGBA's consent. Claimants try to force the application of this NRF with the clear purpose of convincing the Tribunal that they were affected by that system, which was never applied to them. This can be verified by simply reading Section 91 of Decree No. 878/03. This rule shows that the application of this New Regulatory Framework would only be possible if the Concessionaire consented to its validity.

764. Respondent notes that Claimants contend correctly that Provincial Decree No. 878/03 is mentioned in Provincial Decree No. 1666/06 ordering the termination of AGBA's Concession and that therefore the NRF was considered to be in force. However, Claimants omit to note that the NRF was mentioned at only one occasion and that this was necessary in relation to the legality of the administrative act. A careful reading of the Decree shows that all grounds for termination are supported by the articles of the Concession Contract. As there was no agreement reached in view of giving effect to the NRF as set forth in Section 91 of Decree No. 878/03, the old system of Law No. 11820 is invoked in the Decree terminating the Contract. The NRF grants competence to OCABA as the new regulatory authority. Only the second article of the NRF is mentioned, granting OCABA competence to intervene as regulatory agency of the Concession. This included the OCABA's competence to be a part of the Contract termination.

### 3. *The Tribunal's findings*

765. While Claimants complain heavily about the numerous substantial changes and disadvantages brought about in their view by the NRF, they do not seriously oppose to Respondent's contention that it did not apply to existing concessionaires operating under Law No. 11820.<sup>254</sup> It was meant to be applicable to ABSA as new service provider. In AGBA's case its effect was simply that any forthcoming renegotiation had to take the NRF as its foundation.

766. No evidence is before this Tribunal that the NRF had been actually applied to AGBA instead of provisions contained in the Concession Contract or the Regulatory Framework.<sup>255</sup> The termination Decree No. 1666/06 on which Claimants rely does not offer another view. As the Parties have noted, the NRF is mentioned in one of the Recitals, but this merely for the purpose of indicating that the Regulatory Agency in charge of the Concession and the declaration of termination had become OCABA and was no longer ORAB. This is a rule of an exclusively institutional function that did anyhow not belong to the scope of regulation governing AGBA's rights and obligations under the Concession. The rules retaining the grounds for termination all refer, directly or indirectly, to the Concession Contract and the Regulatory Framework on which it was based, mostly in quoting Regulations issued by ORAB or the POES, all based on the "old" Framework. In one of the last paragraphs of the explanation, Decree No. 878/03, Section 2, is mentioned, but again for the purpose of indicating the authority holding the Administration's prerogative to terminate the Contract.

767. Therefore, the Tribunal concludes that the NRF was not actually applied to AGBA. Claimants' complaints about the unfavorable effects it produced on the Concessionaire are related to the negotiations that were forthcoming in view of a new concession regime involving AGBA.

### C. The conduct of the renegotiation based on the New Regulatory Framework

#### 1. *Claimants' position*

768. Law No. 12858 that was enacted on March 12, 2002 and implemented the Federal Emergency Law in the Province caused AGBA to make countless requests to start the renegotiation of the Contract based on Section 3 of said Law, starting with the letters of March 13, 2002 (CU-176) and of April 17, 2002 (CU-177), both of which further stated

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<sup>254</sup> Cf. Witness Seillant, TR-E, Day 4, p. 34/1-35/12.

<sup>255</sup> When asked about the result of the change of regulation on the realization rate, Witness Cerruti told the Tribunal at the hearing as follows: "The regulatory framework was not applied to AGBA – well, it wasn't applicable to AGBA." TR-E, Day 2, p. 6/4-6.

that a situation of force majeure as referred to in Article 14.1.2 of the Contract had occurred. The Province's reaction to AGBA's renegotiation requests was to set up a meeting for June 7, 2002 (letter of June 5, 2002, CU-178), which turned out to be a mere formality. Therefore, AGBA wrote once more to the Governor on June 28, 2002, providing a fully detailed account of the emergency measures' most relevant consequences for the Concession and asking for the Grantor's urgent involvement to start the bilateral negotiations provided for in the Emergency Laws; a concrete proposal for action was included (CU-104, 118). AGBA also voiced the need for bilateral renegotiation in a letter addressed to ORAB on June 11, 2002 (CU-117, 325), recalling that numerous factors contributing to the deterioration of the Contract were altering its equilibrium "al grado de ponerlo en riesgo objetivo de ruina". This did not cause ORAB to say more than that the Province was not "unwilling to discuss these issues in a process for contract renegotiation" (Resolution No. 25/03 of September 17, 2003, CU-69).

769. The Grantor merely organized meetings, moving on with a negotiation process for more than four years that was nothing but an appearance and did not yield any result. The most relevant milestones in the years 2002 to 2004 can be listed as follows: (1) AGBA's letter to the Undersecretary of Public Service of August 14, 2002, providing information of the changes in its expenses due to inflation and requesting the formation of the Bipartite Committee (CU-179). (2) AGBA's letter to the Governor of the Province of Buenos Aires of September 30, 2002, complaining about the Grantor's inaction and reiterating its request for the formation of the Renegotiation Committee (CU-180). (3) AGBA's letter of October 8, 2002 to the Special Committee for the Assessment of the Crisis Impact (set up by Decree No. 1175/02 of June 5, 2002, CU-181), insisting on the need to set up a renegotiation Commission with the Concessionaire as active participant. (4) Letter of the Undersecretary of Public Service to AGBA, dated October 16, 2002 (CU-182), stating that the Special Committee had already been created, without the Concessionaire's participation, and that AGBA had assumed the risk inherent in this sort of agreement and accordingly, must fulfill its obligations, and that the Province is not willing to provide reimbursement for a risky business which, so far, has not been correctly managed. (5) AGBA's letter to the Undersecretary of November 13, 2002 (CU-183) replying to the arguments put forward by the addressee, further stating that the existing Committee played a merely advisory role, and insisting on the creation of a Bipartite Committee to carry out the renegotiation. (6) ORAB Resolution No. 23/03 of September 17, 2003, rejecting the emergency measures proposed by the Concessionaire (CU-124).<sup>256</sup> (7) On January 13, 2004, AGBA asked the Governor of the Province again for the urgent start of the Contract renegotiation process (CU-184). (8) Following a meeting with the Undersecretary on April 29, 2004, and upon his request, AGBA filed its letter of May 3, 2004 (CU-185, 329), submitting a new model for the Concession, however without accepting the provisions of

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<sup>256</sup> Claimants' timeline of the "most relevant milestones" as presented in the Memorial on the Merits (para. 401) does not mention that AGBA had filed an appeal against the NRF on July 17, 2003 and that it had been invited by Minister Sicaro to submit its proposal for the renegotiation on September 10, 2003.

Decree No. 878/03, which imposed the NRF. (9) AGBA then complied with the request to have such model examined by an external auditor, who delivered a certificate that was passed onto the Undersecretary on June 28, 2004 (CU-186). (10) Thereafter, several meetings were held where the audit of the economic-financial model was analyzed in detail. In October 2004, the Province provided AGBA with a document entitled “Bases for Contract Adaptation,” which set up the Concession’s normalization in two stages. (11) In November 2004, the Minister gave AGBA a draft “Memorandum of Understanding,” establishing the terms and conditions for the adaptation of the Contract. These included AGBA’s consent to the NRF and its waiver of any claim based on the NRF or past events, as well as the recognition of reasonable returns and regulatory credit for the Concessionaire on account of past events that had affected AGBA’s revenue very negatively.<sup>257</sup>

770. Claimants also insist<sup>258</sup> on citing the *Impregilo* Award where the Tribunal provides the dates of 11 letters addressed by AGBA “to various authorities” between February 19, 2002 and January 13, 2004 (para. 327), without indicating their content. For the Tribunal, this was sufficient to show that “AGBA repeatedly asked for renegotiations” and demonstrated ultimately that “Argentina failed in restoring a reasonable equilibrium in the concession” (paras. 330/331). The *Impregilo* Tribunal refers to one letter of the Province only, dated July 23, 2002, written not to AGBA but to ORAB (para. 329). Against this, it appears that the Tribunal did not refer to nor examine the content of any of the various replies provided to AGBA by the Grantor and the Agency. This Tribunal appreciates Claimants’ conclusion that it is not bound, or conditioned, by the decision adopted in the *Impregilo* Award.<sup>259</sup>

771. Claimants further submit that “AGBA was not making true proposals in that renegotiation process, which was cut short. What the Concessionaire did, at the Grantor’s request, was use the models supplied to it by the Grantor itself and model in certain variables, as requested by the Grantor.”<sup>260</sup> Neither do Claimants have any problem in acknowledging that AGBA took the initiative in the renegotiation process. However, the Province remained passive and showed no will to collaborate.

772. Claimants note that the Grantor ignored its obligation to enter into a renegotiation with AGBA until it had adopted the New Regulatory Framework. When Respondent states that at that time, waiting for the issuance of the NRF and the start of renegotiations, ORAB was flexible with AGBA, approving the POES progress report for year 1 (2000)

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<sup>257</sup> Claimants’ presentation in their Memorial on the Merits, para. 401, does not refer to evidence in respect of the documents referred to under points 10 and 11. The Province’s bases for contract adaptation corresponds to Exhibits H010 of Seillant I. The draft Memorandum of Understanding of November 2004 could not be located. It was followed in December 2004 by two drafts of financial-economic models submitted by AGBA (CU-187, 188).

<sup>258</sup> Post-Hearing Brief, para. 140.

<sup>259</sup> *Ibid.*, para. 141.

<sup>260</sup> Reply on the Merits and Answer to the Counterclaim, para. 218.



and suspending the POES for year 2 (2001), without issuing fines, Claimants object that this cannot be equated with the renegotiation of a contract.

773. AGBA's continuity as Concessionaire was possible only under the terms of the NRF. That is why AGBA agreed to negotiate its continuity as concessionaire there under. AGBA was forced to adjust its submissions to the Grantor to the NRF. Therefore, to assume that AGBA's submissions to the Grantor were proposals by it is not correct. Claimants' view is, in sum, that after the declaration of emergency and the pesification of tariffs, the required renegotiations never materialized and this constituted the Grantor's first breach in this respect.

774. In respect of the conduct of the renegotiation, Claimants rely on the statements made by witnesses, from which the main lines can be assessed. AGBA submitted its proposal in June 2004, after it had been requested by Minister Sicaro on September 10, 2003.<sup>261</sup> A meeting was held in September 2003 between AGBA and certain provincial officers (Mr. Sicaro and Mr. Sanguinetti).<sup>262</sup> To come up with this version, several previous models were modified upon the suggestions of the grantor and the auditor. It was thus AGBA who insisted on making progress, working diligently for many months until a final version was officially submitted in June 2004. AGBA developed that model and the subsequent amended models at the Province's request.<sup>263</sup> AGBA had to engage in all negotiations possible in order to find a solution for the continuation of the Contract as long as its economic-financial equilibrium was restored; therefore, it accepted to negotiate under the provisions of the NRF. Inconsistencies were signalled by Mr. Seillant, but "none of these issues was impossible to overcome."<sup>264</sup>

775. Witness Cerruti explains that in October 2004, the Province delivered a document entitled "Bases for Contractual Adaptation" to AGBA.<sup>265</sup> It was proposed that the Concession be divided in two stages, first a preliminary and temporary stage of continued emergency, and second a regular stage, leading to a positive operating result sufficient to guarantee a proper return. The conditions relevant for both stages would be lead out in two economic-financial models (MEF1 and MEF2). In November 2004, Minister Sicaro provided AGBA with a draft Memorandum of Understanding. Further drafts of such kind were exchanged between December 2004 and January 2005. Then, starting February 2005, the Province interrupted holding meetings and showed no longer interest in further progress.<sup>266</sup>

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<sup>261</sup> Seillant I, para. 36. The date of May 2004 has also been mentioned: Cerruti I, para. 271; Dáscoli I, para. 29.

<sup>262</sup> Cerruti I, para. 269; Facchinetti I, para. 16, and TR-E, Day 2, p. 75/20-76/4.

<sup>263</sup> Dáscoli II, para. 5.

<sup>264</sup> *Ibid.*, para. 7.

<sup>265</sup> H010 to Seillant I. Cf. also Dáscoli I, paras. 40-44.

<sup>266</sup> Cf. Cerruti I, paras. 273-276.

776. Witness Cerruti observes that what AGBA submitted was not a proposal, but a model prepared at the request of the Province and audited also upon the Province's request. More specifically, in respect of the idea to consider two sequential phases, to have the Province to provide for some works, or to postpone the micro-metering investments, it was always the Province who requested to consider such solutions.<sup>267</sup> The same holds for models, data, or assumptions presented by AGBA during the renegotiation. They were not unilateral contributions by the Concessionaire. They were made as per requests by the Grantor; AGBA merely took steps to make headway in the necessary renegotiations of the pesified Concession Contract. Witness Dáscoli confirms that the "two-road" approach was put forward by the Province.<sup>268</sup> The model was nothing but a work tool.<sup>269</sup>

777. When AGBA used the NRF as a reference, it was not because it thought that this new framework being beneficial, but because it had no other alternative. The Concession Contract had to mandatorily conform to it. This was a regulatory requirement (Sec. 91 of the NRF). The New Regulatory Framework being in force, both AGBA and the Grantor had no choice but to negotiate or not the readjustment of the Contract to it. Witness Facchinetti explains that the NRF was imposed upon AGBA. "At the meeting held on June 15, 2004, the Provincial Minister of Infrastructure and Public Services expressly informed us that the negotiation would lead to AGBA's continued operation under the NRF."<sup>270</sup> AGBA never accepted or consented to the NRF. It included in its proposals a reservation in this respect.<sup>271</sup> This does in no way render AGBA's criticisms regarding the adoption of the NRF inconsistent with the fact that the Concessionaire hold renegotiations in observance of that framework, nor shall it prevent Claimants from invoking a violation of the BIT.

778. Claimants conclude that Respondent's strategy runs counter to good faith. It wants to take advantage of the actions of the Concessionaire who "made everything within its reach to salvage the Concession, first insisting on and later participating in a belated renegotiation that ultimately reached a dead end." AGBA made proposals in observance of the NRF because this is what the Grantor had requested. "The Concessionaire trusted that the Province would sign off on a Contract revision based on the premises the Grantor encouraged AGBA to include into the model." And: "The fact is that AGBA was hostage to measures adopted to fight the emergency and to legislation passed to incorporate the State as operator into the provision of water services by means of a state-owned company. In this context, the Concessionaire did everything within its reach to readjust the Contract's economic equation and ensure the service's continuity." It is then concluded: "This

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<sup>267</sup> Cerruti II, paras. 78, 86-88.

<sup>268</sup> Dáscoli II, paras. 4-6.

<sup>269</sup> Dáscoli I, para. 48, II, para. 6.

<sup>270</sup> Facchinetti II, para. 6.

<sup>271</sup> *Ibid.*, para. 7.

readjustment was not possible because the Province of Buenos Aires obstructed the renegotiation process. Neither was service continuity practicable, because the Grantor terminated the Concession.”<sup>272</sup>

## 2. *Respondent's position*

779. Respondent recalls that during the renegotiation process, AGBA never challenged the provisions of the NRF to be applied after the adaptation of the Contract. AGBA's representatives had submitted different models; if they had been not satisfied with the NRF, one would have expected them to include alternatives for the NRF. AGBA expressly affirmed during the renegotiation process that the activities of the Concessionaire will be carried out subject to the provisions of the NRF. The proposals it made could only be put into operation by means of the tools provided for in the NRF.<sup>273</sup> AGBA tried to renegotiate the contract in accordance with the provisions of the New Framework. This was shown in AGBA's submission of June 2004. Objections came in, however, at the final stage, which was not a good sign in view of an agreement.

780. The NRF provided for a number of essential tools to adapt the Contract that would become effective with the consent of the Concessionaire. It enabled the Province to grant direct subsidies to consumption to help users in extreme poverty and the Provincial Government to bear the costs of part of the investments. The possibility of having the State partially bear the costs of AGBA's investment was crucial and was included in the NRF. AGBA was aware of this novelty. As to the service cut-off, AGBA made proposals to improve collection, without raising objections to Section 61 of the NRF.

781. Respondent also recalls that in late 2004, AGBA's last proposal to the Province provided for a substantial tariff increase and that 100% of the investments to be made were funded by the Province. This shows that AGBA intended to become the service operator, which is completely inconsistent with the principles of the original framework but complies with the NRF. It was AGBA that requested that the Provincial Government make most of the investments through the channel of a trust fund and that this be done in accordance with the NRF.<sup>274</sup> AGBA requested that the Provincial Government be in charge of virtually all works, including the plants of Bella Vista and Alem and the investments required to reduce nitrate levels; the Concessionaire's asset recovery would have been limited to 25% of the technical value. After the declaration of Emergency, the company's breaching behavior was confirmed. During post-Emergency negotiations, it proposed as the only exit strategy to increase tariffs, to apply offset standards in cases of low collectability, and to finance works with Government funds.

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<sup>272</sup> All in Reply on the Merits and Answer to the Counterclaim, para. 260.

<sup>273</sup> Seillant I, paras. 41, 58-61, II, paras. 16-22, 26/27.

<sup>274</sup> Seillant I, para. 59.

782. The Agreement to be concluded between the Province and the World Bank on a project to which AGBA accepted to participate in June 2004 was part of the contract adjustment regime provided for by Provincial Law No. 12858 and Provincial Decree 1175/02. This is why Witness Seillant refers to it as the first achievement in the renegotiation process.<sup>275</sup> It envisaged a 25% expansion in the water service and a 115% expansion in the wastewater service. In turn, according to the proposal, AGBA would make only 25% of the investments for restoring assets and no expansion-related investments. AGBA's rights were not affected in any manner. All works were to be performed upon the Company's approval and the investments it had failed to make would be finally made.

783. Respondent notes Claimants' statement in their Reply-Memorial that "AGBA was not making true proposals in that renegotiation process, which was cut short."<sup>276</sup> Thus, Claimants confess that they never truly participated in the renegotiation process. The actual facts at the relevant time offer a different picture.

784. Claimants acknowledge that such process was requested by the Concessionaire in May 2001, some time before the emergency measures were taken. Claimants also admit that "the need to renegotiate" arose in several occasions during the Concession. Respondent understands that AGBA's request to renegotiate and to temporarily suspend expansion goals was grounded on (i) users' delinquency in their obligation to pay for the service, and (ii) the impossibility of obtaining financing. Since that time, the consortium composed by Claimants was trying to make excuses for its own breaches and errors. They sought to begin an adaptation process that would, in the first place, solve their own mistakes and then, they tried to hide behind the emergency to take advantage of the supervening situation. In simply overlooking the numerous letters submitted by AGBA since the outbreak of the crisis and the emergency it appears in full light that AGBA continuously pressed the Grantor to open the process of renegotiation of the Concession Contract.

785. There is conclusive evidence of the Province's will to correct the direction of the Contract. An example of this is the provisional measures, such as the neutralization of the POES. The Province tried to provide solutions, but it in no way validated the Concessionaire's inefficiencies. The Province made everything possible to safeguard the public service that AGBA should provide.

786. The balance had been broken by the Concessionaire well before convertibility collapsed in 2002 and it was so confessed in its letter of May 2001. What Claimants do not mention is that the Concessionaire had available tools to overcome serious contractual breaches, one of which was for shareholders to make the necessary contributions to comply with their contractual obligations. The Concessionaire did not make any proposal until

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<sup>275</sup> Seillant I, paras. 37, 44, 55-57, II paras. 20/21, 29.

<sup>276</sup> Reply on the Merits and Answer to the Counterclaim, para. 218.

June 2004, except demanding its obligations to be suspended, but it now acknowledges in its submission before the Tribunal that even such proposal was not real.

### 3. *The Tribunal's findings*

787. The Tribunal finds the distinction suggested by Claimants according to which models were presented by AGBA, which were not to be qualified as proposals, highly artificial. As long as two parties are participating and offering contributions to a negotiation, they take both part in it, even if the initiative is most times taken on one side only. If AGBA did not want to assist the renegotiation process, it could have refrained from writing numerous letters requesting the renegotiation to start, and it would not have presented models and replied to questions submitted by the Province Executive. It did not do so. To the contrary, it insisted in requesting that renegotiation takes place<sup>277</sup>, participated in the process and submitted models that were substantial and in a nature of drafts of business plans. It accepted the Province's request that AGBA's business plan be certified by an independent auditor (CU-186, 330).<sup>278</sup> When looking at the two economic-financial models submitted by AGBA in December 2004 (MEF 1 and MEF 2, CU-187/188, subsequent to earlier drafts and later amended) under the heading of "AGBA Business Plan," it seems unrealistic to argue that this "was not a true proposal", as Claimants submit.

788. Claimants may argue that AGBA's contributions were not unilateral because always presented as per requests by the Grantor. They nevertheless admit that AGBA took steps to make headway in the necessary renegotiation of the Concession Contract. They must also accept, however, that the Province was prepared to make substantial proposals, as illustrated by the "Basis for contractual adaptation" presented in October 2004 together with the first version of the two models (MEF-1 and MEF-2), which included a 20% increase in the Concessionaire's revenue for 2005.<sup>279</sup>

789. The Tribunal notes that the "Modelo económico financiero" and the new draft of the Concession Contract submitted to the Province on May 3, 2004 (CU-185, 329) were

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<sup>277</sup> Most letters written by AGBA in 2002 and before the NRF was elaborated were insisting on AGBA's participation within the Special Committee; this request was not granted, for reasons not explained to the Tribunal. The Committee operating on the state's behalf, it may be assumed that it had to work without the concession holders' participation. The reluctance of the Province to entertain a negotiation already at that time was also based on AGBA's own position of no longer proceeding with expansion work. In order to overcome this failure to perform the Concession, a new set of rules replacing the original Regulatory Framework had first to be adopted. This was done with the NRF, and soon after its entry into force, contacts were made in view of the renegotiation.

<sup>278</sup> Witness Seillant told the Tribunal at the hearing that the audit was not covering data like values, costs, income and similar variables, with the effect that important information was not certified and would have to be reassessed. Cf. TR-E, Day 4, p. 51/19-59/5.

<sup>279</sup> Facchinetti I, para. 34, II, para. 10. When the Witness explained at the hearing that the two models were submitted by AGBA to the Province, he must have been referring to a later version, prepared by AGBA, most probably in December 2004. Cf. TR-E, Day 2, p. 69/8-17, 70/12-13.

designated as being “prepared by AGBA” after a meeting had taken place with the Undersecretary for Public Services on April 29, 2004.<sup>280</sup> When Witness Dáscoli was asked at the hearing about his use of the term “tools” for the models elaborated by him on behalf of AGBA, he told the Tribunal that the “tools” represented different alternatives. And when he was asked whether these alternatives could lead to an acceptable result in the end, he confirmed affirmatively, further explaining that all three separate versions of the model changed on the basis of the discussions and conversations they had with the Province.<sup>281</sup>

790. Witness Seillant submitted as Exhibits to his Statement several drafts of a “Protocol of Understanding” that were exchanged in the period of December 2004 and January 2005, most of them originating from the Province while one other dated January 31, 2005 and was designated as “Draft AGBA.” All of them had as common denominator to be based on the two Economic Financial Models that were to be annexed as an integral part for the purpose of providing the target economic financial equilibrium to be reached by the Concessionaire. Witness Seillant further draw the attention to the fact that nothing in the proposal indicated that it had been suggested by the Province. In fact, it was not acceptable for the Province and required further negotiations. If it had been put forward by the Province and subsequently proposed by AGBA, any further negotiation would have been meaningless.<sup>282</sup>

791. Thus, AGBA was an active participant in an on-going renegotiation, albeit not as a leading partner.<sup>283</sup> In relation to collection rates to be considered, Claimants describe that AGBA “was simply cooperating in good faith with the presentation of Models requested by the Province in order to reach an agreement and restore the Concession’s economic-financial equation, by contributing with elements that resulted from the substantial changes brought about by the emergency.”<sup>284</sup> Witness Facchinetti told the Tribunal that AGBA had not at any time refused to enter into an agreement with the Province including the first phase contained in MEF-1<sup>285</sup> and that AGBA never wished to close the door to an eventual renegotiation<sup>286</sup>.

792. Inconsistencies in the presentation of AGBA’s position are also reflected in respect of the NRF. Claimants sustain that AGBA’s never accepted or consented to the

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<sup>280</sup> “preparados por AGBA con el objeto de continuar con las tareas tendientes a cumplir los fines previstos en el Art. 91° del Decreto 878/03, pero sin que ello implique reconocimiento alguno de nuestra parte en relación a lo dispuesto en dicha norma”.

<sup>281</sup> TR-E, Day 2, p. 178/24-179/10.

<sup>282</sup> Cf. Seillant II, paras. 23-25.

<sup>283</sup> Claimants’ submission seems also conflicting with their Witness Cerruti I, para. 263, explaining that while the Province did not show any real inclination to renegotiate any forward progress in negotiations “had the complete support of AGBA.”

<sup>284</sup> Reply on the Merits and Answer to the Counterclaim, para. 164.

<sup>285</sup> TR-E, Day 2, p. 70/14-17.

<sup>286</sup> TR-E, Day 2, p. 127/16, 128/2-3.

NRF. It was imposed upon it. Nonetheless, the fact is not disputed that AGBA had no other choice and that it accepted to enter into a renegotiation on the basis of the NRF.<sup>287</sup> If AGBA had wanted to reject any submission to the NRF, the only coherent reaction would have been not to enter into a renegotiation process based on the NRF. To include in all of AGBA's models a reservation in this respect, as witnessed by Mr. Facchinetti, was therefore useless. On the face of the AGBA's documents submitted to the Tribunal it is easy to recognize that such reservation does not appear on all of them.

793. AGBA's first proposal submitted in June 2004 to the Province, confirming the "Basic Guidelines" of its earlier draft of May, contained a list on "Key Aspects of the Negotiation," on top of which it was stated that "the future activities of the concessionaire shall be conducted efficiently subject to the provisions of the NRF," without any reservation added.<sup>288</sup> The approval of AGBA's involvement through the agreement to be concluded between the Province and the World Bank would have had no standing without the NRF as regulatory background.<sup>289</sup> For Witness Seillant, this was the initial success of the renegotiation.<sup>290</sup> Both negotiations had been moving forward in parallel.<sup>291</sup>

794. Against Claimants' presentation of AGBA's reactive attitude during the renegotiation it is difficult to understand how Claimants can argue that the Province obstructed the renegotiation process<sup>292</sup> and further complain about "the Province's most absolute unwillingness to negotiate"<sup>293</sup> and the fact that it "did nothing all the time."<sup>294</sup> How could the Province obstruct a process in which "AGBA was not making true proposals"?<sup>295</sup> It is even more confusing to read Claimants' Experts affirming that the renegotiation "was never initiated."<sup>296</sup> Claimants present the representatives of the Province as those who requested from AGBA to submit proposals and to answer questions, which seems to constitute an active part rather than an obstruction to the discussions going on. The fact that

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<sup>287</sup> Witness Facchinetti explained at the hearing that AGBA had no possibility to renegotiate the Contract outside the New Regulatory Framework; TR-E, Day 2, p. 68/10-17. And further, referring to the two models: "But in order for us to go ahead with the renegotiation, we accepted to test these new models according to the conditions of the NRF." TR-E, Day 2, p. 78/4-6.

<sup>288</sup> Exhibit H002 to Seillant I, page 32 (not numbered). On the page before this one, Decree No. 878/03 was listed as part of the legal provisions regarding the renegotiation of the agreement. Cf. also Witness Seillant's explanations at the hearing, TR-E, Day 4, p. 129/12-134/24.

<sup>289</sup> Cf. Seillant, TR-E, Day 4, p. 124/9-125/12.

<sup>290</sup> Seillant I, paras. 55-57; TR-E, Day 4, p. 3/2-4/10, 7/14-10/6.

<sup>291</sup> Witness Seillant, TR-E, Day 4, p. 136/17-137/12.

<sup>292</sup> Reply on the Merits and Answer to the Counterclaim, para. 260.

<sup>293</sup> *Ibid.*, para. 495.

<sup>294</sup> Cf. Claimants' Post-Hearing Brief (para. 101) where a timeline of events is presented and priority given to AGBA's letters. A letter of the Undersecretary of Public Service of October 16, 2002 (CU-182) is marginally noted, omitting the Grantor's reference to AGBA's failure to abide by its obligations and to the fact that an adjustment of the Contract could not have the purpose of curing the Concessionaire's breaches.

<sup>295</sup> Reply on the Merits and Answer to the Counterclaim, para. 218.

<sup>296</sup> Giacchino/Walck I, paras. 178, 252, II, para. 109. Finally, at the hearing, it was recognized that the word "never" was too much (TR-E, Day 6, p. 209/1-7) and in their third Report, the Experts recognized that "some progress had been made by AGBA and the Province by the end of 2004" (para. 52).

the Province might not have agreed on certain proposals and that the negotiation had to move on is not sufficient evidence for an obstruction on its part. Claimants' complaints are further difficult to understand in light of the fact that the mutual work on future contractual provisions reached the stage of a first draft of a Protocol of understanding ("Protocolo entendimiento") that was prepared by the end of November 2004 and submitted to Mr. Cerruti of AGBA on December 3, 2004 (CU-331).

795. The Tribunal also notes that when Witness Facchinetti as a leading participant in the negotiations on AGBA's behalf was asked at the hearing whether he could confirm his statement on the Province's "unwillingness to renegotiate the contract with commitment and in good faith"<sup>297</sup>, was not able to provide any factual explanation justifying such a strong criticism. He told the Tribunal that various projects had been exchanged, that he noted dilatory tactics that made him suspicious, that every time AGBA was trying to get to a point, something changed in the process, and that they kept changing the assumptions on which the model was based, with the effect that this extended and protracted the negotiations until the end of 2004.<sup>298</sup> All these indications do not go beyond the level of contentious negotiations where each side is shifting positions in order to provoke further incentives to reach a more favorable result. This does not allow any assessment of unwillingness or bad faith.

#### D. The failure of the renegotiation

##### 1. *Claimants' position*

796. Claimants' understanding of the decline in progress towards a renegotiated concession is based on the experience with other negotiations in relation to water concessions in the country. Claimants note that the talks that took place between December 2004 and January 2005 came to a sudden halt in February 2005, when it appeared that any progress in the negotiation with AGBA was subordinated to the outcome of negotiations with other water concessionaires undertaken at the federal level. Faced with this new impasse, AGBA requested in its letter of July 15, 2005 (CU-58) once again that progress be made in the renegotiation, thus avoiding that the service would collapse, and asking further for the payment of ARS 7,720,323 recognized by ORAB in its letter of April 14, 2003 on account of user re-categorization, and for the authorization of the provisional application of the tariff increases the Province had already approved to the advantage of ABSA, the new concessionaire of AGBA's neighboring zone in the Province.

797. Claimants further report that through its letter of August 25, 2005 (CU-60), the Grantor held the Concessionaire responsible for the delays in the renegotiation process, claiming that it had not provided sufficient information. It also noted that the tariff review

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<sup>297</sup> Facchinetti I, para. 7.

<sup>298</sup> Cf. TR-E, Day 2, p. 110/10-113/23.



process was subordinated to whatever the Federal Government decided in connection with the concessionaires operating under its jurisdiction. AGBA attended some additional meetings, permitting the Grantor to keep up the appearance that it was fulfilling a renegotiation mandate. Through its letter of October 14, 2005, addressed to the Minister of Infrastructure, Housing and Public Services, AGBA requested the resumption of the negotiations and through its letter of November 7, 2005 (CU-189) it asked for a meeting with the Minister. However, the Grantor had already made its decision to subordinate AGBA's future to the outcome of the negotiation between the Federal Government and its concessionaire Aguas Argentinas. The early termination of this concession by the Federal Government implicitly entailed the early termination of AGBA's Concession. On March 21, 2006, by means of Decree No. 303/2006, the concession contract signed by the Federal Government and Aguas Argentinas S.A. was terminated. The day after said termination, the Governor of the Province announced the termination of AGBA's Concession. This information is based on newspaper articles and in particular on a press release of March 23, 2006 explaining that the Province's Governor was pondering the termination of the Concession.<sup>299</sup>

798. The renegotiation failed because the Province decided to send AGBA's Concession down the same path followed by the concession of Aguas Argentinas, which operated under national jurisdiction. When the Government decided to take over the concession of Aguas Argentinas, the same determination was made regarding AGBA's Concession. Claimants admit that proof of the true motives behind the termination is necessarily scarce. One of the elements of proof is the note of August 25, 2005 (CU-60), signed by the Undersecretary of Public Services, Mr. Sanguinetti, in reply to a letter from AGBA, stating that no tariff increases will be allowed to the Concessionaire if they are not allowed first to the water and sanitation public utilities at the national level. Thus, after months of renegotiation, AGBA was told that all the discussion on models had been futile because the Province would not approve any tariff increases until such increases were approved for concessions under national jurisdiction. The note shows that AGBA's renegotiations were not autonomous and their final result dependent on decisions of the Federal Government who did not participate to the renegotiation.

799. It is thus proven that AGBA's renegotiation was conditioned by and subject to factors extraneous to the Concession and that it ultimately failed due to the Federal Government's decision to terminate Aguas Argentinas' concession. The reasons now advanced by Respondent to explain the renegotiation's failure were never expressed by the Grantor during the renegotiation. The said Note of the Undersecretary of August 25, 2005 did not mention that AGBA had made unreasonable demands, leading the Grantor to believe that these were reasons for the renegotiation's failure. It must also be taken account of the fact that upon request of the Grantor, the information submitted by AGBA had been

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<sup>299</sup> Exhibit 253 to Giacchino/Walck I.

audited. As Witness Dáscoli explains, if there were inconsistencies, as pointed out by Witness Seillant, none of these issues was impossible to overcome during the negotiation.<sup>300</sup>

800. Regarding Respondent's point on AGBA's "unreasonable demands," it suffices to compare the tariff increase sought by AGBA according to Respondent (50% for drinking water and 150% for sewage), to the raises later authorized for ABSA (an average of 130% for drinking water and 180% for sewage) to show that this argument is doomed to fail. However, even if AGBA's demands were excessive, where were the Grantor's proposals? If it had the will to reach agreement, it could have submitted other figures and premises. The parameters used by Respondent to consider a tariff increase "unreasonable" cannot be seriously considered given its position that the Grantor should have cut AGBA's tariffs during the emergency situation. On the face of such a position, the Concessionaire could have no chance to succeed in requesting a tariff increase.

801. When the Grantor later argued that the amounts AGBA requested ruled out any sort of agreement (letter of July 12, 2006, CU-167, RA-154), the Undersecretary tried to cover the true reasons behind the failure of the negotiations. The Province did not even define the parameters that were to be used as the starting point for renegotiating. The reverse privatization of the water and sewage services was a repeated occurrence in various Argentine Provinces. This was an evolution that extended well beyond the area of the Concession awarded to AGBA and, accordingly, its inherent foundation had nothing to do with the Concessionaire's situation. This was obviously a political decision.

802. Claimants note that in any event, AGBA's Contract should have been the subject of an urgent, diligent and effective renegotiation process. Claimants had no doubts about the need to restore the economic and financial equation of AGBA's Contract, while Respondent acknowledged that renegotiations were required. This is not what happened, and the Concessionaire never secured the slightest tariff revision, although its tariffs had been cut down to less than one third of their value in January 2002, and remained unchanged until the termination of the Contract in July 2006. This proves that there were no actual renegotiations and that the Grantor only gave false expectations to AGBA.

## 2. *Respondent's position*

803. Respondent finds highly contradictory when Claimants state, on the one hand, that the Concessionaire was virtually the only party to urge for renegotiations vis-à-vis the Grantor's inaction, and, on the other hand, that AGBA was not making true proposals in that renegotiation process, which was cut short.

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<sup>300</sup> Dáscoli I, paras. 6/7.

804. The renegotiation's failure must be exclusively attributed to Claimants who made proposals that turned out to be inconsistent with what was substantiated in the renegotiation process. As Witness Seillant explained, a major drawback faced by the Province was that it had to wait several months for AGBA to submit the information and documentation required to commence renegotiation.<sup>301</sup> AGBA unreasonably delayed the process. AGBA's first proposal dated June 2004, while the Province had requested them to file a proposal more than nine months before. The Witness also recalls that until 2005, his team had failed in having AGBA account for the figures contained in its models. AGBA's projections contained errors in their formulas, atypical cost functions and initial costs inconsistent with the cost history. Until January 2005, AGBA failed to account for those figures.<sup>302</sup>

805. Another contradiction is contained in Claimants' statement that the Concessionaire had authored documents, formulas, and proposals it did not actually make. As Witness Seillant points out, it has not been denied that AGBA filed in June 2004 Note 004/04/VE whereby it accepted an agreement on a project involving the Province and the World Bank that was only possible thanks to the tools provided by the NRF. He added that Witness Dáscoli intends to downplay what they have done, telling that AGBA's proposal was only a model. However, one of the headings reads: "Basic Guidelines for the Proposal."

806. Witness Seillant further explains that AGBA knew, in the renegotiation, that it was incapable as a Concessionaire to perform the Contract and make the business feasible. AGBA projected measured uncollectability indexes. AGBA evidenced in its proposals a difficulty to obtain financing and expected to have State funds either to execute the works or as subsidies.<sup>303</sup> The Witness also notes that "AGBA saw an opportunity in the emergency to increase its profits margins or correct assumptions adopted with regard to its management goals which it perhaps estimated it would obtain, but failed to do so."<sup>304</sup>

807. The Witness further notes that AGBA was requesting a tariff increase of approximately 93%, not to perform expansion investments that were to be provided by the Provincial Government; and the performance of minimum investment to maintain assets. With these minor investments in asset management, AGBA was not able to justify the manner in which the service quality goals could be met.<sup>305</sup> How could the State reach an agreement if AGBA acknowledged or implicitly posited during renegotiation that it was unable to live up to the basic expectations required from it as a service concessionaire,

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<sup>301</sup> Seillant II, para. 60.

<sup>302</sup> Seillant I, para. 109.

<sup>303</sup> Seillant II, paras. 44-46.

<sup>304</sup> Seillant I, para. 141.

<sup>305</sup> Seillant II, paras. 69/70.

and instead expected substantial State support? It was then impossible to keep open for an indefinite period of time a renegotiation process that was blocked by causes attributable to the Concessionaire itself. Every effort made by the Province was in vain, as the Concessionaire failed to resign any of its exaggerated expectations within the renegotiation process, in addition to its breaches resulting from its bad management and the lack of investment in the Concession.

808. AGBA's different requests during the renegotiation process hindered any kind of agreement. AGBA's requests totaled an increase in water tariffs of 50% and 150% for sewage services, combined with the elimination of practically any kind of investment commitment. AGBA claimed an excessive increase of income in comparison with the expenditure to be made. AGBA's requests seemed to ignore the scenario resulting from the social and economic emergency.

809. The failure of the renegotiation process was caused, among other things, by the Concessionaire's elimination of the "basic equilibrium" as a result of releasing AGBA from any obligation in connection with service quality or continuation.<sup>306</sup> AGBA also tried to be released from any obligation to carry out service expansion works.<sup>307</sup>

810. It is impossible to imagine how AGBA could have collected the excessive tariff increases requested, when it was faced with the poor collection rate noted from the beginning of the Concession. AGBA's behavior was inconsistent: it argued that it was impossible to improve collection figures with the contractual tariffs effective at the time, but nevertheless, it requested a substantial increase. The Province's position was clear: if it had accepted the tariff requests, the Concessionaire would have been in an even worse situation, triggered by an increase in uncollectability resulting from constraints in the payment capacity of users.

811. Respondent concludes that it was not possible to continue indefinitely with a renegotiation process hindered by causes attributable to the Concessionaire itself. The Province made all the necessary endeavors to adapt the contract successfully. The non-application of sanctions to AGBA during the renegotiation process was a clear and convincing sign of the Province's willingness to carry out a successful renegotiation process. AGBA tried to take advantage of the circumstances and to transfer the business risk to the Grantor and the users. All the efforts made by the Province were useless since the Concessionaire did not withdraw any of its claims.

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<sup>306</sup> Seillant I, para. 129.

<sup>307</sup> *Ibid.*, para. 136.

### 3. *The Tribunal's findings*

812. AGBA's position was to preserve its rights and interests in the context of rather adverse influences by making proposals that could be expected to attract the interest and possibly the adherence of the Province. From the presentations made before the Tribunal, it appears that AGBA's positions taken in respect of tariff increases it wanted to secure through the renegotiation were critical for the success of the whole process of the renegotiation. A closer look on this matter is required.

813. In light of the social and economic situation following the emergency and which was undoubtedly not yet absorbed when the renegotiations took place it was certainly difficult for the Province to restore or to come close to the level of tariffs and of the ensuing bills as they had existed before the crisis. This must have been all the more so as little progress had been made in respect of collectability, which would certainly have suffered a new drop caused by an increase in delinquency of users as a result of the increase in billing they have had to face. AGBA had expressly stated in its letter of July 17, 2001 to ORAB that the crisis had the effect of "negatively influencing collection rates for the services rendered" (RA-192, CU-135). This consequence must have been seriously aggravated under the emergency, rendering a tariff increase financially ineffective for the Concessionaire and difficult for the public authorities to impose upon the population. However, this view reflects the period of 2002 and part of 2003. It has not been demonstrated before the Tribunal that such situation was similarly prevailing in 2004 and early 2005 when this item of the deal was at the peak of the negotiation.

814. The Tribunal notes at the outset that AGBA's proposed tariff increases identified as high as 93% for drinking water services and qualified as excessive have been accompanied by few explanations and evidence. If this proposal had appeared so truly excessive to the representatives of the Province, it would appear reasonable that the Tribunal would have received substantial evidence and arguments in this respect. To the contrary, Witness Facchinetti confirmed under cross-examination that they were "at no time at all" told that AGBA's claims were exaggerated, outlandish or insuperable.<sup>308</sup> Witness Seillant did say little about facing directly the amount of tariffs envisaged by AGBA's representatives<sup>309</sup>, the exchange of views being rather centered on the most important underlying features, as collectability and investment. The Province's negotiators addressed a number of questions in order to provide AGBA with incentives to change positions. It is not certain whether those acting on behalf of AGBA fully understood the message that they had to move their position more substantially in order to down-size the tariff increase they expected to obtain.

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<sup>308</sup> TR-E, Day 2, p. 68/18-22.

<sup>309</sup> One uncertain reply seems to be in the negative; TR-E, Day 4, p. 148/16-22.

815. The figure of 93% has not been explained in all of its components. As it is derived from AGBA's proposal of June 2004, it is not connected exclusively to an increase in tariffs, which were suggested to be moderate and increasing gradually.<sup>310</sup> It is also based on AGBA's request for no further investment and for the provision of subsidies. The proposal to limit service metering to industrial or high-consumption users may also have played a role.<sup>311</sup> All measures taken together are calculated as representing a 93% increase in AGBA's income.<sup>312</sup>

816. The basic reasons for considering AGBA's tariff requests as excessive were the at the time still low collectability rate<sup>313</sup> and the shift of the investment obligation to the Province that was therefore no longer to be recovered through the income from the users<sup>314</sup>. However, this was not considered, at the relevant time, as the final point on the matter. When Witness Seillant was asked whether this meant that from then on the negotiations were "discontinued," he objected to the use of this term.<sup>315</sup> The representative of the Province was also uncertain about the meaning of AGBA's request to be assured of receiving a "reasonable return" for the capital invested. Witness Seillant understood that the reasonable return figure was 7.9%, as stated on the last page of AGBA's proposal of June 2004, but he did not understand to what figure of capital investment this percentage related. The Province had no position, waiting for AGBA to show the pertinent figures. AGBA had been asked to provide this information, but they never did so.<sup>316</sup> This would mean that the matter was left in a limbo, no further exchange being initiated. On the other hand, since June 2004, when the renegotiation was engaged, it was understood that there was no way to save the Concession otherwise than having the Province assuming the investment for expansion.<sup>317</sup> No explanation has been provided on how this commitment of the Province had to be understood in comparison to AGBA collecting bills on the basis of a tariff increase of 93%.

817. The Tribunal further notes that the record contains little evidence of clear and contemporaneous statements on behalf of the Province to the effect that AGBA's proposals for tariff increases were considered excessive. Even if the Province's refusal may have been considered as reasonable and convincing from its own perspective, it would

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<sup>310</sup> Exhibit H002 to Seillant I, page 34 (not numbered). On page 36, it is indicated that the tariff increase would be 5% for 2004 and 10% for each of the years 2005 to 2008. In addition, the sewerage coefficient was to climb up each year by 0.1 from 0.7 in 2004 to 1.20 in 2009.

<sup>311</sup> Exhibit H002 to Seillant I, page 35 (not numbered).

<sup>312</sup> Cf. Witness Seillant, TR-E, Day 4, p. 65/9-66/6.

<sup>313</sup> Seillant I, paras. 75, 137-153, II paras. 45, 53-60; TR-E, Day 4, p. 91/1-94/2, 140/10-148/15.

<sup>314</sup> Seillant, TR-E, Day 4, p. 50/5-15, 134/3-24.

<sup>315</sup> TR-E, Day 4, p. 84/13-85/6.

<sup>316</sup> Cf. TR-E, Day 4, p. 152/21-155/22 ; Seillant II, paras. 64/65. This is surprising in light of the fact that AGBA's June 2004 proposal identified as one of the key aspects of the negotiation the Concessionaire's chance to obtain a reasonable profit, *i.e.* "a profit that makes it possible to recover the investments made (company capitalization of USD 45,000,000) at a reasonable market rate considering the reality of the country." (page 32, not numbered).

<sup>317</sup> Witness Seillant, TR-E, Day 4, p. 150/2-152/16.

seem that a clear statement addressed to AGBA would have been appropriate. An explicit explanation of such kind is contained in the letter the Undersecretariat of Public Services addressed to AGBA on July 12, 2006 (CU-167, RA-194), a day after the declaration of termination, when it was no longer relevant, referring to AGBA's proposals for a tariff increase of about 93%, the provision of large subsidies, the reduction in the investment plan, confirmation of the poor achievements in collection efforts, and waiver by the Grantor of AGBA's breaches before and after the emergency and ongoing up the time of the renegotiation. The letter concluded that AGBA required a strong commitment from the Province's treasury, as well as a significant increase in tariffs, resulting in an imbalance that did not take account of the contractual obligations relating to service quality and expansion and, mainly, was unsustainable in view of the population's ability to pay. If this position had to be taken for serious and firmly supported by the Province's Executive, one would expect that it had been expressed during the on-going negotiations. On the basis of the Tribunal's record, this did not happen.

818. The Tribunal also finds that such tariff increase might not have been as extraordinary as having the effect of an immediate closing of the negotiation. Firstly, an increase of 93%, if calculated in comparison to the tariff used after the entry into force of the emergency measures, would have had the effect of compensating half of the two third decrease caused by these measures. Without further supporting submissions, this does not seem extraordinary to such an extent that no further discussion was warranted. In light of the tariff increases later granted to ASBA, it would have been a reasonable approach to invite AGBA to lower its requests significantly in a first period and as long as the Argentine economy had not yet recovered. Such an approach could have been reasonably envisaged in a view of reaching tariff regimes that would have become quite close between ASBA and AGBA. Both negotiation tracks could have been conducted in parallel in light of the fact that the Memorandum of Understanding with ASBA was signed on April 7, 2005<sup>318</sup> and therefore under discussion when AGBA was still expecting progress after the discussions that were held until January 2005. In any event, Article 53 of Provincial Decree 3289/04 of December 22, 2004 (CU-126, 168, RA-177) supplementing the New Regulatory Framework provided that the Regulatory Agency had to adopt tariff regimes that were based on the general and uniform principles established in the New Regulatory Framework; this left little room for discrepancies between different concessionaires, the main exception referring to different characteristics of the respective populations and the networks. In any event, before concluding that a proposal on tariffs was "excessive" at the relevant time (end 2004, early 2005) it would have been useful to compare such increase to the growing strength of Argentina's economy as from the year 2004.

819. Further, in order to understand the precise impact of such increase and the tariff AGBA wanted to use for its future collections and billings, it would have been essential

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<sup>318</sup> Cf. Decree No. 757/05 of April 26, 2005 (CU-169).

to know whether the income resulting from such tariff would have represented a return for AGBA's benefit. This is not certain when the Tribunal consults the contractual terms in respect of tariffs that were discussed during the renegotiation in 2004. It results from Section 5.3 of the draft Concession Contract prepared by AGBA and submitted on May 3, 2004 (CU-329) that the investments into the Service were to be funded through a Trust Fund ("Fondo fiduciario") and that this fund received the income corresponding to the component of the tariff that was designed for the expansion of the service ("todos los ingresos generados por el componente tarifario destinado a la expansión del servicio"), in conformity with Section 53 of the New Regulatory Framework (CU-125, RA-175). While the Tribunal has not been provided with Annex Ñ of this draft, it understands that it was envisaged to split the tariff into parts, one of which being reserved for funding the Trust Fund and therefore not recovered by AGBA. Article 7 of the Protocol of Understanding contains a similar provision, referring to an "expansion tariff" ("Tarifa de Expansión"). These provisions were based on Section 56 of the New Regulatory Framework, providing that the tariff shall have two main components, one as service operation and maintenance tariff, and the other as expansion tariff. Pursuant to Section 57, the income generated by the expansion tariff component shall be deposited in the Trust Fund account. Despite this split in components, the tariff system had to set, whenever possible, a single tariff (Sec. 54(g)). Therefore, it seems plausible that the 93% tariff increase proposed by AGBA included this "expansion part," with the effect that such increase loses any impression of being excessive for the purposes of an on-going negotiation.

820. The same scheme results from the Protocols of Understanding debated between the Province and AGBA in December 2004 and January 2005, where the Expansion Tariff serves as the income the Concessionaire has to place in the Trust Fund, which means that the collection from the users of this part was also in the Concessionaire's hands.

821. In sum, it does not appear convincing to the Tribunal to submit that the failure of the renegotiation process was simply due to AGBA's requests for tariff increases.

822. The evidence before this Tribunal revealed that another reason may have played a role in the interruption of the renegotiation process. Witness Facchinetti told the Tribunal at the hearing that he came to realize that the reason for the collapse of the renegotiation was due to the change of one word, from "basic" economic-financial equilibrium to "transition" economic-financial equilibrium.<sup>319</sup> However, the Witness was not more explicit and he could not remember any concrete reaction from the Province. Witness Seilant's explanations went more into some details and were referenced by different drafts submitted by AGBA at the critical time.<sup>320</sup> When comparing the drafts of a protocol of

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<sup>319</sup> TR-E, Day 2, p. 115/11-117/4.

<sup>320</sup> Cf. TR-E, Day 4, p. 67/18-83/21.



understanding submitted by AGBA on January 12 and 31, 2005<sup>321</sup>, respectively, it appears that in the latter draft, the notion of “target economic-financial equilibrium” covering the second period of the renewed concession was retained alone, while the concept of “basic economic-financial equilibrium” applicable to the first period of years disappeared, including its definition as representing “the situation in which the concessionaire’s income covers the operating and maintenance costs, as well as the minimum expansions in order to meet the demand under current quality conditions, based on the MODEL COMPANY and as provided in EFM 1.” Thus, while the model form of EFM 1 was kept, the definition attached to it and relying on actual quality conditions was no longer included in the text. Similarly, the provisions of Article 5 on contractual adjustments were focused on the “target economic-financial equilibrium” and the transition to this stage, while the quality conditions and the minimum expansions covered by the concept of “basic economic-financial equilibrium” were no longer retained.

823. Witness Seillant explained to the Tribunal that with this latest draft, “the quality conditions were no longer provided.”<sup>322</sup> It was not possible to enter into an agreement related to a water service “without any quality standard.”<sup>323</sup> Quality standards were set for the second period only, when after three or four years, the transition to the “target economic-financial equilibrium” was going to take place.<sup>324</sup> The effect was, according to Witness Seillant, that the signature of such a memorandum of understanding didn’t really establish any obligations for AGBA in connection with investment and quality; AGBA would thus have had no commitment whatsoever.<sup>325</sup> From then on, Witness Seillant informed the Tribunal, the negotiations no longer moved forward.<sup>326</sup> His view was that the lack of undertakings in relation to the quality of the service and the failure of AGBA to provide economic projections that would have supported the requested tariff increases were the reasons that prevented the Province from reaching a renegotiation agreement.<sup>327</sup>

824. The Tribunal does not understand why the simple reading of the texts of the drafts for a protocol of understanding exchanged in January 2005 would demonstrate that AGBA no longer wanted to comply with quality standards for the first period of the renewed concession. Witness Seillant’s explanations appear highly artificial and unsupported on the face of the elements of texts on which he relies. In any event, his analysis

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<sup>321</sup> Exhibits H018 and H019 to Seillant I. An earlier version of December 1, 2004 (H017) is, in relevant part, close to the text of January 12, 2005; cf. Seillant I, para. 125. Exhibit 019 is reproduced in part in Seillant I, para. 126. The text of January 12, 2005 was an agreed version, based on the draft of December 1, 2004 and its subsequent amendments; cf. Seillant I, para. 124.

<sup>322</sup> TR-E, Day 4, p. 78/17-18; Seillant I, paras. 127-129.

<sup>323</sup> TR-E, Day 4, p. 79/6-7.

<sup>324</sup> TR-E, Day 4, p. 79/19-22, 80/22-25.

<sup>325</sup> TR-E, Day 4, p. 81/15-20.

<sup>326</sup> TR-E, Day 4, p. 84/13-85/6, the Witness adding that this was communicated informally and did not mean that negotiations were discontinued. They had been deadlocked, the continuity of the Concession being unsustainable due to AGBA’s breaches basically prior to the collapse of the convertibility system; Seillant I, para. 154.

<sup>327</sup> Seillant I, para. 156.

does not explain convincingly that the changes operated in one of the drafts could have reasonably justified the close of the negotiation without any further debate that would have allowed to discuss and to achieve the required clarification.

825. Therefore, the Tribunal concludes at this juncture that neither AGBA's tariff requests nor the purported failure to ensure quality requirements during the first period of the renewed concession can seriously be retained as the grounds that led to the rather abrupt stop of the renegotiation process at the end of January 2005.

826. The Tribunal understands that the decision no longer to proceed with talks and exchange of amended proposals for renegotiation was impacted by the negative experiences the Argentine Republic had with a number of its water concessions nation-wide. The position the Executive of the Province had taken during the renegotiation reflected the political shift leading to restore these concessions in public hands and to have them operated by state-owned companies rather than to keep them privatized.

827. The requirement for the Province to take account of the policies and reforms adopted at the national level was stated already in Decree No. 1175/02 of May 13, 2002 (CU-171, RA-170), setting up the Special Commission for the evaluation of the impact of the crisis on public service contracts, which was instructed in Article 4 to work on the basis of the following criteria:

“1) The interests of users and accessibility to the services, particularly the social impact thereon; 2) Service quality and investment programs; 3) The Companies' future profitability, taking into account the provisions of the respective regulatory framework; 4) *The policies and procedures implemented by the National Government.*” (emphasis added)<sup>328</sup>

When this Decree was issued, Mr. Sicaro, Undersecretary of Public Services, sent a copy to Mr. Biancuzzo, AGBA's President on June 5, 2002 and invited him to a meeting (CU-178).

828. The reference to the policies adopted at the federal level must also have included implicitly consideration for the tasks conferred to the Commission for the Renegotiation instituted by Federal Decree No. 293/02 of February 12, 2002.<sup>329</sup> Part of the reason to institute such Commission was indeed to:

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<sup>328</sup> In Decree No. 1175/02 and in a further Decree No. 2088/02 of September 10, 2002 (CU-172), it was specified that the Commission had to collect all necessary technical information from the concessionaires, and to “analizar las medidas económicas adoptadas en el orden nacional y provincial respecto de las tarifas y la ecuación económica financiera de los contratos vigentes en materia de prestación de servicios públicos de jurisdicción provincial”.

<sup>329</sup> Exhibit 102 to Giacchino/Walck I; Exhibit H020 to Saillant I.

“... centralizar el proceso de renegociación de los contratos, a fin de adecuar la aplicación de criterios homogéneos por parte del Estado Nacional en todos los casos, como también para posibilitar que su tratamiento se realice en forma ordenada y rápida.”

829. AGBA had knowledge of the developments at the national level, and it referred to it in its letter of September 30, 2002 (CU-180) requesting the formation of the Renegotiation Committee and AGBA’s participation in its work. In reply to this letter, the Province expressed its reluctance to engage in renegotiation of the Concession in the letter Mr. Sícara, Undersecretary of Public Services, addressed on October 16, 2002 to the Company (CU-182). The Undersecretary recalled that the Concession Contract’s benefits “hinge on an uncertain event, as is the collection of revenue during the concession term” and that therefore “the usual contingencies of an unstable country and the measures adopted” constitute the risk inherent in this type of contract.

830. Shortly after that letter, the Provincial Special Commission for the evaluation of the impact of the crisis on public service contracts, established by Decree No. 1175/02 of May 13, 2002 (CU-171, RA-170), issued its first report that was later approved and made publicly available through Decree No. 689/03 of May 12, 2003 (RA-103), noting in respect of AGBA’s Concession:

“Al mismo tiempo o puedo ignorarse el impacto negativo de la emergencia económica nacional y provincial, *evidenciada en una sustancial baja de ingresos y aumento de costos en la prestación del servicio.*” (emphasis in the original)

831. The Commission recommended a revision of the rules applicable to public service concessions, including the regulatory framework and the concession contracts and to proceed with a valuation of the respective tariffs and costs in view of reforms to be adopted on the medium and the long term, while the companies should maintain in the short term the service quality and minimal investments.

832. These conclusions were the basis for the Commission’s preparation of the New Regulatory Framework that was approved by Decree No. 878/03 of June 9, 2003 and validated by Article 33 of Law No. 13154.

833. Shortly after the New Regulatory Framework took effect, on June 12, 2003, the Federal Government, the Province and nine Municipalities, some of which belong to Region B, signed a Master Agreement (“Acuerdo Marco”) providing for joint work to be undertaken for solutions to the sanitary emergency affecting the population of Greater Buenos Aires and to carry out negotiations in order to obtain funds from the World Bank. The Agreement was later approved by Decree No. 2397/03 of December 5, 2003, which relied on the NRF (CU-139). The Province took responsibility for the construction of another part of the network to serve 870,000 inhabitants that were to be incorporated to

the wastewater service, covering an investment of ARS 160 million from loans granted by the World Bank, budget funds and revenues accumulated in the infrastructure trust fund held by the Province.<sup>330</sup> Consequently, AGBA was invited by a letter of January 29, 2004 (CU-140) to a meeting to assess the progress of the projects performed with the sums loaned by the World Bank in seven districts that were part of the Concession Area under AGBA's charge. On June 28, 2004, AGBA approved the text of an agreement to be subscribed with the Province.<sup>331</sup> AGBA was designated therein as the "Concessionaria", however with a role limited to advise on technical feasibility and supervision. The works were undertaken in parallel to AGBA's presence on the network and they have thus certainly affected the negotiations between AGBA and the Province.<sup>332</sup> For Witness Seillant, this was the first success of the renegotiation.<sup>333</sup> The size of the projects submitted to the World Bank was important and represented for the five concerned districts in AGBA's Zone 2 an increase of the expansion of the water service of 36'556 connections (25%) and for the sewerage service of 98,436 connections (115%).<sup>334</sup>

834. In light of these positive developments and the fact that the reasons invoked by reference to matters dealt with during the renegotiation (like tariff increases and quality standards) have been highlighted *ex posteriori* as deal breakers while in reality they were not, the true reasons for the deadlock of this process must be found in circumstances exterior to the on-going debate between the representatives of AGBA and the Province.

835. Witness Cerruti notes that "provincial officers had warned off the record" that the Concession's fate was dependent on the decision taken by the National Government with respect to Aguas Argentinas S.A.<sup>335</sup> Witness Facchinetti explained that he heard repeatedly from officials of the Province that termination would be done for political reasons while no breach of the Concession by AGBA was mentioned.<sup>336</sup> These were serious, albeit informal signs of a forthcoming strategy of the Province's negotiators to stay close with the approaches and negotiations adopted by the Federal Authorities.

836. When the Province had adopted its attitude of no longer pursuing negotiations with AGBA, it must have been determined by events happening with the neighboring concession that had been handed over to ABSA on March 13, 2002 by Decree No. 757/02

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<sup>330</sup> Cf. public announcement of August 20, 2003 (CU-71).

<sup>331</sup> Exhibit H001 to Seillant I. Cf. Seillant I, paras. 55-57; TR-E, Day 4, p. 123/5-125/12.

<sup>332</sup> Witness Cerruti I, para. 177/178, notes that the Agreement included works that should have been performed within the bounds of AGBA's Concession Contract and that it constituted a clear violation of AGBA's exclusivity right. He does not explain whether and if so to what extent the Agreement covered work AGBA had to undertake under the first Five-Year POES.

<sup>333</sup> Seillant I, paras. 37, 44, 55-57, II paras. 20/21, 29. Witness Facchinetti (I, para. 16) also referred to the agreement as being an appropriate step given the serious economic situation and the renegotiation process that AGBA was involved in, so that the Province could take advantage of the World Bank's funding.

<sup>334</sup> Cf. AGBA's proposal for renegotiation of June 2004, Exhibit H002 to Seillant I, pages 17 and 23 (not numbered).

<sup>335</sup> Cerruti I, para. 277.

<sup>336</sup> TR-E, Day 2, p. 71/5-17.

(CU-211, RA-241). A Memorandum of Understanding based on Section 91 of the New Regulatory Framework was signed with ABSA on April 7, 2005 and approved by Decree No. 757/05.<sup>337</sup> This must have offered the potential for an extension to Zone 2 once AGBA had left the Concession. Other concessions were shifting back into the public sector at the federal level.

837. This explains that AGBA's repeated requests to have the Minister of Infrastructure, Housing and Public Services accepting to resume the negotiations, through letters of July 15 (CU-58), October 14 and November 7, 2005 (CU-189), were not producing positive results above a number of meetings conducted for reasons of courtesy rather than for the purpose of negotiating with AGBA and assisting the Company in its attempt to overcome the situation of progressive deterioration of the services. Significant seems to be the Undersecretariat of Public Services' letter of August 25, 2005 (CU-60) that replies to AGBA's complaints raised in its letter of July 15, 2005, without reacting to its main request consisting in the reopening of the talks on renegotiation, further noting that no tariff increase could be envisaged in light of the policies adopted at the national level.<sup>338</sup> Under these circumstances, any renegotiation of AGBA's Concession was left with no future, and above all, the actual negotiations with AGBA were conducted by the Province in constant observance of the policies developed at the federal level, without introducing this important objective into the actual discussions with AGBA's representatives, who were warned on an exclusively informal basis.

838. Similarly surprising must have been for AGBA to be carved out from the program on sustainable development of the Province that supported the conclusion of framework agreements between the Province and the Municipalities on the provision of drinking water and sewage services on the basis of Decree No. 963/05 of May 12, 2005 (CU-212) that provided for the improvement of public sanitation providers.

839. Further uncertainties emerged on the federal level in relation to the public debate about a new regulatory regime for public service companies proposed by the Federal Government that would almost certainly have later developed at the level of the Province.<sup>339</sup>

840. The Tribunal thus understands that Claimants' impression must have been correct that the purportedly excessive proposal on tariffs on part of AGBA could not have caused the stop of the negotiations in February 2005. As explained above, doubts are permitted

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<sup>337</sup> Exhibit 7 to Giacchino/Walek I.

<sup>338</sup> As Witness Cerruti I, para. 281, explains, the letter "confirmed that a political decision did exist to tie the fate of AGBA's Concession to the National Government's resolution of the conflict that it then faced with the concessionaire Aguas Argentinas."

<sup>339</sup> Cf. press reports: La Nación (October 27, 2004), Clarín (October 23, 2004), El Cronista (October 18 and December 3, 2004), all under CU-229.

about the excessive character of these proposals that have not been convincingly explained and evidenced by Respondent. However, even if the proposals were excessive, there was no serious reason to react by an abrupt end of discussions with a Concessionaire with whom negotiations had been conducted in correct terms over more than a year and who still showed its interest in continuing the service under the Concession.

841. Certainly, AGBA's representatives had to be aware of the forthcoming developments that had been outlined in the Federal and Provincial Decrees establishing the Commissions evaluating public service contracts and the Commissions for renegotiation, and that were in the public knowledge anyhow.

842. However, it was surprising for AGBA to be suddenly confronted with the effects of this evolution in February 2005 without any earlier and appropriate warning from the Province. Even in considering that the "official" argument used by the Province's representatives about the excessive dimension of AGBA's latest tariff proposal had some merit, there was no reason to react by categorically refusing any further answer or reaction<sup>340</sup>. The silent attitude of the Province caused an imbalance all the more so as AGBA sent a considerable number of requests to resume the negotiations in 2005, which showed a positive attitude implicitly calling for a meaningful reaction from its counterparts. Witness Cerruti's statement stands:

"The Province never informed us that it believed our requests to be excessive and let alone that negotiations were suspended because of that. This argument was raised for the first time a year and a half later and to justify Contract Termination (Note No. 234/06 of the Minister dated July 12, 2006), but not during the negotiation process."<sup>341</sup>

843. In the context of renegotiations that were initially caused by Argentina's emergency and the measures taken thereafter, the Concessionaire could expect to be treated with more deference when it had waited more than a year for the renegotiation to start and contributed to it with substantial proposals that have been seriously taken into consideration by the Province. If the Province's policy shifted towards aligning the outcome of the Concession for Zone 2 with the fate of the concession of Zone 1 and others on the national scale, one could expect that in one way or the other, AGBA as counterpart in the negotiation would have been told so clearly and officially.<sup>342</sup> This did not happen and despite a number of other requests for renewal of the talks, the Province remained closed-off from further exchanges of views on this topic until in March 2006 when AGBA got

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<sup>340</sup> Attitude reported by Witness Facchinetti I, para. 34a, p. 9; TR-E, Day 2, p. 70/18-22.

<sup>341</sup> Cerruti II, para. 92.

<sup>342</sup> One factor in favor of understanding the Grantor's approach could have been the fact that the Province could not move on in declaring the Concession terminated before it had put in place a solution for the immediate taking over by another concessionaire or contractor (cf. Witness Seillant, TR-E, Day 4, p. 116/19-117/2). However, this difficulty was relatively easy to be resolved because Zone 1 was in the hands of state-entity ASBA, with which a MOU had been concluded under the NRF in April 2005.

to learn that the outcome of Aguas Argentinas' concession was the signal for the termination of AGBA's Concession. It was then also told by Mr. Sanguinetti at the meeting of March 22, 2006 that it was expected to accept, without further negotiation, to request termination based on an agreement with the Province, as explained by Witness Hernando at the hearing.<sup>343</sup> AGBA declined to act accordingly.<sup>344</sup> There was no ground for keeping AGBA on hold from February until the end of 2005 without informing the Concessionaire about the policy that then came to prevail and that was of a nature to most probably determine AGBA's future. Nor was it fair and equitable to invite AGBA to submit proposals for a renegotiation and to entertain intensive discussions, which were put to an end abruptly in reliance on federal policies unrelated to the Concession under negotiation and producing an impact that the Province must have been aware of in advance but did not inform AGBA's representatives appropriately.

844. The situation became different as from the end of 2005 and early 2006, when the Province must have been informed of the two Notices of dispute Claimants had submitted to the Government of the Argentine Republic. According to these formal documents, Claimants were envisaging the filing of claims for arbitration. Such an initiative must have been understood as a sign that Claimants were not interested in pursuing with the Concession any longer.

845. The Tribunal therefore concludes that in light of these circumstances, Respondent – acting through the Province – failed in the period covering the Concession's renegotiation between 2003 and 2005 to provide AGBA and Claimants with a transparent treatment that could reasonably be expected from the host State in its relation to foreign investors. This amount to a violation of the standard of fair and equitable treatment under the BIT and the Tribunal will so declare.

846. Such violation of the BIT raises the question of compensation for the loss allegedly suffered by the Concessionaire and ultimately its shareholders. In this respect, Claimants and AGBA are faced with the actual state of the Concession. By the end of the first Five-Year POES, AGBA's undertakings had manifestly not been fulfilled. In particular, the required objectives in respect of expansion work to be achieved and investment amounts to be provided have not been met, and this for reasons that are primarily attributable to AGBA and its shareholders' failure to provide funding from their own or from third parties above the minimal amount of their stockholding. Under these circumstances, the Concession had no future in any event, and the actual minimal service provided by AGBA did not offer any positive perspective other than to prepare the taking over by a new concessionaire. Therefore, the fate of the Concession was entirely based on AGBA's and its shareholders' failure to comply with their commitments and had not been caused by the Province's handling of the renegotiation in terms not complying with the fair and

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<sup>343</sup> TR-E, Day 3, p 55/2-56/24; Hernando, paras. 73, 75.

<sup>344</sup> TR-E, Day 3, p. 58/25-59/3; Hernando, para. 74.

equitable treatment required by Article IV of the BIT. As from the end of year 2004, at the close of the first Five-Year POES, the Concession was exposed to the threat of termination that was ultimately formalized in June 2006. Therefore, the breach of Article IV of the BIT was not the cause of any prejudice to AGBA's shareholders who were operating at loss due to their handling of the Concession through AGBA as their investment vehicle.

847. The protection afforded by the standard of fair and equitable treatment cannot provide redress where the failure of the Concession is predominantly attributable to the failure on part of Claimants to make the required investment, resulting in a situation where no expansion work or other development could be envisaged any longer on the basis of the undertakings initially agreed upon. Consequently, the Tribunal dismisses Claimants' requests for payment of damages in this respect.

## **IX. The Termination of the Contract**

### **A. The way towards termination**

848. When after a last period of silence and unsuccessful attempts by AGBA to reactivate contacts with the Province the process of renegotiation came definitively to its full stop by the end of year 2005, there was no other outcome reasonably left than to terminate the Concession Contract. AGBA and its shareholders were not willing to continue with a Concession they considered operating at loss after two third of the incomes funded by the users' payments had been taken away by the emergency measures. The Province understood that the strategy of minimal investment on side of AGBA's shareholders – devoid of funding from third parties or from their own – will not be corrected, and that therefore no hope remained to have any forthcoming POES performed by the Concessionaire under the conditions retained in the Contract.

849. For the Concession to operate further under the conditions of the Contract entered into by AGBA, it would have become necessary for AGBA to submit a proposal for the second Five-Year POES and to get it approved by the ORAB. Such proposal was not provided. The only outcome left for AGBA and its shareholders was the renegotiation and, in case of its failure, the end of the Concession and recourse to any available remedial measure.

850. Claimants' Notices of dispute, filed with the Argentine Government in December 2005<sup>345</sup> and January 2006<sup>346</sup> do not provide a full account of the situation as it was understood by AGBA's shareholders at that time. Nonetheless, they must have been a clear

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<sup>345</sup> By CABB, Exhibit 15 to the Request for arbitration.

<sup>346</sup> By Urbaser, Exhibit 14 to the Request for arbitration.



sign given by Claimants that international arbitration was the only outcome left for them to save at least part of their involvement in the Concession.

851. According to these (in their content identical) Notices, Claimants stated that their investment had been adversely affected by unjustified measures adopted by the Federal Government and the Government of the Province of Buenos Aires, and more specifically:

- (i) the infringement of their rights acquired under the BIT, resulting from the “unilateral modification of the contract commitments concerning the conversion of currencies into Argentine pesos when they were originally set in United States dollars”;
- (ii) the unlawful expropriation without compensation of their investment;
- (iii) the violation of the main investment protection mechanisms available to the investors under the BIT, by passing Emergency Law No. 25561 subjecting the investors to inequitable treatment, and because “Grantor repeatedly denied negotiating with Concessionaire for a mutual agreement on the possible measures to avoid the interruption of the financial-economic balance of the Concession Contract”;
- (iv) the breach of the obligation to accord fair and equitable treatment to investments;
- (v) the breach of the commitments undertaken in the BIT not to refrain from issuing arbitrary or discriminatory measures to the detriment of the investors.

On the basis of these Notices, concluding that the measures adopted by the Federal and Provincial Government “have affected the investment causing a damage that the Federal Government must compensate,” there was no room left for any result other than monetary compensation, leaving no perspective for any continuing negotiation restoring AGBA’s shareholders’ involvement in the Concession.

852. CABB’s intention to abandon the Concession was further confirmed by information made publicly available in early 2006 that it was negotiating with the pension funds that ensured the financing of its holding in AGBA the sale of its part.<sup>347</sup> URBASER had informed AGBA’s other shareholders at a Board of Director’s meeting on November 16, 2005 about its intention to initiate proceedings under the BIT.<sup>348</sup> Witness Hernando said that he was aware of the Notice of dispute. This had no influence on him nor did he feel that it had an influence on the Province, because the situation could not have been worse anyhow.<sup>349</sup>

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<sup>347</sup> “El Consorcio negocia con fondos de pensiones la venta en Argentina”, EL PAÍS, January 9, 2006 (RA 66).

<sup>348</sup> Minutes of CABB’s Management Board Meeting held on December 20, 2005, dated January 26, 2006 (CU-278).

<sup>349</sup> TR-E, Day 3, p. 82/20-83/17.

853. On part of the Province's Executive, preparations were ongoing for a declaration of termination to be issued in due course. A press release of March 23, 2006, explained that the Province's Governor was pondering the termination of the Concession, after having received a report from Mr. Sicaro on AGBA's alleged serious breaches.<sup>350</sup> It was said that Argentine's President's push in nationalizing water and wastewater services companies operating in and nearby Buenos Aires provides back-up for terminating the Contract with AGBA. The Governor was also told that the Company's relentless call for a tariff increase or a subsidy stalled talks for renegotiation.

854. On March 10, 2006, Mr. Sicaro, Minister of Infrastructure, Housing and Public Services, instructed OCABA by Resolution No. 84/06 (CU-75) to provide detailed information on the breaches of contractual provisions committed by AGBA and to advise whether these breaches allow the termination due to the Concessionaire's fault based on Article 14.1.3 of the Concession Contract. On March 22, 2006, OCABA's Head of the Department of Regulations received, upon his request, all of OCABA's administrative files on AGBA. A detailed report on AGBA's failures to comply with the Concession Contract had been prepared thereafter by the Technical Area on April 12, 2006, on which a report submitted by the Buenos Aires Water Regulatory Agency on April 21, 2006,<sup>351</sup> was based (both under CU-76, RA-210).

855. AGBA must have been aware of the Executive's intention when it tried for a last time to redress the situation by its communication of June 14, 2006 to the Grantor (CU-190). Witness Facchinetti recalled that he was told a few days before by Mr. Sanguinetti, Undersecretary of Public Works that the solution will be: "either you terminate or we terminate."<sup>352</sup> AGBA then reacted first, requesting in its letter of June 14, 2006 from the Province "to cure all breaches and restore the financial and economic equation of the concession held by AGBA within a term of 45 days." Section 14.1.4 of the Concession Contract was expressly referred to, under "the warning of exercising all rights conferred under the Contract."<sup>353</sup> In response, the Grantor went ahead and gave notice of termination to AGBA, followed the next day, on July 12, 2006 (CU-167, RA-194) by a letter in reply to AGBA's complaints raised on June 14, 2006. On July 13, 2006, the services in the districts under AGBA's Concession were transferred to ABSA by Decree No. 1677/06 (CU-203).

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<sup>350</sup> Exhibit 253 to Giacchino/Walck I.

<sup>351</sup> It may be assumed that this report was the basis for the elaboration of the decision on termination, which had existed in draft form before June 8, 2006 when the Attorney General's Office of the Province provided its comments (CU-170).

<sup>352</sup> TR-E, Day 2, p. 120/19-121/1. The Witness further explained that AGBA's letter still left open a possibility for redress and was not meant to threaten the Grantor anyhow, albeit it mentioned the contractual termination term of 45 days ; TR-E, Day 2, p. 124/3-16, 127/2-10, 128/2-3.

<sup>353</sup> Witness Cerruti I, para. 286, states that the letter meant that if AGBA's requests were not granted, "AGBA would terminate the Concession under Section 14.1.4 of the Contract."

B. Provincial Decree No. 1666/06 on termination

1. *Outline of the grounds for termination*

856. Decree No. 1666/06 dated July 11, 2006 (RA-195, CU-166) contains a list of contractual obligations the Province identified as being breached by AGBA and that fall within the reasons for termination due to the Concessionaire's fault as set forth in Section 14.1.3 of the Concession Contract. AGBA was thus held responsible for the following:

- 1) Serious noncompliance with legal, contractual or regulatory provisions to the Service (lit. a);
- 2) Repeated and unjustified delays in fulfilling the coverage goals set forth in the POES (b);
- 3) Repeated violation of the User regulations provided for in Article 13-II of the Regulatory Framework (h);
- 4) Repeatedly withholding or concealing information from the Regulatory Agency (i);
- 5) Failure to furnish, renew or refurnish the Contract guaranty as provided for in Section 11.1, and the Operator guaranty provided for in Section 11.2 (k).

857. The grounds of non-compliance as invoked under No. 2 to 5 are then identified and explained in the Decree. There appears no development in respect of item No. 1, which seems to be a catch-up rule covering all topics further addressed in the Decree.

2. *General matters*

a. Claimants' views

858. Against the background of the failed renegotiation process, Claimants explain that in the end phase of the Concession the Grantor engaged in conduct intended to wear the Concessionaire out. In the last stages, it planned its actions with the sole goal in mind to terminate the Concession Contract and get the service back without paying any compensation. It hindered systematically the measures defined in the Contract to ensure payment for the service. In 2003, the new Government brought a shift in priorities and the Grantor acted accordingly. It waited for the privatization of the water and sewage service at the federal level and then walked down the same path. It used early termination due to breaches to cover up what was actually a confiscation.

859. Decree No. 1666/06 terminated AGBA's concession "due to the Concessionaire's fault," referring to the grounds stated in Section 14.1.3 (a), (b), (h), (l) and (k) of the Contract. Such early termination was nothing but the final step in a process of expropriation or confiscation targeting AGBA's Concession and the Claimants' investment. It took place in the seventh year of the Concession, following the freezing and pesification of the

tariffs, which had been cut down to one third of their initial value in the third year of the Concession term. The said Decree included in its Section 5 the order to suspend payments to the Concessionaire for services provided until the date thereof, which prevented AGBA from collecting bills totaling about 110 million pesos. This early termination was used for a purpose other than its intended purpose, in an obvious misuse of authority. The Concessionaire brought an action to have the said Decree declared null and void before the La Plata Contentious-Administrative Court No 2 on December 4, 2006. The proceedings are at the evidentiary stage.

860. Termination was decreed after the declaration of economic emergency and the adoption of a series of measures which reduced AGBA's tariffs by two thirds. It was ordered after apparent renegotiations during which AGBA's tariffs were never increased. Faced with this dramatic and unforeseeable alteration of one of the basic conditions of the Concession, it is impossible to ground the termination on breaches by the Concessionaire.

861. The termination of AGBA's Concession on the grounds of breach is incompatible with the declaration of economic emergency and the measures adopted to address it, upon the pesification of the tariffs and the rejection of every request for review submitted by the Concessionaire. The application of the principle of "rebus sic stantibus" is an insurmountable obstacle to any attempt at justifying the termination, as explained by Expert Bianchi.<sup>354</sup> Expert Mata as well refers to extraordinary circumstances. The Concessionaire was unable to accomplish investments in the expected amounts due to the decrease in its income as a result of the lower value of its pesified tariffs and its inability to access the financing that was being negotiated. The fact that the termination due to a breach is entirely at odds with the economic emergency declared and the measures adopted by the Province to address it renders this apparent termination a sort of uncompensated redemption, confiscation or expropriation. Claimants quote Judge Brower's dissenting opinion in the *Impregilo* case, stating that "the Award's conclusion that the Province's termination decree was legitimately based on the failure of AGBA to meet its Concession Contract obligations cannot be reconciled with the conclusion that Claimant was denied fair and equitable treatment by the 2002 pesification of that Contract."

862. Claimants further point to the lack of sanctions. In line with the principle of good faith, it would seem reasonable to understand that when the Grantor abstained from applying the relevant penalties, it was acting in a way tantamount to the inexistence of breaches. Any other conclusion would show a violation of fair and equitable treatment. The investor's legitimate expectations would be inconsistent with the action of a Grantor who overlooks breaches by a Concessionaire with foreign investors, waiting for the very last moment to decide to allude to all hypothetical breaches without giving the opportunity

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<sup>354</sup> Bianchi III, paras. 42-56.

to rectify them in order to justify the Concession Contract's termination. If the economic emergency and the measures adopted to counter it are added, the violation of the BIT becomes even more obvious. If it is admitted that the Grantor breached its obligation to apply the relevant penalties, this situation would be in and of itself be proof of the existence of a violation of the fair and equitable treatment principle.

863. On a more fundamental level, Claimants submit that the termination was based on an exclusively political motivation: "the termination of the Concession was encompassed within a political strategy, and was the result of a decision adopted by the Administration on political grounds."<sup>355</sup> The statements of the Governor of the Province a few months before termination had announced to the media that the decision to terminate the Concession had already been made. Witness Facchinetti mentions a similar position taken by Minister Sícario at a meeting in July 2006. The Argentine Republic acknowledges the political nature of the termination. The termination of the Concession was encompassed within a political strategy, and was the result of a decision adopted by the Administration on political grounds. Such decision is tantamount to an expropriation.

864. The early termination of AGBA's Concession Contract was tied to the early termination of Aguas Argentinas' contract that has been declared on March 21, 2006.<sup>356</sup> This is best demonstrated by the Province's Governor's statements made the day after termination Aguas Argentinas' contract. At that time, the decision to terminate AGBA's Contract had already been made; its public announcement followed immediately, and ABSA as replacement service provider was already determined. It was well known that the termination as it was to be declared was not properly grounded. OCABA had expressed the view that this was a complex issue and it asked to have the files submitted for review, thus acknowledging that it did not have in its possession all information.<sup>357</sup> The Governor's statement demonstrate that there was a pre-existing decision to terminate AGBA's Contract and that such decision was based on political grounds very different from the grounds finally invoked as justification for the termination. The conduct and the positions of ORAB and OCABA in the various incidents with AGBA were not unrelated to political motivations. There must have been taken as guidelines based on political reasons that subjected the Concessionaire to a *de facto* regime entirely different from the one provided for in the Regulatory Framework.

865. Claimants further submit that the termination of AGBA's Concession was not actually grounded on breaches by the Concessionaire. This is explained in the first Report prepared by Inglese Consultores S.A., the Auditor of AGBA's Concession: (i) Pursuant

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<sup>355</sup> Reply to the Merits and Answer to the Counterclaim, para. 375; Hernando, TR-E, Day 3, p. 8/4-12, 56/13-18.

<sup>356</sup> Decree No. 303/06 (CU-19).

<sup>357</sup> As shown by the OCABA's Rules Manager's letter of March 22, 2006 (CU-207) and OCABA's President's decision of the same day (CU-208).

to Section 6.3 of the Contract, the Concessionaire had to designate and hire a Technical Auditor; (ii) Inglese Consultores S.A. was appointed by AGBA; (iii) the Technical Auditor was an integral part of the Concession's regulatory system; (iv) it acted as assistant of the Regulatory Agency and ensured that the information provided to it was accurate. The Technical Auditor concluded: (i) AGBA intended to be audited by the company most qualified for the task; (ii) the Auditor certifies that the Annual Reports submitted by the Concessionaire allow for an evaluation of its operations and compliance with the Contract; (iii) it was reasonable to analyze the impact on the economic-financial equation of the concession and adjust the system and tariff levels and the expansion purposes and service levels to such consequences; (iv) the Technical Audit could also certify that at the end of the year 5 of the Concession, after more than 3 years of crisis, such adjustment had not occurred yet.

866. AGBA found itself dealing with a termination decree that listed alleged violations, on which the Concessionaire had not even been warned about and had never been ordered to correct, and in connection with which it was never given the opportunity to present a defense.<sup>358</sup> AGBA was notified of the early termination of the Contract without having been afforded the opportunity to provide a statement and arguments denying the allegations made against it, and without having been offered the possibility to correct the breaches, as this was required, *inter alia*, by Chapters 13 and 14 of the Contract, Law No. 11820 (Sec. 4(c) and 20(h)), the New Regulatory Framework Section 88(m), requiring respect for the due process of law, and the Law on Administrative Procedure (Sec. 103).

867. The early termination of AGBA's Concession was carried out in utmost disregard of the defense rights enshrined in the applicable legal and contractual provisions. This decision was devised for the specific purpose of serving interests that were political in nature. AGBA was faced with a Contract the economic-financial equation of which had been dramatically disrupted by a set of so-called emergency measures, which, because of their ongoing application, have become final provisions, without the renegotiation process imposed by the same legislation ever yielding any sort of positive result for AGBA. What was impossible to reach for AGBA was reached easily by ABSA, which evidences discriminatory treatment. AGBA's investors' rights were consummated, irreversibly and definitely depriving them of the object of their investment.

868. The mere termination of a Concession after only one fifth of its effective period had elapsed is more than sufficient cause for damage to the Concessionaire and the investors, who, in addition to being prevented from earning profits on their initial investment were also kept from even recovering their investment. The investors were cut short of any prospective recovery in the future. It is true, indeed, that crisis periods are followed by prosperity periods. So, an investor must consider the entire period to come to a conclusion

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<sup>358</sup> For Claimants' Experts, "the Province did not give the firm any warning" (Giacchino/Walck II, para. 253), as would have done a "reasonable regulator" (para. 246).

regarding the timing, viability and results of an investment. However, in the instant case, such predictions came to nothing when the Grantor terminated the Concession with only one fifth of the initially defined period behind. The Grantor's conduct kept the economic-financial equation to the Concessionaire's detriment from being restored.

b. Respondent's views

869. Respondent disputes Claimants' allegation that the termination was based "exclusively on political grounds." Such argument is devoid of any meaning, because all public authorities' activities are political. And politics is not, *ipso facto*, evidence of irrational or arbitrary conduct of a government. In this case, there are objective grounds justifying termination. The fact that any political motivation may have been involved does not amount to a breach of international obligations. Claimants' claim on this point lacks any legal validity. They refer to newspaper articles and third parties' statements. Prior to the date when Provincial Decree No. 1666/06 was issued, different social and political sectors had requested the termination of the Contract. There is no point in arguing that these initiatives were political and therefore irrelevant.

870. Respondent also mentions that Claimants attach the report of Inglese and reach the conclusion that the termination for breach was actually a veiled rescue, confiscation, or expropriation. Inglese's role was to be the Technical Auditor of AGBA's Concession. As per Section 6.3 of the Contract, the Auditors' duties shall facilitate the exercise of police power by the Regulatory Authority. According to the terms of the audit contract, Inglese had the responsibility to provide information about the Concessionaire's compliance with its obligations. The Technical Auditor's tasks do not include giving an opinion as regards compliance with the Concessionaire's contractual obligations. He notes that on several occasions the audit certificates issued by Inglese exceeded the scope of its mandate, by adopting positions on the fulfillment of the Contract by the Concessionaire. Inglese admitted in a report that it did not prepare the audit plan necessary to support the relevant certification of the POES progress report. Thus, there is evidence for Inglese's lack of independence as regards the Concessionaire. Instead of cooperating with the Regulatory Authority, it gave an opinion as regards compliance of the contractual obligations by the Concessionaire, as this is confirmed again when submitting its report together with Claimants' Reply.

c. The Tribunal's findings

871. The Tribunal acknowledges that the competent authorities in charge of dealing with AGBA's Concession exercised political functions. However, the first task of the Tribunal is simply to analyze whether Decree No. 1666/06 was or was not a lawful termination of the Concession Contract. It would only be if the termination was unlawful that the Tribunal would then need to proceed to determine whether Claimants have been seriously deprived of their Treaty rights.

872. Claimants' statement to the effect that the mere finding that the fair and equitable treatment principle has been violated in pesifying the tariffs precludes considering the Contract to have been terminated on grounds of breach by the Concessionaire is not correct. If this principle had been violated in respect of a specific occurrence as the tariffs' pesification, it would be correct to admit that no breach of Contract could be admitted if it was caused by such a decrease in tariffs and in the income of the Concessionaire that is based on it. On the other hand, if the Concessionaire has not complied with its contractual commitments for different reasons, not related to such a decrease in tariffs, it could very well be in breach of its contractual undertakings. Thus, it would be surprising that an alleged violation of the fair and equitable treatment in respect of the pesification of tariffs would have the effect that the Concessionaire could no longer be faced with any argument based on its breaches of the Contract that are unrelated to the facts underlying the violation of the fair and equal treatment standard, *i.e.* its obligation to proceed with investments according to the POES, or its duty to provide performance guarantees. Similarly, such a violation could not have in any way the effect of exempting the Concessionaire of any threat to the population's health, for instance in case it had the nitrate level of the drinking water exceeding far above the acceptable maximum.

873. The Tribunal is not convinced by Claimants' complaints that it was not awarded any opportunity to correct the deficiencies in its performance. In fact, AGBA was given such opportunity several times in the course of ORAB's statements in relation to AGBA's report on progress of the POES, starting with Resolution No. 77/02 of December 30, 2002 (CU-137, RA-121) and with Resolution No. 25/03 of September 17, 2003 (CU-69). Although these warnings had been issued well before the term of the first Five-Year POES, they kept their relevance beyond that time in light of AGBA's on-going failure to reach the goals undertaken.<sup>359</sup> ORAB had also expressed its concerns about AGBA's resources to meet the investment goals of the POES.<sup>360</sup> In summer 2006, there was no point in reopening such a timeline for AGBA to cure its delays in performing the Contract when AGBA was announcing to the Province itself, in its letter of June 14, 2006, that it was considering stepping down from the Concession, and after Claimants had declared to the

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<sup>359</sup> Thus, it appears correct when Witness Cinti states that a list of all of the non-performances had been provided in Resolution No. 77/02 (TR-E, Day 3, p. 147/15-19, 148/7-10, 151/13-155/17, 160/9-25; Cinti I, paras. 132-135, II, paras. 104-106). Claimants object in their Post-Hearing Brief that the reference to these Resolutions is inconsistent in light of the fact that there did not exist a notice of default, and above all that the goals had been declared to be reached for year 1 and neutralized for year 2 (para. 155). Claimants overlook that these decisions in respect of years 1 and 2 did not remove the overall goals of the first Five-Year POES. Another misconception is contained in the objection that if the defaults went back to 2000 and 2001, the Province should have declared termination at that time, instead of waiting until 2006 (para. 156). This is again misunderstanding the system of POESs, whereby the Five-Year POESs only are mandatory. Therefore, the Province would have had a difficult task to try to find grounds for termination upon the Concessionaire's fault before non-compliance with the first Five-Year POES was verified by the end of 2004.

<sup>360</sup> ORAB's letters of September 26, 2001, January 22, July 2, 2002; Exhibits 183, 185, 190 to Giacchino/Walck I.



Federal Government, through their Notices of Dispute, that they were seeking compensation for the measure that had allegedly adversely affected their investment.

874. In so arguing, Claimants do not respond to the statements contained in Decree No. 1666/06 that the breach identified by the Province “is at present fully materialized” and that it “cannot be cured, overcome, or reversed, as the damage to the population has already been done.” Claimants do not offer an explanation how AGBA would have been able to proceed in a short timeframe with expansion works that the Decree identifies as never been undertaken, or by providing funding it did not obtain and did not want to provide from their own shareholders’ sources. In any event, AGBA was abundantly informed about the breaches by ORAB’s Resolutions.

### 3. *Scope of the dispute*

875. Claimants state that what they have to prove is that the termination constituted a violation of the BIT, for which purpose it is sufficient to prove that the termination was not due to the Concessionaire’s breaches, but due to other reasons. They maintain that it is not correct to place on Claimants the burden to prove that no breaches did occur. The Arbitral Tribunal’s role is not to determine whether the breaches invoked in support of termination existed, and the termination therefore was admissible, but rather if there were circumstances allowing to conclude that the termination for breach of contract was a mere excuse to expropriate the Concession and the termination was a politically based act of government.

876. Respondent explains that the termination Decree was adopted in compliance with the provisions of the Concession Contract. Section 14.1.3 of the Contract provides that the Grantor has the power to terminate the Concession Contract for the Concessionaire’s fault in the events listed under letters a, b, h, i and k. Thus, the Province (as the Grantor) had the power to terminate the Contract based on the Concessionaire’s many breaches. The termination Decree is an administrative act consisting in a unilateral statement issued in the exercise of the administrative function. All legal conditions as to substance and to form have been fulfilled in accordance with the Administrative Procedure Law of the Province of Buenos Aires. The termination of the Contract was decided on the basis of a detailed report on AGBA’s breaches, issued by the Regulatory Authority on April 11, 2006. All of the listed breaches can be subsumed under the grounds for termination due to Concessionaire’s fault foreseen in Section 14.1.3. Resolution No 25/03 of September 17, 2003 outlined already each and every breach committed by AGBA, which were aggravated by the passage of time until the day of termination. Thus, contrary to Claimants’ submission, the Province did inform AGBA on time about the alleged breaches before it declared the termination of the Contract.

877. Respondent also submits that the termination declared by Decree No. 1666/06 is a contractual matter that must be heard by the contentious administrative courts of the City of La Plata and not by an ICSID Arbitral Tribunal. Respondent observes that Claimants have recognized in many parts of their Reply the lack of jurisdiction of the Arbitral Tribunal over the matters inherent to the termination. They affirmed that the Arbitral Tribunal's role is not to determine whether the breaches invoked existed and whether the termination was admissible. They have recognized that Decree No. 1666/06 has been contested by the Concessionaire before the administrative courts in La Plata and that the proceedings are still pending. In conclusion, the claim on termination is a contractual claim not before this Tribunal.

878. The Tribunal understands that the grounds of termination invoked by the Province in Decree No. 1666/06 are not before this instance as a contractual matter. The burden of proof would be on Respondent's side, *i.e.* the required demonstration that the breaches allegedly committed by the Concessionaire actually occurred. The Tribunal does not entertain any debate about the proceedings pending before the administrative courts in La Plata on AGBA's initiative, nor does it consider relevant the opinion of Attorney General Szelagowski (RA-196) allegedly filed in defence in that administrative proceeding.

879. Claimants invoke Decree No. 1666/06 as an alleged ground of a violation of a guarantee recognized under the BIT, mostly as an act of expropriation for which the Argentine Republic has to assume responsibility. For this purpose, Claimants bear the burden of proof of the pertinent requirements in support of the proof of such a breach.

880. The Tribunal has to examine whether Claimants can show that the breaches allegedly committed by AGBA did not constitute grounds sufficient to allow a declaration of termination under the Concession Contract. If and to the extent Claimants fail in such demonstration, the declaration of termination itself cannot constitute, in this respect, a breach of an obligation under the BIT. This would then have adverse effects on the claim based on an alleged expropriation caused by the termination.

881. If such case would be confirmed, this would still leave open another argument, which appears implied in Claimants' position, submitting that in case the termination declared by the Province had a legal foundation in the Contract, this would not dispose of Claimants' contention that they were deprived of their rights for reasons other than the termination, in particular by reference to the emergency measures and the Province's conduct during the renegotiation. When looked at from this perspective, Claimants' argument places the termination as a consequential event, allegedly based on political reasons, at the end of the line of AGBA's deprivation of its rights starting with the emergency or even earlier on. Nonetheless, from this point of view as well, the grounds of termination retained in the Decree may be of relevance as part of a succession of events constituting an alleged breach of an obligation under the BIT.

882. The Tribunal notes, however, that its task is not to make rulings about the legal foundation of the termination declared by the Province under the Concession Contract. The Tribunal's examination has to focus on the effects of the Decree on termination upon the Claimants' position in respect of its allegations based on a violation of an obligation of Respondent under the BIT. Therefore, the Tribunal will mention, but not further consider grounds of termination that reflect a purely contractual dispute that does not affect the Parties rights and obligations under the BIT. The approach is similar, in this respect, to the Tribunal's examination of Claimants' allegations on violations of the Concession Contract in Chapter IV.

4. *The grounds for termination reviewed*

a. The POES service expansion goals

aa. Claimants' position

883. Claimants explain that Decree No. 1666/06 held that AGBA had incurred repeated delays in the fulfillment of the service expansion goals provided for in the Service Optimization and Expansion Program (POES). However, there was no such failure, because the Regulatory Agency confirmed the POES fulfillment for the first year of the Concession, suspended the deadlines for the second year and did not rule on the Concessionaire's requests concerning the POES for the following years, which covered a period subsequent to the issue of the emergency measures. Under the Contract, the POES "establishes the quantitative and qualitative goals to be attained by the Concessionaire and includes the Five-Year Plan" (Sec. 1.2).

884. On March 22, 2000, AGBA filed the POES' first Five Year Plan (2000-2004) with ORAB (CU-192), followed by a final version on November 8, 2000, which was approved by ORAB on January 31, 2001 (Resolution No. 07/01, CU-193, RA-182). AGBA filed its first annual POES progress report on July 17, 2001 (CU-194). It was approved by ORAB on December 3, 2002, stating that AGBA "has met the service expansion and quality goals" (Resolution No. 69/02, CU-129, RA-113).

885. A few days before the enactment of the Province's Emergency Law No. 12727 (CU-195, RA-164), the Concessionaire requested the temporary suspension of the first Five-Year POES by letter of July 17, 2001 (CU-135, RA-192). This suspension was granted by ORAB for the second year of the Concession (Resolution No. 77/02 of December 30, 2002, CU-137, RA-121), explaining that in light of the extraordinary events that had occurred, "the modification of the five-year plan for the second year of the concession is admissible." AGBA submitted the POES progress reports for year 3 (2002), 4 (2003) and 5 (2005), but ORAB never ruled on any of them.

886. Following Law No. 12727, were issued Federal Law No. 25561 of January 6, 2002 (ordering tariff pesification and freeze), ORAB Resolution No. 4/02 of January 11, 2002 (anticipating AGBA's tariffs' pesification before the enactment of Law No. 12858 of March 6, 2002), and finally Decree No. 878/03 (approving the NRF). This new legislative framework rendered the fulfillment of the set of goals and targets as established in the Regulatory Framework impossible. In addition, this legislation ordered the initiation of a renegotiation process that the Grantor never honored.

887. Accordingly, there is no justification or point in raising a failure to fulfill the POES goals as grounds for termination, when fulfillment had been confirmed for year 1 and the POES suspended for year 2, without the Agency ever ruling on the same subject in the years that followed, due to the emergency situation. Moreover, no attempt was made to restore the contractual equilibrium, not even in a renegotiation process that the Grantor followed as a mere formality. When Respondent argues that the goals unfulfilled in years one and two should have been met in years three to five, it does not take account of the fact that year 3 (2002) was when the tariffs were pesified and frozen for the rest of the Concession. It was not possible to consider that the 2001 crisis justified the suspension of the POES, while understanding the same suspension as ineffective and of no consequence for the following years.

bb. Respondent's position

888. Respondent recalls that one of the principal aspects of AGBA's Concession was compliance with the POES by the Concessionaire. Section 38 of Law No. 11820 provides that the Concession Contract shall include the Five-Year POES corresponding to the entire concession period, which from year one (1) to five (5) shall be mandatorily complied with. From year six on, programs shall be updated by the Concessionaire and shall be submitted to ORBAS for approval. Such programs shall include detailed projects of periodic plans, which in turn shall include the investment amounts expected. Section 39 provides that failure to comply with such plans shall be deemed a serious offence. The Concession Contract considers that complying with the POES is mandatory, as this is clearly stated in Annex F. Section 5.3 states that upon the approval of the Concessionaire's proposal, this becomes the Five-Year Plan and shall be part of the POES and be binding. Claimants recognized the mandatory nature of the POES.

889. The serious breaches committed by AGBA were the ground for the Province to issue Decree No. 1.666/06. The Grantor has the power to terminate the Contract due to the Concessionaire's fault, based on the grounds listed in Section 14.1.3, of which those mentioned under letters a, b, h, i and k are relevant in the instant case. Claimants also failed to meet the objectives imposed by the POES under Section 13.2.5.5. The Province's decision to terminate the Contract was a logical consequence of AGBA's breaches, which are explained in full detail in the Decree.

cc. The Tribunal's findings

890. The Tribunal's first emphasis shall be on the ground of termination in respect of AGBA's failure to comply with the POES as it is identified in Decree No. 1666/06. In respect of the Concessionaire's fault under Section 14.1.3(b) of the Concession Contract, the Decree starts by recalling the mandatory service optimization and expansion program established in Chapter 5 of the Concession Contract. This program "must be complied with by the concessionaire in six stages following the preparation of five-year plans." The Decree then refers to the first Five-Year POES, as approved by Resolution No. 7/01, and it notes that AGBA had undertaken therein to invest USD 230,917,300 million. This POES represented the contractual obligations and goals and in particular the Concessionaire's "responsibility for compliance with the POES goals." These basic statements contained in the Decree confirm that the Concessionaire's mandatory obligations to comply with the POES take as their terms of reference the Five-Year POESs only. This is what Section 5.3 of the Concession Contract provides for.

891. This also means that the One-Year POESs that were to be set-up during the first five-year period did not have such a mandatory character. These programs had as their purpose to set-up goals to be achieved by the Concessionaire, and they triggered an obligation for the Concessionaire to prepare an assessment of the stage of on-going work, to be submitted to the ORAB in the form of a yearly progress report. Given that these programs were not declared as mandatory under Section 5.3 of the Contract, the fact for the Concessionaire of not having met the targets set therein did not entail its responsibility. Accordingly, the Decree No. 1666/06 does not invoke any delay in fulfilling coverage or investment goals of such a yearly POES as a ground for termination.

892. The Decree invokes the First-Year POES (2000) as an "implementation" of the first Five-Year POES. It recalls that Resolution No. 69/02 approved the compliance with goals and milestones of the first year of implementation of the first Five-Year plan, and that Resolution No. 77/02 provided that, in relation to the coverage goals for the second year of the concession (2001), the required annulment of the implementation period of the works and expansion program should be granted, and that the percentages that had not been complied with should be adjusted together with the Granting Authority. The Decree further explains as follows:

"Whereas the aforesaid annulment of the POES implementation period for the second year of the concession did not imply setting aside the goals undertaken by the concessionaire for that year; rather it meant that they should be readjusted in accordance with and under the procedure established by Emergency law No. 12,858 with the Granting Authority."

The Decree then quotes a communication of the Chairman of the Board of ORAB of September 11, 2001, stating

“... this Regulatory Agency believes that the determination of the deferral of the five-year plan should only be limited to the coverage goals (expansion works), that the circumstances warrant such deferral and that a period not exceeding 6 months from that required under the five-year plan should be granted to resume the execution of works.”

The Decree then concludes that “all coverage goals specified in the aforesaid plan must be attained by the end of the five-year plan.”

893. The Decree further explains that Resolution No. 77/02 had also stated that the goals for the second year of the First Five-Year Plan had to be adjusted, and this within the framework of the utility contract adjustment procedure established by Law No. 12858 and Decree No. 1175/02. Since the annulment of the POES implementation period for the second year did not imply setting aside the goals undertaken, this implied a need to re-schedule the works undertaken and unexecuted by AGBA in that second year.

894. These positions, jointly reflected in Decree No. 1666/06 and Resolution No. 77/02, had two implications: (1) The decision taken in respect of the “annulment” or “neutralization” of the goals set for year 2 (2001) was of a temporary effect only and did not remove these goals to be attained under the first Five-Year POES that had not been modified in any way. (2) The shift of the goals for year 2 into the remainder of Years 3 to 5 required an adjustment procedure to be undertaken.

895. In this latter respect, Decree No. 1175/02 instituted a Commission having as one of its tasks adjustments required in respect of on-going concessions. It is common ground that this Commission did not undertake action in that perspective in the instant case, and that the matter became part of the broader renegotiation process that ultimately failed.

896. The termination Decree No. 1666/06 does not reflect the failure of such contract adjustment. It does not address either the fate of yearly POES programs for years 3, 4 and 5.

897. The Decree’s ground for termination relating to the POES is based exclusively on the mandatory nature of the Five-Year POES. In this respect, AGBA’s obligations and responsibilities remained unchanged, since the emergency measures did not alter the validity and application of public service contracts, including AGBA’s Concession. The division of works for performance within that period and in respect of the yearly POESs remained independent from AGBA’s duty of compliance with the Five-Year POES. In particular, the adjustment required as a consequence of the suspension of the program for year 2 did not imply any setting aside of the goals undertaken in the Five-Year POES, subject to a possible renegotiation, which was not conducted successfully.

898. Claimants argue, however, that after the suspension of the goals retained for year 2, the same consequence must have been applied to the programs for year 3, 4 and 5. Such conclusion fails to consider that no decision had been taken by ORAB to the effect that POESs for the years 3, 4 and 5, were suspended (as this was done for the plan for year 2) or that those plans were no longer required, pending a future renegotiation. It must be considered again, in this respect, that AGBA remained bound by the Five-Year POES. If the plans for years 3, 4 and 5 would have lost their relevance, this would not have necessarily the effect that the goals of the Five-Year POES could no longer be relevant either; such an extended deprivation of effects would have required an amendment pursuant to Section 5.4 of the Concession Contract. Such amendment was never made and AGBA did not file a request that this should be done.

899. The Decree explains in detail, for each district, and in part for a great number of localities, the expansion goals the Concessionaire had to reach in light of the required investment, and that in fact it failed to reach. The information provided in the Decree is based, as explained therein, on a report prepared by the Buenos Aires Water Regulatory Agency dated April 21, 2006, which is based in part on a report prepared by the Technical Area on April 12, 2006 (both under CU-76, RA-210). These documents contain further details identifying the expansion work not accomplished. The percentages given here below are those contained in the Decree and, when printed in *italics*, those mentioned in these reports but missing in the Decree.

900. In this respect, the Decree recalls that based on the first Five-Year POES as approved in Resolution No. 7/01 the Concessionaire undertook to make an investment of USD 86,663,700 million for the expansion of the drinking water network, and that the main results in comparing the goals specified in the POES and those actually reached are as follows (using percentages of the population concerned):

Expansion of drinking water network in Districts:	Goals specified in the POES	Goals attained by AGBA
Escobar	78.5	85.25
General Rodríguez	55.3	47.34
José C. Paz	58.2	8.82
Malvinas Argentinas	67.2	5.29
Merlo	83.1	46.44
Moreno	81.1	42.73
San Miguel	74.5	45.11

Based on this information, together with the additional details provided, the Decree concludes that AGBA only complied with the drinking water supply expansion goals in the Escobar District and failed to comply with the POES in all other Districts insofar as none of the drinking water supply service expansion goals have been met.

901. On the other hand, the Concessionaire undertook to make an investment of USD 144, 253,600 million for the expansion of the sewer network. The main results in comparing the goals specified in the POES and those actually reached are as follows (using percentages of the population concerned):

Expansion of sewer network in Districts:	Goals specified in the POES	Goals attained by AGBA
Escobar	56	56
General Rodríguez	43.4	42.01
José C. Paz	50.8	0
Malvinas Argentinas	40.9	0
Merlo	58.8	23.77
Moreno	57.8	20.96
San Miguel	69.8	41.98

Based on this information, together with the additional details provided, the Decree concludes that AGBA also failed to comply with the expansion goals regarding the sewage service. In particular, the Concessionaire's failure to perform any of the sewage works undertaken has as result that the percentage of served population in tow of the districts is 0%.

902. In sum, the Decree concludes that the Concession's network suffered from "a serious, repeated, and systematic breach of contract, given that AGBA has failed to comply with most of the expansion works in connection with the drinking water and sewerage supply service, as stipulated in Annex F to the Concession Contract." It is added that "the non-compliance amounts to 84% in relation to installation of water networks and practically 100% in connection with the laying of sewer networks, which has deprived approximately 100,000 potential new users of drinking water and 150,000 potential new users of sewerage in the concession area."

903. As the matter is addressed in this context as AGBA's performance with the Concession Contracts, the Tribunal understands that AGBA was far from complying with the goals determined and undertaken in the first Five-Year POES. This can be looked at mainly from two perspectives: (1) The figures of non-compliance in respect of the expansion goals to be attained clearly show that AGBA was far behind schedule. (2) The other perspective starts by looking at the amount of funds to be invested by AGBA, above USD 230 million, and the amount actually made available, which is so low that no expansion work above the parts actually construed could be expected. AGBA's failure to attain the expansion goals determined and accepted in the first Five-Year POES is thus established.



b. The micro-metering goals

904. The installation of micro-meters that allowed to measure consumption of drinking water in each particular locality was closely linked to the expansion work. Section 29-II of Law No. 11820 states that “the metered consumption tariff system shall mandatorily apply to all expansion works.” As long as it is not implemented on other parts of the network, the fixed rate tariff system shall apply. Decree No. 1666/06 states that the Concessionaire has not complied with the micro-measurement goals insofar as it has failed to install meters with the effect that at the end of the fifth year of the Concession the service billing system could be based on consumption measurement, as this was provided in Annex F (No. 2.2.1) of the Contract.

905. Respondent further explains that the complete failure to install meters (except one) had the effect that the traditional invoicing system was maintained at 100%, rather than the measured system, as stipulated in Annex F. Law No. 12858 did not exempt the Concessionaire from complying with the POES. Therefore, it did not exempt the Concessionaire from completing the installation of micro-meters.

906. Respondent also notes that Claimants argue that the situation was due to the issuance of the New Regulatory Framework. But this document was never in force for AGBA and it would not have exempted the Concessionaire from fulfilling its assumed obligations. Section 52 of Provincial Decree No. 878/03 had the purpose to make the measured system effective and to gradually reverse the situation. Nevertheless, the Concessionaire undertook in Annex F of the Concession Contract to install meters before Section 52 came into effect, and it did not do so in the period from 2000 to 2003.

907. Claimants do not object that micro-meters had not been installed but they recall that the entire service in the area was subject to a fixed-rate system under which customers with a higher payment capacity subsidized those with the lowest capacity. In order not to distort the whole system, the transition to a metered system had to be undertaken as a whole. The Province burdened the Concessionaire with the obligation to install meters to those who so requested (Resolution No. 85/00 approving the Customers Rules, Section 23, CU-120), with the effect that those ranking in the higher payment capacity category did act accordingly, thus diluting the cross-subsidy resulting from the original system.

908. The implementation of the metered system called for material investments and created an increase in costs related to the meters’ reading, their maintenance and replacement. The Contract did not establish any concrete metering obligation until completion of the fifth year of the Concession term, and, by then (2004), the Emergency Laws and the Decree establishing the NRF had already been enacted. The approval of the NRF

introduced the concept of “sustainable service” by reference to the “users’ payment capacity” as a tariff setting criterion, which was in conflict with tariffs set through a metering mechanism identifying each of the user’s consumption.

909. The Tribunal observes that the installation of 40% of individual meters within the first five years of the Concession was provided for in Annex F of the Contract, which was still binding even after the emergency had broken out. In fact, as this has been explained above, Claimants had never even started with the installation of meters, which is related to AGBA’s policy not to proceed with expansion works as defined under the Contract. Therefore, there is no point for Claimants in arguing about costs and the potential distortion of the system by installing meters as AGBA had contractually agreed upon, all the more so the financial consequences of the instructions given by ORAB upon AGBA are exaggerated in large part and not supported by evidence in other part. Finally, while Claimants are right in stating that the goal of expanding metering devices in the system had to be reached in 2004 only, when the first Five-Year POES came to its term, they must accept that they were far from achieving that goal and that they cannot take the emergency situation as an argument for not complying with an undertaking they should have reasonably put into reality, together with the expansion work that was closely related to metering, long before the crisis broke out. In fact, AGBA had requested the postponement of the metered system already in its March 19, 2001 letter to ORAB (CU-328), arguing specific features of the Concession area and not referring to economic or financial difficulties.

c. Nitrate quality levels

910. Respondent states that in Section 3.6.2 of the Contract, AGBA undertook to provide a certain water quality to users, any breach of such qualities being qualified as a “potential danger for the population.” Respondent contends that the mandatory parameters were not complied with. It notes that Witness Quijada admitted that AGBA was not performing the studies required by the legal rules and the Concession contract.<sup>361</sup> And Expert Molinari concluded that the Concessionaire failed to comply with the minimum sampling plans as required and it also failed to analyze the required parameters.<sup>362</sup> The report prepared by the Technical Area on April 12, 2006 (CU-76, RA-210) noted values exceeding the maximum standard authorized by the Contract (50 mg/l) in all districts<sup>363</sup>. The Concessionaire has been put on notice of the situation through letters sent by ORAB.<sup>364</sup> AGBA was putting the population’s health in potential danger.

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<sup>361</sup> The Tribunal notes that this assertion is not confirmed in Quijada II, para. 122, where Respondent refers to.

<sup>362</sup> Molinari II, paras. 90-95.

<sup>363</sup> Comments on pages 262-264 and chart on page 276 (handwritten).

<sup>364</sup> Cf. ORAB’s letter of June 30, 2004 (CU-326).

911. Claimants report that the Technical Auditor states that the compulsory levels under the Concession Contract were reached, while showing values exceeding the maximum values set forth in the National Food Code. Witness Quijada reports that additional measures had to be taken in some areas and that a plan was set up for that purpose.<sup>365</sup> He also notes that the Regulatory Agency had permanent and sufficient knowledge of the water quality provided and had the possibility to intervene, if so required. The lowering of the nitrate level called for an important infrastructure work that was affected by the circumstances that led to the POES suspension. In any event, AGBA did comply with the values established by Decree No. 6553/74, which was applicable for the first three years. Thereafter, the NRF called for a Permanent Committee to rule on the matter, what never happened. The Concessionaire had never received a violation notice from the Agency. This shows that such violation never occurred.

912. The Tribunal adds that the Halcrow Report (CU-209) had assessed the matter and concluded as follows: “We consider the Company would hardly be able to achieve the 50mg/l contractual limit from 2003, once the current waiver expires.” (page 50) Samples taken in three districts in 2000 showed average figures above 50% in three districts, the highest rates being observed in Escobar and San Miguel. It is also said that many of the raw water analyses from some boreholes indicate nitrates concentration over 100 mg/l (pages 8, 50).<sup>366</sup> The Tribunal also notes that Engineer Inglese did not confirm to the Regulator more than that the Concessionaire’s information provided on the nitrate level quality was correct.<sup>367</sup> At the hearing, he implicitly accepted that the nitrate level was too high, but he also said that this was “not something that affects public health in general,” while in some cases (as babies less than six months of age), “you have to be careful.”<sup>368</sup> In this respect, Mr. Inglese added: “and you have to take this into account also for cases of methemoglobinemia, for instance.”<sup>369</sup> Methemoglobinemia is a disease having as one of its possible cause water contaminated with nitrate.<sup>370</sup> The failure to reach the required figures is not denied by Claimants but explained by the need to invest in important infrastructures, which were on hold for the same reasons that caused the suspension of the POES. This position is reflected in one of the “Basic Guidelines” contained in AGBA’s proposal for renegotiation of June 2004, where it was suggested that investments were to be made by the Province through the Fiduciary Fund to reduce nitrate levels.<sup>371</sup> There can be no doubt that AGBA’s management and CABB as its Technical Operator were well aware of the fact that their failure to provide for adequate funding had as one

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<sup>365</sup> Quijada II, paras. 130-133.

<sup>366</sup> For further information about excessive amounts of nitrate cf. Universidad Nacional de General Sarmiento, p. 73, chart 4.1, p. 100, chart 6.1.

<sup>367</sup> Inglese, para. 48.

<sup>368</sup> Cf. TR-E, Day 4, p. 209/13-212/5.

<sup>369</sup> TR-E, Day 4, p. 211/18-19 (spelling corrected).

<sup>370</sup> It is one of the principal diseases linked to water in the Buenos Aires province; cf. Universidad Nacional de General Sarmiento, p. 22, chart 2.3.

<sup>371</sup> Exhibit H002 to Seillant I, page 35 (not numbered).

of its important effect an increased exposure of the population to health diseases caused by excessive nitrate concentrations. Therefore, the Tribunal finds that this ground for termination has been rightly retained by the Province.

d. Maintenance of drinking water storage tanks

913. Relying on the Termination Decree, Respondent's position is that AGBA did not comply with its obligation to maintain drinking water storage tanks in good condition, most of them being out of service. Respondent refers to Section 7.4 where it is stated that all the property allocated to the Service must maintain a good state of conservation and use, for which purpose renovations have to be conducted from time to time. If tanks were out of order, the necessary investment to recover them as prescribed in Section 7.4 ought to have been made. When assets had to be replaced, the Concessionaire had to inform the Regulatory Authority and the Grantor (Sec. 7.9.1). AGBA never notified any removal from the Service, which means that all property in place at takeover was still within the service. Section 7.10 further stated that deficiencies in an asset shall not justify the breach of obligations assumed by the Concessionaire, who had to be aware of the state of the property within the Service.

914. Claimants, on the other hand, recall that the Auditor reports explain that AGBA had installed flow pumps with speed regulation that technically rendered obsolete the system providing for storage tanks. In fact, AGBA discarded those tanks that were obsolete while it repaired and maintained in proper condition those that could be used. In this respect, AGBA had never been served with any request or communication from the OCABA or its successor, the ORAB. The only information it received was the alleged results of an inspection in the termination Decree; this also means that AGBA never had the opportunity to correct such alleged violation or to raise arguments in its defense.

915. The Tribunal notes that it did not receive evidence sufficient either in support of the existence of such ground or to allow a statement denying it.

e. Water pressure quality goals

916. Respondent relies upon the explanations given by Expert Molinari.<sup>372</sup> According to his observations, the Concessionaire measured water pressure with an emergency method. Users' persistent complaints show that the pressure of 10 meters of water column required under the Contract was not reached. The emergency framework did not exempt AGBA from these obligations.

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<sup>372</sup> Molinari II, paras. 96-104.

917. Claimants contend that the Concessionaire undertook to achieve a pressure of ten meters of water column by the end of the first five-year period. This period ended in 2004 that is almost three years after the pesification. Even if the minimum values were not achieved, there is no breach attributable to the Concessionaire inasmuch as its tariffs had been reduced by two thirds of their value. The Auditor reports that for years 3, 4 and 5 the levels required for the end of the five-year period had been reached. He also states that these certification reports were not commented upon by the Regulatory Agency. The Decree identified as evidence for such violation only four users' complaints. Any such lack of sufficient pressure was basically curable, and AGBA had never been penalized for any such pressure violation.

918. The Tribunal notes that it did not receive evidence sufficient either in support of the existence of such ground or to allow a statement denying it.

f. The commissioning of the sewage treatment plants

919. Decree No. 1666/06 identifies as a further specific ground for termination independent from AGBA's compliance with the POES the alleged failure to recondition and operate the Bella Vista Plant up to the level of reaching the quality standards applicable to sewage treatment plants under the Concession Contract. This ground is based on the Province's position that this plant had been transferred to AGBA at least from the moment when it became clear that no transfer to UNIREC had occurred. Claimants object that Respondent's allegations as to the Concessionaire's failure to meet wastewater quality standards are based on an erroneous interpretation of AGBA's responsibility over the UNIREC plants.

920. It has been explained that ORAB and AGBA adopted opposing positions on this point and that on the basis of the evidence before this Tribunal, no transfer, either to UNIREC or to AGBA upon Takeover, has been established. The termination Decree does not assist in identifying the correct attribution of property. It refers to Section 43-II of Law No. 11820 and to ORAB's Resolution No. 32/03 that do not provide evidence about any transfer of property that might have occurred. The Decree also mentions an inventory attributed to AGBA's communication 150/01/GTO dated June 28, 2001 (which was the date of receipt by ORAB) that is not attached to the copy of the cover letter filed by Respondent (RA-238). The Tribunal therefore concludes that ORAB was the owner of this asset pursuant to Section 29-I of Law No. 11820. No transfer of this asset to AGBA having occurred, there was no ground to require from AGBA to proceed with the reconditioning and expansion of this plant and to satisfy the quality standards as required by the Concession Contract.

921. As a matter of fact, AGBA had undertaken some technical measures for the purpose of improving the conditions of the Bella Vista Plant and it attempted to improve the

flow of the collection networks to prevent overflow. It did so with ORAB's agreement. This work was placed outside the Concession Contract. It could not be envisaged that the reconditioning and expansion work initially to be done under the leadership of UNIREC could have been suddenly transferred to AGBA and put under the umbrella of the Concession Contract merely as an effect of the Province's failure to secure the necessary finding of the work covered by Circular No. 30(A). Therefore, the ground invoked in the Province's Decree on termination in respect of the Bella Vista Plant has no foundation in the Concession Contract.

922. However, this ground of termination is one of several other grounds invoked by the Province in Decree No. 1666/06. The fact that it has no basis in the Concession Contract does not remove the other grounds of termination as far as they, or one of them, stand under the Contract in support of the declaration of termination. In addition, the Tribunal notes that while the matter is not governed by the Concession Contract, its nature is nevertheless purely contractual and has, in any event, no impact as an alleged breach of an obligation of Respondent under the BIT.

923. The Tribunal is left without reliable evidence in respect of the treatment plant situated in Alem, which was considered as abandoned by the local authorities and neighbors. The Decree's explanation does not allow verifying the allegations voiced in that regard, nor is it possible to consider the Parties' opposing views on whether this plant belonged to the service area or not, in the absence of the submission of the content of Annex L of the Concession Contract and other documentary evidence.

g. The renewal of the Concession Contract performance bonds

924. Another termination ground was related to the non-renewal of the Contract guarantees. Respondent explains that under Section 11.1.1 of the Contract, the Concessionaire had the obligation to maintain the Contract's guarantee and the operation guarantee. It had to be granted in favor of the Province and to be firm, irrevocable, unconditional and subject to total or partial foreclosure. The operation guarantee had to be in force during the first 12 years of the Concession (Sec. 11.2.1). Presidential Decree No. 86/03 authorized the pesification of the insured amount. Claimants recognize AGBA's failure to comply with these two obligations of the Concession Contract, and this as from May 4, 2004. OCABA Resolution No. 45/06 of September 6, 2006 (CU-201) decided that the Concessionaire and its technical operator had not complied with the Concession Contract as far as the guarantees were concerned; this was already stated in Decree No. 1666/06.

925. Claimants oppose that there was no serious basis for the Grantor to demand that AGBA maintained the Contract performance guarantees when the Contract's economic and financial equation had been destroyed by the emergency and the tariffs' pesification. The pesification of AGBA's tariffs, which reduced their value by two thirds, made it

impossible to cover the costs. Under such condition, it was impossible to obtain the guarantee from a financial entity or insurance company. The reduction in the amount covered due to its pesification did not bring an actual solution. The Concession was going to start operating at a loss and, therefore, it was impossible to obtain contract performance and operation guarantees. The Grantor was aware of the impossibility to obtain these guarantees and, therefore, did not request them from the Concessionaire until it decided to terminate the Concession. Between 2004 and 2006, there are no actions from the Grantor recorded, which means that its inaction was tantamount to consent. The Regulatory Agency and the Grantor were aware of this and, therefore, did not demand the renewal of the guarantees until they decided to terminate, by letter dated March 22, 2006 (CU-200, RA-252).

926. The Tribunal understands that obtaining a guarantee for the performance of the Concession must have been extremely difficult if not impossible under the then prevailing conditions for reasons similar to those explaining the impossibility to overcome the obstacles opposing any search of external funding. Respondent does not argue that it would have been reasonably possible for AGBA or its shareholders to provide such guarantee. The Grantor must have accepted implicitly this difficulty when it did not insist on AGBA's contractual obligation between 2004 and 2006. This attitude, understood in good faith by AGBA, could be considered as a waiver of this requirement, with the effect that the failure to submit the contractual guarantees did not constitute an admissible ground in support of the declaration of termination of the Contract by the Province. However, the Tribunal notes that this is a purely contractual dispute. The failure to provide the guarantees is one of many others, and more important grounds for termination. It did not contribute effectively to any breach of an obligation under the BIT and, if retained, would merely constitute a consequence of such a breach based on other grounds, as those alleged by Claimants, based on the emergency and the tariffs' pesification.

h. The sewage quality parameters

927. One of the grounds for termination stated in Decree No. 1666/06 is the failure to observe the quality parameters for sewage services. This ground is mentioned separately from the numerous complaints raised in relation to AGBA's purported failure to reach the expansion goals regarding the sewage service, which are dealt with in relation with the goals set by the POES.

928. It is said that AGBA "has failed to comply with [drinking water and] sewerage service quality levels, according to the parameters set out in Articles [3.6 and] 3.12 of the Concession Contract, thus posing a constant threat to the life and health of the population." The Decree also tells that "it is important to highlight the lack of conditioning of the sewage liquid treatment plants." Section 3.12 of the Contract provides that the Con-

cessionaire must adapt the effluent treatment system to meet the quality standards established in Annex D, where a number of quality parameters are listed and the sampling frequency defined.

929. Claimants submit that the report of Attorney General Szelagowski, on which Respondent's position is based, is nothing more than an allegation by a party. On this basis, it is asserted that the wastewater treatment plants were either out of specification, exceeding the maximum parameters, or virtually non-functional. Claimants recall that upon taking over the Concession, AGBA received virtually non-functional wastewater treatment plants. Auditor Inglese certified that (i) in 2002, important operating improvements were introduced in the Merlo and Moreno plants; (ii) also in 2002, the Garín, Merlo and Moreno plants featured output qualities in compliance with the contractual requirements; (iii) again in 2002, the Escobar and General Rodriguez plants had been in repair that was close to be done by the end of that year; (iv) in 2003, these plants had operated satisfactorily; and (v) that the San Miguel plant was out of service, but did belong to UNIREC. The Auditor stated that its statement had been given to the Regulatory Agency, who did not raise objections. For Claimants, this means that the only wastewater treatment plant that yielded unsatisfactory results due to its inactivity was the San Miguel (Bella Vista) plant.

930. The Tribunal notes that the debate on the quality parameters in respect of sewage plants other than the Bella Vista plant is closely intertwined with the accomplishment of the expansion goals fixed by the POES. To the extent the matter would be examined independently, as a specific ground for termination as sustained by Respondent, the Tribunal cannot do otherwise than to state that it did not receive evidence sufficient either in support of the existence of such ground or to allow a statement denying it. The reciprocal complaints exchanged between the Parties in respect of the results obtained from the collection and testing of samples of various plants is of a purely contractual nature and not to be examined further by the Tribunal. In any event, the issue is not relevant in respect of an alleged breach of an obligation under the BIT and Claimants do not argue otherwise.

- i. The cooperation with the Regulatory Agency and the application of the Customer Rules

931. Decree No. 1666/06 puts on the list of grounds for termination the observation that AGBA "has repeatedly and systematically violated the User Rules" and that it had failed "to comply with its obligation to cooperate with the regulatory agency" as stated in Resolution No. 1/02 (C-204). This called for the imposition of a fine pursuant to Section 13.2.5.2(a) of the Concession Contract.

932. Claimants refer to AGBA's Auditor who left no doubt that there was no breach and no objection arisen by the Regulatory Agency. There is no evidence for a failure to



cooperate with the Agency. The Concessionaire's Technical Auditor selected by ORAB demonstrates that the alleged breaches by AGBA mentioned in the Termination Decree are unfounded. Claimants also note that in respect of the complaint contained in Resolution No. 1/02, it took ORAB four years to issue a fine, the day before the Termination Decree was issued, applying to AGBA the only penalty it had ever received (Resolution No. 36/06, CU-205).

933. The Tribunal notes that it did not receive even a minimum of evidence either in support of the existence of such a ground or in favor of denying it. If this matter had to be taken for serious, the Parties should address the Halcrow Report (CU-209) stating that ORAB's officials are demonstrating a proactive attitude as they exercise control of technical and customer related issues whereas AGBA was answering the Regulator's requests directly to the point and following ORAB's requirements with respect to presentation quality and contents.

5. *Are AGBA's alleged breaches cured by the non-application of sanctions?*

934. Claimants submit that during the life of the Concession that ended with the termination decree on July 11, 2006, only one sanction was applied, and this for the lowest amount of USD 10,000, and the day before termination. This represents a clear contradiction to the incurable breaches alleged in the termination decree. The kind of flexibility adopted by the Grantor over 5 years is totally incompatible with its position that the alleged breaches would seriously endanger human health and the environment.

935. In Claimants' view, the complete absence of any sanction during the life of the Concession demonstrates that the breaches adduced as grounds for the termination never existed. The Concessionaire consistently complied with everything it was expected to undertake and this to the satisfaction of the Regulatory Agency and the Grantor. If ABGA's actions deviated from the Regulatory Framework, this can never be attributed to the Concessionaire after the Province and the Federal Government decreed the state of emergency and adopted drastic measures. The breaches alleged in the Termination Decree were no breaches. The termination was based on grounds others than grounds based on AGBA's violation of its obligations under the Contract.

936. Respondent asserts that AGBA's breaches long preceded the termination, and that the Grantor chose not to penalize them in display of good faith. It was also an expression of the Operator's flexibility with the purpose to facilitate the renegotiation. Respondent also notes that there is no contract provision establishing the application of penalties as a prerequisite for contract termination.

937. The Tribunal observes that the point in dispute here is whether the Grantor, in each case it identified a breach of AGBA's obligation under the Regulatory Framework

or the Concession Contract had an obligation to sanction the Concessionaire and that in case it would not act accordingly, the purported breach would no longer constitute a breach that could be invoked as a ground for termination. Claimants argue affirmatively in this respect, submitting that in good faith, it would seem reasonable to understand that the lack of sanction is tantamount to the inexistence of breaches.

938. This position seems to be far away from reality when considering Expert Molinari's statement that if the breaches regarding the expansion works had been penalized, the total sanction would have been 600 million. That would have been an amount approaching the total amount of the investment under the POES. In actual terms, it would have caused the insolvency of AGBA with the effect that the Concession would have been pulled into immediate collapse. It seems highly unreasonable to admit that the Grantor would have been forced to proceed accordingly under a duty to penalize AGBA's breaches as contended by Claimants. Claimants' position seems inconsistent for another reason: the Regulatory Agency was authorized by Section 13.2.5.1 of the Contract to demand that the total amount of penalties owed by the Concessionaire be discounted to users in the following invoice. If AGBA had been faced with such an instruction, it would have insisted, certainly and forth-fully, on the inadequacy of any sanction having the effect of reducing its revenue and this potentially in an amount that would have left the Company without any income allowing recovering its costs.

939. The Tribunal is not convinced by Claimants' theory that the Grantor was under an obligation to penalize breaches and, furthermore, that in not issuing a sanction, the corresponding breach of the Contract would be cured and no longer serve as a ground for termination.

940. When looking carefully to the applicable legal provision, the attention is firstly drawn to the opening part of Section 13.2 on "Sanctions," stating that "if Concessionaire fails to fulfill its duties it shall be subject to the following sanctions," which are then identified. It is true that the series of specific provisions defining particular sanctions are phrased in a compulsory mode, using the word "shall." Nevertheless, these provisions are sub-ordinate to the opening part of Section 13.2 that does not go further than making the Concessionaire "subject" to sanctions, which does not imply an obligation on the Grantor to proceed accordingly. It may also be added that pursuant to Section 13.2.5.6(b), "fines may be reduced at the discretion of the Regulatory Agency, and shall not apply when the breach results in serious and irreparable harm or significant social repercussions" (see also, in similar terms, Sec. 13-II[n] of Law No. 11820). This provision could also serve as an explanation for the Grantor's waiver of its right to impose penalties to the Concessionaire.

941. Section 13-II of Law No. 11820 provides that ORBAS has the powers and obligations to “impose on the Concessionaire the penalties set forth in the Concession Contract if it fails to comply with its obligations” (lit. n). It is not stated in this provision that this would constitute a duty with compulsory effect on the Agency. And, more specifically, there is no indication whatsoever that the non-issuing of a sanction would have the effect of curing the related breach in such a way that it can no longer serve as a ground for termination. Another provision of the Law is perfectly in line with this understanding: Section 26-II defines all appropriate service levels, including service coverage, drinking and sewage quality, and it has as its final clause the following: “Failure to attain the above-mentioned service levels shall entitle ORBAS to apply the penalties provided for in the Concession Contract.” Such entitlement is not equal to a compulsory obligation and does by no means have the sense of waiving the right to invoke a breach that had not been sanctioned by a penalty.

942. Moreover, as rightly observed by Respondent, it is not true that the only fine was imposed the day after termination. On that day, the Province rejected by Resolution No. 36/06 (CU-205) AGBA’s challenge against Resolution No. 1/02 (CU-204) pursuant to which AGBA was fined on January 3, 2002. Another fine has been ordered on October 23, 2003 in Resolution No. 32/03 relating to the Bella Vista Plant (CU-68, RA-198, 214).

## 6. *Conclusion*

943. The Tribunal notes that its review of most of the specific grounds for termination, unrelated to the POES, ended with the conclusion that it did not receive evidence sufficient either in support of the existence of such ground or to allow a statement denying it. In relation to the Province’s complaints about the state of abandonment of the Bella Vista plant and the missing renewal of the performance guarantees, the Tribunal inclines to accept Claimants’ position that these grounds for termination have no foundation in the Concession Contract. In any event, the Tribunal’s views on these matters have no impact in light of its overall conclusion about the admissibility of the termination declared by the Province and, further, they do not have any complementary effect upon the consideration of the breaches of an obligation under the BIT as they are alleged by Claimants. They represent, as stated, purely contractual disputes.

944. The foremost important ground for termination is related to AGBA’s failure to meet the expansion goals undertaken in the first Five-Year POES, which has an explanation that is twofold, based on the failure to achieve the work as it has been accepted to be accomplished, on the one hand, and the failure to provide for the necessary funding that would have permitted to meet the expansion goals agreed upon, on the other hand. This failure is largely sufficient to support the legal grounding of Decree No. 1666/06 on the Concession Contract. The Tribunal adds that the failure to ensure compliance with the required Nitrate levels appears of some gravity, in light of the threat to the population’s

health and in particular small children and other vulnerable people. Further consideration of all other specific grounds mentioned above is moot.

945. In this regard, Claimants' contention that Decree No. 1666/06 was based solely on political reasons unrelated to AGBA's rights and performance under the Concession Contract must fail. Therefore, the termination declared by the Province does not imply, as for itself, a deprivation of Claimants' rights that would qualify as being illegal and therefore accede to being a constituent element of a breach of an obligation of Respondent under the BIT. It does not constitute either a measure that would be part of successive events constituting as a whole an act or omission breaching such an obligation.

946. On the other hand, the Tribunal's finding in respect of Decree No. 1666/06 does not dispose of Claimants' claim that are allegedly based on a violation of obligations under the BIT, in as much as they are not directly related to this Decree and the Contract's termination. Indeed, while Claimants argue that the termination was declared by the Province on purely political grounds, they contend that the disruption of the Concession Contract occurred well before, when the crisis culminated in the emergency measures that cut off two third of AGBA's income, and later on when the renegotiation was allegedly not conducted in a perspective of restoring AGBA's legitimate expectations.

947. Claimants' claims based on the protection through the BIT are to be examined on their own basis. The legal grounding of the termination Decree in the Concession Contract is, in this respect, of incidental relevance only, to the extent that it provides evidence for the Province's correct handling of the Concession under the Argentine Republic's domestic law. In light of the evidence of AGBA's failure to comply with the Five-Year POES and of Claimants' failure to provide for funding from third-parties or from their own, which caused the goals of the POES to become impossible to reach, termination was the only issue for a Concession that was no longer viable anyhow. No breach of the fair and equal treatment guarantee can be retained in this respect.

948. Furthermore, the shareholders were aware of the approaching end of the Concession in light of their own acts directed towards such a result. As from the date of the Claimants' Notices of dispute (December 2005 and January 2006), filed when the failure of the renegotiation was certain, no doubt could remain that AGBA's shareholders had recourse to monetary relief through international arbitration as the only outcome. When the Undersecretary of State observed in March 2006 that the Province was about to terminate the Concession, this may have been a surprise for AGBA at that moment, but this was not a surprise as far as the result to be obtained was announced, which coincided with AGBA's shareholders intentions.

949. Similarly, the termination Decree must have been expected by any reasonable contractor under the then prevailing circumstances. There were, indeed, the announcements made by officials from the Province, in respect of which the termination Decree was a simple consequence. There was also AGBA's letter of June 14, 2006, putting the Province on notice to repair its failure to comply with the Concession, which could not have any other meaning than to announce a potential termination declaration on the Concessionaire's behalf. The Province reached the target earlier, as the Concessionaire in its situation under the first Five-Year POES had to expect. There is therefore no convincing point in Claimants' contention that they were faced wholly unexpectedly by the use by the Grantor Province of the termination device.

950. The Tribunal concludes therefore that in relation to the events preceding and cumulating in the termination Decree No. 1666/06, no breach of the fair and equitable treatment standard can be retained.

## **X. Expropriation**

### **A. Claimants' position**

951. Claimants recall that the letters of December 2005 and January 2006 attached to the Request for Arbitration stated that the unilateral modification of the Concession Contract by the Argentine Republic and the Government of the Province of Buenos Aires as Grantor by reason of the Emergency Laws falls within the concept of indirect expropriation. Before the termination of the Concession, the Claimants already felt that their investment had been expropriated and thus informed the Respondent and they wanted to inform the Argentine Republic accordingly. The serious disruption of the economic equilibrium had generated the loss of value of the investments, which is evidenced by AGBA's financial statements.

952. The expropriation was fully consumed when Decree No. 1666 declared the termination of the Concession Contract. Since July 10, 2006, when the termination was declared, AGBA was no longer holder of the Contract. The termination decree was proof that the process had no turning back and that the value of the investment would never be recovered. At this point, direct expropriation was the right term, because AGBA's service and assets had been transferred to ABSA. Thus, there occurred acts of indirect and of direct expropriation.

953. Direct and indirect expropriations are equivalent in terms of their effects because they both deprive the investor of the enjoyment of the investment. When there is indirect expropriation not only the title to ownership is formally retained but even the possession of the assets can also be retained. However, the owner loses the use and the enjoyment of

the investment and the benefits deriving from it. Therefore, indirect expropriation must also be compensated.

954. Nowadays, the recognition of indirect expropriation is beyond doubt and is enshrined in many international treaties. The BIT followed the general trend and included in Article V “nationalization, expropriation or any other measure having similar characteristics and effects.” Therefore, any measure taken by a Contracting State and having effects equivalent to expropriation will generate an inexcusable obligation to compensate on the part of the host State even if no formal expropriation was present, as explained by the *Waste Management Tribunal*.<sup>373</sup>

955. Neither the Federal Government nor the Province, after having deprived the investment made by Claimants of its value, compensated the investors after hindering the renegotiation of the Concession Contract. Thus, the investment was expropriated even before Decree No. 1666/06 was issued. Indeed, the Concessionaire’s tariffs had been pified, reducing their value by two third, any chance to restore the original tariffs had been eliminated and the Regulatory Framework had been substantially modified. The emergency measures taken from early 2002, the modification of the Regulatory Framework and the refusal to renegotiate the Contract had already substantially and dramatically reduced AGBA’s value. This had an effect tantamount to expropriation. The termination ordered on July 10, 2006 eliminated the residual value, thus consummating the expropriation process.

956. For there to be an indirect or creeping expropriation, the degree of interference must be such that its effects resemble those of a formal expropriation. Such degree is reached when the measures taken by the State “neutralize” the benefit resulting from the investment, as explained by the *CME Tribunal*.<sup>374</sup>

957. A measure constituting or equivalent to an expropriation is the conduct of a host government which, in the long run, deprives the enterprise of its capacity to operate at a profit. The measures taken had deprived AGBA of its ability to generate benefits and event of the possibility to appropriately cover for its service provision costs. It became impossible to obtain the rate of return legally set forth in the Regulatory Framework. Achieving benefits had been one of the elements guaranteed by the Regulatory Framework. Law No. 11820 provided that one of the purposes was to ensure provision of quality services at reasonable tariffs and that in this regard, prices and tariffs shall reflect the economic costs “including the Concessionaire’s profit margin” (Sec. 4 and 28-II). Taking measures that not only make it impossible to obtain any margin but also eliminate any chance of covering costs and investments can only be defined as expropriation.

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<sup>373</sup> *Waste Management Inc. v. United Mexican States*, ICSID/ARB(AF)/00/3, Award of April 30, 2004 (CUL-67, ALRA-86).

<sup>374</sup> *CME Czech Republic B.V. v. Czech Republic*, Partial Award of September 13, 2001 (CUL-56).

958. The current value of Claimants' investment is negative as evidenced in the Report on Valuation and Regulations. In any event, even a substantial deprivation of the investment value would be sufficient to count as an expropriation. The *Metalclad* Tribunal had stated that a significant reduction of value is sufficient.<sup>375</sup>

959. While the Spain-Argentina BIT is silent on this issue, other BITs signed by the Argentine Republic have echoed these principles, stating that a high degree of interference is enough. This can be found in the addendum to Article 4 of the BIT with Germany, referring to a "serious damage" caused to an investment. This confirms that the Argentine Republic is bound to provide compensation also for the acts or omissions that cause serious damage to the investor. The measures taken in regard of AGBA, up to the termination of the Concession, have deprived the Claimants of their total investment.

960. Claimants further observe that their investment consists in the ownership of shares in AGBA and, therefore, of the rights arising from the Concession as well. Both tangible and intangible assets can be subject to expropriation, including rights as shares and contract rights. This encompasses the cancellation of investors' rights and interest (*SPP Award*).<sup>376</sup> The *Revere Copper* case offers a good comparison in this respect, because it dealt with the destruction of contract rights.<sup>377</sup> If the Tribunal in the later case found that there had been expropriation, there can be no other conclusion in the case of AGBA and URBASER.

961. The measures taken by the Federal Government and the Province have rendered it impossible for the investments to have their reasonably expected effects. They deprived the investor of the subject-matter of its investment. As the *Eureko* Tribunal had confirmed, contract rights can be subject to expropriation; they are "assets."<sup>378</sup> The *Siemens* Tribunal found, as well, that a contract can be considered as an investment and subject to expropriation.<sup>379</sup> The Emergency Law and the amendment to the Regulatory Framework were beyond the contracting party's control and their imposition was an act of power. Decree No. 1666/06 entailed an act of termination that was only formally grounded on contract mechanisms but was in fact a true act of government intended to end the Concession (as concluded also by the *Vivendi* Tribunal).<sup>380</sup> Upon termination of the Contract, Claimants' contract rights were expropriated.

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<sup>375</sup> *Metalclad Corporation v. The United Mexican States*, ICSID/ARB(AF)/97/1, Award of August 30, 2003 (CUL-57).

<sup>376</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID/ARB/84/3, Award of May 20, 1992 (CUL-71).

<sup>377</sup> *Revere Copper and Brass Inc. v. Overseas Private Investment Corporation*, Award of August 24, 1978 (CUL-72).

<sup>378</sup> *Eureko B.V. v. Republic of Poland*, Partial Award of August 19, 2005 (CUL-73).

<sup>379</sup> *Siemens AG v. Argentine Republic*, ICSID/ARB/02/8, Award of February 6, 2007 (CUL-61).

<sup>380</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID/ARB/97/3, Award of August 20, 2007 (CUL-6).

962. Expropriation can exist in the event of a temporary deprivation. This was stated in the *Sedco Award*<sup>381</sup> and in the *Myers Award*.<sup>382</sup> When Claimants filed the first expropriation claim against the Respondent (December 2005 and January 2006), the Concession had not been terminated yet. At that time, an expropriation had already taken place, because what started as a temporary provision had become permanent. Thus, the measures turned out to be expropriatory. On July 10, 2006, all of the Concession assets were transferred to ABSA. The early termination was a permanent expropriation. It became permanent in the course of time when the renegotiation process produced no results, and it culminated in the termination of the Contract. The early termination was a direct expropriation.

963. The expropriatory nature of certain regulatory measures has been widely recognized. As this is explained in the *CME Award*, they are critical when they must be characterized as actions designed to force the foreign investor to contractually agree to the elimination of basic rights for the protection of its investment and as actions supporting the foreign investor's contractual partner in destroying the legal basis for the foreign investor's business. Regulatory measures are one of the main and most frequent path leading to an expropriation, as stated in the *Pope & Talbot Award*.<sup>383</sup> Such measures include actions that, while regulating prices or tariffs, cause the impairment of an investment. The fact that measures like most of those involved in the instant case were based on statutory rules does not place them beyond the scope of an expropriation. The question raised in this case is not whether such measures could be enacted under domestic law. The purpose is to redress the harm inflicted on foreign investors as a direct result of such measures.

964. The intent, as expressed by the Federal Government and the Province, on which the emergency regulations were based was: (a) To reorganize the financial, banking and exchange market system; (b) to spur the economy, to raise the employment rate and improve income distribution; (c) to create conditions for sustainable economic growth in line with the restructuring of the public debt, and (d) to regulate the restructuring of obligations being performed, which are affected by the new exchange regime.

965. Claimants are not asking for an assessment of the stated purposes behind the measures that have been taken. The intention of a State, when adopting expropriatory measures is irrelevant to a finding of expropriation and the conclusion that an obligation rests with the State to compensate in such a case. Expropriation must be "in the public interest," but even if this is so, expropriation must be compensated for. The just cause does not drive the State away from the obligation to compensate (*Santa Elena Award*).<sup>384</sup>

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<sup>381</sup> *Sedco v. National Iranian Oil Company and the Islamic Republic of Iran*, Iran-United States Claims Tribunal, Award of October 28, 1985 (CUL-83).

<sup>382</sup> *S.D. Myers Inc. v. Government of Canada*, Partial Award of November 13, 2000 (CUL-46, ALRA-160).

<sup>383</sup> *Pope & Talbot Inc. v. Government of Canada*, Interim Award of June 26, 2000 (CUL-75, ALRA-129).

<sup>384</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID/ARB/96/1, Final Award of February 17, 2000 (CUL-77).



On the other hand, if there is no just cause, expropriation is unlawful and contrary to the BIT, so much so that it cannot be carried out even if compensation is paid.

966. This explains why the finding of a certain intention has sometimes not be considered as a prerequisite to deem a measure expropriatory, as in the *Norwegian Shipowners Award*.<sup>385</sup> The making of a gain by the expropriating State is not an essential requirement either, as this has been stated in the *Metalclad Award* and in the *Myers Award*. This also reflects the idea that the Government's intention is less important than the effects that the measure has on the owner of the affected rights (*Tippets Award*).<sup>386</sup> The *Siemens Tribunal* confirmed that intent is irrelevant when it comes to qualifying certain measures adopted by the Argentine Government as expropriatory. The Tribunal recalled that for an expropriation to be in conformity with Agreements for the promotion of investments, it must be for a public purpose, to the effect that if the goal of satisfying a general interest is missing, expropriation is unlawful under international law.

967. When taking measures resulting from the state of emergency, the Government of the Province opted to place the whole sacrifice on the Concessionaire's shoulders. If users had been in a real situation of need and unable to afford the tariffs in effect, the State should have to help the most disadvantaged through a subsidized service, the same way it did with state-owned ABSA. However, in respect of AGBA, between January 2002 and July 2006, no such action was taken.

968. The intent behind the expropriatory measures becomes much clearer when one looks at the termination of the Concession Contract. The true aim was totally different and obviously inconsistent with the statutory purposes specified for termination. The intention was directly an expropriatory one. The Grantor availed itself of termination under the Contract in order to avoid the payment of compensation due in case of an expropriation.

969. Proportionality is a condition that renders expropriation lawful, although it does not exclude compensation for the damage caused. Proportionality has also been considered by the *Tecmed Tribunal*, stating that "There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not."<sup>387</sup>

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<sup>385</sup> *Norway v. USA*, Award of October 13, 1922 (CUL-78).

<sup>386</sup> *Tippets et al. v. Affa Consulting Engineers of Iran et al.*, Iran-United States Claims Tribunal, Award of June 29, 1984 (CUL-81).

<sup>387</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID/ARB(AF)/00/2, Award of May 29, 2003 (CUL-58).

970. In the instant case, the measures adopted were not in any way proportional to the purpose sought and expressly declared in the referred provisions. At the time the Emergency Law was enacted, an obligation was imposed on the Province to renegotiate concession contracts. But when this process had still not produced results, the Regulatory Framework was altered again by Decree No. 878/03, providing however again for negotiation an adaptation of contracts. All efforts were to no avail.

971. The extension of time that renegotiation was suffering demonstrate that the losses sustained by AGBA and the Claimants were disproportionate. Other measures were available, even under the Contract, to deal with the circumstances. They would have allowed tariffs to be naturally adapted to the needs of the economy. In the event of a crisis, an extraordinary review was in place as set forth in the Contract.

972. The Grantor sought to justify the termination on the Concessionaire's alleged and non-existing breaches. However, in AGBA's case, the disproportion of the measure is unquestionable. The termination was an abuse of power. Under Article V of the BIT, an explicit requirement is that measures of expropriation be non-discriminatory. This is also stated in the World Bank' Guidelines (CUL-36). Several BITs entered into by the Argentine Republic expressly repudiate discriminatory expropriation. The measures that harmed AGBA and the Claimants were discriminatory, in particular when compared to the treatment provided to ABSA. Discrimination is also evidenced when a comparison is made to the compensation provided in other sectors affected by the emergency laws.

973. Respondent does not address the Decision on Jurisdiction and Liability in *Saur*. This will be done by Claimants. *Saur's* position was that the actions and omissions of the host State violated the fair and equitable treatment and full protection standard, in addition to constituting an expropriation. *Saur* argued that it was the victim of a succession of measures amounting to an indirect expropriation. The Argentine Republic contended that the placing of the concession under state administration and the termination of the concession contract did not amount to an expropriation of *Saur's* investment but represented the adoption of legitimate measures in exercise of the State's regulatory powers, outside the Arbitral Tribunal's jurisdiction. Respondent maintained that no arbitral tribunal had ever found the emergency measures taken in the Argentine Republic to be expropriatory in nature. Nevertheless, the *Saur* Decision contains a finding that the Argentine Republic had adopted a series of expropriation and nationalization measures. The finding of expropriation did not concern the emergency measures themselves but the placing of the concession under state administration and the concession's termination. The reason for this was, however, that *Saur* had signed a Letter of Understanding with the Province of Mendoza, settling all actions taken before the execution of that agreement.

974. The *Saur* Decision contains other interesting elements, worth to be quoted. The BIT focuses on the concept of dispossession, which entails the investor losing the use and

enjoyment of the investment. After the expropriation, the Concession was placed in the hands of a state-owned company, thus taking for itself the assets and rights expropriated from the investor. The set of expropriatory measures taken by the Province cannot be taken as private acts based upon rights and obligations under the Concession Contract. It is an undisputed fact that a sovereign State may, for a public interest reason and in defense of what it deems to be the general interest, order at any moment the nationalization of an essential public service like the drinking water and sewage service. However, if it has done so, what the State cannot possibly escape is its international obligation to pay compensation for the real value of the assets the investor has been deprived of. The Tribunal accepts that an investor may not seek compensation from the State for its own decisions, poor performance or lack of business planning. The Saur Decision is evidence for the similarities between the facts of that case and the facts which have caused CABB and URBASER to appear before this Arbitral Tribunal. The acts and omissions relevant in the instant case are similar to those in the Saur case. This comparison may enlighten the Tribunal.

B. Respondent's position

975. Respondent notes that it is difficult to understand the way Claimants articulate their claim based on Article V of the BIT. On the one hand, Claimants state that they “already felt that their investment had been expropriated”<sup>388</sup> and that such expropriation was the result of a series of measures that led to the alleged “creeping expropriation”<sup>389</sup>. On the other hand, Claimants not only refer to such indirect expropriation, but also state that “direct expropriation was the right word”<sup>390</sup>. It cannot be argued that the disputed measures entailed both direct and indirect expropriation.

976. Article V of the BIT does not contain any definition of expropriation. In any event, the measures adopted by the Argentine Republic did not constitute or were tantamount to expropriation. The Argentine Republic adopted the disputed measures in the legitimate exercise of its police power and of the rights granted by the very Concession contract and the regulatory framework. It was AGBA's serious violations of its obligations under the Concession contract that forced the Province to terminate the Contract. The measures taken complied with the agreed upon requirements were not discriminatory and were implemented in a well-reasoned manner.

977. Claimants contend that since the first letter sent before the commencement of this arbitration, they had informed the Argentine Republic that their investment had been expropriated. Claimants cite the *Revere Copper* case as an illustration of a situation where the government substantially modified the terms of the concession. Neither this case,

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<sup>388</sup> Memorial on the Merits, para. 682.

<sup>389</sup> *Ibid.*, para. 688.

<sup>390</sup> *Ibid.*, para. 685.

which concerned a typical investment agreement, nor any other case cited by Claimants does bear a significant factual relation to the facts and the law governing this arbitration. And the *Revere Copper* case dealt with the scope of a typical stabilization clause, which does not exist in the instant case. Neither the depiction of facts nor the arguments presented by Claimants are correct.

978. In general, BITs do not contain a definition of expropriation. A number of arbitral tribunals have stated that expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect.

979. Section 14.1.3 of the Concession Contract provides for the grounds of termination relevant in this case. Such a right also derives from the administrative nature of the contract. Provincial Decree No. 1666/06 refers to such public power of the grantor to unilaterally terminate the contract. The Decree was exclusively based on AGBA's serious, repeated and irreparable breaches. The Decree refers to the failure to complete works, the unjustified and repeated delays in attaining the goals established in the POES, the failure to meet service quality levels, the repeated violations of the user regulations, the failure to provide accurate information to the Regulatory Agency, and the failure to post, renew, or replace the performance bond relating to the Concession Contract. The Decree concluded that "there is virtually no investment in service infrastructure." There was virtually no guarantee to which the Province could resort in order to enforce the Concession Contract in accordance with its provisions. In deciding to terminate the Contract, the Grantor did not violate the legal framework and the terms of the Concession Contract. It was a reasoned decision and the result of the exercise of a right enshrined in the very same Contract. Therefore, the claim of direct expropriation should be rejected.

980. The measures adopted before termination did not amount to indirect expropriation. Claimants argue that the emergency measures deprived their investment in Argentina of value, thus causing its expropriation, which has not been compensated after hindering the renegotiation of the Concession Contract. In order for indirect expropriation to exist, several requirements must be met: (i) there must be a substantial interference with the investor's rights, (ii) the effects of which must be tantamount to direct expropriation of the rights allegedly affected, (iii) the government measures must be beyond the State's police power and have the effect of transferring the investment to the State, to an agency appointed by the State, or to a third party.

981. In order for such a claim to succeed, the investor must suffer dispossession or deprivation to such an extent that the measure concerned is tantamount to expropriation. The mere reduction in the value of the investment is not sufficient. Article V refers to "other measures having similar characteristics or effects." The dispossession or depriva-

tion must be substantial in nature. The *CMS* Tribunal noted that the following requirements must be met: the investor must not be in control of the investment; the Government must manage the day-to-day operations of the company; and the investor must lack full ownership and control of the investment. Arbitral tribunals have used the term “substantial impairment.”<sup>391</sup> A State is not liable for economic injury which is a consequence of *bona fide* regulation. A State’s exercise of its sovereign power may cause economic damage without entailing any right for compensation.

982. In the instant case, the main questions to be asked are whether the Argentine authorities arbitrarily interfered with the ownership and control of Claimants’ investment, whether the Argentine government managed the day-to-day operations of AGBA, whether Argentina interfered with AGBA’s and/or Claimants’ activities, and whether it deprived Claimants, in whole or in part, of their ownership of AGBA’s shares. These conditions were not met in *Azurix*.<sup>392</sup> A certain degree of impairment does not give rise to expropriation if the ownership and control of the investment is not lost. The measures adopted by Argentina were general and neither discriminatory nor arbitrary. The emergency measures were necessary to protect essential public interests.

983. It would be erroneous to equate the BIT with an absolute guarantee against the business risk. Furthermore, the Concessionaire had breached its obligations under the Concession Contract prior to the adoption of the emergency measures by the Argentine Republic. The *LG&E* Tribunal stated that “Interference with the investment’s ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for expropriation.”<sup>393</sup> In the case of *Metalpar*, it was concluded that the company continued performing its business activities and improved its production.<sup>394</sup> The *Generation Ukraine* Tribunal noted that while there were many examples of indirect expropriation, it is more difficult to find cases that would explain the application of the notion of “creeping” expropriation.<sup>395</sup> The *Waste Management* Tribunal stated that the mere failure to comply with a contractual obligation does not necessarily amount to an expropriation. “The loss of benefits or expectations is not a sufficient criterion for an expropriation, even if it is a necessary one.”

984. This is not a case where the whole enterprise was terminated or frustrated, nor is there a clear chain of measures that would eventually amount to a substantial interference

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<sup>391</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID/ARB/01/8, Award of May 12, 2005 (ALRA-130).

<sup>392</sup> *Azurix Corp. v. Argentine Republic*, ICSID/ARB/01/12 (ALRA-132, CUL-13).

<sup>393</sup> *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID/ARB/02/1, Decision on Liability of October 3, 2006 (ALRA-133).

<sup>394</sup> *Metalpar S.A. y Buen Aire S.A. v. Argentine Republic*, ICSID/ARB/03/5, Award on the Merits of June 6, 2008 (ALRA-134).

<sup>395</sup> *Generation Ukraine Inc. v. Ukraine*, ICSID/ARB/00/9, Award of September 16, 2003 (ALRA-135).

with or a full deprivation of the investment. The acts or omissions invoked by Claimants do not amount to a substantial deprivation of property rights. The measures adopted by the Argentine Republic were implemented in response to the crisis that hit the country, which called for an adaptation of contractual terms. Claimants' claim is insufficient to turn an alleged breach of contract into a violation of international law that is tantamount to an expropriation.

985. Claimants seem to suggest that any measure taken by the Argentine Republic that may have somehow reduced the profitability of their business must be considered tantamount to expropriation. However, the Treaty was not meant to have and does not have such a broad scope. The *Azinian* Tribunal noted that NAFTA was not intended to provide foreign investors with blanket protection from any disappointment investors may have in their dealings with public authorities.<sup>396</sup> The reduction in the profitability of a business does not constitute "impairment" in value of such type that may be considered tantamount to a taking of property.

986. The most frequently cited definition of the doctrine of police powers is contained in Article 10(5) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961). The *Saluka* Tribunal cited this provision and concluded that measures aimed at the general welfare of the State were a lawful and permissible regulatory action by the host State, with the effect that there was no obligation to indemnify the investor pursuant to the BIT.<sup>397</sup> The Tribunal explained that the principle that general regulations of such kind are commonly accepted as within the police power of States and do not constitute an expropriation forms part of customary international law. Nevertheless, a line has to be drawn that makes such regulations distinguishable from measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable.

987. The Tribunal in *Saluka* strongly supports the allegations put forward by the Argentine Republic that are: (1) The standard of evidence applicable where expropriation claims are submitted is high; (2) the States have a "margin of discretion" in complying with their general welfare obligations; (3) the reasons provided by State authorities in justifying their regulatory decisions may only be challenged through clear and convincing evidence of the mistake or wrongful act; (4) the deprivation of assets may be a lawful regulatory decision in cases of appropriation for legitimate public interest reasons, even where such measure affects only one business; and (5) the mere determination of the existence of "deprivation" does not create in itself an obligation to indemnify. When deprivation is the result of legitimate regulatory measures, no compensation must be paid.

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<sup>396</sup> *Robert Azinian et al. v. United Mexican States*, ICSID/ARB(AF)/97/2, Award of November 1, 1999 (ALRA-87).

<sup>397</sup> *Saluka Investments BV v. The Czech Republic*, Partial Award of March 17, 2006 (ALRA-137, CUL-59).

988. The Argentine Republic maintains that the management of its monetary policy is integrally related to the measures adopted to face the serious crisis. They were not expropriatory in nature and did not produce an effect tantamount to expropriation because the Argentine Republic merely exercised its police power. The fact that no arbitral tribunal has ever found those measures to be expropriatory is particularly relevant. It is clear that the reasonableness and proportionality of the State's response to a situation of collapse are an essential factor in determining whether or not the State crossed the dividing line between a regulatory action that is permissible – and therefore non-compensable – and an expropriation.

989. In *Lauder*, it was stated that the tribunal must “look at the real interests involved and the purpose and effect of the government measure.”<sup>398</sup> In *LG&E*, the Tribunal stressed that there must be a balance in the analysis both of the causes and the effects of the measure in order that one may qualify a measure as being of an expropriatory nature. This Tribunal also found that the State has the right to adopt measures having a social or general welfare purpose without any imposition of liability, “except in cases where the State's action is obviously disproportionate to the need being addressed.”

990. The existence and effect of the doctrine of police powers has been confirmed in *Fireman's Fund*.<sup>399</sup> The Tribunal distinguished between a compensable expropriation and a non-compensable regulation by the host State. The factors to be taken into account are: whether the measure is within the framework of the recognized police power of the host State; the purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized and the bona fide nature of the measure.

991. In *Continental*, these rules were even better established, when stating that “there are limitations to the use of property in the public interest that fall within typical government regulations of property entailing mostly inevitable limitations imposed in order to ensure the rights of others or of the general public. Such restrictions are not therefore considered a form of expropriation and do not require indemnification, provided however they do not affect property in an intolerable, discriminatory or disproportionate manner.”<sup>400</sup> In view of this, Claimants' argument that the measures adopted by the Argentine Government are unlawful has no valid grounds.

992. In addressing the expropriation claim put forward by Claimants the Tribunal must first determine whether the action concerned was actually carried out or whether the

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<sup>398</sup> *Ronald S. Lauder v. Czech Republic*, Final Award of September 3, 2001 (ALRA-139).

<sup>399</sup> *Fireman's Fund Insurance Company v. United Mexican States*, ICSID/ARB(AF)/02/1, Award of July 17, 2006 (ALRA-138).

<sup>400</sup> *Continental Casualty Company v. Argentine Republic*, ICSID/ARB/03/9, Award of September 5, 2008 (ALRA-140).

measures taken by Argentina constituted a *bona fide*, non-discriminatory and legitimate regulation. In such case, there will be neither a breach of the BIT nor a duty to compensate, even where there is a reduction in the value of the investments. One may not validly conclude that there was an indirect expropriation since Claimants maintained, at all times, the ownership, management and control of their investment in AGBA. AGBA's operation of the service did not become unfeasible. At no time did the measures challenged by Claimants render compliance with the Contract virtually impossible. Argentina did not adopt any measure entailing interference with AGBA's management and did not take any measure depriving Claimants of control over their investment. Claimants have never suffered a substantial deprivation of their ownership or control of their investment. The disputed measures were adopted and applied by the Argentine Republic in the legitimate exercise of its regulatory power. Claimants' indirect expropriation claim must be rejected.

993. The last claim submitted by Claimants in relation to the expropriation is based on the alleged deprivation of their contractual rights owing to the pesification of AGBA's tariffs at an artificially low level; the failure to apply the tariff review mechanisms set forth in the Concession Contract; the abrogation of AGBA's right to collect construction charges; and the final abrogation of AGBA's right to manage the Company, through the imposition of the New Regulatory Framework. The purpose of the measures that Argentina was forced to adopt was to protect "legitimate public policy interests" in the face of the crisis that broke out in 2001. The measures taken were aimed at restoring public order. They were general in nature, were adopted in a well-reasoned manner and in accordance with the relevant legal provisions, and did not discriminate against anyone. These emergency measures are part of the police power held by every State. Their sole purpose was to respond to the most severe crisis in the history of Argentina. The crisis made it necessary to adapt the Regulatory Framework to the newly identified needs. They were aimed at preserving the integrity and legitimacy of the Argentine State. They were regulatory actions aimed at preserving an essential service such as the drinking water and sewerage service. They did not affect all or a substantial part of Claimants' alleged investment to such an extent that they may be equated with dispossession (expropriation). They were not discriminatory and were not adopted or applied in bad faith or disregarding Claimants' rights. The measures did not involve an expropriatory intent or effect simply because they did not entail the expropriation of Claimants' investment. Therefore, the expropriation claim submitted by Claimants should be rejected.

994. Claimants partly transcribe the decision on liability of the *Saur* case where the facts are different, when they could have commented the *Impregilo* Award. Claimants invoke the similarity of the concurring facts. Claimants acknowledge that the finding of expropriation did not concern the emergency measures themselves. No arbitral tribunal concluded that those measures were expropriatory in nature. The facts in that case differ clearly from the arbitration at hand.



995. The *Saur* Tribunal stated that the Argentine Republic had adopted a series of expropriatory measures. In the *Saur* Tribunal's understanding, there were two decisive factors in the determination of the existence of expropriation. (a) The Tribunal considered that there was a set of "successive measures" which had the effect of the dispossession of the foreign investor of its protected investment. (b) It qualified these measures as expropriatory because they had been "executed in the exercise of sovereign powers." These two factors do not exist in the arbitration at hand. There is no set of successive measures that have led to the Claimants' dispossession. This was indicated by the *Impregilo* Tribunal. The AGBA Concession in this case was not subject to any sort of placement under government control. The termination of AGBA's Concession Contract was made on the basis of the provisions of the Contract itself. As the *Impregilo* Tribunal explained, the Concession Contract provided for termination in various defined circumstances, and if the Contract is terminated in conformity with these provisions, this is not an act of expropriation.

996. Another fact indicates that both cases are different. In the *Saur* case, it was not considered that the concessionaire had committed material and repeated breaches. The *Impregilo* Tribunal, on the contrary, found that the material and numerous breaches of AGBA's obligations under the Concession Contract constituted the basis of the termination of the Contract. For the Tribunal, this was sufficient to exclude that the termination could be regarded as an act of expropriation. The determining facts in the *Saur* case differ substantially from the relevant facts in this instant arbitral proceeding. All arguments raised by the Argentine Republic in the Counter-Memorial are reiterated and have not been answered by Claimants.

### C. The Tribunal's findings

997. The Tribunal notes that Claimants' first contention that they were victims of indirect expropriation relates to a state of facts as achieved by the end of 2005. Indeed, this situation was alleged in support of the two identical Notices of dispute filed with the Argentine Government by Claimants in December 2005 and January 2006.

998. Compared to such occurrence of successive adverse measures taken by the Argentine authorities the termination Decree No. 1666/06 appears as the culminating point in this succession representing an indirect expropriation. However, Claimants also argue that the Concession's sudden termination constitutes a direct expropriation given its effect of taking the Concession away from AGBA, followed by its transfer to ABSA.

999. The Tribunal does not need to entertain a debate about the distinction between direct and indirect expropriation. It is sufficient to examine the relevant circumstances of the instant case in light of the Parties' arguments and by reference to Article V of the BIT that reads as follows:

“Nationalization, expropriation or any other measure having similar characteristics or effects that might be adopted by the authorities of one Party against investments made in its territory by investors of the other Party shall be effected only in the public interest, in accordance with the law, and shall in no case be discriminatory. The Party adopting such measures shall pay the investor or his assignee appropriate compensation, without undue delay and in freely convertible currency.”

1000. This provision does not define the notions of nationalization and expropriation. Therefore, the terms “any other measure having similar characteristics or effects” are equally left undefined. The basic idea is that of a “taking.” Such measures are in the nature of depriving the investor of all or significant parts of its rights, including properties and contractually acquired rights, which represent the investment. In such a case, Article V states that such measures are lawful under the BIT if three conditions are met: the measures must be in the public interest, according to the law and not being discriminatory. When these conditions are satisfied, the host State is under an obligation to afford appropriate compensation. In the opposed hypothesis, the measure is unlawful and triggers the investor’s right for reparation.

1001. Claimants’ line of alleged successive events representing an indirect expropriation starts with the pesification and freeze of tariffs ordered as part of the emergency measures taken in early 2002. The ensuing reduction in value of the tariffs had a potential of significant loss of income for the Concessionaire over the years if no remedy was provided. The effects of these measures were not unilaterally affecting the income derived from public concession contracts. They were complemented by an undertaking of the authorities to provide for renegotiation of the contracts, which implicitly meant a review of basic contractual parameters that went beyond the adjustment mechanisms anyhow available under the contract. Therefore, the emergency measures were far away from any “taking” away of the Concessionaire’s rights. They represented a temporary reduction in the Concessionaire’s income the effects of which were to be compensated in full or in part through a process of renegotiation to be undertaken and concluded by mutual agreement.

1002. Under the then prevailing circumstances, AGBA’s and its shareholders’ loss of revenue could not arguably represent a reduction of AGBA’s involvement in the expansion of the network. While the loss in income had the effect of reducing the available funds originating from this source of revenue, AGBA would nevertheless have been capable of proceeding with the required investment in the network if its shareholders had provided for the funding they were required to ensure under the POES in the absence of third-party loans. Therefore, the Tribunal concludes that the emergency measures taken in 2002 did not represent a “taking” tantamount to an indirect expropriation.

1003. Claimants contend that nonetheless, the Province’s negligence in proceeding with serious and effective renegotiations in the period between 2002 and 2005 confirmed and intensified the adverse effects of the tariff’s pesification and freeze. The emergency

measures were thus given long-term effects that definitively caused the disruption of the Concession and the loss of AGBA's shareholders' investment.

1004. The Tribunal has explained above that it does not share Claimants' presentation of the conduct and the failure of the renegotiation. While the whole process appears as having been conducted over an overly long period, the Tribunal does not find that there were clear signs of an intention to disrupt the process or to let it collapse on one part or the other. The Province had actively participated in the discussions and provided AGBA with incentives to improve its models for future business. There is no showing on part of Claimants and no evidence provided in support of an assertion that AGBA was the object of an intention or implicit result of the conduct adopted on part of the Province to be deprived of its rights under the Concession in a way similar or tantamount to an expropriation.

1005. Such an allegation on Claimants' parts appears moreover inconsistent with AGBA's own actual participation in these negotiations that Claimants cannot deny. AGBA's involvement would not have been as constructive as it was, at least in 2003 and 2004, if its representatives had understood that the Province's expressed or implicit objective was to deprive the company from its rights and legitimate expectations to conduct the Concession any further.

1006. Claimants' position is inconsistent for the other reason that they argue before this Tribunal that AGBA had not participated actively in these renegotiation. If this position would be correct in light of the actual facts, Claimants would have no point in arguing to be victim of an indirect expropriation they had decided not to resist through their own participation in the renegotiation.

1007. The Tribunal further notes that at that time, AGBA's situation did not improve for reasons independent from the pesification and freeze of the tariffs. It has been established that AGBA was not able to proceed with expansion work as determined under the first Five-Year POES and that the lack of sufficient funding was not made up by its shareholders as they should have done. Under these circumstances, there could be no "taking" by the Province of a Concession that was running at its loss by the Concessionaire's and its shareholder's own acts and omissions.

1008. The Tribunal has explained above that Decree No. 1666/06 declared the termination of the Concession Contract on grounds that were mainly and rightly based on the Concessionaire's fault in not having achieved, and by far, the expansion goals determined in the first Five-Year POES, together with its failure to provide for the necessary funding as it had undertaken to make available in the same POES. The Decree's foundation in the Concession Contract renders moot any debate about an alleged expropriation. In any event, Claimants' had lost their interest in the Concession long before, as this had been expressed

in the two Notices of dispute of December 2005 and January 2006, and in AGBA's letter of June 14, 2006, that could have had no other meaning than to announce the forthcoming declaration of the Concessionaire to terminate the Contract on the Grantor's fault. When the Grantor was finally first in declaring termination, it reached the same effect and did certainly not expropriate rights that the Concessionaire was about to declare to terminate as well. The entity that was then "taken away" was in fact an empty shell, representing an investment in which the investors had no interest any more, subject to the outcome of a remedy based on international arbitration.

1009. Therefore, the Tribunal dismisses Claimants' claims based on an alleged expropriation of their rights under Article V of the BIT.

## **XI. Discriminatory and Unjustified Measures**

### **A. Article III(1) of the BIT**

1010. Under the title "protection," Article III provides, in its here relevant part of paragraph 1, as follows:

"1. Each Party shall protect within its territory investments made in accordance with its legislation by investors of the other Party and shall not obstruct, by unjustified or discriminatory measures, the management, maintenance, use, enjoyment, extension, sale and, where appropriate, liquidation of such investments."

1011. Claimants contend that Respondent had not complied with this obligation under the BIT in both of its main aspects, when it took discriminatory measures in treating the Concessionaire (B) and when it took measures that were unjustified (C).

### **B. Claimants' claim based on allegedly discriminatory measures**

#### *1. Claimants' position*

1012. In support of its claim whereby Claimants invoke AGBA's discriminatory treatment, a number of comparisons are presented that all aim to show that AGBA was treated differently than other concessionaires and this to such a significant extent that such difference entailed discrimination.

1013. The treatment afforded by the same Grantor to AGBA, for region B, and to AZURIX, for regions A and C, was different. The Province did sign a Memorandum of Understanding with AZURIX, on February 15, 2001. With AGBA, the Province did not intend to sign such an agreement. The reply was that that the issue with AZURIX had

first to be worked out (CU-174). AGBA filed a claim in that respect (CU-210). Azurix had some of its requests satisfied, whereas they were denied to AGBA. Resolution No. 15/00 allowed Azurix's concessionaire to re-categorize users initially recorded as vacant, while AGBA's request to that effect remained un-answered. The discrimination was worse when considering the treatment accorded to ABSA. This concessionaire was subject to the same regime as Azurix, "except, however, for the investment and service expansion regime" (Decree No. 577/02, ratified by Law No. 12989, CU-211). The same applied when ABSA took over AGBA's concession on July 13, 2006 (Decree No. 1677/06, CU-203). ABSA was thus exempted from the obligation to perform expansion works and investments and fulfill the POES.

1014. While it refused to renegotiate the Contract with AGBA, the Grantor adapted the concession it handed over to ABSA through a Memorandum of Understanding signed on April 7, 2005, providing in particular for a transfer of funds of over 60 million ARS, a promise of future contributions and future tariff increases. That Memorandum was approved by means of Decree No. 757/05 of April 26, 2005 (CU-169), stating that thus the obligation to adapt contracts as provided in the NRF was satisfied. The said Memorandum did not contain expansion, quality improvement and micro-metering obligations. The Decree recognized this and approved a financial model that incorporated tariff increases starting in the second half of 2005. At least 120 million ARS were spent to maintain ABSA's "sustainable equilibrium." This means that the Province: (1) acknowledged that it was impossible for ABSA to afford expansion and/or quality improvements, leaving this out of its obligations; (2) acknowledged that ABSA had operated and would continue to operate at a deficit; (3) justified two contributions of each more than 60 million ARS as "sustainable equilibrium"; (4) left the quality goals established in the original Regulatory Framework out of the scope of ABSA's obligations; (5) promised tariff increases of 33%; (6) promised to recognize future hikes in costs. ABGA was recognized none of these.

1015. By Decree No. 963/05 of May 12, 2005, the Governor of the Province instructed the Ministry of Infrastructure, Housing and Public Services to execute a Framework Agreement as contained in its Annex II (CU-212). Under this Agreement, the Province was to carry out and finance the works and, upon completion, transfer them to the service provider. This required a renegotiation of the existing contracts, which was refused to AGBA.

1016. On March 24, 2007, the Grantor issued Decree No. 953/07, ordering the modification of the regime in place and a tariff increase for ABSA, by reference to the Memorandum of Understanding of April 7, 2005, which had been approved by Decree No. 757/05. This increase was explained by the growth in real estate development in the Prov-

ince. In respect of AGBA, this was qualified by the Grantor as one of the Concessionaire's business risks. Thus, the tariff increases that were denied to AGBA many times were granted to ABSA less than one year after the termination of AGBA's Concession.

1017. Decree No. 3144/08 of December 9, 2008, approved a new tariff regime applicable to ABSA, based on reasons that had been denied to AGBA (CU-214). These reasons included the insufficiency of the tariff level and the economic-financial imbalance of the Concession. The Decree recognized that the tariffs had remained unchanged since 1991 and that since then, the economic-financial equilibrium of service provision had been substantially altered, with the effect that it had become urgent to revise the tariff regime through tariffs reflecting the economic cost of service provision in line with the Regulatory Framework provided in Decree No. 878/03. It was also recognized that the submission by ABSA of a new tariff regime was driven by the need to cover the large gap between the costs to be covered by the provider for service operation, maintenance and investment purposes, and the provider's income. One point is incorrect in this respect: Indeed, the tariffs had suffered a sudden change in 2002 as a result of their pesification and freeze. The Decree states expressly that (1) the tariffs were not even sufficient to cover the costs of the service; (2) the Concession's economic-financial equation was off balance; and (3) the Concession was economically impossible to sustain via the existing tariffs. The metered service tariff increases were of an average of 130% for the water service and of 180% for the sewage service. The media impact of this tariff increases was important. They were justified for the same reasons as those used by AGBA.

1018. In addition, a good number of the measures adopted to supplement the tariff increases were the same as those requested by AGBA, as the use of the "2000 Valuations" database, the full increase of the Sewage Fee to its final value, the charge of a meter price of ARS 242.80, the right to increase the reconnection fee, the lowering of the minimum consumption level. ASBA's tariff increases came hand in hand with a whole set of measures that were reasonable and contributed to bring the Concession back to economic equilibrium. It appears therefore even more discriminatory that AGBA was refused these additional measures as well.

1019. Because of its expansion obligations, AGBA suffered an increase in its electricity consumption. It could therefore not take advantage of the "Program de Uso Racional de la Energía Eléctrica" (PUREE, Rational Electricity Use Program) (CU-219 and CU-220), which rewarded users with lower consumption levels, while punishing those having higher peaks. The program also applied to AGBA, starting in May 2005 (Secretary of Energy Resolution No. 745/2005, CU-221). The exemption AGBA requested (CU-58) was not supported. On the other hand, ASBA secured a reduction of about 1.2 million.

1020. The tariff freeze applied by the Province of Buenos Aires was not applied in the same way in other Provinces. On October 16, 2009, the "Consejo Federal de Entidades

de Servicios Sanitarios” (COFES, Federal Council of Sanitarian Entities) noted the existence of tariff increases and the injection of public funds to the concessionaire in certain Provinces (CU-222). The Concessionaire in the Province of Salta got a tariff increase as early as 2002, cumulating at 89.11% as of 2006. The Concessionaire in the Province of Tucumán arrived at an increase of 45.48% in 2009. Aguas de Tucuman received contributions from the provincial government in the amount of 12.25 million between 2002 and 2008. This also demonstrates that there were other solutions available to address the emergency and that there was no reason to apply them on a discriminatory basis.

1021. The Argentine Government took clearly different positions in other sectors of the economy regarding the price adjustments implemented by Argentine companies after the implementation of the emergency measures. The vast majority of companies in sectors other than the water sectors changed their prices without being subject to any sort of restriction (CU-223). A second group of sectors, like gasoline, increased their value hand in hand with the USD value, based on an authorization (CU-224). The same applied to air fares and other public transportation fares. Construction, Operation and Maintenance contracts for electricity transportation expansion received inflation adjustment based on public decisions (CU-225, CU-226). In another group are those sectors which maintained USD-denominated tariffs, as ports and airline services. A very different treatment was applied to the public service companies holding concession contracts the values of which were pesified into arbitrary values at the rate of USD 1 = ARS 1 and frozen in January 2002. AGBA is one of the clearest examples. Such discriminatory treatment had a very detrimental impact on the valuation of the affected companies and on the value of their stockholders’ investments.

1022. Claimants submit the conclusion that such discrimination had the following implications: (1) unless measures were taken to allow an increase in the concessionaire’s income, the concession could not survive; (2) people could share efforts which, in fact, were exclusively forced upon the concessionaire and its stockholders; (3) there were formulas other than the pesification and freezing of tariffs available and no reason provided why they could not have been applied to other public service providers, as AGBA. In this respect, the treatment of ASBA is particularly relevant. This entity took over the same region, the same services and the same users, but it was subject to very different obligations and very different income levels and financing sources. The detrimental impact of the favorable treatment accorded to ASBA is even worse in light of the fact that, for a while, both companies operated at the same time in the same Province. Workers’ salaries is an example: while ASBA could afford to satisfy them using the public funds it received from the Province, AGBA had to yield to union pressure without any sort of public subsidy or tariff increase.

1023. Claimants further provide a concise summary of the measures taken *vis-à-vis* AGBA and the Claimants’ investments that were discriminatory with respect to other

foreign investors and, particularly, with respect to Argentine entities that are owned by the State: (1) The Province of Buenos Aires authorized concessionaire AZURIX to apply mechanisms that allowed it to use real valuations to recategorize users whereas AGBA was barred from doing the same. (2) The same Province signed a Memorandum of Understanding with AZURIX, while AGBA was barred from such a deal. (3) AGBA had never received any response to its claims for tariff increases and compensation for damages and imbalances from the emergency measures and the change in the Regulatory Framework, whereas ABSA received substantial tariff increases and subsidies. (4) AGBA witnessed the freezing and pesification of its tariffs, for the alleged reason that the population could not afford higher tariffs, while significant increases in the price of food and transportation were allowed. (5) AGBA was never allowed to reduce the surcharge resulting from the increase in electrical power consumption, while ASBA was allowed to implement such reduction. (6) AGBA was never allowed to increase tariffs whereas companies from other sectors received compensations. Claimants were discriminated against in the application and maintenance of measures through which the Federal Government and the Province of Buenos Aires intended to address an emergency declared by the State and the Province.

1024. In response to Respondent's explanations and refusal of Claimants' submissions on measures taken by the Argentine Republic and based on discrimination, Claimants contend that the objections and conclusions put forward by Respondent are not correct.

1025. For the purposes of Article III(1) of the BIT, it is sufficient that a portion of AGBA's capital stock was held by Spanish investors, irrespective of the nationality of the other shareholders. The investment was made and the risk undertaken by the foreign investors, who must be awarded the protection of the BIT.

1026. Claimants note that it is not necessary that the differential treatment for foreign investors be based on their nationality. It is merely required that a discriminatory situation occurred, irrespective of its cause. Several awards analyze allegations of discrimination from the perspective of the application of a national treatment clause. In the case of Treaties which include specific provisions regarding discriminatory measures and national treatment, such as the Spain-Argentina BIT (Articles III.1 and IV.5), the former cannot be equated to the latter. Therefore, requiring that acts be considered discriminatory only with respect to nationals from the host State is inadmissible. As stated in the *National Grid Award*<sup>401</sup>, a non-discrimination clause does not limit itself to discrimination on the basis of nationality without covering measures based on other grounds. The fact that a measure is adopted against foreign investors is an element that helps determining its discriminatory nature, but it does not constitute an absolute requirement to prove the presence of discrimination, as stated in the *Saur Decision* (CUL-174). One of the assumptions

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<sup>401</sup> *National Grid P.L.C. v. Argentine Republic*, Award of November 3, 2008 (CUL-45, ALRA-219).



of discrimination may be the fact that the measure is targeted specifically at foreign investors, but this does not mean that this is an additional requirement.

1027. The occurrence of “exact circumstances” between the investor alleging discrimination and those it is compared with is not necessary to determine the existence of discrimination, as purported by the Argentine Republic. Like circumstances are sufficient. The fact that two companies operate in the same business or economic sector is sufficient to consider that both companies are in like circumstances for the purposes to identify what are “like circumstances.” Therefore, AGBA was in like circumstances with respect to ABSA, Azurix and other water and sewage services concessionaires or providers. In the *S.D. Myers* case, the Tribunal took the view that the word “sector” has a wide connotation that includes the concepts of “economic sector” and “business sector.”<sup>402</sup> The Respondent fails to mention the Award rendered in the *Occidental* case (CUL-175). Since the matter concerned the reimbursement of value added tax, it was concluded that a relevant comparison had to include all companies standing in a situation comparable to that of the claimant, thus covering all export companies. Therefore, the requirement of like circumstances generally includes all players within the same business sector, but it may also include economic sectors other than that where the claimant operates.

1028. It is not required that the discriminated investor must prove that the challenged measure was adopted to harm it. This assertion was rejected in the *El Paso* case (CUL 176). In the *Occidental* Award as well, discrimination was admitted without inquiring whether it had been practiced with the intent of discriminating against foreign investors. Equally clear is the opinion given in the *Siemens* case.<sup>403</sup> The Government’s intent in adopting discriminatory measures is only relevant where there is no objective evidence of discrimination. This is not relevant in this case, since there are abundant objective elements which evidence the discriminatory treatment.

1029. In case there is any difference in treatment, such difference will be deemed discriminatory unless the Government proves that it has a reasonable justification for the different treatment. This has been reflected in the *Saluka* case, stating that the Czech Government was bound to implement its policies, including its privatization strategies, in a way that did not lead to unjustified differential treatment unlawful under the Treaty.<sup>404</sup> A measure may be lawful, and even adequate, but still be discriminatory. What must be justified is the reasonability of affording differential treatment to the claimant’s investment. The differential treatment afforded to AGBA having been proved, the Respondent bears the burden of proving that the measures adopted with respect to AGBA but not to other concessionaires in the water services sector were justified by the different situations that may have unfolded in the case of AGBA, as opposed to the case of the benefited

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<sup>402</sup> *S.D. Myers Inc. v. Government of Canada*, Partial Award of November 13, 2000 (CUL-46, ALRA-160).

<sup>403</sup> *Siemens AG v. Argentine Republic*, ICSID/ARB/02/8, Award of February 6, 2007 (CUL-61).

<sup>404</sup> *Saluka Investments BV v. The Czech Republic*, Partial Award of March 17, 2006 (CUL-59, ALRA-137).

companies. The test applicable to cases of this nature is that applied in the *Saluka* case, stating that “State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.” AGBA was in the same situation as other concessionaires and companies that benefited from the several measures adopted by the authorities, and such differential treatment was owing to purely political considerations, and not to an objective inequality or to circumstances different from those of the other concessionaires or companies. Therefore, discriminatory treatment was afforded in violation of the Spain-Argentina BIT.

1030. Claimants understand that the Respondent does not deny that AGBA was afforded differential treatment with respect to the providers of other public services, the concessionaires of water and sewage services in other provinces, like ABA (concessionaire of which AZURIX was a shareholder), and the state-owned company ABSA, which succeeded AGBA in the service provision upon the Contract’s termination. Claimants submit that therefore, the burden of proving that such differential treatment is validly justified falls on the Argentine Republic.

1031. Claimants also understand that the Respondent accepts that the possibility of a tariff increase was accepted by the Province in favour of ABSA but not applied to AGBA. This was a discriminatory treatment. Respondent’s argument that the Province had no intent to discriminate against AGBA is irrelevant in Claimants’ view, because such intent is not a requirement for retaining such discrimination.

1032. Claimants dispute strongly the Respondent’s allegation that AGBA and ABSA were not in like situations. They argue that this is wrong. Both companies provided the same services, in the same Province, under the same regulatory framework and subject to the same regulatory authority. They object to Respondent when it resorts to the fact that ABSA is a state-owned company. The degree of risk assumed by either concessionaire is irrelevant. The issue is not the economic profit made by each concessionaire, but the existence of measures affording a significantly more favourable treatment to ABSA than AGBA. The relevant fact is that both entities operated in the same business sector.

1033. Claimants do not find any explanation why such difference between the areas in which both companies rendered the service is relevant for the purpose of discriminating against AGBA. Since the areas to be served by ABSA were amongst the poorest in the Province, were there any justification to provide aid to one of the service provider, it was AGBA, not ABSA that should have been the beneficiary of that aid. Respondent intends to hold AGBA liable for any event, on the grounds that it was a privately-owned company that had chosen to assume enormous risks. Therefore, it would seem that, if any kind of public support was necessary in any place, such place would be AGBA’s Concession area, not ABA’s, later taken over by ABSA. If the Grantor considered that support of water and sewage services was needed, the logical thing would have been to equally

distribute such support to AGBA, in lieu of benefitting the state-owned provider vis-à-vis the privately-owned one.

1034. There is equally no ground in the Respondent's argument that a number of benefits had been granted to AGBA, like the suspension of the investment obligations for 2001. This is not correct, in light of the fact that a breach of the expansion goals due to lack of investment is the first ground specified in the termination Decree, although no legal ground for doing so did exist, as this was demonstrated by the Province through its waiver to punish AGBA as required under the Contract.

1035. In order to avoid discriminatory treatment in relation to the renegotiation process, the Grantor could have offered AGBA the same advantages afforded to ABSA, thus preventing discrimination. It is inconceivable that the Argentine Republic should describe a 93% increase as an "excessive tariff increase," when ABSA was granted, on average, a 130% increase for its water service and a 180% increase for its sewage service. It is also inconceivable that Respondent should be shocked by AGBA's alleged intention to get released from all investment obligations, considering that ABSA had no obligations in that regard.

1036. The Provincial Decree No. 757/05 of April 2005 (CU-169) did restrict ABSA's obligations, order a number of measures intended to restore the contract's equation, acknowledged that in the period 2002-2004, ABSA had operated at a loss, which is why it received subsidies in the amount of ARS 60.5 million, and approve a financial model providing for tariff increases and additional contributions in the event of future cost increases. ABSA had the certainty that it had not to suffer from a loss. AGBA never enjoyed any such guarantee and was never granted a tariff increase. Respondent's argument that the Province's shareholder contributions to ABSA and the guarantees as to future tariff increases and the comparison to what CABB and URBASER might have done in connection with AGBA are absolutely baseless. The language of the Decree makes clear that the Province was not acting as a shareholder but in its role as the concession's Grantor. Such role cannot be compared in any way with contributions made by shareholders to their company.

1037. Claimants find further evidence for discriminatory treatment of AGBA in Respondent's allegations regarding Decree No. 963/05. This Decree allowed the Province's Ministry of Infrastructure, Housing and Public Services to enter into agreements with drinking water and sewage services providers. However, there was one requirement that only ABSA could meet: the company had to sign a contract in line with the New Regulatory Framework. AGBA never had the chance to sign any such contract, given the authorities' non-existing willingness to negotiate, which materialized three months before the Decree was issued, when the authorities abandoned the negotiations with AGBA in February 2005. It is obvious that the execution of works by the Province in the context

of the Concession would have allowed the Company to serve more customers, thereby increasing AGBA's revenue. AGBA had no access to such benefits as a result of the discriminatory nature of Decree 963/05, since ABSA was the only company with access to them.

1038. As regards Decrees 953/07 and 3144/08, Respondent's only response is that they were issued after AGBA's Concession had been terminated. While this is correct, these Decrees nevertheless demonstrate that ABSA was granted every request AGBA had been reasonably making for years and was systematically denied to it. The Province knew that it was impossible to maintain the Concession's economic-financial equation and did not assist AGBA at all. Once it had regained control over the Concession for purely political reasons and it had transferred it to ABSA, it approved the necessary changes (tariff increases) to make the concession viable. This is evidence of obvious discrimination against AGBA.

1039. In Claimants' view, the indisputable fact is that there was a material difference in the treatment ABSA received as compared to that afforded to AGBA. The first two elements the *Saluka* Tribunal took into consideration in determining whether there had been discrimination are present here: different treatment afforded in similar cases. Therefore, the burden of proving the reasons for that difference in treatment lies with the State. Claimants have provided more than abundant evidence of the existence of discriminatory treatment by the Argentine Republic. Claimants have also proved that very different treatment was afforded in comparable cases, whereas Respondent has been unable to provide any valid justification for such difference in treatment.

## 2. *Respondent's position*

1040. Respondent explains at the outset that there is discriminatory treatment in violation of Article III.1 BIT only if the investor is treated in a way that (a) is different by reason of its nationality, (b) is less favorable than that accorded to other investors under the same circumstances, (c) is intended to harm the foreign investor, (d) causes actual damage to the foreign investor, and (e) is not justified by sufficient reasons. Although Claimants acknowledge that in order for there to be discriminatory treatment pursuant to Article III.1 of the Treaty the difference in treatment needs to result in an actual damage to the foreign investor and lack a reasonable justification, they make observations regarding the three other requirements only.

1041. Claimants state that it is not necessary for the differential treatment afforded to investors to be contingent upon nationality. Contrary to what Claimants affirm, the discrimination referred to in Article III.1 is to be distinguished from the national treatment of Article IV.5. The latter article implies a comparison between foreign investors and domestic investors, whereas Article III.1 prohibits cases of intentional discrimination on

the basis of foreign nationality. Case law confirms that the discrimination prohibited by the bilateral Investment treaties is that based on the nationality of the investor. The *Genin* Tribunal considered that the relevant article of the Estonia-U.S. BIT prohibited the differential treatment of foreign investment by reason of nationality.<sup>405</sup> The *Noble Venture* Tribunal indicated that it was necessary to prove that a certain measure was directed specifically against a certain investor by reason of its nationality.<sup>406</sup> The *PSEG* Tribunal determined that there had been no discrimination precisely because the questioned measures had not been directed specifically at the claimants as foreign investors.<sup>407</sup> The *El Paso* Tribunal held that the protection against discrimination in the BIT is a protection against discrimination of foreign investors as such.<sup>408</sup>

1042. Claimants also state that a similarity of circumstances is required. They argue that the fact that two companies operate in the same business or economic sector is sufficient to consider that both companies are in like circumstances for these purposes. In this respect, Claimants hold that the requirement includes all players within the same business sector. There is no agreement between the Parties regarding the extent of the similarity of circumstances. The different treatment accorded to different economic sectors cannot give rise to discrimination. And the fact that two companies are in a same economic sector is a necessary but insufficient condition to consider that those companies are under similar circumstances for purposes of a comparison under Article III.1 BIT.

1043. The treatment accorded to the foreign investor should be compared with that accorded to other investors in the same economic sector. Nevertheless, the fact that two investors belong to the same economic sector is not a sufficient condition to conclude that they are under like circumstances. This can be illustrated by the *Champion Trading* case.<sup>409</sup> Belonging to the same economic sector constitutes a necessary condition but is not sufficient to determine whether two investors are under like circumstances.

1044. In relation to the requirement of intent, although Claimants argue that it is not a requirement, they later acknowledge that the discriminatory intent of the State is relevant, although they assign it a limited role. For an act to constitute discrimination under international law, an intention to harm the aggrieved alien is required.

1045. Claimants acknowledge that the measures adopted by the Government must somehow affect the investment in order to constitute discrimination. This is provided for in

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<sup>405</sup> *Alex Genin et al. v. Republic of Estonia*, ICSID/ARB//99/2, Award of June 25, 2001 (ALRA-194).

<sup>406</sup> *Noble Venture Inc. v. Rumania*, ICSID/ARB/01/11, Award of October 12, 2005 (ALRA-211).

<sup>407</sup> *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID/ARB/02/5, Award of January 19, 2007 (ALRA-224).

<sup>408</sup> *El Paso Energy International v. Argentine Republic*, ICSID/ARB/03/15, Award of October 31, 2011 (ALRA-234).

<sup>409</sup> *Champion Trading Company Ameritrade International Inc. v. Republic of Egypt*, ICSID/ARB/02/9, Award of October 27, 2006 (ALRA-220).

Article III.1 BIT itself, when it requires that the measures must “obstruct” the investor’s activities. Claimants also accept that a difference in treatment with a reasonable justification does not constitute discriminatory treatment prohibited by the BIT.

1046. In conclusion, in order for there to be discriminatory treatment in violation of Article III.1, the investor is to be accorded differential treatment by reason of its nationality, such treatment is to be less favorable than that accorded to other investors under the same circumstances, it is to be accorded with the intent to harm the foreign investor, causing actual damage to the foreign investor, and not justified by sufficient reasons.

1047. When turning to the specific circumstances of the instant case, Respondent notes that Claimants allege discriminatory measures that were detrimental to them (i) with regard to the treatment accorded to ABSA’s concession in the Province of Buenos Aires, (ii) in relation to other water services concessionaires in other provinces and (iii) with respect to other economic sectors.

1048. AGBA and ABSA were not in like situations. Companies can operate in the same industry and find themselves in significantly different situations. AGBA’s situation was significantly different. ABSA was created by the Province in 2003, with state capital mainly, for the purpose of taking over the concession that had been operated by AZURIX. One of the reasons why the Province had to create ABSA was to respond to the sanitation emergency and to maintain quality levels. The areas in which both companies were operating are not comparable either. ABSA took over a concession which included 48 districts all over the Province. On the contrary, AGBA decided to invest in seven districts of Greater Buenos Aires. The measures adopted by the Province with respect to AGBA had no relation whatsoever to the nationality of AGBA’s investors but were, rather, connected with the numerous breaches committed by the company.

1049. The New Regulatory Framework did not affect AGBA, because it had not chosen to submit to the regulation, whereas ABSA did. A series of supplementary standards resulting from the New Regulatory Framework only affected ABSA. ABSA adapted its situation to the New Regulatory Framework pursuant to Article 91. For example, Provincial Decree No. 757/05 of April 2005 approved the memorandum of agreement subscribed by ABSA, unlike AGBA. It did not introduce any tariff increase yet it acknowledged the possibility that the Province might make contributions to ABSA under certain conditions.

1050. The situation is similar with regard to Provincial Decree No. 953/07 of May 24, 2007. In addition, it cannot have any interest in respect of the discussion on discrimination, as it was issued ten months after the termination of AGBA’s Contract. In addition, the Decree did not grant any tariff increase. The only such increase was granted to ABSA in February 2009 that is more than 30 months after the termination of AGBA’s Contract.

It was implemented through Provincial Decree No. 3144/08. Here again, Claimants complain about measures that were not applied to them since they were adopted after the termination of the Contract.

1051. Provincial Decree No. 963/05 is also based on the relevance of the New Regulatory Framework. The same Decree refers to Provincial Decree No. 878/03 that has set up a new management system that was based on the NRF. Claimants cannot argue that the New Regulatory Framework was a discriminatory or unjustified measure. It was a valid tool within a contractual renegotiation process that brought about a series of management and operation possibilities for the Concession that had been claimed by AGBA itself since 2001. When Claimants indicate that subsidies were not granted to AGBA, they forget that it was only possible to grant it subsidies through the agreement contemplating the NRF's tools. And when they complain about Provincial Decree No. 963/05, they fail to indicate any damage. On the contrary, they confirm that this Decree would be implemented upon renegotiation of the Contract.

1052. Respondent also notes that Claimants have no reason to be upset by the alleged discrimination resulting from the Program for the Rational Use of Electricity (PUREE). The program began to be applied in May 2005. Claimants complain that as a result of their expansion commitments, they had to increase their consumption of electricity, which had caused them to be fined. However, the Concessionaire did not engage in any kind of expansion, which is why it can hardly consider itself to have been affected by that program.

1053. Claimants invoke an alleged discriminatory treatment regarding the water service concessionaires in other provinces. It is sufficient to point out in this respect that unequal treatment is only discriminatory between subjects that are in like situations, which is not the case between concessionaires in different provinces. For similar reasons, it is not possible to compare different treatments between investors in respect of the adjustment of prices in different economic sectors. The fact that they are subject to different regulatory frameworks is also worth noting. Indeed, each specific province establishes the applicable administrative law and regulatory framework. In addition, the concessionaires in different provinces operate in highly dissimilar concession areas, in particular in respect of the needs, geographic features, socioeconomic circumstances and the availability of resources.

1054. Respondent thus concludes that Claimants have not proved that they received a differential treatment by reason of their nationality, less favorable than that accorded to other investors in a like situation, which was accorded with the intent to harm them, which has caused them actual damage and which has not been justified with reasonable grounds. In sum, Claimants failed to demonstrate (i) that they were discriminated against because they were foreign investors, (ii) that they were discriminated against to the benefit of a

national investor and to their own detriment, (iii) that they were in like situations, (iv) that they suffered harm as a result of such treatment, and (v) that there were no reasonable grounds for making that distinction.

C. Claimants' allegations on unjustified measures

1. *Claimants' position*

1055. Claimants submit that apart from being discriminatory, the measures applied to AGBA were equally unjustified. This was so when AGBA was prevented to collect bills from default users, to commence debt-enforcement proceedings, to collect the expenses incurred to demand payment and the interest accrued, to cut off services to default users. Also ungrounded was the prohibition imposed on the Concessionaire to apply updated real estate data to reevaluate property. Equally ungrounded was the prohibition or delay in the application of connection and work charges. It was also beyond any understanding why the increase of coefficients was rejected on the ground that expansion plans were not complied with when actually the 2000 POES had been approved, the 2001 POES had been neutralized and no answer was given on the neutralization of the 2002 POES. Also ungrounded was the early imposition to place meters, without paying tribute to the terms set out for such service, in such a way as to allow maintaining the balance and rationality of the Contract. Special mention must be made of the refusal to pay regulatory credits in favor of the Concessionaire that were acknowledged, but said to be paid in relation to the renegotiation process and ultimately never paid. This applies to the USD 7.7 million credit resulting from the incorrect categorization of users. These are a number of acts and omissions that significantly affected the Concessionaire's ability to generate and collect income and that were completely ungrounded, thus violating Article III.1 of the BIT. The *Azurix* Tribunal addressed acts significantly similar to those described above and confirmed the existence of unjustified measures.<sup>410</sup>

1056. This Tribunal is not asked whether such measures were correct or incorrect but to determine whether they violated the BIT, and, therefore, impose on the Respondent the duty to compensate the Claimants for the damage sustained.

1057. The measures taken under the protection of economic emergency also qualified as unjustified in light of the BIT. The unjustified nature of the emergency measures is evidenced by the Report of Valuation and Regulations. Pesifying and freezing tariffs was not unavoidable. The dollar/pesos parity did not require necessarily that the dollar tariff provisions in the Concession Contract had to be abandoned as well. They could have been maintained through the extraordinary tariff reviews established in Section 12.3.6 of the Contract. The crisis should have prompted a review of the peso-denominated costs as

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<sup>410</sup> *Azurix Corp. v. Argentine Republic*, ICSID/ARB/01/12 (CUL-13, ALRA-132).



well, which fell considerably after the devaluation. An extraordinary review would still have resulted in lower tariffs in real dollars. If the tariffs had been maintained, expressed in USD and collected in pesos, the tariffs would have tripled in pesos and, given the economic situation at that time, collection ratios would have dropped considerably. AGBA would have been obliged to drop the value of its tariffs in dollars. A commonly used adjustment could have been to use an exchange rate of ARS 1.4 per USD 1, and to adjust the prices monthly. This would have been reasonable because some of AGBA's costs had decreased also, like salaries. Another solution would have been to use the extraordinary tariff review of Section 12.3.6 of the Contract, which could have come to results applicable as of January 1, 2003. The advantage of this last option would have been to allow AGBA to either charge a dollar-denominated tariff or an equivalent one that would eventually reach the original bill level by July 2006, creating a more reasonable financial situation for AGBA.

1058. Claimants submit that the measures that had been taken were unjustified in the terms of Article III.1 of the BIT because: (1) they were unnecessary to face the economic situation prevailing at the time; (2) the Contract provided for mechanisms that would make it possible to adjust tariffs to extraordinary economic changes; (3) the application of such mechanisms would have made it possible to distribute on an equitable basis between the Concessionaire and the users the economic hardship; (4) it would further have permitted to implement a gradual increase in tariffs; (5) conversely, the pesification and tariff freeze disrupted the economic equilibrium of the Contract abruptly, placing all the hardship on the Concessionaire.

1059. In response to Respondent's contentions, Claimants reiterate that they have never equated "unjustified" to the term "arbitrary." The Argentine Republic's allegations, which only concern the concept of arbitrariness, are thus irrelevant to the case at hand. The authors of the Spain-Argentina BIT have chosen the word "unjustified" on purpose, rather than "arbitrary," which is found in other treaties. The term "unjustified" carries with it a less stringent test than the one required for establishing arbitrariness. This focus is on whether the measure in question is compatible with the expectation the investors may have had at the time of their investment, in light of the BIT and the legislation then in force in the host State.

1060. In the *BG* case, the Arbitral Tribunal offered an accurate interpretation of the term "unjustified" as used in Article 2.2 of the United Kingdom-Argentina BIT, the relevant portion of it is identical to the Spain-Argentina BIT. It stated that Argentina unilaterally withdrew commitments which induced *BG* to make an investment and this constitutes unreasonable action and a breach of Article 2.2 of the Treaty. In particular, Argentina granted the application of U.S. dollars as the currency of reference and it committed to

ensure that tariffs provide a reasonable rate of return. The unilateral withdrawal by Argentina of these key components of the Regulatory Framework was unreasonable and therefore a breach of the second sentence of Article 2.2.

1061. An act may be characterized as unjustified without it necessarily being arbitrary. That is why the term chosen in the Spain-Argentina BIT is broader than the term “arbitrary.” The *Saur* Decision describes arbitrariness by various factors, including measures that are shocking, or at least surprise, a sense of juridical propriety, or those manifestly violate the requirements of consistency. Such measures are also those who are fulfilling some purely political purposes, as was the case with the measures put in place in connection with AGBA’s concession and, in particular, its termination. Had the BIT made reference to “arbitrary” measures, the interpretation Argentina proposes for that term is not correct either, as the content of that standard are much broader than what Argentina suggests they are.

1062. Claimants further note that the Argentine Republic fails to respond to all of the unjustified measures listed in the Memorial on the Merits. One example is the fact that the Concessionaire was never paid the regulatory credits it was recognized, such as the claim for a sum in excess of USD 7.7 million resulting from the incorrect categorization of service users. Respondent’s position is that this claim was subjected to the renegotiation process. However, such renegotiation never succeeded. This shows that the Grantor failed to abide by the Regulatory Framework and the investors were treated in a manner which was entirely unjustified.

1063. As to the measures addressed by Respondent, the failure to deliver the three UNIREC plants has nothing to do with an emergency situation. As regards another set of measures (like the non-application of the work charges and others, including the concession’s termination), Respondent merely argues that these are of a purely contractual nature. Claimants deny that they were resolved pursuant to the Contract and the Regulatory Framework. Quite to the contrary, these were actions by the Grantor and the Regulator, taken in an unjustified manner. The renegotiation process was frustrated by the Province’s most absolute unwillingness to negotiate and, ultimately, by it completely abandoning the negotiations in February 2005. As regards the NRF, in combination with the emergency measures it led to the absolute disruption of the essential elements that had been considered by CABB and URBASER to invest.

1064. Respondent did not explain why, in its view, the emergency measures it adopted were justified and lawful, as well as reasonable in view of the urgent need to deal with what it qualifies as the worst crisis in Argentine history. The correct question is whether the measures taken by the Argentine Republic can be viewed as justified measures under the Spain-Argentina BIT. In this regard, the frustration of the legitimate expectations the Argentine Republic created to induce Claimants to invest entails a violation of standard

of fair and equitable treatment, but it can also be argued to constitute a violation of the obligation not to adopt unjustified measures in connection with the investment.

1065. Moreover, the measures taken by the State of Argentina were not necessary to deal with the economic situation that existed at the time. The Concession Contract already made provision for mechanisms that allowed the tariffs to be adapted to extraordinary economic changes. The measures taken caused a sudden disruption in the Contract's economic equilibrium causing the entire burden to fall upon the Concessionaire. The tariff pesification and freeze was a political decision intended to ensure, as it managed to do, that it would be just AGBA, not the users or the authorities, who would completely bear the consequences of the emergency. Respondent burdened the Concessionaire with guaranteeing what it describes as the human right to water, leaving the State, which is the true grantor of the right, free of any share in that sacrifice. From the economic perspective, the measures taken caused irreparable harm to the Concessionaire and the service itself, as they shattered the Concession's economic-financial equilibrium. The priority was to secure the users' vote, which is why the tariff pesification and freeze had no justification other than politics.

1066. Respondent's general justification rests on the users' economic situation and crisis. However, if the State believes a given public service is essential, it has legitimate means available, such as subsidies, to do so. What it cannot do is shifting the cost of the measures taken to guarantee the service onto a private company like AGBA. Such an excuse is not a valid justification for a measure.

1067. Claimants therefore conclude that the Argentine Republic has not in the least defeated their allegations regarding the existence of unjustified measures contrary to Article III.1 of the Spain-Argentina BIT. Claimants further note that the measures discussed would still be contrary to the BIT if, as the Argentine Republic would prefer, the term "unjustified" is to be treated as if the BIT authors had used the word "arbitrary." The measures in question were based solely upon the political authorities' will that the entire sacrifice which was allegedly required to be made be borne by the Concessionaire.

## 2. *Respondent's position*

1068. Respondent submits that the concept of "unjustified" measures is similar, to a great extent, to the concept of arbitrariness, according to the definition provided in the ELSI judgment. The protection clauses against arbitrary/unjustified measures are common in bilateral investment treaties. As the *Plama* Tribunal stated, such measures "are those which are not founded in reason or fact but on caprice, prejudice or personal preference."<sup>411</sup> These words are nothing more than another way to say "contrary to justice,

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<sup>411</sup> *Plama Consortium Limited v. Bulgaria*, ICSID Case No ARB/03/24, Award of August 27, 2008.

reason.” The *Noble Ventures* Tribunal added that consideration must also be given to whether the measures adopted by the State were the only short-term alternative to prevent collapse and whether such measures were reasonable and well-founded. The Tribunal should thus take into account the circumstances surrounding the adoption of the challenged measures and also make a comparative analysis of similar circumstances.

1069. Claimants state that the terms “unjustified” and “arbitrary” cannot be equated. The focus shifts to the determination of whether the measure in question is compatible with the expectations the investors may have had at the time of their investment. The standard would thus have to be interpreted in a manner similar to the fair and equitable treatment standard. This lacks all grounds.

1070. Claimants contend that the more recent description of arbitrariness given by the *Saur* Tribunal should be used. However, that decision uses the definition provided by the International Court of Justice in the *ELSI* case. It is evident that the description of arbitrariness provided by the ICJ in the *ELSI* case remains fully valid.

1071. Even if the measures taken were unjustified, in order to prove a violation of Article III.1 of the BIT, Claimants would need to prove that those measures hindered the management, maintenance, use, enjoyment, extension, sale or, where appropriate, the liquidation of the alleged investment.

1072. The issues invoked by Claimants are far from constituting even a *prima facie* breach of the BIT. Some of the measures challenged by Claimants are of a purely contractual nature, such as the decisions taken in respect of the work charges, the sewerage coefficient, the prohibition against demanding payment of bills where the requirements were not fulfilled.

1073. Above all, the measures identified by Claimants did not constitute a deliberate omission of due legal process or acts that shocked, or at least surprised, the sense of juridical propriety. The Province had to guarantee the continuation of the basic water supply to millions of Argentines. The protection of this universal basic human right constitutes the framework within the Claimants should frame their expectations.

1074. The emergency measures adopted by the Argentine Republic were justified and lawful, as well as reasonable in view of the urgent need to take emergency actions in order to deal with the worst crisis in Argentine history. As to other measures Claimants complain about, they were taken with a view to protecting the users of an essential public service in one of the poorest areas in Argentina. None of the tribunals which analyzed the emergency measures arrived at the conclusion that those measures had been arbitrary. Claimants indicate that one of the possible options would have been to resort to mecha-

nisms for extraordinary review included in the Concession Contract. However, this possibility was unfeasible, as the tariff calculation and adjustment mechanisms were inapplicable in the context of the crisis.

1075. In relation to the failure to deliver the three UNIREC plants, this would have only presented AGBA with some difficulties in the expansion of the service with respect to 30% of two of the 7 districts and such difficulties would have only appeared as from the third year (2002). The connections that poured water into these plants comprised only 34.7% of the total connections that AGBA was required to carry out during the first five-year period. Moreover, none of such connections has even been planned for the first two years of the Concession. That means that Claimants could never justify their own breach by arguing that the Province did not deliver those plants. Therefore, Claimants' alleged expectations are entirely unrealistic.

1076. Claimants cannot maintain that the renegotiation of the Contract was unjustified. This position is inconsistent. It was Claimants who requested the renegotiation prior to the emergency measures. The failure of this process was due to the unreasonable demands made by AGBA. Given that the tariff regime had become unfeasible, the renegotiation was the only form of re-establishing an equilibrium that would abide by the principle of fair and reasonable tariff. The Province's decision to renegotiate the contracts was a decision that was fully justified in light of the facts and the crisis, but also a decision that was favorably received by AGBA. In this arbitration, Claimants confess that they never made true proposals. This shows that the Argentine Republic was the only party willing to renegotiate the Concession.

1077. With respect to the modification of the NRF, it should be noted first that it was not applied to Claimants. Furthermore, it was agreed upon with AGBA and was drafted taking into consideration the possibility that the Contract might be modified, a fact that the Claimants were aware of, as it was mentioned in Section 1.2 of the Concession Contract. In any event, the modifications adopted maintained the principles of the previous framework. In relation to the alleged violation of the guarantee granted in the Contract and the Regulatory Framework, there are no detrimental differences for AGBA between the content of the original and the new framework. In any case, the application of the NRF to AGBA was subject to AGBA accepting it, as expressly provided in its Article 91. The NRF was in no way a capricious and unjustified measure. Its purpose was to guarantee the water and sewerage service provision within a severe crisis context.

1078. Claimants' expectations were never violated. Even in the New Regulatory Framework, the right of the Concessionaire to collect its unpaid invoices was expressly provided for. Claimants cannot hold the Argentine Republic responsible for a right they were always entitled to exercise. Claimants question the lack of payment of the regulatory credits the Concessionaire was recognized. The truth is that Claimants were always in a position

to enforce their unpaid invoices and that their right to enforcement was recognized in Article 59 of Provincial Decree No. 878/03 approving the NRF.

1079. In conclusion, the measures adopted by the Argentine Republic were justified, since they were reasonable and proportional to the objective pursued.

D. The Tribunal's findings

1. *The meaning and purpose of Article III(1) of the BIT*

1080. Claimants' claims regarding discriminatory and unjustified measures overlap significantly with their claim based on fair and equal treatment and their attempt to bring purely contractual claims under the BIT. Claimants, of course, have expressly admitted that purely contractual disputes fall outside of this Tribunal's jurisdiction under the BIT. Therefore, while assessing the relevance of Claimants' claims raised in reference to Article III(1), the Tribunal will also incorporate the evidence and the comments contained in the respective chapters on Claimants' allegations on violation of the Contract and their claim based on an alleged violation of the standard of fair and equitable treatment.

1081. In light of a reasonable reading of Article III(1) in conjunction with the other provisions of the BIT providing specific protections to investors' interest (Art. IV to VIII), the protection afforded by Article III(1) cannot have the meaning of supplementing the rules on more specific protections by an additional or extended protection or guarantee. For instance, the investor's guarantee for fair and equitable treatment of its investment is determined in Article IV(1) in its content and all its limits (subject to more favorable terms under Article VII). Article III(1), which is placed before Article IV, cannot have as its meaning and purpose to provide for an extended guarantee as to the treatment of an investment, above the range of what is to be understood as "fair and equitable."

1082. The Tribunal does not retain an additional requirement based on nationality. While it is correct to say that nationality is often a factor for testing whether a measure or decision qualifies as discrimination, as stated by Respondent, it does not appear as a criterion circumscribing the notion of "discriminatory measures" in Article III(1). The BIT is based on the foreign origin in relation to the definition of investments exclusively. Claimants comply with this requirement and therefore rightly object to Respondent's restrictive interpretation.

1083. The Tribunal further observes that the interpretation of the core terms of "unjustified or discriminatory measures" must follow the provisions relating to the law to be applied by this Tribunal pursuant to Article X(5) of the BIT. This provision states that the Tribunal has to make its decision on the basis of the BIT. This means that the concepts

used in Article III(1) are of an autonomous character, specific to this BIT. General principles of international law may also be relevant in certain respects. Article X(5) also permits the application of the Argentine Republic's domestic law "where appropriate."

1084. Contrary to Claimants' repeated assertions that they have themselves accepted as not relevant for this Tribunal, the Concession Contract is not a basis for this Tribunal's decision and is therefore not a basis either to understand and determine the content of the "unjustified or discriminatory measures" referred to in Article III(1).

1085. On the other hand, the rights and obligations arising out of the Concession Contract, and Argentina's domestic law (to extent its consultation appears "appropriate"), are important elements of reference for the Tribunal. They determine AGBA's and Claimants' respective situation that has necessarily to be considered for the purpose of assessing whether a measure taken by Respondent appears "justified" or not, "discriminatory" or not, according to the standards set in Article III(1) of the BIT.

1086. The Tribunal also draws the attention to another element of text in Article III(1) that is not commented by Claimants but noted as a restriction by Respondent. Indeed, the terms "unjustified or discriminatory measures" are not standing alone. The protection afforded to the investors potentially faced with such measures has the meaning that these measures "shall not obstruct" ("no obstaculizará") investments, and more specifically "the management, maintenance, use, enjoyment, extension, sale and, where appropriate, liquidation of such investments." In other words, the investor is not protected against such measures when they are not "obstructing" its operation and activity.

1087. The requirements resulting from Article III(1) are at the very basis of Claimants' claims in this respect. The burden of proving the applicable conditions falls on Claimants. The Tribunal does not share Claimants' view that once Respondent has accepted that AGBA was afforded differential treatment, the burden of proof that such treatment was validly justified would shift to Respondent.

1088. The Tribunal basically agrees with a position stating that measures affecting an investor are discriminatory if they are clearly less favourable than those accorded to other investors operating under the same or similar circumstances, they intend to harm the foreign investor and cause actual damage, and if they are not justified by sufficient reasons. Article III(1) requires adding the requirement that such measure had to obstruct one of the activities related to an investment as listed in the provision.

1089. The Tribunal recognizes the difficulty to provide the concept of "unjustified measures" with a meaning reflecting the initial intentions of the Contracting Parties to the BIT and suitable in comparison to the other rules covering the protection of investors in the BIT. The Tribunal notes that the measures referred to are supplied by a negative and

not by a positive qualifier. Article III(1) does not ensure the investor to be faced with measures only that are “justified.” The protection is more restrictively circumscribed as a bar against measures that have “no justification.” Such justification could be based on the applicable law as determined by Article X(5), including, where appropriate, the host State’s domestic law. However, the measure to be addressed in a particular case must not necessarily be “lawful” in order to meet the standard required under Article III(1). This provision does not use the term “unlawful” but instead the word “unjustified,” which can imply possible justifications by reference to grounds other than legal ones, in particular in case of measures justified by reasons based on equity or good faith.

2. *The claims based on allegedly discriminatory measures*

1090. Claimants’ numerous comparisons between the treatment afforded to AGBA and the more favorable conditions offered to other concessionaires suffer in general from several flaws making those explanations imprecise, vague or meaningless. In a great number of cases, it is simply affirmed that a concessionaire compared with AGBA operated under the same or “like” conditions, without any demonstration based in particular on the contract and the undertakings for performance applicable to such concessionaire. Claimants do not distinguish between those concessionaires that were operating an investment covered by a BIT and state-owned companies placed on an entirely different legal, economic and financial framework.

1091. Comparisons are made between treatments afforded to AGBA in 2002-2005 and more favorable measures taken for entities operating in 2008 when the economic situation of Argentina and the population’s health and employment rate had seriously improved. Claimants object that the same Province signed a Memorandum of Understanding with AZURIX as concessionaire, while AGBA was barred from such a deal, without considering that the conditions offered by AZURIX might have been more attractive for the Province, in particular due to the very different and more favorable economic environment in Regions A and C and in comparison with AGBA’s record of non-compliance in respect of the first Five-Year POES for the high-risk Region B. Claimants also complain about reliefs offered to other concessionaires or entities in respect of investment to be provided and expansion work to be achieved without observing that similar measures were envisaged for AGBA during the renegotiation but rejected by the Concessionaire.

1092. Claimants complain extensively about the favorable conditions that were offered to ABSA when it took over the AZURIX and the AGBA Concessions and allege that the difference was so significant that it amounted to discriminatory treatment.

1093. The Tribunal observes, however, that ABSA was a state-controlled entity that did not need to achieve an economic and financial equilibrium as this is sustained by Claimants as private investors interested in a positive return and profit. The most important



advantages provided to ABSA and complained about by Claimants relate to the Province's undertaking to ensure the required investments and not to require compliance with specific expansion goals. Claimants do not mention that this is quite similar to what the Province had intended to negotiate with AGBA. They brush away the Province's participation in the renegotiation in affirming that its representatives were not willing to do so, but this without resorting to the evidence before this Tribunal that is, as Claimants must know, different. Claimants also dispute the tariff increases granted to ABSA, but they do not provide information or evidence sufficient to understand more precisely the extent to which these increases have been accepted, nor do Claimants distinguish between the respective situations in 2006, 2007 and 2008 for ASBA and the years 2003, 2004 and 2005 in respect of AGBA. Decrees No. 1677/06, 953/07 and 3144/08 are quoted as containing regimes offering discriminatory favors to ASBA; they demonstrate, in Claimants' view, that ABSA was granted every request AGBA had been reasonably making for years and systematically was denied. However, Claimants do not draw the attention to the differences when considering AGBA's situation before and even long before the termination of its Concession compared to ABSA's situation after taking over AGBA's Concession, nor do they note that these regimes are mostly focusing on upgrading the regime of the former concession of AZURIX in Zone 1, which was manifestly operating in a very different economic and social environment. Moreover, Claimants argue that the Province, after having regained control over the Concession for purely political reasons and transferred it to ABSA, approved the necessary changes (tariff increases) to make the concession viable for ASBA; however, no evidence is provided in this respect, in so far as the effects of the tariff increases cannot be evaluated without full information about the economic framework of ASBA's concession, including the origin and the amount of investments and the subsidies provided by the Province. Claimants must also understand that when they regret that AGBA was suffering discrimination in not being provided subsidies by the Province, there was no legal basis to act accordingly under its Concession Contract, while the NRF that Claimants reject would have opened access to such a contribution.

1094. In reply to Claimants' complaint that AGBA was treated discriminatorily when it did not receive subsidies from the Province although ASBA was provided with such a contribution in the amount of 60 million, the Ministry of Infrastructure, Housing and Public Services replied in its letter of August 25, 2005 (CU-60), that the comparison should be made differently. The Province's contribution was made in its capacity as shareholder of ASBA and it was therefore fair to expect that AGBA's shareholders offer a comparable contribution.

1095. Claimants do not take account of the fact that all measures allegedly discriminating against AGBA and taken after the date of termination in July 2006 were ordered at a

time when AGBA and its shareholders were no longer operating the Concession and were therefore no longer entitled to claim for the BIT-protection.<sup>412</sup>

1096. In sum, Claimants' claims in this respect are overloaded with a great number of simplifications that do not allow a serious comparison, all the more so that the relevant facts and precise effects of the measures complained about are not supplied by convincing evidence.

1097. Similar remarks must be addressed to comparisons with concessionaires of drinking water and sewage services in other provinces, where the conditions underlying these systems should be seriously examined before making comparative conclusions. The Tribunal was not provided with any reliable evidence in respect of such concessions, and it notes that most of the solutions taken as comparative factors relate to a period several years after 2002 when the emergency measures had been issued. Moreover, Claimants have mentioned but not supplied with reliable economic evidence the reactions to the emergency measures in sectors other than the public service contracts like water and sewage concessions. Even when it would be accepted that, as sustained by Claimants, the occurrence of "exact circumstances" between the investor alleging discrimination and those it is compared with is not necessary to determine the existence of discrimination, as purported by the Argentine Republic, and that "like circumstances" are sufficient, which might exist in comparison to sectors other than the drinking water and sewage services, this still requires that evidence is adduced to demonstrate that such circumstances being "close" do exist. Claimants have not done so. The Tribunal cannot provide explanations on its own initiative, but it might mention that the particular vulnerability of the population to be supplied with water and sewage must have been an important factor in the Government's policy to refrain from increasing tariffs as long as other approaches, more protective to the population, remained available.

1098. The Tribunal puts into question Claimants' assertion that the discrimination they allegedly suffered had as one of its implications that unless measures were taken to allow an increase in the Concessionaire's income, the concession could not survive. Of course, the Concession could survive: Claimants cannot ignore that they were far away from providing the required funding they had undertaken to provide in accordance with the first Five-Year POES. Claimants also argue that the population should have shared the efforts to overcome the difficulties: again, had AGBA's shareholders accomplished their part of the obligations incumbent on the investors under the Contract and the POES, the population would not have to be called to contribute. Claimants' further state that formulas other than the pesification and freezing of tariffs would have been available: indeed, one of those formulas would have been the shareholders' financing involvement, and the

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<sup>412</sup> This is subject to minor exceptions as those relating to unjustified and discriminatory measures obstructing the liquidation of the investment, not alleged by Claimants in the instant case.

other one was provided through the renegotiation that had as one of its purposes to wipe out the adverse effects of the emergency measures.

1099. Claimants reiterate their inability to understand why AGBA received different treatment than ASBA that operated in the same region and, for a short time, in the same Province, when ABSA took over Regions A and C. However, ASBA was a state-entity operating under a legal and economic framework different from AGBA's Concession. As this has been stated many times in this proceeding, Zone 1 was significantly different in respect of its economic background and the poverty and vulnerability of the population. AGBA, unlike ASBA, was holding a Concession requiring the Concessionaire to comply with POES. In addition, ASBA was operating under the NRF that provided the more favorable conditions that Claimants identify as a source of discrimination to AGBA although AGBA had the opportunity to join the same regime.

1100. The Tribunal does not share Claimants' position that AGBA received discriminatory treatment in light of the subsidies and guarantees for additional contributions ASBA received from the Province on the basis of Decree No. 757/05 of April 2005 (CU-169), while AGBA was not granted any such advantage. Claimants deny that there existed like circumstances between the two companies, because the contributions made to ASBA were made by the Province acting as the concession's Grantor and not as shareholder. Nonetheless, AGBA could have enjoyed a comparable financial protection if its shareholders had committed to their investment obligations under the Contract and the POES. ASBA was a state-owned company and thus financially supported by the Province as its governing body or "owner." In any event, at the relevant time in April 2005, after the negotiations had been suspended in February, the Concession was already in a vulnerable situation in Claimants' own assessment, which does no longer allow any conclusion that ASBA and AGBA were in like situations requiring equal treatment.

1101. The Tribunal also finds unconvincing Claimants' objections regarding Decree No. 963/05 that allowed the Province's Ministry of Infrastructure, Housing and Public Services to enter into agreements with drinking water and sewage services providers that accepted to sign a contract in line with the NRF. Claimants submit that AGBA had no access to such a contract and to its benefit. This is not correct. Claimants were prepared to have AGBA accessing to the NRF that was the basis of the renegotiations and had been retained as such by AGBA during such process. Moreover, Claimants argue confusingly when they regret that AGBA could not rely on the Province in the context of the Concession with the effect that it could serve more customers, thereby increasing AGBA's revenue, while they also regret that they were deprived of the guarantee of exclusivity and thus running the risk to let third parties operate in the area of the Concession.

3. *The claims based on allegedly unjustified measures*

1102. Claimants use the standard of protection against unjustified measures as a free standing tool where they can argue and object to most of the alleged violations of the Concession Contract they raised as contractual disputes. They further argue again matters already dealt with under the protection standard on fair and equitable treatment in an attempt to convince the Tribunal that measures that might not reach that standard were nevertheless “unjustified” because many reasons can be put forward for the purpose of demonstrating that the measures taken were wrong and not justified.

1103. The Tribunal does not share Claimants’ views in this regard and rejects attempts to extend the scope of “unjustified measures” in such a way that the focus of this concept is on “whether the measure in question is compatible with the expectation the investors may have had at the time of their investment, in light of the BIT and the legislation then in force in the host State.”<sup>413</sup> Article III(1) of the BIT does not link the nature and content of the host State’s measures to the expectations of the investors, and even if it would do so, it would not refer to the investors’ expectation at the time of their investment exclusively, but include the expectations as they have developed during the lifetime of the Concession.

1104. The Tribunal does not follow either Claimants’ suggestion that the Tribunal is not asked whether such measures were correct or incorrect but to determine whether they violated the BIT, and, therefore, impose on the Respondent the duty to compensate the Claimants for the damage sustained. In order to know whether, on the basis of Claimants’ line of argument, a measure was “unjustified” or not, the Tribunal would certainly have to know whether it was correct or not. In any event, Claimants argue at length that a considerable number of measures facing AGBA were “unjustified” exactly for the reasons that were given in support of their line of arguments on the alleged violations of the Contract by the ORAB. Most of these arguments failed when the Tribunal examined the Contract and considered AGBA’s failure to comply with the first Five-Year POES. Those contentions cannot be somehow reintroduced under the umbrella of “unjustified measures” pursuant to Article III(1) of the BIT.

1105. The Tribunal has repeatedly stated that the protection afforded to AGBA’s shareholders under the BIT does not cover or reinstate the rights derived for AGBA under the Concession Contract. The fact that Claimants repeat again their purported ignorance of this clear limitation is not a reason for the Tribunal not to reaffirm it again.

1106. Therefore, the Tribunal refers to what it explained in respect of the matters revealing purely contractual disputes in Chapter IV. Most of the grounds invoked again under

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<sup>413</sup> Reply on the Merits and Answer to the Counterclaim, para. 479.

the heading of “unjustified measures” find appropriate support in the Concession Contract. They are therefore far away from being able to qualify as “unjustified measures” on the basis of Article III(1) of the BIT. It may be added that Claimants do not supplement their enumeration of such alleged measures by a comparison to the manifest failure of AGBA and its shareholders to comply with the requirements to be fulfilled under the first Five-Year POES in respect of expansion work and the amount of funding. It is difficult to follow Claimants’ line of submissions complaining about the Argentine Republic’s regulatory measures, while ignoring completely their failure to comply with their undertakings that were fundamental for the success of the Concession.

1107. It appears similarly unconvincing to the Tribunal that Claimants rely on their Experts to submit that the measures taken under the protection of economic emergency also qualified as unjustified in light of the BIT, explaining that these measures were “not unavoidable,” and that the dollar/pesos parity “did not require necessarily” that the dollar tariff provisions in the Concession Contract had to be abandoned as well, because such provisions “could have been maintained” through the extraordinary tariff reviews established in Section 12.3.6 of the Contract. Claimants also argue that the State had subsidies as legitimate means available in support of the users, but they do not provide any evidence that this would have been possible at the critical period in 2002 and 2003, and they do not note either that subsidies from the State would have been difficult to obtain from the State’s budget when the Concessionaire failed to comply with its undertakings for the necessary funding on its part and refused to adopt the NRF.

1108. Claimants thus argue merely in support of solutions other than the measures taken, focusing on the expectations for profit and return of AGBA’s shareholders. Claimants do not sustain any argument in support of such a broad interpretation of the standard of “unjustified measures.” They merely assert that under the umbrella of Article III(1) an investor may obtain damages whenever there exists some ground more reasonable than the reason given for the measure. Once again, Claimants try to argue their dissatisfaction with the loss of the Concession, which they did not support with adequate funding, and invoke BIT protections that are not designed for such purposes.

1109. For all the reasons given above, the Tribunal dismisses Claimants’ claims based on Article III of the BIT.

## **XII. Respondent's Counterclaim**

### **A. Jurisdiction and admissibility**

#### *1. Claimants' objections*

##### *a. Preliminary matters*

1110. Claimants observe at the outset that Respondent has chosen to assert an unexpected and surprising counterclaim. It had been a long time since the Notices of dispute were sent by CABB and URBASER to the Office of the Attorney General on December 21, 2005 and January 24, 2006, respectively, until May 29, 2013, when the Argentine Republic filed its Counter-Memorial and Counterclaim. Up to this last date, Respondent never raised, asserted or even suggested its intent to present a counterclaim. Complete silence was also observed after Claimants had filed their Request for Arbitration on July 6, 2007. The procedural rules agreed upon by the Parties and made part of their Agreement on December 16, 2009 contain no reference whatsoever to a counterclaim.

1111. Claimants submit that while it is correct that Arbitration Rule 40 allows Respondent to present a counterclaim not later than in the counter-memorial, Respondent's silence over more than seven years is an unmistakable symptom of the completely unfounded nature of an improvised counterclaim entirely devoid of foundation. The Counterclaim itself shows Respondent's lack of credibility. There can be no reason for waiting seven years since the termination of the Concession to raise a counterclaim for the first time.

1112. Respondent's unsuccessful jurisdictional challenge cannot stand as an excuse. Respondent could have asserted its intention to present a counterclaim if its jurisdictional challenge failed when discussing the Parties' procedural agreement. AGBA, the Concessionaire, has filed an action for the Annulment of Decree No. 1666/06, and this still pending proceeding could have offered to the Grantor the opportunity to raise a counterclaim, but it did not do so. These facts show that this Counterclaim is entirely groundless, fully discrediting Respondent's rigor.

1113. The Argentine Republic's arguments are nothing but completely unelaborated assertions. They are based on an alleged failure to invest in the Concession. This would be as true of the *Impregilo* case, but in that matter, the Argentine Republic did not assert any counterclaim. The failure to raise a counterclaim against *Impregilo* shows that a counterclaim against CABB and URBASER makes absolutely no sense.

1114. Respondent only mentions that CABB and URBASER accepted the offer contained in the BIT, without any reference whatsoever to the contents and scope of such acceptance.

1115. As to the violations allegedly committed by CABB and URBASER, Respondent refers to certain general principles and human rights, without explaining how these were supposedly infringed upon. On the subject of damages, Respondent fails to provide any sort of explanation for the reason why the damages claimed should equal the allegedly non-invested amounts. Respondent does not submit any rationale that might shed some light on how such alleged breaches by CABB and URBASER can be reconciled with the emergency measures. This demonstrates that the Tribunal is not seized with a proper counterclaim but rather with an outline of a counterclaim. In a similar situation, the *Hamester* Tribunal dismissed a counterclaim on the grounds of it not being sufficiently justified.<sup>414</sup> The Counterclaim actually submitted does not satisfy the minimum requirements for the Tribunal to be able to assess its merits. Any attempt by Respondent to file an amended counterclaim or subsequently present the basis it failed to provide in its Memorial of May 29, 2013, must be rejected.

1116. Although the Tribunal has not fixed a time limit as provided for under Rule 40(3), Claimants decided to provide their answer to the Counterclaim within the time limit fixed to submit their Reply on the Merits. They affirm, however, that there will not be a subsequent pleading stage. The Respondent may not address its Counterclaim in its Rejoinder on the Merits. Where counterclaims are concerned, there is a single round of written submission accepted only.

b. The Tribunal's lack of competence

1117. Claimants accept that host States may be claimants in investment arbitration proceedings and, likewise, that they may file a counterclaim, as this is recognized in Article 46 of the ICSID Convention. However, said provision does not, by itself, vest the Arbitral Tribunal with competence over the Counterclaim. The jurisdiction and competence requirements to be satisfied are established in other provisions, including Article 25 of the ICSID Convention and the applicable BIT. The existence of jurisdiction over an ancillary claim is a precondition for the operation of Article 46 and of Arbitration Rule 40(1).

1118. The possibility of a respondent State to file a counterclaim against the claimant investor is supported by the need to avoid the duplication of procedures and to prevent the risk of contradictory decisions. Nevertheless, consent is the very foundation of arbitration and stands above any goal of facilitating a complete resolution of the disputes between the parties. Such was the conclusion in the *Saluka* case<sup>415</sup>, where the Tribunal found that it lacked jurisdiction over certain issues raised in the counterclaim which were not in a close connection to the primary investment dispute.

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<sup>414</sup> *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID/ARB/07/24, Award of June 18, 2010 (CUL-189).

<sup>415</sup> *Saluka Investments BV v. The Czech Republic*, Partial Award of March 17, 2006 (CUL-59, ALRA-137).

1119. Not even reasons of economy, efficiency or consistency would be sufficient for the Arbitral Tribunal to hear the Counterclaim presented by the Argentine Republic, given the fact that this Counterclaim is not within the Tribunal's competence. Had the Argentine Republic actually had some pending claim against Claimants as a result of an alleged failure to make investments, it would have so stated when Claimants notified it of the dispute in December 2005 and January 2006 or, at the very least, when procedural matters included in the Tribunal's Agenda were discussed. The failure to fulfill the obligation to invest alleged by Respondent would have taken place prior to the termination of the Concession ordered in July 2006 via Decree No. 1666/06. The natural place to lodge such a counterclaim would be before the Courts of La Plata where this Decree is the subject of an action for annulment. However, the Province, a respondent in these proceedings, did not present a counterclaim in that action. If added to this the fact is taken into consideration that this Counterclaim is very poorly-argued, all elements are put together to show that Respondent's claim is not serious.

1120. Turning to the BIT involved in the instant case and the matter of consent to submit an investment dispute to ICSID arbitration, Claimants assert in the first place that the asymmetric nature of BITs prevents a State from invoking any right based on such a treaty, not even a right to submit a counterclaim against an investor. The main aim of such treaties is, indeed, to protect the investor's rights. BITs neither provide for the procedure for submission of State's counterclaims nor even mention the right of an investor to submit counterclaims. This means that investment Treaties do not impose obligations upon investors and, accordingly, that host States cannot rely on the violation of the provision of any such Treaty as basis to sue an investor. Such a right to claim would run counter to the object and purpose of treaty arbitration, which is to grant the investors a one-sided right of quasi-judicial review of national regulatory action.

1121. In the instant case, the Argentine Republic is not holding any right to submit a claim under the BIT for the additional reason that Claimants did not consent to such an extension of arbitral proceedings. As this is the case with the Spain-Argentina BIT, BITs contain an offer by the State parties to submit to arbitration. Such offer must be accepted by the investor in order for consent to arbitration to be perfected. Accordingly, the scope of the consent expressed by the investor becomes an essential element, as it determines whether the counterclaim is within the scope of the Tribunal's competence. Neither the request for arbitration, nor its registration within ICSID is proof of Claimants' consent concerning a counterclaim. As was held in the *Roussalis* case, the existence of such parties' consent must be determined on the basis of instruments other than the Convention itself, Article 46 of the Convention not being sufficient.<sup>416</sup>

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<sup>416</sup> *Spyridon Roussalis v. Romania*, ICSID/ARB/06/1, Award of December 7, 2011 (CUL-203).



1122. Claimants admit that the Spain-Argentina BIT does not lay down *ratione personae* restrictions on who may bring a claim or expressly limit such claims to a violation of the BIT's own provisions. This only means that the State parties did not restrict their offer to arbitrate. However, the scope of the offer's acceptance by Claimants is another matter that has yet to be determined.

1123. CABB and URBASER's acceptance of the arbitration offer was delimited in the terms established by their respective Boards. It was circumscribed to what constituted the subject-matter of their claim and, in addition, to claims arising from violations of the Spain-Argentina BIT, to the exclusion of any other potential claim based on a violation of any other set of legal provisions. As far as URBASER is concerned, the offer to arbitrate was accepted at a meeting of its Board of Directors held on March 19, 2007, and it covered "any dispute arising between this company and the Argentine Republic as a result of the damage caused to the company's investments in that country." CABB's acceptance was based on "the dispute between this entity and the Argentine Republic as a result of the damage suffered by the Consortium's investments in such country." Thus, CABB and URBASER restricted their consent to their involvement in the proceedings as claimants, to the exclusion of any potential counterclaim.<sup>417</sup> Even if the Spain-Argentina BIT would accept the possibility of the host State being the original claimant or a counterclaimant, in the case at hand the acceptance of that offer by CABB and URBASER restricted its scope, by limiting their consent to disputes arising from damage caused to their investment, thereby ruling out any potential losses sustained by the Argentine Republic. Claimants admit that they did not literally exclude potential counterclaims by the respondent State. There had never been the slightest concern expressed in that regard. However, the terms of their offer to arbitrate produces the same results as a direct exclusion of counterclaims.

1124. Claimants further mention that potential counterclaims were never included in the communications exchanged between the Parties prior to the filing of the Request for arbitration. Thus, an essential requirement laid down in Articles X(1) and X(2) of the BIT has not been met. At no time was the claim that is the basis for the Counterclaim notified to investors CABB and URBASER and, accordingly, the six-month negotiation period did never even start.

1125. Basically, the Counterclaim presented by the Argentine Republic is outside the scope of the Parties' consent since, even though the Spain-Argentina BIT makes provision for either party being the claimant, CABB's and URBASER's acceptance of the offer

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<sup>417</sup> Claimants refer in this regard to Notarial Minutes relating to their respective corporate authorities; cf. Reply on the Merits and Answer to the Counterclaim, paras. 719/720; TR-E, Day 1, p. 52/19-53/5. These declarations are quoted in Claimants' Notice for Arbitration (first section) and attached to it as Documents 1 and 2.

to arbitrate restricted such consent to disputes concerning losses sustained by their investments in the Argentine Republic.

- c. The Counterclaim does not relate to a dispute arising directly from an investment within the meaning of the ICSID Convention and the BIT

1126. The lack of this Tribunal's competence to deal with the Counterclaim is further sustained by Claimants on the basis of the nature of Respondent's claims and the legal grounds on which they are allegedly based.

1127. In this respect, Claimants' submission is to be divided in two parts, relevant respectively for the Tribunal's competence and for the merits of the Counterclaim. Claimants submit that the Counterclaim, in all of its parts, has no basis whatsoever in the BIT and does therefore not relate to a "dispute in connection with an investment within the meaning of the BIT" as required by Article X(1) of the BIT. All of Respondent's claims are based on Argentine domestic law and related to the Regulatory Framework and the Concession Contract. The position in this respect is thus the same than that of the Tribunal's conclusion that it has no competence to rule upon Claimants' claims based on the same Contract.<sup>418</sup> Therefore, for Claimants, there is no need to consider the (inexistent) merits of the Counterclaim that is anyhow outside the Tribunal's competence. Should Claimants have actually committed a domestic law violation, then it would fall upon the domestic courts of the Argentine Republic to resolve the dispute.

1128. Claimants understand Respondent's claim as allegations that the assumed investment obligations gave rise to *bona fide* expectations that those investments would indeed be made. Both Argentine law and the general principles of international law recognize the principle of good faith and the *pacta sunt servanda* principle. It is argued that Claimants, through their management of AGBA, flagrantly violated these principles, by failing to make the investments they had undertaken. Such failure affected basic human rights, as well as the health and the environment of thousands of persons most of which lived in extreme poverty. Claimants note that it is thus stated that the Counterclaim is not based on any violation of the Spain-Argentina BIT. The alleged violations relate to Argentine law, the Concession's Regulatory Framework and international law; they concern a mere breach of contract. The fact that Article X(5) of the BIT designates Argentine law and international law as applicable law does not mean that the BIT requires the investor to comply with such laws or that it elevates their breach to the level of BIT violations that the Argentine Republic could bring before an ICSID tribunal. Because the BIT does not impose obligations upon the investor, it is impossible for the State to rely on a BIT which does not include an umbrella clause to assert a contractual obligation. Respondent's

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<sup>418</sup> Decision on Jurisdiction of December 19, 2012, paras. 251-254.

Counterclaim must be dismissed outright, as it is neither within the scope of the Tribunal's jurisdiction nor a dispute arising directly from an investment, as required by Article 25(1) of the ICSID Convention, to which Article 46 thereof and Arbitration Rule 40 implicitly refer.

1129. As regards the alleged violation of international law, Article X of the BIT does not authorize a decision by the Arbitral Tribunal either. As the *Biloune* Tribunal put it, a ruling on human rights violations is outside the scope of its jurisdiction.<sup>419</sup> Besides this point, the rules of international law are directly binding on States but not on private parties.

1130. Claimants further recall that on the basis of their acceptance of the offer to arbitrate, there is no consent for the resolution of potential disputes arising from an alleged violation of instruments other than the BIT.

1131. Claimants note that the uneven manner in which investor and host State are treated is widely recognized. There are actually only a handful of cases in which a counterclaim was presented in an investment arbitration case; equally limited is the number of cases in which a host State instituted the arbitration. Several decisions dismissed the counterclaim on the grounds that it was based on a domestic-law provision, such as in the *Amco* case.<sup>420</sup> A similar argument can be found in the *Sergei Paushok* Award,<sup>421</sup> which refers to the Decision of the *Saluka* Tribunal.<sup>422</sup>

1132. Claimants further object that no counterclaim can be considered by the Tribunal if there is not demonstrated that such claim has a close connection to the main claim. The investor's acceptance of the host State's offer to arbitrate can only be extended to the counterclaim where there is a connection that renders it virtually impossible to determine the investor's claim without also adjudicating the host State's counterclaim. This connection is viewed as an admissibility issue.

1133. Such connection must exist as regards both the facts and the legal grounds supporting the claim and the counterclaim. The factual connection must be so close as to require the adjudication of both claims in order to achieve the final settlement of the dispute. As regards the legal connection, the matter is more delicate when the host State's

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<sup>419</sup> *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, Awards of October 27, 1989 and June 30, 1990, Yearbook Commercial Arbitration XIX (1994) p. 11 (CUL-207).

<sup>420</sup> *AMCO v. Republic of Indonesia*, ICSID/ARB/81/1, Decision on Jurisdiction of May 10, 1988 (CUL-205).

<sup>421</sup> *Sergei Paushok et al. v. The Government of Mongolia*, Award on Jurisdiction and Liability of April 28, 2011 (CUL-206).

<sup>422</sup> *Saluka Investments BV v. The Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim of May 7, 2004.

counterclaim is based on a breach of contract. In the instant case, Claimants submitted a complaint under the Spain-Argentine BIT, whereas the Argentine Republic's counterclaim finds no support in the BIT. Therefore, the required connection does not exist. The only connection between the two claims is the investment made by the Claimants in the Argentine Republic. The settlement of the dispute raised by the initial complaint is entirely possible with no need to obtain an adjudication of the counterclaim. This lack of connection is also demonstrated by Respondent's failure to submit a counterclaim in the *Impregilo* case.

1134. Accordingly, Claimants conclude that the Argentine Republic's Counterclaim should be dismissed for the further reason that it does not present the necessary connection with the main complaint.

## 2. *Respondent's position*

1135. Respondent states the principle retained in Article 46 of the ICSID Convention, whereby ICSID tribunals are under an obligation to determine any counterclaim filed by a party, provided that it arises directly out of the subject-matter of the dispute, is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre. ICSID tribunals are under an obligation to resolve such claims provided that all applicable conditions are met. As the Counterclaim is inserted into Respondent's Counter-Memorial, the requirement as to its timely filing under Arbitration Rule 9 is fulfilled. The Counterclaim was filed as a result of the Tribunal's Decision on Jurisdiction; there was no reason to raise it before the Tribunal dismissed Respondent's objections to its jurisdiction. The Counterclaim is advanced without prejudice to Respondent's primary position which is that it maintains all of its objections to ICSID jurisdiction over the main claim.

1136. Based on Article X(5) of the BIT, Respondent's Counterclaim must be decided on the basis of the BIT, Argentine law and the general principles of international law.

1137. The Counterclaim is based on the damage suffered by the Argentine Republic as a result of Claimants' administration of the Concession, mainly due to the failure to make the investment they had undertaken to make. The relationship between the claim and the Counterclaim is direct. They are two sides of the same coin. The groundless claims put forward by Claimants and this Counterclaim are based on the same controversy and may be adequately resolved by this Tribunal in the same proceeding.

1138. Argentina's claims are directly related to the "investments" that the Tribunal in its Decision on Jurisdiction considered Claimants made in the Concession and, therefore, are clearly within the scope of the consent of the parties under the terms of Article X(1) of the BIT. The Claim-Memorial and the Counterclaim are two sides of the same coin.

Claimants complain about the damages allegedly caused by the treatment given by the Province and the Argentine State, and the Argentine Republic seeks damages for the frustration of the investment expectations in an area that, due to its nature, had an imperative need for the service. The Counterclaim is a reaction to the main claim memorial filed by Claimants as it refers to the same dispute.

1139. Claimants challenge the direct relationship between their claim and the Counterclaim since, in their view, the Argentine Republic is not invoking a breach by Claimants of the Argentina-Spain BIT. However, the rules applicable to the arbitration proceeding, in accordance with Article X(5) of the BIT, including the rules applicable to counterclaims, are the BIT, Argentine law and the general principles of international law.

1140. Claimants consider that there is an asymmetry between the investor and the host State. They seek the absolute impunity of an investor that files a claim against a State invoking a treaty, and they even assert that no regulation demands the investor to act in conformity with the law of the host State. However, the BIT expressly acknowledges the need for the investor to act in conformity with the law of the host State to enjoy the protection under the BIT, as stated in Articles I(2) and III(1). As a result, if an investor does not act in conformity with the laws of the host State, it would not be protected under the BIT.

1141. Claimants mix up the statements made by the Argentine Republic in relation to the satisfaction of the requirement of parties' consent and jurisdiction of the Centre. Claimants acknowledge the right of States to file counterclaims under the ICSID Convention, but they contend that such right cannot be exercised when a State is sued under a BIT. Numerous tribunals have accepted cases involving counterclaims where the consent of the parties had already been given upon the execution of a treaty.

1142. On the basis of the conclusions contained in the Decision on Jurisdiction, it should be accepted that the Counterclaim meets the requirements set forth in Article 25 of the ICSID Convention. Also, by accepting the arbitration offer included in Article X of the BIT, Claimants accepted the conditions set forth therein, including: (i) the type of disputes as established in Article X(1), considering that the reference to disputes contained therein does not require that the dispute shall be exclusively submitted on the grounds of a violation of the BIT; (ii) the rules applicable to the arbitration proceedings in line with Article X(4); (iii) the law applicable to the dispute under Article X(5). As regards the consent of the parties, both the notary records of Urbaser's Board of Directors and CABB's Management Board decisions confirm that the consent extends to "disputes arising" between the companies and the Argentine State without imposing any restriction on which party files a claim. Articles X(1) and X(3) of the BIT do not make such a distinction either.

Respondent also refers to Claimants' statement in their Reply where it is stated that "Claimants did not literally exclude potential counterclaims by the respondent State."<sup>423</sup>

### 3. *The Tribunal's findings*

1143. The Tribunal observes that Claimants explain their basic position by the asymmetric nature of BITs, which in their view prevents a host State from invoking any right based on such a treaty, including through the submission of a counterclaim. The Tribunal finds that this submission conflicts with the simple wording of the dispute resolution provisions of Article X of the BIT invoked in the instant case. Indeed, Article X(1) provides:

"1. Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute."

This provision is completely neutral as to the identity of the claimant or respondent in an investment dispute arising "between the parties." It does not indicate that a State Party could not sue an investor in relation to a dispute concerning an investment. Article X(2) further states that when no settlement had been reached within six months from the date "on which one of the parties to the dispute" instigated it, "it shall, at the request of either party," be submitted to the competent tribunals of the host State – again without making any distinction depending on whether the investor or the host State may be "one of the parties" or "either party." This view is confirmed in Article X(3), stating that in certain circumstances the dispute may be submitted to an international arbitral tribunal "at the request of either party to the dispute." It results clearly from these provisions that either the investor or the host State can be a party submitting a dispute in connection with an investment to arbitration. Arbitral decisions invoked by Claimants when arguing that counterclaims are generally dismissed in actual practice are all based either on more narrowly drafted arbitration clauses<sup>424</sup> or on a lack of close connection of counterclaims

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<sup>423</sup> Reply on the Merits and Answer to the Counterclaim, para. 723, adding that they could hardly imagine that the Argentine Republic would ever present a counterclaim.

<sup>424</sup> It follows from the text of Article X(1) that Claimants' reliance on the *Roussalis* Award is mistaken. This Award admits that "the investor's consent to the BIT's arbitration clause can only exist in relation to counterclaims if such counterclaims come within the consent of the host State as expressed in the BIT" (para. 866). The Award then quotes Article 9 of the applicable BIT that refers to "disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former" (para. 868). Clearly, the Spain-Argentina BIT does not contain restrictive terms as "disputes ... concerning an obligation of the latter." In the *Roussalis* case, the counterclaim was based on domestic law; the Tribunal therefore observed that in order to extend the Tribunal's competence to a State counterclaim, the arbitration agreement should refer to disputes brought under domestic law (para. 871). This is equally irrelevant in the instant case to the extent the Counterclaim is not based on domestic law but on alleged obligations of Claimants under international law. In the *Amco II* case, the counterclaim was considered outside the second Tribunal's jurisdiction for reasons related to the *res judicata* effects of a preceding annulment decision, entirely different to the reasons invoked by Claimants in the instant case.

based on domestic law.<sup>425</sup>

1144. It further follows from the dual possibility to initiate an arbitration that the BIT does include in the dispute resolution mechanisms retained in Article X the hypothesis of a counterclaim, provided that the requirements defined by the provisions governing such mechanism are met. Indeed, when both parties are entitled to lodge a claim, it cannot happen that in acting first one party could prevent the other from raising its claim. This can be avoided only by admitting the possibility of a counterclaim.

1145. Claimants admit that the Spain-Argentina BIT does not lay down *ratione personae* restrictions on who may bring a claim or expressly limit such claims to a violation of the BIT's own provisions.<sup>426</sup> This only means that the State parties did not restrict their offer to arbitrate. However, the scope of the offer's acceptance by Claimants is another matter that has yet to be determined. In other words, Claimants submit that the State's offer to arbitrate can be large, but that this does not mean that such extended scope of the commitment to arbitrate is imposed upon the investor, whose obligation to arbitrate is determined in its substantial content by the terms of its own consent. In the instant case, the acceptance of that offer by CABB and URBASER restricted its scope, by limiting their consent to disputes arising from damage caused to their investment, thereby ruling out any potential losses sustained by the Argentine Republic.

1146. The Tribunal notes that Claimants admit that their acceptance did not comprise any specific exclusion of potential counterclaims by the respondent State. There had never been the slightest concern expressed in that regard. Therefore, it cannot be assumed that the exclusion of a counterclaim on part of the Argentine Republic had not been made one of the purposes of Claimants' acceptance of international arbitration. Claimants' declaration observes complete silence on the issue that has not been addressed, neither explicitly nor implicitly. Moreover, it would seem surprising to give effect to the contradiction appearing in Claimants' position: when Claimants accept that Article X of the BIT retains a right for the Argentine Republic to raise a claim against the investor, how could it be possible to also admit that Claimants would be entitled to render this right nonexistent merely by restricting their acceptance of arbitration to their own claims?

1147. More importantly, Article X(4) of the BIT offers submission of "disputes between the parties within the meaning of this article" either to an ICSID arbitral proceeding or to an *ad hoc* UNCITRAL arbitral tribunal. There is no indication given that such submission, including its offer and its acceptance, could be split into parts of the dispute based

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<sup>425</sup>In both *Saluka* and *Paushok*, the Tribunals had declined jurisdiction to hear counterclaims relying on domestic law because of their lack of close connection with the investors' primary claim; no other reason was invoked to dismiss the counterclaims that were brought in both cases on the basis of the UNCITRAL Rules and a BIT.

<sup>426</sup>Reply on the Merits and Answer to the Counterclaim, para. 717.

on the origin *ratione personae* of claims or on the basis of other criteria of delimitation. This was certainly not the Contracting Parties' intention when referring to UNCITRAL arbitration which comprises Respondent's right to submit a counterclaim. Article 46 of the ICSID Convention cannot be understood otherwise. When allowing additional or counterclaims to be raised "within the scope of the consent of the parties," this provision does not open the door for any unilateral determination of the Tribunal's competence. The consent given by Claimants on the basis of Article X of the BIT, which has been invoked by them as basis of this proceeding, covers all disputes in connection with investments within the meaning of the BIT, exactly as the scope of the Argentine Republic's offer to arbitrate has been defined in the very same provision. Even if it is argued that Claimants' acceptance was more restricted in its scope than the Argentine Republic's offer to arbitrate contained in Article X of the BIT, the appropriate conclusion would have been that no agreement had been concluded between the Parties. This has never been sustained by Claimants, and the point is manifestly moot since this Tribunal has rendered its Decision on Jurisdiction on December 19, 2012.

1148. The Tribunal additionally notes, as Respondent did, that Claimants' so-called restricted consent to ICSID jurisdiction is not contained in the notary's minutes they quote in their submissions and in their Request for Arbitration. Indeed, what is restricted is the mandate given to lodge a request for arbitration, which mandate, of course, covers Claimants' claims only. Upon further reading the documents, it can be noted that both declarations expressly say (in two variants) that "the Arbitration Agreement" instituted by the BIT "is approved." The documents do not contain any restriction in respect of a future counterclaim or any other limitation relating to Article X of the BIT.

1149. Claimants also advance that Respondent failed to comply with the preliminary steps for negotiation and submission to the jurisdiction of local courts as provided in Article X (1) and (2) of the BIT. The position needs not to be explained in all parts of its absurdity. When Claimants had chosen to submit to ICSID arbitration, what would be the reason for requesting Respondent to suggest, and to submit to, a prior attempt for settlement, deferring the submission of any of its claim until after the six months term had elapsed? What would have been the purpose of requiring submission of the Argentine Republic to domestic jurisdiction under Article X(2) when Claimants had failed to do so and did successfully argue before this Tribunal that this provision was not pertinent? How should the Tribunal understand Claimants' complaint that Respondent had not submitted to the procedure provided for in Article X (1) and (2) of the BIT, thus waiting a cumulative period of two years before being permitted to start arbitration, when in the same move, Claimants criticize Respondent heavily for not having raised its claims as soon as Claimants submitted to arbitration?

1150. The Tribunal therefore finds that the BIT accepts a possibility for Respondent to raise a counterclaim in the instant case. It understands Claimants' surprise that such claim



was raised many years after they had given notice of a dispute and that Respondent did not reveal even a hypothesis of such initiative when the Parties agreed upon a set of procedural rules governing this proceeding in preparation of the Tribunal's first session. Nonetheless, such surprise and disappointment has no legal effect given the provision of Arbitration Rule 40(2) permitting submission of a counterclaim no later than in the counter-memorial. The Parties had not agreed on any waiver of this procedural right nor did they agree on another time factor. The Tribunal accepts therefore that Respondent's Counterclaim was filed on time in compliance with Arbitration Rule 40(2). It does not share either Claimants' view that the late submission of this claim, or the fact that no similar claim was raised by the Argentine Republic in the *Impregilo* case, had to be understood somehow as a clear sign of its "completely unfounded nature."

1151. One of Claimants' main objections is that Respondent's Counterclaim has no connection with Claimants' claims under the BIT. The Tribunal observes that the factual link between the two claims is manifest. Both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession. This would be sufficient to adopt jurisdiction over the Counterclaim as well. The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only. Respondent argues indeed that Claimants' failure to provide the necessary investments caused a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT. It would be wholly inconsistent to rule on Claimants' claim in relation to their investment in one sense and to have a separate proceeding where compliance with the commitment for funding may be ruled upon in a different way. Reasonable administration of justice cannot tolerate such a potential inconsistent outcome.

1152. This conclusion leaves still open another and principal part of Claimants' objections, stating that given the fact that Respondent had no right whatsoever to bring before this Arbitral Tribunal any claim on the basis of the BIT, the Tribunal shall dismiss the Counterclaim based on its clear lack of competence.

1153. The Tribunal's finding is different. As stated above, Article X of the BIT provides for a possibility of a host State submitting a claim or a counterclaim to international arbitration. Therefore, when seized with such a claim, the Tribunal must assume its competence provided that Respondent submits a claim based *prima facie* on a dispute relating to an investment covered by the BIT and to facts that if established as alleged may constitute violations of rights and obligations that are within the scope of the arbitration agreement governed by Article X. This being affirmed by this Tribunal, Claimants' objections in this respect will be dealt with as relating to the examination of the merits of the Counterclaim.

1154. The Tribunal adopts the same distinction in respect of the scope of an arbitration governed by Article X of the BIT. Claimants argue in particular that any claim brought before this Tribunal through the Counterclaim on the basis of an alleged violation of human rights is outside the Tribunal's competence.<sup>427</sup> The Tribunal admits that such argument is not sufficient to go so far as excluding on a simple *prima facie* basis any such claim as if it could not imply a dispute relating to an investment.

1155. In light of the reasons given above, the Tribunal concludes that it has jurisdiction to deal with Respondent's Counterclaim in accordance with Articles 25 and 46 of the ICSID Convention and Article X of the BIT, and that this claim is admissible to be examined on the merits.

## B. The merits of the Counterclaim

### 1. *Respondent's position*

1156. Respondent notes by way of introduction that under the Concession Contract and the applicable Regulatory Framework, Claimants assumed investment obligations. Furthermore, these obligations gave rise to *bona fide* expectations that those investments would indeed be made and would make it possible to guarantee, in the area in question, the basic human right to water and sanitation. By failing to make the investments they had undertaken to make, Claimants violated the principles of good faith and *pacta sunt servanda* that are recognized both by Argentine law and by international law. Such failure did not only affect mere contractual provisions, but basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty.

1157. When relying for the purposes of its Counterclaim upon international law and the human right to water contained therein, Respondent objects above all to Claimants' view that the Argentine Republic would be the "true guarantor" of human rights and that such rules, as they are part of international law, are directly binding on States but not on private parties. Claimants argue that guaranteeing the human right to water is a duty of the State, not of private companies like the Claimants. Respondent denies: Claimants' most important obligation during the Concession term was to guarantee the access to water and thus to comply with a fundamental human right.

1158. The Universal Declaration of Human Rights of 1948 is part of customary international law. The commitment of the Argentine Republic with this Declaration is evident.

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<sup>427</sup> The decisions rendered in the *Biloune* case, referred to by Claimants, are not pertinent in this respect. Indeed, no BIT was involved in this case; the arbitration clause was contained in an agreement concluded with the Ghana Investment Centre and restricted to disputes arising between the foreign investor and the Government in respect of the investor's enterprise.

The regulatory nature of this Declaration is acknowledged by Claimants when they state that “there are international rules that include specific obligations having to do with drinking water.” Respondent submits – further referring to the *Goetz Award*<sup>428</sup> – that the BIT is to be considered by the Tribunal not on its own basis but by including all relevant rights and obligations of the Argentine Republic under international law.

1159. The Declaration avoids making reference to who would be responsible for the rights and obligations arising therefrom. However, upon reading the Declaration, it is evident that obligations arising therefrom do not lie exclusively on States. The Preamble expressly sets forth that the duties would lie both on institutions and on individuals. Article 1 states that its provisions apply to individuals even in private relationships. Article 30 declares that nothing in the Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth herein. Article 29 sets forth that everyone has duties to the community. Therefore, business companies and international corporations are affected by the obligations included in international human rights law.

1160. The Argentine Republic is a signatory to the International Covenant on Economic, Social and Cultural Rights of 1966 (RA-254), which acknowledges the right of everyone to an adequate standard of living, including adequate food, clothing and housing (Articles 11 and 12).

1161. Respondent conveys an understanding of human rights recognized in international law as being binding on individuals and therefore companies as well.<sup>429</sup> For Expert Kliksberg, the right to water is an essential human right that represents not only an obligation of States but also, and more importantly, a social right based on a policy to which the whole society has to contribute, based on the understanding of the United Nations.<sup>430</sup> It is a fundamental right that the leading companies of the world have adopted in the Global Compact as being part of their corporate social responsibility.<sup>431</sup>

1162. Respondent adds that the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, as amended in 2006 by the International Labor Office (including representatives of 33 multinational companies), acknowledges that the rules contained in the Universal Declaration of Human Rights and the corresponding International Covenant are applicable to multinational companies. Similar statements have been made in other important international instruments, such as the UN Draft Code of Conduct

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<sup>428</sup> *Antoine Goetz v. République du Burundi*, ICSID/ARB/95/03, Award of February 10, 1999 (LARA-126, CUL-106).

<sup>429</sup> Cf. Opening Statement, TR-E, Day 1, p. 108/15-109/24.

<sup>430</sup> TR-E, Day 8, p. 168/16-169/8; Kliksberg II, paras. 36, 37, 43.

<sup>431</sup> TR-E, Day 8, p. 174/18-175/18.

on Transnational Corporations. Therefore, it is evident that rules of International Human Rights Law create obligations that must also be respected by multinational companies.

1163. Respondent thus asserts, further relying on Expert Kliksberg, that the “basic human right” for water and sanitation is part of the recognized human rights that are applicable to multinational companies. UN General Assembly Resolution 64/292 of 28 July 2010 has recognized that this is a basic need (CUL-185).

1164. In its General Comment No. 15, the Committee on Economic, Social and Cultural Rights stressed the importance of the supply and the economic accessibility of water (ALRA-236, CUL-186). The Committee also noted that when such services were provided by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. Likewise, the Millennium Declaration voiced concern about the access to drinking water by individuals.

1165. Finally, Respondent explains that the amounts claimed in this Counterclaim relate to the damage arising from the investments that Claimants failed to make. This amount is USD 404.34 million. This amount represents the updated present value as of 1999, calculated on the basis of the amount originally mentioned in the Business Plan of 713.96 million, less an amount of USD 25.03 million corresponding to the investments actually made. If Claimants’ shareholding is taken into consideration, the proportional compensation is equal to USD 191.75 million. In the event that only the investments not made in the first five-year period are taken into account, the proportional damages amount to USD 80.90 million. For both amounts interest must be added at such rate as the Tribunal may deem appropriate.<sup>432</sup>

1166. Respondent adds in its Post-Hearing Brief a further alternative based on “minimum damages,” consisting of the deficit in the investments required for the first two years of the Concession, prior to the adoption of the emergency measures. For this purpose, Respondent suggests using Expert Walck’s information based on a comparison between the approved POES and AGBA’s financial statements. The deficit would then be USD 9.3 million for the first year and USD 52 million for the second year, resulting in the Counterclaim’s amount of USD 61.3 million plus interest.

## 2. *Claimants’ position*

1167. In respect of the merits of the Counterclaim, Claimants start with reiterating their basic position initially submitted on the matter of the Tribunal’s competence to entertain Respondent’s Counterclaim. This is the premise that BITs do not provide any protection to States for damages arising out of a breach of domestic law, international law, or out of

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<sup>432</sup> This position was also presented in Respondent’s opening statement at the hearing; TR-E, Day 1, p. 110/11-22.

the investment in a capacity not covered by the original claim. In Claimants' view, the Spain-Argentina BIT adopts the classical asymmetric model that exclusively regulates State obligations. The BIT does not impose obligations upon the investor. Consequently, the Counterclaim presented by Respondent faces the insurmountable obstacle of having been presented in the context of a BIT which does not create obligations for the investor or subject the investor to the rules of Argentine or international law either.

1168. Claimants understand that Respondent is not accusing them for having violated the Spain-Argentina BIT. There is no room for an allegation of a breach of a Treaty which does not impose any obligations to the investor. In relation to Article X(5) of the BIT, Claimants add that this provision cannot have the effect of protecting a host State against damages under local law or international law.

1169. Claimants strongly deny that they breached any of their investment obligations. Had any such violation taken place, it would be a contractual obligation allegedly undertaken by AGBA vis-à-vis the Province as Grantor. CABB and URBASER undertook no obligation whatsoever owing to the Argentine Republic. Claimants are allowed to file a complaint against the Argentine Republic because this Republic is responsible for the actions of its political subdivisions and agencies. However, Respondent has formulated no argument whatsoever to justify its contention that a right that would lie with the Province of Buenos Aires could be exercised by the National State, the Argentine Republic itself. Respondent failed to mention that it was AGBA, not Claimants, who undertook the obligations to make certain investments vis-à-vis the Grantor. Therefore, the Argentine Republic lacks standing to claim for their violation against CABB and URBASER. The fact that CABB and URBASER have standing to assert a claim against the Argentine Republic concerning their investment does not authorize the Argentine Republic, or vest it with standing, to assert a counterclaim against CABB and URBASER in connection with investments the Concessionaire was required to make. If it would be assumed that AGBA's conduct did cause damages, it is evident that the "victim" of such damages would be the Province. The National State would have sustained no damage at all and, accordingly, it lacks standing to seek damages before the Arbitral Tribunal.

1170. Claimants also submit that Article I(2) of the BIT does not create any such obligation on charge of an investor by defining "investment" as any kind of property "acquired or effected in accordance with the legislation of the country receiving the investment." The requirement for investments to be in accordance with the laws and regulations of the host State means simply that investments which would be illegal under the laws of the host State are disqualified from the protection of the BIT. Such provision cannot serve as a cause of action for a counterclaim.

1171. Claimants note that they are accused for their failure to make investments that were essential to ensure the provision of the drinking water and sewage services.

Throughout their submissions, Claimants have established the circumstances that caused the Concession from being performed as provided for in the Bidding Terms and Conditions. Even if it were true that not all expected investments could be carried out, this does not amount to a breach by Claimants or the Concessionaire; it is the result of the Province's own breaches and the actions of the Regulatory Agency, as well as the emergency measures adopted by the Argentine Government and the Province of Buenos Aires.

1172. The Argentine Republic presented its Counterclaim based on Claimants' alleged failure to fulfill their investment commitments even though AGBA's Concession was terminated barely a little more than six years after Takeover. Any alleged failure to make the agreed investments is not attributable to CABB and URBASER.

1173. The mere fact that Respondent has argued a state of necessity is, in itself, incompatible with its blaming CABB and URBASER and holding them responsible for such failures. When a state of necessity might render certain breaches non-attributable, then, however, it would no longer be possible to argue a breach in connection with the other party's conduct. The circumstances that allegedly caused the state of necessity would have affected both parties. It is unthinkable to simultaneously maintain that AGBA was to continue to perform the Concession Contract as if nothing was going on. The investor's business risk and the state of necessity favoring the host State cannot be reconciled at a given moment in time.

1174. The Counterclaim neglects to even bring up the situation with the POES plans. It does not mention that the Grantor expressly declared the first POES to have been fulfilled by the Concessionaire and then neutralized the second POES, without even ruling on the requests for the neutralization of the POES plans for the coming periods. It is utterly impossible to speak of investment commitments when the first plan containing such commitments was expressly declared to have been fulfilled and the second was neutralized with Law No. 25561, enacted during the third POES period.

1175. The Argentine Republic also argues that CABB and URBASER violated the Concession with the obvious intention of forcing a renegotiation of their Contract. It fails to consider that the investors had no need to force a renegotiation, as such renegotiation was required first as a result of the enactment of the Emergency Law and then as a result of the New Regulatory Framework.

1176. In respect of the Argentine Republic's reference to ABGA's letter of May 17, 2001, Claimants have extensively explained that, at the time, not only were the effects of the crisis becoming evident (the Province's emergency law being enacted in July 2001), but also the Concession was already suffering as a result of the Grantor's violations and the Regulatory Agency's actions, which materially affected the Concessionaire's income.

In any event, a contracting party's proposal to modify the contract does not entail a violation of it or an attempt to exercise any coercion. The letter is nothing but a written reflection of a first attempt to restore contractual equilibrium.

1177. A dismissal of the Counterclaim does not even require the existence of the Grantor Province's breaches as basis, as it is a necessary outcome of the Argentine Republic's very own arguments.

1178. Claimants further object that Respondent's damage claim itself is entirely unsupported. The "Prayer" section of the Memorial of May 29, 2013 does not include a quantification of the Counterclaim. The amounts of the claim are contained in a paragraph of said Memorial (para. 1001). The full amount is USD 404.34 million, representing the difference between the commitment undertaken by the consortium for the whole 30 years period (USD 429.38 million) and the investments for USD 25.03 million actually made. The proportion in respect of Claimants' shareholding in AGBA results in an amount for compensation of USD 191.75 million.

1179. Respondent's argument shows a complete lack of rigor. Even if the investments had been correctly quantified, the damages quantification presented by the Argentine Republic would still be inconsistent and unfounded. If Respondent contends that Claimants had not assumed an obligation to invest, then the damages potentially resulting from such failure could not total the value of the unperformed investments. Respondent is not seeking damages for a breach but to have such breach remedied through an arbitral award enforcing the alleged obligation. Moreover, when considering for the purposes of a damage calculation investments that should have been made, it would also be necessary to take account of the higher revenue AGBA would have earned as a result of service expansion and the ensuing profit for the shareholders. Claimants also submit that damages should have to be determined in pesos, since the investments had also to be made in this currency.

1180. AGBA's Concession was terminated by means of a decree of July 11, 2006. Were the Arbitral Tribunal requested to order that the investments be made, the only option would be to make contributions to AGBA. Since AGBA no longer holds the Concession, such contributions would be useless to the Grantor or the Argentine Republic. In the hypothesis that an obligation to invest had not been fulfilled, the damage would be the damage resulting from the inexistence of the investment, as for instance the deterioration of facilities, the costs of unperformed expansion works, or other work to be quantified by the claiming party. The Respondent chose to replace this procedural burden with a mere mathematical calculation by which it seeks to equate the damage resulting from a breach with the breach itself.

1181. The Argentine Republic's Counterclaim is thus entirely baseless, as the breach upon it rests is non-existent. In addition, the damage quantification is completely inconsistent and unjustified.

3. *The Tribunal's findings*

a. The applicable law under the BIT

1182. The first step in the examination of the merits of Respondent's Counterclaim is to deal with Claimants' principled objection that the asymmetric nature of the BIT means that this Treaty does not provide for any right of the host State and, correspondingly, does not impose any obligation upon the investor.

1183. A first reading of the BIT provides as answer that what Claimants assert is nowhere expressed in the BIT. It is certain and undisputed that the BIT's main and manifestly prevailing focus is on a number of standards of protection for the investors rights and interests, which are retained for the purpose of inducing and protecting foreign investments. Nevertheless, there is no provision stating that the investment's host State would not have any right under the BIT.

1184. A further reading in simple terms confirms that such categorical understanding would be wrong. It is well understood, indeed, that the two dispute resolution clauses in Articles IX and X necessarily contain rights, albeit of a procedural nature, of a Contracting State when it participates in such a proceeding, relating respectively to disputes between Contracting Parties and to disputes between an investor and a State Party hosting the investment.

1185. Claimants rightly note that Article I(2) of the BIT, when requesting that an investment must be acquired or effected in accordance with the legislation of the country receiving the investment, relates to the definition of investments for the purposes of determining the scope of application of the BIT. It does not in itself contain an investor's obligation to comply with the host State's legislation when pursuing its investment with the effect that the host State would have a right to trigger the application of the BIT and its arbitration clause in case of a violation of its domestic law.

1186. The question is then whether any host State's rights under the BIT shall be denied because of the very nature of BITs deemed to constitute investment law in isolation, fully independent from other sources of international law that might provide for rights the host State would be entitled to invoke and to claim before an international arbitral tribunal.

1187. Any examination of such a question has again to start by observing the wording retained by the Spain-Argentina BIT. When assuming that the host State may not have



title to rights (other than those implied in Art. IX and X) that it may invoke against an investor as holder of a corresponding obligation, the definition of a dispute able to be submitted to arbitration should carve out the possibility for the host State to invoke such rights. Interestingly, Article X(1) of the BIT does not contain such an exclusion, declaring that it applies to “disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement.” No distinction is made in respect of the party entitled with the rights that are at the basis of the dispute. Thus, they can be rights of the investor as they can be rights of the host State. It cannot be said that this particularity of the drafting of this provision is not significant or does not correspond to the views the drafters had when preparing the BIT. Indeed, when comparing this provision to the parallel clause of Article IX(1) relating to disputes between the Contracting Parties to the BIT, it is to be noted that it is stated specifically therein that these disputes are “relating to the interpretation or application of this Agreement.” It must therefore be assumed that the omission in Article X(1) of any required connection between the investment dispute and what should read as “the interpretation or application of this BIT” was made on purpose and must have a meaning.

1188. The next step to undertake is then to turn to the provision on the law applicable to the Tribunal’s decision contained in Article X(5). Such decision shall be made “on the basis of this Agreement.” To this basis, the word “and” connects an additional basis, which can be, alternatively, another treaty in force between the Parties, the host State’s domestic law, or the “general principles of international law.” In order to be pertinent “where appropriate,” these additional legal bases must be connected or referred to by the BIT (“this Agreement”), which represents the ground of the decision in all cases.

1189. As far as recourse to the “general principles of international law” is concerned, such reference would be meaningless if the position would be retained that the BIT is to be construed as an isolated set of rules of international law for the sole purpose of protecting investments through rights exclusively granted to investors. Such a view, which Claimants favor, is not correct for more than one reason.

1190. Interpretation must serve the goal of providing provisions with a meaning. As stated in the Decision on Jurisdiction (para. 52), when considering the purpose either of the BIT as a whole or of a particular provision, the Tribunal has to give such purpose an understanding that comports with the equally important principle of effectiveness (or principle of *effet utile*). Any treaty rule is to be interpreted in respect of its purpose as a rule with an effective meaning rather than as a rule having no meaning and effect. This principle is one of the main features of the law of treaties and a standard of continuous application for ICSID Tribunals. It is given effect within Article 31(1) of the Vienna Convention by virtue of the requirement to interpret in good faith. Effectiveness of a treaty rule denotes the need to avoid an interpretation which leads to either an impossibility or absurdity or empties the provision of any legal effect.

1191. As has been stated above, the definition of disputes capable of being submitted to arbitration and, hence, the possible scope of claims to be submitted to arbitration under Article X is not limited to rights directly based on the application (or interpretation) of the BIT. If Claimants' view of the BIT as a closed system strictly preserving investors' rights under the BIT would be correct, it would not fully reflect the terms of Article X(1), which have a broader scope, as explained above; therefore, Claimants' understanding of the BIT would deprive this provision of part of its meaning.

1192. When still remaining in the framework of the BIT, an illustration of the need for a broader view is provided in Article VII(1) on "more favourable terms," which reads as follows:

"Where a matter is governed by this Agreement and also by another international agreement to which both Parties are a party *or by general international law*, the Parties and their investors shall be subject to whichever terms are more favorable." (emphasis added)

This provision states expressly that a source of international law that is external to this BIT can provide more favorable rights that are granted on the basis of Article VII(1) of this BIT and therefore subject to be claimed, if need be, through the dispute resolution mechanism provided in Article X. As a general note, it can thus be retained that the BIT does not represent, in the view of the Contracting Parties and its clear text, a set of rules defined in isolation without consideration given to rules of international law external to its own rules.

b. The BIT's relation to international law and human rights

1193. On a preliminary level, the Tribunal is reluctant to share Claimants' principled position that guaranteeing the human right to water is a duty that may be born solely by the State, and never borne also by private companies like the Claimants.<sup>433</sup> When extended to human rights in general, this would mean that private parties have no commitment or obligation for compliance in relation to human rights, which are on the States' charge exclusively.

1194. A principle may be invoked in this regard according to which corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law. While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals. A simple look at the MFN Clause of Article VII of the BIT shows that the Contracting States accepted

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<sup>433</sup> Reply on the Merits and Answer to the Counterclaim, para. 582.

at least one hypothesis where investors are entitled to invoke rights resulting from international law (in addition to the rights resulting from Article X). If the BIT therefore is not based on a corporation's incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations.

1195. The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation.<sup>434</sup> In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.

1196. The 1948 Universal Declaration of Human Rights proclaims that "All human beings are born free and equal in dignity and rights" (Art. 1), that "Everyone has the right to equal access to public service in his country" (Art. 21(2)), and that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social service" (Art. 25(1)). It may be said that these and other provisions do not state more than rights pertaining to each individual. Nevertheless, in order to ensure that such rights be enjoyed by each person, it must necessarily also be ensured that no other individual or entity, public or private, may act in disregard of such rights, which then implies a corresponding obligation, as stated in Article 30 of the Declaration : "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." (Art. 30) The Declaration may also address multinational companies.<sup>435</sup>

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<sup>434</sup> The basic document is today the UN Special Representative, John Ruggie's Final Report on "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (A/HRC/17/31, March 21, 2011). According to these principles, business enterprises should respect human rights (No. 11). This responsibility refers to internationally recognized human rights (No. 12). It requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. (No. 13) In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements; (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. (No. 23).

<sup>435</sup> "Every individual and every organ of the society excludes no one, no company, no market, no

1197. Similarly, the 1966 International Covenant on Economic, Social and Cultural Rights states that States Parties recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (Art. 11(1) and 12), further providing that “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant” (Art. 5(1)). The UN Committee on Economic, Social and Cultural Rights stated that “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”<sup>436</sup> The United Nations’ General Assembly Resolution of July 28, 2010 (64/292, CUL-185) states in similar terms that the Assembly “*Recognizes* the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”

1198. The International Labor Office’s Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy (of 1977, as amended in 2006) states that all parties concerned by this Declaration should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations (principle 8).

1199. At this juncture, it is therefore to be admitted that the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.

1200. The Tribunal further retains that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of May 23, 1969, and that Article 31 § 3 (c) of that Treaty indicates that account is to be taken of “any relevant rules of international law applicable in the relations between the parties.” The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT’s special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.<sup>437</sup>

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cyberspace. The Universal Declaration applies to all of them.” Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, Brooklyn Journal of International Law, 25, 1999, p. 17-25 (25).

<sup>436</sup> General Comment No. 15 (2002) on “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights,” relating to “The right to water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)”, para. 3, submitted to the Economic and Social Council on January 20, 2003 (E.C.12/2002/11, CUL-186, LARA-236). It is added that “The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.”

<sup>437</sup> Cf. *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID/ARB/11/28,

1201. The Tribunal observes that this approach reflects what Article X(5) of the BIT states, albeit in a wording requiring interpretation. This provision instructs the Tribunal to make its decision on the basis of the BIT and, where appropriate, by reference to one of the two bases other than the host State's domestic law, which are the main sources of international law, *i.e.* "other treaties in force between the Parties" and "general principles of international law." It is thus Article X(5) itself that states the evidence that the BIT is not framed in isolation, but placed in the overall system of international law.

1202. Article 42(1) of the ICSID Convention confirms this understanding. Pursuant to this provision, the Tribunal shall decide a dispute "in accordance with such rules of law as may be agreed by the parties." Article X(5) of the BIT constitutes such an agreement. This rule of the BIT does not contain any exclusion in respect of international law. Therefore, Article X(5) is in harmony with Article 42(1) of the ICSID Convention, stating that in the absence of an agreement on the choice of applicable rules of law, the Tribunal shall apply the law of the host State "and such rules of international law as may be applicable." The ICSID Convention does not provide for any restriction in respect of these "applicable rules of international law," which are not circumscribed by the applicable BIT only; they necessarily include all such rules which according to their self-determined scope of application cover the legal issue arising in the particular case.

1203. Another illustration is given by peremptory norms of general international law (*ius cogens*) to the extent they may be of interest in an investment matter. If so, such norms must certainly prevail over any contrary provision of the BIT, as per the express statement in Article 53 of the Vienna Convention.<sup>438</sup>

1204. Beyond these sources of law, it remains to be examined, in light of the openly framed provision of Article 31 § 3 (c) of the Vienna Convention, whether other parts of international law may be relevant in the instant case. This leads to the question whether the human right to water and sanitation as part of the general notion of human rights is pertinent in the instant case and, in particular, whether such right is completed by a corresponding obligation on part of Claimants as investors.

1205. It is not disputed that the human right to water and sanitation is recognized today as part of human rights and that this right has as its corresponding obligation the duty of States to provide all persons living under their jurisdiction with safe and clean drinking

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Decision on Annulment of December 30, 2015, paras. 86-92, where the *ad hoc* Committee refers to the "principle of systemic integration," stating that resort to authorities stemming from the field of human rights is a "legitimate method of treaty interpretation."

<sup>438</sup> As this has been stated in *Phoenix*, taking an extreme example, "nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs." *Phoenix Action, Ltd. v. The Czech Republic*, ICSID/ARB/06/5, para. 78 (LARA-68).

water and sewage services. For Claimants, this is accepted but this is also the end of the matter.<sup>439</sup> For Respondent, the same human right is incumbent upon any private party in charge with providing for drinking water and sewage services as this was AGBA's and therefore its shareholders' obligation under the Concession.

1206. However, this does not answer the question whether Claimants' as investors were bound by an obligation based on international law to provide the population living on the territory of the Concession with drinking water and sanitation services. Respondent does not, in fact, go so far. Indeed, it argues that such human right was incumbent on Claimants because providing for water and sewage was AGBA's and therefore its shareholders' obligation under the Concession. Even if this obligation could be imposed upon Claimants, Respondent does not state that such obligation is based on international law. It merely asserts that the performance obligation under the Concession had the effect of supplying the services that are part of the population's human right to access to water. Respondent also states that Claimants had violated human rights obligations clearly applicable to international companies.<sup>440</sup> This argument does not reference any particular international law obligation, but relies only on AGBA's obligations based on the Concession Contract. And while Respondent correctly introduces the principle of *pacta sunt servanda* as a principle of international law, it identifies the relevant *pactum* as Claimants' obligation to invest in expansion work, thus relying again on the Concession Contract and admitting that international law does not provide a cause of action for the Counterclaim.<sup>441</sup>

1207. The Tribunal further finds that none of the provisions of the BIT has the effect of extending or transferring to the Concessionaire an obligation to perform services complying with the residents' human right to access to water and sewage services. Respondent does not invoke any such provision to this effect. For such an obligation to exist and to become relevant in the framework of the BIT, it should either be part of another treaty (not applicable here) or it should represent a general principle of international law. In the affirmative, such obligation would be applicable as part of the legal framework of international law in which the investment is integrated in the particular case or, either cumulatively or alternatively, on the basis of the provision on applicable law in Article X(5).

1208. Respondent does not explain the basis of such obligations under international law other than by emphasizing Claimants' duty to ensure AGBA's performance in providing

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<sup>439</sup> Claimants submit in their Post-Hearing Brief (paras. 199-201) that the Argentine Republic refused to recognize the human right to water when its express regulation in a proposed Section 241 of the first bill providing for the reform of the Civil Code was removed. While this might be criticized as a matter of domestic law, it has no impact on Argentina's responsibility to accept and implement the right to water under international law and its standing to invoke this right, to the extent it is recognized.

<sup>440</sup> Respondent's Post-Hearing Brief, para. 203.

<sup>441</sup> Cf. Respondent's Post-Hearing Brief, para. 209. And further: Respondent's Counter-Memorial and Counter-Claim, para. 999/1000; Respondent's Rejoinder on the Merits and Counter-Reply, paras. 812/813. Respondent also invokes the principle of good faith and *bona fide* expectations, however without any further specification as to its relevance in relation to the human right to water and sanitation.

water and sewage services as if such duty were based on the human right to water and thus on international law. This is incorrect. The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and sewage services.

1209. This obligation, as all others retained in the Covenant referred to above, "imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible."<sup>442</sup> This includes establishing "accountability mechanisms to ensure the implementation of the strategy."<sup>443</sup> The necessary step is therefore that a host State accepting investments in the domain of the provision of water relies on the BIT to have the investor participating to its obligation under international law. It thus complies with the conclusion of the UN Committee on Economic, Social and Cultural Rights that "States parties should ensure that the right to water is given due attention in international agreements."<sup>444</sup> This includes the possibility to consider matters related to the human right to water in the dispute resolution mechanisms provided for in such agreements.<sup>445</sup> However, the investor's obligation to ensure the population's access to water is not based on international law. This obligation is framed by the legal and regulatory environment under which the investor is admitted to operate on the basis of the BIT and the host State's laws.

1210. While it is thus correct to state that the State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, this is not the case for the investors who pursue, it is true, the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water. Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law. The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of

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<sup>442</sup> Cf. General Comment No. 15 (2002) referred to above, para. 45.

<sup>443</sup> Cf. *Ibid.*, para. 47.

<sup>444</sup> Cf. General Comment No. 15 (2002), para. 35, adding: "Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water."

<sup>445</sup> This item is retained in the conclusions of General Comment No. 15 in more general terms: "Judges, adjudicators and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to water in the exercise of their functions." (para. 58) Interestingly, the Spanish version of the text uses the term "árbitros" for "adjudicators."

immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case.<sup>446</sup>

c. The human right to water in the framework of AGBA's Concession

1211. The Tribunal understands that human right for access to drinking water means "physical access to sufficient, safe and acceptable water," and that the "core" of the corresponding obligation is "to ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease." Moreover, "under no circumstances shall an individual be deprived of the minimum essential level of water."<sup>447</sup> The concern at the basis of the obligation is the access to water, and this much more than the revamping of an existing network, albeit remaining in poor conditions. The Tribunal therefore finds that Claimants' alleged failure to comply with the population's human right for water would have to be focused on unperformed expansion work; it appears highly uncertain and in any event unsupported by evidence that other work not performed on the network might have raised concerns about a breach of such fundamental human right.

1212. AGBA's performance and its shareholders' investment were certainly designed as a substantial contribution to the enforcement of the population's right to water. Nevertheless, the mere relevance of this human right under international law does not imply that AGBA and its shareholders were holding corresponding obligations equally based on international law. No human rights obligation to provide access to water existed on part of Claimants before they entered into the Concession. The acceptance of the Bid and the Concession Contract could not have as an effect that the obligations arising out under this Contract became, in addition or in parallel, obligations based on international law. The BIT does not contain any indication in such a direction, and its reference to general principles of international law in Article X(5) cannot let emerge an obligation that did not exist on charge of the investing companies before they entered into their investment in the Argentine Republic.

1213. The shareholders and their investment vehicle AGBA were operating on the basis of a Concession that was placed under the authority of the Executive of the Province and the regulatory power of ORAB, both representing the host State for the purposes of the application of the BIT. Respondent's authorities were in charge of full legal and effective control of AGBA's conduct as Concessionaire. The Regulatory Authority had to ensure the protection of the community's interests (Sec. 13-II of Law No. 11820). It was therefore the State's primary responsibility to exercise its authority over the Concessionaire in

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<sup>446</sup> Therefore, Respondent's reliance on the case *Filártiga v. Peña-Irala*, U.S. Court of Appeal, 2nd Circuit, 630 F.2d 876, June 30, 1980 (ALRA 307) is not convincing.

<sup>447</sup> Cf. General Comment No. 15, paras. 24, 37, 56.



such a way that the population's basic right for water and sanitation was ensured and preserved.

1214. For such purpose to be achieved, it was certainly not sufficient to call upon the Concessionaire to comply with the first Five-Year POES. AGBA's failure to fulfill the undertakings retained in this POES could be sanctioned on the basis of the Concession at the end of year 2004 only, and the Province waited to act accordingly through the termination of the Contract until July 2006. While it is true that the Province called upon AGBA to comply with its obligations in respect of expansion work to be done and funding to be provided as from the time when the POES for year 2 (2001) was neutralized, it must also be noted that the legal and regulatory framework was not effective in order to ensure AGBA's and its shareholders' compliance with their commitments in the short or medium term. The Regulatory Agency had approved AGBA's POES report for year 1 (2000) and rendered inefficient the report for the following year. Such lack of efficiency was due not only to the circumstances prevailing at the time, but moreover to an inherent lack of density in the legal constraints imposed upon the Concessionaire by the Concession Contract and the Regulatory Framework. Further, as from the time the emergency measures took effect, the Federal and the Provincial Governments engaged in either shifting concessions back into public hands or renegotiating the remaining concessions with contractual partners as AGBA. This policy approach prevailed over any immediate action undertaken to secure the population's human right for access to water and sewage services. There was no governmental policy either requesting from the Concessionaire immediate and efficient activity in response to the Concession's not yet served users' basic needs for provision of water and sanitation. The Memorandum of Understanding (MOU) initially proposed by the Province and to be concluded with AGBA in June 2001 had the purpose of redefining the schedule in order to prioritize works corresponding to the most urgent needs of the population. However, while AGBA was prepared to accept a working committee to be set up for such purpose, the Province ultimately refused to execute the agreement.

1215. This conclusion is confirmed when Respondent's assessment of alleged damages arising from the violation of the human right to water it invokes is looked at more closely. Respondent measures such damages by calculating the amount of funding AGBA and its shareholders failed to provide.

1216. Respondent's first alternative claim refers to the period of 2000-2004, covering the years governed by the first Five-Year POES that retained a total amount of AGBA's investment of USD 230,917,300. If then Claimants' share of the investments actually made is deducted and their shareholding of 47,4122% further taken into consideration, the proportional compensation claimed by Respondent is equal to USD 80.9 million. However, as from year 2002, the Argentine Republic changed its strategy in respect of

public service concessions, moving away from privatization towards public service supply supported by public subsidies and investment. In the Province of Greater Buenos Aires, this development was consolidated by the approval of the New Regulatory Framework. The renegotiation process was based on the same concept. Therefore, the claim for damages for failing to provide the required investment under the POES is groundless when as from 2002 the policy was adopted to have the State involved by its own funding in supplying basic water and sewage services and thus complying with the obligations resulting from the human right for access to drinking water and sanitation.

1217. Moreover, it must also be taken into account that since mid-2003 and more intensively in 2004 agreements were concluded for the purpose of developing work within AGBA's Concession area that the Concessionaire failed to undertake or advanced insufficiently due to its limited resources. The "Framework Agreement" concluded between the Federal Government and the Province in June 2003 and the works funded by the World Bank to which AGBA had been associated in 2004 may be recalled in this respect. These developments implied not only a shift towards other methods for providing the required funding, but they also had the effect of repairing otherwise than by calling upon AGBA's obligation for funding the breach of the human right for water that was allegedly caused through the failure to proceed with the expansion work contractually undertaken in the Five-Year POES.

1218. Respondent's second alternative is based on a deficit in investment required for the first two years of the Concession and the Five-Year POES. Respondent's calculation is based on Claimants' Expert Walck's comparison made at the hearing between the approved POES and AGBA's financial statements.<sup>448</sup> The amounts thus retained are USD 9.3 million for 2000 and USD 52 million for 2001, resulting in a total amount of USD 61.3 million.<sup>449</sup> The Tribunal notes that the respective amounts would be lower if those provided for and agreed upon in the first Five-Year POES in respect of funds required for expansion work in 2000 and 2001 would be taken into account.

1219. However, the amounts for funding that AGBA and its shareholders failed to provide in the years 2000 and 2001 do not correspond in any way to an alleged violation of an investor's obligation under international law to ensure the population's right to water. The legal framework of the Concession was such that the respective amounts retained for these both years in the first Five-Year POES were not mandatory in respect of this period in time, but in respect of the overall compliance with the investment commitments for the first five years of the Concession only (Sec. 5.3 of the Contract). Additionally, the Regulatory Agency approved AGBA's POES report for year 2000 and "neutralized" the report

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<sup>448</sup> TR-E, Day 6, p. 72/7-74/19.

<sup>449</sup> On the basis of the figures retained by the Tribunal in Chapter V, the respective deficits would be USD 9,282,477.19 for 2000, and USD 59,488,626.17 for 2001, with a total of USD 68,771,103.36.

for year 2001, thus effectively declaring that it did not hold the Concessionaire responsible for the delay in complying with the schedule set up in the first Five-Year POES. ORAB's strategy consisted initially in insisting upon AGBA's commitments remaining in view of the complete performance of this POES by the end of the five-year period, before the effective operation of the Concession was affected by the emergency measures ordered in 2002. Under these circumstances, Respondent's compliance with its primary responsibility to ensure the area's population's right to water was not a governmental primary focus and can therefore not be retained as a corresponding obligation on behalf of the Concessionaire.

1220. The Tribunal also notes that Respondent does not state any legal ground for any individual's right to claim damages as a consequence of an alleged violation of the human right to water.<sup>450</sup> Respondent does not demonstrate either that the alleged violation of such human right entails a duty of reparation equally based on international law, with the effect that the individuals concerned by such an alleged harm obtain an appropriate compensation. Respondent failed to state such a claim. This would be a reason sufficient to dismiss Respondent's Counterclaim. The Tribunal adds that such failure can also be explained by the lack of any legal ground based on international law that would entitle a group of individuals to raise a claim for performance for delivery of water and sewage services directed against a company or any other private party. Accordingly, there does not exist a claim for compensation in case of lack of such performance not based on an obligation under international law.

1221. For the reasons given above, Respondent's Counterclaim must fail.

### **XIII. Costs**

1222. On August 24, 2012, the Parties had filed with the Tribunal declarations regarding the costs incurred respectively in this proceeding in relation to the jurisdictional phase.

1223. Claimants stated that the costs incurred by URBASER were USD 306,475.99, plus EURO 146,511.71, plus ARS 58,989.31, and by CABB USD 159,991.96 plus EURO 147,818.40.

1224. Respondent converted the amounts determined in three currencies into one amount of USD 637.292,57.

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<sup>450</sup> See TR-E, Day 9, p. 156/4-157/16.

1225. In respect of the merits, Claimants stated that for the main claim the costs incurred by URBASER were EURO 401,561.66 plus ARS 327,551.99, in respect of legal counsel, and USD 1,187,441.46 plus ARS 250,943.81 for the other costs; and by CABB EURO 324,790.23 for legal counsel, and EURO 56,629.70 plus USD 892,490.52 and ARS 183,088.87 for the other costs.

1226. Claimants submitted a separate list in respect of the Counterclaim, causing costs for URBASER of EURO 133,853.89 plus ARS 109,184.00 in respect of legal counsel, and USD 169,634.49 plus ARS 35,849.12 for the other costs; and for CABB EURO 108,263.41 in respect of legal counsel, and EURO 8,089.96 plus USD 127,498.65 and ARS 26,155.55 for the other costs.

1227. For the merits phase, Respondent determined its costs at the amount of USD 1,838,315.26.

1228. The amounts mentioned above in USD include the respective advances paid to ICSID.

1229. The Parties accept that they have not reached an agreement as to the arbitration costs and their allocation and that there is no provision in the BIT applicable to this matter. They agree that the Tribunal shall apply Article 61(2) of the ICSID Convention and that it has discretion to determine how, in what amount and by whom expenses incurred by the Parties in relation to this proceeding are to be paid.

1230. Claimants consider that the costs of the jurisdictional phase are to be borne by Respondent. In respect of the merits phase, Claimants note that Arbitral Tribunals have repeatedly applied the criteria of costs follow the event, even in cases of partial admission of a claim. Other Tribunals have indicated that ordering the losing party to pay the costs of the winning party is a manifestation of the principle of full compensation for the damage caused. Finally, the principle that the costs of the arbitration proceeding are to be shared equally by the parties with each side bearing its own legal expenses has become a subsidiary rule that applies when the conditions required for the application of the other costs allocation criteria are not met. These directions should be followed by the Tribunal in respect of the main claim, but also in relation to the Counterclaim, which represents for Claimants one fourth (25%) of its legal costs and one eighth (12.5%) of the other costs. In their ultimate brief of March 18, 2016 Claimants argue additionally that the alleged dilatory conduct of Respondent in relation to the constitution of the Tribunal in the years 2007 to 2009 should have a serious impact on Respondent's burden to bear the costs of the proceeding.

1231. Respondent had requested in its relief on the merits, as confirmed in its Post-Hearing Brief, that the Tribunal should order Claimants to pay for all costs and expenses arising from these arbitration proceedings. In its brief filed on March 11, 2016, Respondent

explains the different methods that have been followed by ICSID Tribunals. Respondent recalls in particular that the Tribunals seized with the consequences of the emergency measures ordered by the Government of the Argentine Republic have decided in general that the costs incurred by each party shall be borne by each party and the fees of the arbitrators divided in equal parts. This method should be followed equally in the instant case, and preferred to Claimants' submission that the losing party should bear the full or at least the dominant part of the other side's costs.

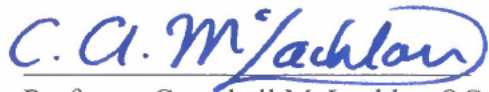
1232. In respect of the jurisdiction phase, the Tribunal notes that all of Respondent's objections to the jurisdiction in respect of Claimants' claims failed. It considers that in respect to jurisdiction, Respondent reference to the emergency nature of the measures triggering BIT claims cannot prevail. This must have as consequence that Respondent has to pay a substantial part of Claimants' costs incurred in this respect. The Tribunal does also take account of the rejection of all of Claimants' objections on jurisdiction and admissibility in respect of Respondent's Counterclaim, and of the fact that Claimants lost when they proposed to disqualify Arbitrator McLachlan. The Tribunal does not take account of the delays allegedly caused by Respondent during the phase related to the Tribunal's constitution; such delays had various reasons, not all attributable to Respondent, and Claimants do not demonstrate that they had significant consequences in respect of their legal costs. In light of these factors, the Tribunal concludes that Respondent shall pay all costs incurred by ICSID in relation to the proceeding for the jurisdictional phase, including the fees and expenses of the members of the Tribunal. Respondent shall further pay to Claimants USD 400,000 as contribution to their legal and other costs in this phase, together with post-award interest of 3%.

1233. In respect of the merits phase, the Tribunal considers that Claimants were successful in claiming for a declaration on Respondent's breach of the fair and equitable treatment standard. On the other hand, they did not obtain similar declarations in respect of other provisions of the BIT, and they failed entirely with their damage claims. The Tribunal has also found that most of the alleged violations of the Regulatory Framework were of a contractual nature and had no basis in the BIT. In respect of the Counterclaim, the Tribunal observes that Respondent has raised serious concerns about the human rights implications of AGBA's and its shareholders' failure to provide investments and to support expansion works assisting the needs of the population in the Concession area. While the Counterclaim ultimately failed, Claimants' opposing arguments were of little assistance to find the way reaching an adequate legal analysis of such an important matter. Taken all this together in light of its discretionary power the Tribunal concludes that each Party shall bear its own legal fees and costs and that each Party bears its contribution to the costs of ICSID incurred during the merits phase, which have been shared by advances paid in equal parts.

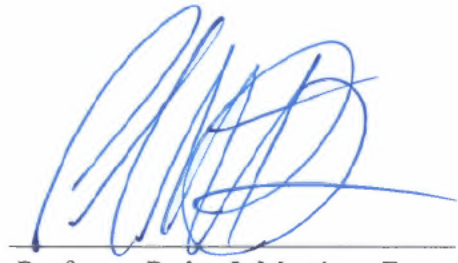
#### **XIV. Decision**

1234. Based on the reasons stated above, the Tribunal decides:

1. To confirm its Decision on Jurisdiction of December 19, 2012 and to assert that the Centre has jurisdiction and the Tribunal has competence over the Argentine Republic's Counterclaim.
2. To declare that the Argentine Republic breached Article IV(1) of the Bilateral Investment Treaty executed between the Argentine Republic and the Kingdom of Spain on October 3, 1991 in not affording fair and equitable treatment to Claimants in relation to the renegotiation of the Concession Contract in the period between 2003 and 2005.
3. To dismiss URBASER's and CABB's other claims for a declaration on a breach of this Bilateral Investment Treaty.
4. To dismiss in their entirety URBASER's and CABB's claims to order the Argentine Republic to pay compensatory damages.
5. To dismiss the Counterclaim submitted by the Argentine Republic and related to the human right to access to drinking water and sanitation.
6. To order the Argentine Republic to pay to URBASER and CABB a contribution to their legal fees and costs incurred in respect of the jurisdiction phase in the amount of USD 400,000, and Claimants' share of the advance for costs paid to ICSID during the jurisdictional phase in the amount of USD 647,000 together with annual interest of 3% as from 60 days after the date of the issuance of this Award.
7. To decide that the costs incurred by ICSID as from the end of the jurisdictional phase, including the Arbitrators' fees and expenses, shall be born in equal parts by both URBASER and CABB and by the Argentine Republic.
8. To dismiss any other claim submitted by any Party.



Professor Campbell McLachlan QC  
Arbitrator



Professor Pedro J. Martínez-Fraga  
Arbitrator



Professor Andreas Bucher  
President of the Tribunal

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding between

**URBASER S.A.**  
**AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAI A UR PARTZUERGOA**

(Claimants)

and

**THE ARGENTINE REPUBLIC**

(Respondent)

ICSID Case No. ARB/07/26

**Decision on Jurisdiction**

Rendered by

**Professor Andreas Bucher, President**  
**Professor Pedro J. Martínez-Fraga, Arbitrator**  
**Professor Campbell McLachlan QC, Arbitrator**

*Secretary of the Tribunal:* Mr. Marco Tulio Montañés-Rumayor

*Representing Claimants:*

Dra. Mercedes Fernández Fernández  
Dr. Juan Ignacio Santabaya González  
*Jones Day*  
Madrid, Spain

*Also representing Urbaser S.A.:*  
Juan Carlos Calvo Corbella

D. Enrique del Carril  
*Del Carril, Colombres, Vayo y*  
*Zabalía Lagos*  
Madrid, Spain

*Representing Respondent:*

Dra. Angelina María Esther Abbona  
Procurador del Tesoro de la Nación  
*Procuración del Tesoro de la Nación*  
Buenos Aires, Argentina

Date: December 19, 2012



## Table of Contents

I.	Background .....	1
A.	Procedure.....	1
B.	The nature of the dispute .....	7
1.	Claimants’ claims on the merits .....	7
2.	Respondent’s position and objections to jurisdiction.....	11
C.	The legal framework.....	12
II.	Respondent’s First Objection: Claimants failed to meet the requirements set forth in Article X of the Argentina-Spain BIT .....	16
A.	Preliminary matters .....	16
B.	The Parties’ analysis of the requirements of Article X (2) and (3) of the BIT .....	18
1.	Respondent’s position .....	18
2.	Claimants’ position .....	22
C.	The Tribunal’s findings .....	31
1.	The purpose and relevance of understanding the 18 month rule .....	31
2.	The requirement of submission of the “dispute” to the “competent tribunals” of the Host State .....	49
a)	The effects of the emergency laws on the operation of Argentina’s courts.....	49
b)	Competence of local courts requires Claimants’ <i>jus standi</i> .....	51
3.	The nature of the “dispute” to be decided “on the substance” within 18 months .....	54
a)	The “substance” cannot be reached through proceedings of an ancillary nature. ....	55
b)	The “substance” cannot be reached pursuant to summary or expedited proceedings... ..	57
c)	The “substance” cannot be reached by a declaratory judgment.....	57
d)	What <i>fora</i> for claims for compensation of damages? .....	61
e)	The 18 month requirement with respect to ordinary court proceedings .....	64
4.	Conclusion .....	68
III.	Respondent’s Second Objection: Claimants have no legal standing to bring claims for legal rights that belong to another entity .....	69
1.	Respondent’s position .....	69
2.	Claimants’ position .....	74
3.	The Tribunal’s findings.....	78
IV.	Respondent’s Third Objection: The investment invoked by Claimants is not a protected investment under the Argentina-Spain BIT .....	84
A.	Preliminary matters .....	84
B.	The transfer of AGBA shares held by Dycasa S.A. to URBASER S.A. ....	87
1.	Respondent’s position.....	87
2.	Claimants’ position .....	88
3.	The Tribunal’s findings.....	89
C.	CABB’s shareholder interest in AGBA and its participation agreements concluded with third parties.....	95
1.	Respondent’s position.....	95
2.	Claimants’ position .....	97
3.	The Tribunal’s findings.....	99
D.	CABB’s legal standing as a public entity not acting with the authorization of the Kingdom of Spain .....	102
1.	Respondent’s position .....	102
2.	Claimants’ position .....	104
3.	The Tribunal’s findings.....	105
V.	Decision.....	111

## **I. Background**

### **A. Procedure**

1. On July 20, 2007, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a Request for Arbitration (“the Request”) dated July 6, 2007, presented in the Spanish language (“Solicitud de Arbitraje”) and submitted by URBASER S.A. AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAI A UR PARTZUERGOA (“Claimants”, respectively “URBASER” and “CABB”) against the ARGENTINE REPUBLIC (“Argentina” or “Respondent”). The Claimants submitted the Request pursuant to Article X of the Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain signed on October 3, 1991<sup>1</sup> (“Argentina-Spain BIT” or “the BIT”).

2. On October 1, 2007, the Acting Secretary–General of ICSID registered the Request and notified the Parties of its registration.

3. Claimants and Respondent (the “Parties”) agreed to waive the nationality requirement as provided in Article 39 of the ICSID Convention (the “Convention”). Respondent selected the formula provided for in Article 37(2)(b) of the Convention regarding the constitution of the Tribunal. Claimants agreed to this choice, subject to the provisions of Article 38 of the Convention.

4. On December 18, 2007, Claimants appointed a national of Spain as arbitrator and proposed the designation of another arbitrator as president of the Tribunal. Respondent rejected the latter proposal on December 28, 2007, and suggested another candidate to become president. Claimant objected to this new proposal on January 3, 2008. On February 15, 2008, Respondent appointed an arbitrator of Argentine nationality and advanced a new proposal for president of the Tribunal. Because both arbitrators proposed by the Parties shared the nationality of Claimants and Respondent, respectively, pursuant to Article 39 of the Convention the agreement of all parties was required to confirm these appointments. On June 18, 2008, Claimants rejected both proposals that Respondent had raised.

5. On September 29, 2008, Claimants withdrew their initial appointment of an arbitrator and instead appointed Professor Pedro J. Martinez-Fraga, a national of the United States of America, as Arbitrator. The Parties were informed on October 30, 2008 that Professor Martinez-Fraga had accepted his appointment.

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<sup>1</sup> Acuerdo para la promoción y protección recíprocas de inversiones firmado por la República Argentina y el Reino de España el 3 de octubre de 1991.

6. Respondent stated on December 18, 2008 that an agreement had been reached between the Parties to accept the appointment of a national of a party pursuant to Article 39 of the Convention. On January 20, 2009, Claimants requested that the two remaining arbitrators be appointed by the Chairman of the Administrative Council, one of them to serve as the Tribunal's president. By letter dated February 13, 2009, the Centre confirmed that in the absence of an agreement between the Parties, no party could designate an arbitrator having the nationality of either Party.

7. On February 23, 2009, Respondent appointed Sir Ian Brownlie, a national of the United Kingdom, as arbitrator. On February 26, 2009, the Centre confirmed that Sir Ian had accepted his appointment.

8. On May 26, 2009, Respondent rejected and Claimants accepted a proposal by the Centre for the appointment of a president of the Tribunal. A new proposal by the Centre on June 9, 2009 was accepted by Claimants on June 16, 2009 and rejected by Respondent on the same day. A further proposal submitted by the Centre on July 10, 2009 was refused by both Parties on July 17, 2009.

9. The Centre then considered Claimants' earlier request to have the third presiding arbitrator appointed by the Chairman of the ICSID Administrative Council as provided for in Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules. By letter dated July 30, 2009, the Centre informed the Parties that it intended to propose the appointment of Professor Andreas Bucher, a national of Switzerland and a member of the ICSID Panel of Arbitrators, as the third arbitrator and President of the Tribunal. In an additional letter dated August 21, 2009, the Secretary-General of ICSID responded to Respondent's objections to the proposed appointment by concluding that these objections were not compelling.

10. On August 25, 2009, Respondent agreed to the appointment of another Swiss national that the Centre earlier had suggested and to which Claimants had agreed on May 26, 2009. When the Centre stated that it was going to seek this appointee's acceptance, on September 1, 2009, Claimants stated that their earlier acceptance was no longer in effect and that they were opposed to Respondent's attempt to have Professor Bucher's designation replaced upon its unilateral initiative.

11. On October 13, 2009, the Parties were informed that the Chairman of the ICSID Administrative Council had appointed Professor Andreas Bucher as the President of the Tribunal. On October 16, 2009, the Parties were further informed that Professor Bucher as well as Sir Ian Brownlie and Professor Pedro J. Martinez-Fraga had accepted their respective appointments and that accordingly, the Tribunal was deemed to be constituted and the proceedings to have begun on that date.

12. In view of the first session of the Tribunal that was envisaged to be held in Paris on December 16, 2009, the Parties submitted an agreement on multiple issues listed on that meeting's provisional agenda. By letter dated December 10, 2009, the Tribunal offered additional suggestions for the Parties' consideration. As the Parties were making progress in resolving outstanding issues, the meeting in Paris was cancelled, based on the expectation that agreement would be reached on the outstanding issues listed on the provisional agenda within a few days between the Tribunal and the Parties.

13. On January 3, 2010, Sir Ian Brownlie passed away. Pursuant to Arbitration Rule 10(2), the proceeding was thus suspended and the Argentine Republic was invited to appoint an arbitrator.

14. On February 26, 2010, the Argentine Republic appointed Professor Campbell McLachlan QC, a national of New Zealand as arbitrator. On March 8, 2010, the Centre informed the Parties that Professor McLachlan had accepted his appointment and that therefore, in accordance with Arbitration Rule 12, the proceeding resumed the same day from the point it had reached at the time the vacancy occurred.

15. On March 18, 2009, Claimants filed with the Centre a Proposal to disqualify ("Propuesta de Recusación") Professor McLachlan as Arbitrator pursuant to Article 57 of the ICSID Convention. The same day, the Centre confirmed receipt of the Proposal and declared that in accordance with Arbitration Rule 9(6) the proceeding was suspended until a decision on the Proposal for disqualification was taken.

16. On April 16, 2010, Respondent filed a submission in response to the disqualification proposal. Invited thereupon to make his own statement on the matter, if any, Professor McLachlan submitted such statement by letter dated May 5, 2010. The Parties all filed a further response to this statement on May 14, 2010.

17. Considering the Proposal for disqualification submitted by Claimants in accordance with Arbitration Rule 9(4), Professor Pedro J. Martinez-Fraga, Arbitrator, and Professor Andreas Bucher, President, decided on August 12, 2010 to dismiss the Proposal.

18. As of the date this Decision issued, *i.e.* August 12, 2010, the proceedings resumed. By letter of August 18, 2010, the Tribunal raised remaining procedural issues. By their respective statements of September 2, 2010, the Parties confirmed that all outstanding items had been clarified and agreed upon. On September 23, 2010, the Tribunal received the Parties' joint Agreement on the issues included in the first meeting's Agenda that had been convened for December 16, 2009, both in Spanish and in English. By letter of September 27, 2010, the Tribunal approved the Parties'

Agreement on the issues listed on the first meeting's Agenda and declared the first session closed.

19. In accordance with the rules contained in that Procedural Agreement and within the time limits fixed therein and later amended in part, the Parties filed submissions as follows:

- Claimants' Memorial on the Merits dated January 27, 2011
- Respondent's Memorial on Objections to the Jurisdiction of the Centre and the Competence of the Tribunal dated April 12, 2011
- Claimants' Counter-Memorial on Objections to Jurisdiction dated June 22, 2011
- Respondent's Reply on Objections to the Jurisdiction of the Centre and the Competence of the Tribunal dated August 15, 2011
- Claimants' Rejoinder on Objections to the Jurisdiction of the Centre and the Competence of the Arbitral Tribunal dated September 29, 2011.

These submissions were presented in Spanish and completed by a translation in English. A selected number of the attached documents and legal authorities were provided in English, either as originals or as translations.

20. Each Party filed supporting documentation together with the submission to which it relates. Further, on July 27, 2011, and in addition to a request contained in its Memorial on Objections to Jurisdiction, Respondent requested the Tribunal to order Claimants to submit additional documents that (a) were mentioned in Legal Opinions filed by Claimants but not submitted; (b) would allow to determine the standing and legal representation of CABB; and (c) relate to Claimants' shareholding in AGBA and to the transfer of those shares. In their letter of August 4, 2011, Claimants rejected this request. After several complementary exchanges of letters submitted by the Parties, the Tribunal's decided on August 15, 2011 not to rule on this matter before the exchange of briefs on jurisdictional issues concluded. Taking account of the documents filed by Claimants together with their Rejoinder on Objections to Jurisdiction, Respondent submitted a new request on October 21, 2011, containing a shorter list of documents requested, to which Claimants replied through their letter of November 3, 2011. In its Procedural Order of November 14, 2011, the Tribunal requested Claimants to submit a number of documents referred to in Prof. Manóvil's Report but not submitted, while it declined to make an order on Respondent's request in relation to other documents, *i.e.* "accounts in participation agreements" concluded by CABB and financial statements of Aguas de Bilbao S.A., which Claimants had refused to produce because they related to third parties alien to these proceedings. In reply, Claimants indicated in their letter of November 24, 2011 that one of the

documents requested in fact had never existed and that in relation to all others those that were available already had been submitted, while the remaining documents to be searched could not be found and were, in any case, not necessary to resolve the matter submitted to arbitration. Respondent addressed these propositions that Claimants advanced in a letter dated December 5, 2011, that requested the Tribunal to draw a negative inference from Claimants' position with respect to the contents of the share transfer agreements and related documentation that was not submitted. Respondent further reiterated its request that Claimants submit the accounts contained in the participation agreement concluded by CABB with Aguas de Bilbao S.A. and confirm that there are no other accounts in participation agreement relating to AGBA. In their comments dated December 19, 2011, Claimants rejected Respondent's requests and denied the relevance of the documents Respondent still sought to file with this Tribunal.

21. The Parties having agreed that it would be appropriate to hold a jurisdictional hearing, it was so decided. In accordance with Arbitration Rule 13(3), the Parties agreed to hold such hearing in Paris.

22. This hearing on the jurisdictional matters raised through Respondent's objections to the jurisdiction of the Centre and the competence of this Tribunal was conducted in Paris on February 6-8, 2012. The following Experts had presented written statements and were examined at that occasion:

- Prof. Dr. Ismael Mata, presented by Respondent
- Prof. Dr. Ricardo Augusto Nissen, presented by Respondent
- Prof. Dr. Rafael Mariano Manóvil, presented by Claimants
- Prof. Dr. Alberto B. Bianchi (Second Opinion), presented by Claimants
- Prof. Dr. Tomás Ramón Fernández, presented by Claimants

Prof. Mata was examined through videoconference between Paris and Buenos Aires. All other Experts were examined in Paris. The second part of the hearing was devoted to the presentation of the Parties' closing statements. At the end of the hearing, Respondent and Claimants declared that they had no remaining objection in respect of the conduct of this proceeding since this Tribunal's constitution.

23. Complementary documentation was filed after the hearing in compliance with decisions made on agreed terms by the Tribunal at the close of the hearing, as follows:

- Copies of a sample of decisions rendered by courts of the Argentine Republic, initially submitted on a CD-Rom exclusively, completed by

an English summary of each decision prepared by Respondent, and commented upon by Claimants in a Note submitted on March 20, 2012;

- English translation of a claim of annulment, offer of evidence and reservation of rights filed with the La Plata Contentious Administrative Court No. 2 on December 4, 2006, concerning which Respondent prepared some corrections, which were reviewed in turn by Claimants who did not raise on their side a need to make any more specific observation or clarification;
- Claimants' English translation of Exhibits to the Request for Arbitration;
- Copies of slides used by Claimants during their closing statement at the hearing of February 8, 2012. While Respondent submitted its set of slides at the hearing, the Tribunal was of the view that Claimants' filing occurring after the hearing was, under the circumstances, not detrimental to any of Respondent's procedural rights or positions.

24. The hearing held in Paris was recorded and a transcript prepared both in Spanish (hereinafter: TR-S, Day page/line) and in English (TR-E Day page/line). Unfortunately, the audio recording of the hearing covering part of Claimants' closing presentation in Spanish contained serious technical defects, rendering it inoperable in most part. The English version, performed by the interpreters, was recorded correctly and completely. A translation of this version in Spanish was provided. Respondent then objected to the filing of a brief entitled "Cierre" and described in Claimants' letter of March 20, 2012 as "[a] written note in support of the claimants' closing statement." The Tribunal recognized that this Note has the effect of duplicating somehow the oral presentation given by Claimants. This is not what the procedural rules agreed upon by the Parties and the complementary provisions adopted in preparation and during the conduct of the hearing had permitted. The presentation of each Party in support of its position concerning Respondent's objections to the Tribunal's jurisdiction was to be made orally and recorded in the transcript. No rule authorized a Party to submit a written brief covering a matter presented orally and available as recorded in the transcript. However, the Tribunal had to adopt a solution that would be fair to Claimants in light of the fact that no fully accurate transcript of their presentation in Spanish is available. Therefore, the Tribunal accepted Respondent's objection in part and decided to disregard this document for the remainder of this proceeding to the extent it contains statements that are not present in equivalent terms in the English transcript. The Parties were advised accordingly by letter dated May 17, 2012. Claimants submitted on June 12, 2012 corrections to the English and Spanish transcripts of their closing statements, to which Respondent declared not to have comments.

25. At the end of the hearing in Paris and in its letters of February 8 and 24, 2012, the Tribunal submitted to the Parties a series of questions they were invited to comment upon, which was done by March 20, 2012.

26. On August 24, 2012, the Parties filed with the Tribunal declarations regarding their costs incurred respectively in this proceeding in relation to its jurisdictional phase.

27. The Tribunal had a deliberation on September 1, 2012.

B. The nature of the dispute

1. *Claimants' claims on the merits*

28. Summarized and reduced to its basic elements in reliance on Claimants' presentation, the dispute's history starts when CABB, as a member of a consortium also composed of Sideco Americana S.A., Impregilo S.p.A. and Iglys S.A., was successfully submitting a bid for the provision of drinking water and sewage services in the Province of Buenos Aires. The successful bidders were required to set up a company in Argentina, to act as Concessionaire. Thus, AGUAS DEL GRAN BUENOS AIRES S.A. (AGBA), organized on December 2, 1999, became the holder of the concession for the provision of a drinking water supply and sewage services in the Region B of the Province of Buenos Aires, based on the Concession Contract it had concluded with the Province of Buenos Aires on December 7, 1999.

29. URBASER became stockholder of AGBA soon after its constitution, when it first acquired shares through Urbaser Argentina S.A. and then directly. Dycasa S.A. also became shareholder at that time. Actually, URBASER entities hold a stake of 27.4122% in AGBA's capital stock. Of this shareholder participation, 26.3435% is directly owned by URBASER. The remaining 1.0687% is held by Urbaser Argentina S.A., an Argentine company. URBASER is the owner of 100% of Urbaser Argentina S.A. It directly owns 98% of Urbaser Argentina, and holds the remaining 2% through Transportes Olivos S.A.C.I. y F. an Argentine company. Transportes Olivos S.A.C.I. y F. in turn is 98% held by Urbaser Argentina S.A. URBASER holds a 2% interest in Transportes Olivos S.A.C.I. y F. CABB holds 20% of AGBA's capital stock. Other shareholder interests in AGBA were held by Impregilo S.A., Iglys and Sideco. The Employee Stock Ownership Program ("Programa de Participación Accionaria del Personal"- PPAP) holds a 10% shareholder interest in AGBA.



30. On March 27, 2002, pursuant to Decree No. 757/2002, Sideco was authorized to transfer its shares to Impreglio and Iglys. At that time URBASER, Urbaser Argentina, and Dycasa were approved for purposes of securing shareholder status in AGBA.

31. Thus, URBASER and CABB collectively acquired an interest of 47.4122% in the water supply and sewage concessionaire for 7 districts in the Province of Buenos Aires. URBASER is the environmental arm of the ACS Group, Actividades de Construcción y Servicios and is a leader in the management of public utility services. CABB is a Spanish entity almost exclusively engaged in the provision of water and sewage services, which is characterized by Claimants as having independent legal status and capacity, whose members include a great number of Municipalities and the Basque Government. It is the entity responsible for the primary network management in the Province of Bizkaia (Basque Country). It serves more than 70 Municipalities and, as Claimants note, it is also authorized to carry out such activities in other countries.

32. Claimants assert that the dispute arose when AGBA was proscribed from charging tariffs in conformance with its own internal decision-making. The dispute further ripened when the concession was taken away on July 14, 2006, and the Province notified AGBA of the early termination of the Concession. This notification was issued pursuant to Decree 1666 dated July 11, 2006. Claimants assert that the prohibition to calculate the tariffs in US-\$ and to review them by reference to US price indexes was of great importance. The state of emergency legislation prevented operation, maintenance, and amortization costs from being computed in US-\$, as provided for in Law 25.561 of January 6, 2002. This legislation also was adopted in the Province of Buenos Aires pursuant to Law 12.858, dated February 28, 2002.

33. The tariffs were converted from US-\$ into Pesos, using an exchange rate of 1:1, during a time when the Peso had depreciated by more than two thirds of its value. Concessionaire's obligations, however, remained constant; AGBA had to endure the reduction and freezing of its tariffs to one third of their initial value without that value ever reverting to its initial levels or even increasing at all as of the termination date. In the fourth year, the Province enacted a new law that caused the reversal of privatization of services, which actually took place at the seventh year of the Concession. This legislation was to be applied without the prior adaptation of the contract. The new regulatory framework included provisions that materially altered the rules relied upon by the Claimants at the time of the investment. Moreover, the investors were faced with clearly uncooperative behaviour on the part of the Executive Branch of the Province of Buenos Aires (the Grantor) and the Buenos Aires Water Regulatory Agency (ORAB). Both authorities adopted measures and decisions or refrained from taking action so as to ensure that the economic burden on the users would be minimized or mitigated, and they prevented AGBA from applying the

established tariffs and from adopting any procedure intended to collect amounts that could constitute a nuisance to delinquent users who were also their constituency at the voting polls. The economic equilibrium of the Concession was thus disrupted and the investment lost. The Grantor took formal actions only and did not consent to the adoption of any methodology designed to contribute to the readjustment of AGBA's Concession Contract. The Grantor never seriously committed to any renegotiation process. In fact, the Grantor itself terminated the Contract. The termination was no more than the final act of a death foretold that divested Claimants from any remaining value of an investment that already had been materially devaluated.

34. While AGBA's requests to increase the tariffs and to restore a distorted economic equation were rejected, other service concessionaires, and particularly the entity that would replace AGBA in the concession area (Aguas Bonaerenses S.A., ABSA), were granted tariff increases and subsidies that had been dismissed with respect to AGBA. Similar events concerning other water service reverse-privatization processes in Argentina also took place.

35. AGBA is undergoing liquidation because the concession was terminated and as a result of having been prevented from charging the tariffs. The investors have waited a long time and have not been paid any compensation at all. Impregilo S.p.A. is another AGBA shareholder who has initiated an ICSID arbitral proceeding that led to issuance of an Award on June 21, 2011.<sup>2</sup>

36. It is Claimants' position that the Argentine Republic is the party responsible for the actions and omissions of the Federal Government and the Province of Buenos Aires, being both the legislature and the executive branches of the Federal Government and the Province of Buenos Aires, including their actions as Grantor and those of the Regulatory Agency.

37. Claimants contend that the Argentine Republic is responsible for the actions of the Province under BITs and customary international law. In the instant case, its responsibility is based on the Spain-Argentina BIT of October 3, 1991. Article I(2) of this BIT makes reference to the "territory" in which the investment is located, and Article I(4) defines "territory" as the "land territory of each Party." In Argentina, such territory comprises all Provinces.

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<sup>2</sup> *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17. The Award is pending before an *ad hoc* Committee constituted on January 30, 2012.

38. Claimants' Prayer for Relief is stated in their Memorial on the Merits and has been confirmed as follows:

“1. A declaration that the Argentine Republic breached the provisions of the Bilateral Investment Treaty executed between the Argentine Republic and the Kingdom of Spain on October 3, 1991 and, in particular, the following obligations of the referred Treaty: Article III.1 on the obligation to protect foreign investments and the prohibition to adopt unjustified or discriminatory measures; Article IV.1 on the obligation to afford fair and equitable treatment to the referred investments; and Article V, which forbids any illegal and discriminatory expropriation of foreign investments and imposes the obligation to compensate the investor in the event of expropriation or any other measure of similar characteristics and effects.

2. An order for the Argentine Republic to compensate CABB and URBASER for all damages caused by the referred breaches and, consequently, to pay the following amounts:

2.1 To URBASER, S.A., the sum of USD 101,758,797 (ONE HUNDRED AND ONE MILLION, SEVEN HUNDRED AND FIFTY-EIGHT THOUSAND, SEVEN HUNDRED AND NINETY-SEVEN U.S. DOLLARS).

2.2 To CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BIZKAIA UR PARTZUERGOA, the sum of USD 109,449,861 (ONE HUNDRED AND NINE MILLION, FOUR HUNDRED AND FORTY-NINE THOUSAND, EIGHT HUNDRED AND SIXTY-ONE U.S. DOLLARS)

3. An order for the Argentine Republic to pay interest to the Claimants, as accrued in the amounts established in sections 2.1 and 2.2 above, at an annual compound interest rate of 15% (FIFTEEN PER CENT), computed from December 31, 2010 up to the date of actual payment.

4. An order instructing the Argentine Republic to make any additional compensation as may be required to remedy the damages caused to the Claimants, as deemed just and adequate by the Tribunal.

5. The mandate for the Argentine Republic to bear the costs of this arbitration, including the fees payable to the ICSID, the fees and costs incurred by the Arbitral Tribunal and all legal costs, experts' fees, and any other expenses incurred by the Claimants in this proceeding under the concept of full compensation.

This request for relief and payment of interest contemplates any amounts resulting from the evidence produced in this arbitration, as deemed appropriate by the Arbitral Tribunal.

The Claimants hereby expressly reserve the right to supplement, add to or amend the claims asserted in this Memorial, according to the circumstances

considered in the course of the arbitration proceeding, pursuant to Article 46 of the ICSID Convention.”

39. Claimants have submitted their claims to ICSID arbitration without resorting first to the competent courts of the Argentine Republic, as provided for in Article X (2) of the BIT. They assert that they were authorized to proceed directly to international arbitration by virtue of the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the BIT. They maintained this position in this proceeding and reject Respondent’s objection to jurisdiction based on this ground and other premises that Respondent has raised.

2. *Respondent’s position and objections to jurisdiction*

40. In general, Respondent rejects Claimants’ claims in their entirety and contends that Claimants have not asserted a plausible or *prima facie* case for violation of any of the provisions of the Argentina-Spain BIT. Whereas it did not address the substance of Claimants’ claims in its written submissions on the matter of jurisdiction, Respondent advised the Tribunal in its introductory statement at the hearing that the whole case is a “story of a total failure to comply with the expectations that the State had.”<sup>3</sup> Even before the emergency measures were taken, the Concessionaire was not able to meet its obligations under the operative agreements concerning the provision of services. Respondent further asserts that it was fundamental for the Argentine Republic to know who was awarded the Concession and this knowledge in particular was important with respect to the company acting as the Technical Operator. There were clear rules pertaining to the transfer of shares that have not been observed neither by URBASER nor by CABB. The Authorities of the State had not been informed of several transfers of shares that had actually been made. In this connection Respondent further avers that Claimants violated the legal framework to which the investment was submitted.

41. Respondent has raised three objections to the Tribunal’s jurisdiction in the instant case, all of them being invoked in order to re-assess the basic importance of consent and of complete compliance with the terms of such consent.

42. First, Respondent objects that the condition set forth in Article X (2) and (3) of the BIT requiring that disputes between a Contracting Party to the BIT and an investor of another Party be first submitted to the local courts of the Host State had not been complied with. Claimants admit that there was no such submission. Respondent asserts that this is a jurisdictional requirement and cannot be circumvented by using the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the underlying BIT.

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<sup>3</sup> TR-E, Day 1, p. 12/12 s.

43. Second, Respondent requests that the Tribunal reject Claimants' claim because neither general international law, the Argentine-Spain BIT, the ICSID Convention, nor Argentine law provide for indirect or derivative shareholder actions. Respondent observes that Claimants assert that both URBASER and CABB are shareholders of AGBA. Their respective investments are limited to shares in AGBA. Consequently, Respondent asserts, their claims must be confined to the protection of rights arising from those shares. The rights Claimants seek to enforce are derived from the Concession Contract and are not held by Claimants but rather belong to AGBA.

44. The third objection to the Tribunal's jurisdiction states that URBASER had proceeded to an acquisition of shares contrary to the laws of Argentina when it acquired all Dycasa's shares in AGBA. Similarly, Respondent further avers that CABB also had engaged in illegal transfer of shares when it transferred its shares to third parties through participation agreements that imply serious violations of the law governing the holding and transfer of shares in AGBA. Moreover, Respondent objects that CABB had no standing to resort to ICSID arbitration because it had not obtained the prior express authorization of the Kingdom of Spain.

45. Respondent's Prayer for Relief is stated in its Memorial on Objections to the Jurisdiction of the Centre and the competence of the Tribunal. It requests the Arbitral Tribunal to:

“(1) *decide*, pursuant to Arbitration Rule 41(4), *to admit* this *Objection to Jurisdiction* and to grant the request for production of documents made in Section E;

(2) *order*, in accordance with the arguments presented by the Argentine Republic, a second round of pleadings (reply and rejoinder) at this jurisdictional stage; and

(3) *declare*, pursuant to Rule 41(5), that the Centre has no jurisdiction and that the Tribunal has no competence over this dispute and, therefore, *reject* this claim, taxing costs and fees against Claimants, in accordance with Arbitration Rule 47(1)(j).”

### C. The legal framework

46. The Tribunal at the outset notes that under Article 41(1) of the ICSID Convention, it is “the judge of its own competence” and hence has to arrive at its own conclusion regarding Respondent's objections.

47. The Tribunal's jurisdiction, if any, is based on an agreement between the Parties to this proceeding to submit the dispute framed by Claimants to ICSID arbitration. The agreement of the Republic of Argentina is contained in Article X of the Spain-Argentine BIT. More precisely, this provision contains an offer of each Contracting State of the BIT to submit disputes to arbitration, which an investor may accept. Such acceptance is often contained in an investor's request for arbitration. This acceptance is what happened in the instant case, as both Claimants decided to submit the dispute to arbitration under the Argentine-Spain BIT. Additionally, Claimants suggest that by virtue of the MFN clause in Article IV(2) they also invoke the provisions on dispute resolution contained in the BITs concluded by the Republic of Argentina with Chile and France, respectively, which do not require prior submission of the dispute to the domestic courts of the Host State.

48. The issues to be dealt with in this Decision, as they arise based on Respondent's jurisdictional objections, relate to the scope and the content of the offer to arbitrate contained in Article X of the BIT. In very broad terms, the issues before this Tribunal relate to each Claimant's standing as investors under the BIT and to the requirements that must be met in order for this ICSID Arbitral Tribunal to have jurisdiction pursuant to Article X of the BIT.

49. The arbitration clause offered and invoked in this case is contained in a treaty. The interpretation and meaning of its terms must therefore follow the principles and rules of interpretation of the law of treaties. This law is settled in the Vienna Convention on the Law of Treaties 1969, to which both Spain and the Republic of Argentina are Parties.<sup>4</sup> The applicable principles and rules are contained in Articles 31 to 33 of this Convention, which do not need to be reproduced here in full. The primary principle is stated in Article 31(1) providing that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

50. The broad purpose of the Argentine-Spain BIT is stated in its Preamble as the aim of the Contracting Parties in the following terms:

"Desiring to intensify economic cooperation for the benefit of both countries,  
Intending to create favourable conditions for investments made by investors  
of either State in the territory of the other State, [and]  
Recognizing that the promotion and protection of investments in accordance  
with this Agreement will encourage initiatives in this field."

While focusing on the treaty's object and purpose is important as a general guideline for the understanding of the BIT, attention also must be accorded to the interpretation

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<sup>4</sup> Argentina ratified the Vienna Convention on 5 December 1972; Spain acceded to it on 16 May 1972.

of each particular provision. The Contracting States adopted the provisions of the BIT with the broad intention of creating favourable conditions for foreign investments. Nevertheless, the Contracting States may have adopted concrete solutions that may be considered as not favourable enough in such a perspective, in particular when looking at prevailing investment policies of today. In such a case, the favourable conditions as they were understood, negotiated and expressed in legal terms by the Contracting States when they signed the treaty must prevail, unless in a particular legal framework the BIT leaves room open for an interpretation based on more recent developments in the realm of investment protection law. Such an “open window” allows, however, only little air to come in because the interpretation of the BIT language must be made in accordance with the ordinary meaning to be given to the terms of the BIT in their context.

51. The Tribunal notes that it has not received information on the preparatory work undertaken by the Contracting States. The Parties have not referred to any relevant agreement or instrument of the kind referenced to in Article 31(2) of the Vienna Convention, nor to any “subsequent practice” of the kind referred to in Article 31(3)(b) that would establish an agreed interpretation of the BIT between the two Contracting States. Also, there is no authentic interpretation agreed to between the Parties to the BIT. The Argentine Republic had referred to the position taken by the Kingdom of Spain before the *Maffezini* Tribunal,<sup>5</sup> but such argumentation merely shows what had been argued by counsel at that time on Spain’s behalf in that particular arbitration. It does not allow a broader understanding concerning an interpretation shared by the Spanish Government in general pertaining to the application of certain provisions of the BIT. Were such an agreement or understanding to be deemed legitimately binding, it would require a mutual agreement between Spain and The Republic of Argentina.

52. When considering the purpose either of the BIT as a whole or of a particular provision, the Tribunal has to give such purpose an understanding that comports with the equally important principle of effectiveness (or principle of *effet utile*). Any treaty rule is to be interpreted in respect of its purpose as a rule with an effective meaning rather than as a rule having no meaning and effect. This principle is one of the main features of the law of treaties and has been applied by many ICSID Tribunals.<sup>6</sup> It is given effect within Article 31(1) of the Vienna Convention by virtue of the requirement to interpret in good faith. Effectiveness of a treaty rule denotes the need to avoid an interpretation which leads to either an impossibility or absurdity or empties the provision of any legal effects.

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<sup>5</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000.

<sup>6</sup> Cf. *CEMEX Caracas investments B.V. v. Bolivarian Republic of Venezuela*, ICSID/ARB/08/15, Decision on Jurisdiction of December 30, 2010, No. 107, with further references.

53. The interpretation of the BIT in light of its objective and purpose must be further contextualized with the “mother” treaty to which most BIT’s (including that in the instant case) relate, *i.e.* the ICSID Convention. As well stated in its preamble, the broad and fundamental purpose of this Convention is the promotion of and support for private international investment. However, at this level as well, this goal is embedded in a policy that seeks to foster a reasonable and tempered balance between the interests of the investors and those of the Host States. This objective was plainly stated in the Report of the Executive Directors in the following terms:

“While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States.”  
(para. 13)

While this proposition is true for the ICSID Convention, it must also be true for the BITs that have been developed based on this treaty.

54. With respect to the applicable law, the Tribunal has to premise the legal foundation of its decision on the ICSID Convention, the Argentine-Spain BIT and, where appropriate, on other sources of international law, with priority accorded to the Vienna Convention on the Law of Treaties. Article X(5) of the BIT contains a provision on applicable law which reads as follows:

“The arbitral tribunal shall make its decision on the basis of this Agreement and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its norms of private international law, and the general principles of international law.”

While this provision is primarily directed to the applicable law on the merits of the dispute, it may have a role to play in connection with certain specific issues to be examined concerning jurisdiction, *e.g.* where the operation of Article X (2) and (3) of the BIT requires consulting of the Host State’s domestic law.

55. The Tribunal briefly notes the double layer structure for examining the Centre’s jurisdiction and this Tribunal’s competence. Both of these fundamental aspects and their most important constituent elements, as are the concepts of investment and the requirement for consent, must be based, respectively, on the ICSID Convention and on the Spain-Argentine BIT.

56. When considering the question of its jurisdiction, the Tribunal’s task is not to examine the merits of Claimants’ claims. At a minimum, and according to generally accepted practice, the Tribunal is requested merely to examine whether on a *prima*



*facie* basis the facts alleged by Claimants are sufficient that they may support a finding of possible breaches of the provisions of the BIT and the claims submitted.<sup>7</sup>

57. Claimants have filed with the Tribunal an extensively documented Memorial on the Merits of their claims. These claims arise out of a legal dispute. The Tribunal finds that, *prima facie*, the facts as alleged, if established, may constitute possible violations of at least some of the provisions of the BIT invoked by Claimants, that could justify a claim for compensatory damages. This level of averment is sufficient to allow a ruling affirming the Tribunal's jurisdiction. Whether Claimants' recitation of the facts is proven will, to the extent necessary, be examined at the merits stage of this proceeding if the Tribunal's jurisdiction is affirmed. The *prima facie* test does not preclude the Tribunal from making legal determinations concerning jurisdiction.

## **II. Respondent's First Objection: Claimants failed to meet the requirements set forth in Article X of the Argentina-Spain BIT**

### **A. Preliminary matters**

58. Respondent's first objection is focused on the terms set forth in Article X (2) and (3) of the BIT requiring that disputes between a Contracting Party to the BIT and an investor of another Party first be submitted to the local courts of the Host State. The same objection includes the position that this requirement cannot be circumvented by using the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the BIT.

59. Claimants' basic position in this respect is that they did not and had no juridical obligation to submit their claims to courts of the Argentine Republic, because of the MFN clause which Claimants assert to be equally applicable to the terms of the dispute resolution clause in Article X of the BIT. As a subsidiary issue, Claimants contend that it would have been impossible, in any event, to have the dispute resolved by the local courts in the Argentine Republic in the 18 month period prescribed by Article X(3)(a) of the BIT before its submission to an international arbitral tribunal.

60. The Tribunal will separate the two related issues raised by Respondent's objection and first examine the requirement for the investor to submit the dispute to the local courts of the Argentine Republic (hereinafter also referred to as the "18

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<sup>7</sup> Cf. *Phoenix Action Ltd. v. The Czech Republic*, ICSID/ARB/06/5, Award of April 15, 2009, No. 58-64; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID/ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, No. 84-91; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID/ARB/03/3, Decision on Jurisdiction of April 22, 2005, No. 235-254, 263-281. For a case where jurisdiction was denied because the *prima facie* test failed, cf. *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID/ARB/04/15, Award of September 13, 2006, No. 34, 68-80.

month rule”), standing on its own terms in Article X (2) and (3). It is only in the case that this requirement, as properly construed, was not met or to be met by Claimants that a related query ripens. The second question would be whether the MFN clause has the effect of permitting Claimants to submit their dispute to international arbitration without first addressing the Host State’s local courts. This second question is moot unless the 18 month rule applies and was not met, or had to be met, in this case.

61. Before articulating the 18 month rule, Article X(1) of the BIT requires that the Host State and the investor shall attempt to settle amicably the dispute “as far as possible.” Article X then defines the rule on prior submission of disputes to the local courts of the Host State as follows:

“2. Where a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties to the dispute instigated it, it shall, at the request of either party, be submitted to the competent tribunals of the Party in whose territory the investment was made.

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

(a) At the request of either party to the dispute, when no decision has been reached on the substance 18 months after the judicial proceeding provided for in paragraph 2 of this article began or

When such a decision has been reached, but the dispute between the parties persists;

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

62. As a matter of fact, the dispute was formally notified to the Government of the Argentine Republic by separate letters with similar content from CABB, dated December 21, 2005, and from URBASER, dated January 24, 2006. Both letters requested the formal commencement of negotiations in order to reach an amicable solution within the framework of Article X of the BIT. In the Attorney General’s reply of March 24, 2006 it was stated that Claimants must first submit the dispute to an Argentine Court, prior to resorting to international arbitration. It also was noted that the investor’s direct standing to sue was denied with respect to rights that are to be claimed by AGBA and not by its shareholders. Pursuant to letters dated September 5 and 6, 2006, Claimants observed that the six month term stated in Article X(2) of the BIT had elapsed without the dispute having been settled. They then requested the commencement of arbitration proceedings under the ICSID Convention. The Attorney General replied on September 27, 2006 stating that no actual proposal or claim had been submitted by the investor in order to have the controversy settled and that their reference to the negotiation period appeared as a pure formality; therefore, unless the investors change their position, the amicable negotiation period provided by the BIT “may not start running.”

63. In their letters sent on October 11, 2006, Claimants noted that there had not been any attempt on Argentina's part to conduct negotiations and that because the six month term for reaching an amicable settlement had been met, arbitration proceedings could now commence. As arbitration was requested in early September of 2006, the three months period fixed by Article X of the BIT had long elapsed when the Request for Arbitration was filed with the ICSID Centre on July 6, 2007. The Tribunal notes that in the course of this proceeding, Respondent did not again raise an objection asserting that the six month negotiation period never had started running. In fact, there is in Article X no formal requirement other than that the dispute had to be "instigated" by one of the parties. This predicate did undoubtedly take place pursuant to Claimants' letters of early September 2006.

B. The Parties' analysis of the requirements of Article X (2) and (3) of the BIT

1. *Respondent's position*

64. Respondent explains that Article X establishes a sequential dispute settlement system: (1) Disputes will have to be amicably settled. (2) When six months have elapsed with no settlement being reached, the dispute shall then be filed, upon request by one of the parties, with the competent courts of the Host State. (3) The dispute may be submitted to international arbitration if (i) a period of 18 months has elapsed after submission of the dispute to domestic courts, or (ii) a final decision has been rendered but the Parties are still in dispute.

65. The prior submission to the local courts is a jurisdictional requirement that may not be unilaterally set aside. It does not reflect merely a waiting period because it imposes an obligation to submit the case to domestic courts. The rule contains two elements: an obligation *ratione fori* and an obligation *ratione temporis*. The rule requires that international arbitration is subject to the prior submission of the dispute to the Argentine Courts for a term of 18 months or until a decision is rendered on the merits of the case, whichever comes first.

66. The purpose of the requirement is to offer a concrete opportunity for the courts of the Host State to provide for a suitable remedy. The BIT does not require that the dispute be resolved, but merely that it be submitted to the domestic courts for the specified period of time. Thus, these courts would have the opportunity to attempt to resolve the dispute before the Host State's responsibility is discussed at the international level. Respondent also notes that the rule of Article X(2) is akin to the

rule of exhaustion of local remedies in international law; the State where the violation occurred should have an opportunity to redress it by its own means.

67. By its nature, the 18 month rule is a jurisdictional requirement that is part of the offer to arbitrate, which includes that condition and that cannot unilaterally be modified. Claimants are third parties to the BIT. Therefore, they may not alter it and have to comply with its provisions as they stand. The requirement that disputes be first submitted to local courts is an essential prerequisite and an integral part of the “standing offer” to arbitrate. The option for an investor to omit this step is simply not provided for in the BIT. This requirement is closely related to the consensual nature of arbitration. As regards a BIT, the respect for the State’s consent is an essential element. In the BIT at issue in the instant case, the requirement for prior submission to local courts constitutes an important element of such consent.

68. Claimants have failed to comply with this obligation and they have acknowledged non-compliance since the time at which they filed their Request for Arbitration.

69. Respondent objects to Claimants’ contention that the requirement first to resort to local courts is exceptional. Respondent submits that it is not. It is a common provision in BITs and was included in a dozen BITs. The 18 month clause was specifically negotiated by the Argentine Republic. This intent on the part of Respondent is demonstrated by the fact that, after entering into treaties that did not include the 18 month clause, the Respondent continued to execute treaties that included this provision in certain cases. Such a clause was included in the BITs with Italy (1990), Belgium/Luxemburg (1990), the UK (1990), Germany (1991) and Switzerland (1991). Then, the Argentine Republic concluded BITs with France, Poland, and Chile, all in 1991, that did not contain the 18 month rule. The Republic of Argentina reverted to its older practice in the BITs concluded with France (1993), Spain (1991), Canada (1991), Austria (1992), the Netherlands (1992) and South Korea (1995). But even if the rule were exceptional, it would not in any way change its binding nature as far as concerns the Argentine-Spain BIT, as it applies in this case.

70. Nothing prevented Claimants from filing legal claims. A number of decisions have been rendered by courts of the Argentine Republic within the 18 months period. As further explained by Respondent’s Expert, Prof. Mata, the domestic legal system of the Argentine Republic provides for a wide range of possibilities for Claimants to submit their dispute to the local courts in an expedited fashion and to have such claims decided within the term established in the Treaty.

71. In its Answer to questions raised by the Tribunal at the conclusion of the hearing, Respondent stated at the outset that there is no doubt that it was possible for

Claimants to bring the instant dispute before Argentine Courts, at least for three reasons: First, under Article 18 of the Constitution every person has a constitutionally guaranteed right of access to justice. Second, under Article 20 foreigners enjoy all the civil rights of the citizen. Third, Article 75, paragraph 22, provides that treaties are superior to laws, which also means that Article X(2) of the BIT is directly enforceable in Argentina. Any provision that would deny Claimants access to justice would be unconstitutional.

72. Claimants did bring the dispute before this Arbitral Tribunal notwithstanding non-compliance with a fundamental condition attached to Argentina's consent to international jurisdiction. Respondent points to the recent decision of the US Circuit Court of Appeals for the District of Columbia in the case *Republic of Argentina v. BG Group plc*, decided on January 17, 2012, which affirmed that the Contracting Parties to the UK-Argentine BIT provided that an Argentine court would have eighteen months to resolve a dispute prior to resort to arbitration. Whatever an Argentine Court decided on the admissibility and/or merits of the claims, it would not have prevented Claimants from subsequently pursuing their claims before an arbitral tribunal.

73. Respondent adds that nevertheless, the fact that Claimants could have brought this dispute before domestic courts does not mean that, in turn, Argentina – as a party to such potential lawsuit – would not have the right to raise any objection it may have against, for example, Claimants' *jus standi* or otherwise.

74. In the referenced Answer, Respondent addressed a selection of different actions as suitable to comply with the requirements of Article X(2) of the BIT. The first of several alternatives could have been a motion for merely a declaratory judgment, based on Article 322 of the Federal Code of Civil and Commercial Procedure, which would allow for a "declaration of unconstitutionality of laws," based on a violation of an international treaty, which is in itself unconstitutional. The investor could argue that a given measure taken by the Government or one of its subdivisions adversely affects its rights under the BIT, and that it requests a judicial decision on the conformity of such measure with the BIT. As to Claimants' objection that this action does not allow for the submission of a claim for damages, Respondent replies that Article X(2) only requires that the dispute submitted to the domestic courts be the same as the one subsequently submitted to international arbitration, but that nothing prevents a party in this latter proceeding from requesting additional remedies such as compensation for damages, not included in the action before the domestic courts provided that it is the same dispute. This scenario would result, as Respondent explains in its Answer, when damages deriving from the contested measures did not exist at the time the dispute was submitted to domestic courts. Thus, a motion for a declaratory judgment may be filed in order to prevent the occurrence of damages, which complies with the purpose of Article X(2) of the BIT. Whatever the domestic

courts may finally decide within the framework of a motion for a declaratory judgment, the investor would have complied with the requirement of prior submission to local courts.

75. Second, Respondent mentions as another means, albeit in some vein comparable to a declaratory judgment, the possibility for a Spanish investor to resort to an *Amparo* action for the purposes of complying with the requirements of Article X(2) of the BIT. Such a proceeding is based on Article 43 of the Constitution and can be initiated by any person (including a shareholder or investor) concerning any act or omission of the public authority and rights or guarantees recognized by a treaty. Respondent has submitted summaries of a large number of actions brought before domestic courts, which include many *Amparo* actions and decisions rendered in less than 18 months. An *Amparo* action mainly seeks a declaration but does not exclude in actual practice a court ruling ordering banks to return funds to their customers. In any event, as stated above, a claim for damages is, in Respondent's view, not indispensable in order to comply with the requirement of prior submission. Such an action before domestic courts may be filed in order to prevent damages. Respondent also cites a precedent showing that an *Amparo* action can deal with complex issues, *e.g.* relating to the telecommunications market.

76. Respondent further asserts that no comparison can be had with the action brought by AGBA before administrative courts. This action, so Respondent contends, was not brought by Claimants but by AGBA who is not an investor protected by the BIT. In addition, it is further averred that the claim expressly states that it must be distinguished from potential actions brought by AGBA's shareholders under BITs. Therefore Respondent concludes, this action is irrelevant for purposes of compliance with the requirement contained in Article X(2) of the BIT.

77. Finally, Respondent explained in yet another answer to a question raised by the Tribunal, that neither the Emergency Law nor Decree No. 214/2002 precludes the filing of actions. Article 12 of the Decree only ordered a stay for 180 days and exclusively for actions concerning financial and foreign exchange matters. This provision was amended by Decree No. 320/2002 dated February 15, 2002, which stayed the "compliance with precautionary measures" and the "enforcement of judgments" but again did not preclude the filing of actions. The decree referred solely to lawsuits relating to the financial and foreign exchange system and the stay only remained in force for 180 days in 2002.

## 2. *Claimants' position*

78. Claimants stated in their Request for Arbitration that the request was filed “without taking the action to the internal courts of the Argentine Republic”, and have done so pursuant to the MFN clause contained in Article IV(2) of the Spain-Argentina BIT.

79. Claimants agree that consent is of course essential to all arbitral jurisdiction and that Article X constitutes an integral part of the offer to arbitrate. However, they contend that the MFN clause of Article IV(2) also is contained in that offer. There is no normative juridical principle, Claimants advance, that MFN clauses do not apply to jurisdictional issues. This expansive construction is all the more relevant where, as in the instant case, the Spain-Argentina BIT’s MFN clause provides that it applies to “all matters governing this Agreement.”

80. Numerous BITs signed by the Argentine Republic do not require that the dispute be first submitted to the courts of the host country. That is the case with the BITs of Argentina with Perú (Art. 10.2), Chile (Art. X), USA (Art. VII, 2 and 3) and France (Art. 8.2). Claimants invoke these BITs and especially the ones with Chile and France to the extent that those treaties permit the foreign investor to resort to international arbitration directly without any need of first filing a complaint with Argentina’s domestic courts. Simply stated, were this requirement imposed on Spanish investors they would be accorded a treatment less favourable than the treatment that the Republic of Argentina extends to Perú, Chile, the U.S., and France. According to Claimants, the requirement to resort first to the local courts of the Host State is an exceptional condition. As stated by the Tribunal in the *Plama* case, it is “curious.”

81. Claimants explain that Concessionaire AGBA brought several challenges before Argentina’s domestic courts, mostly seeking reversal of the decisions made by the Regulatory Agency and the Grantor. For the most part, these remedies are still pending, more than four years after the termination of the Contract. AGBA also brought an action for annulment of Decree No. 1666/06 which ordered the termination of the contract. The action was brought before the Contentious Administrative Branch No. 2 in and for the City of La Plata on December 4, 2006. The proceeding is still in the evidentiary phase. Therefore, it is asserted that Claimants’ decision to resort directly to the arbitral tribunal is also fully justified on grounds of diligence and efficiency. It had to be assumed that it would be impossible to have a dispute resolved by the local courts in the period prescribed in the BIT. The possibilities of securing a court decision within 18 months are non-existing.

82. More generally, Claimants place great weight on their contention that the failure of Argentine Courts to settle investment disputes promptly is both well chronicled and beyond cavil. The wide range of opportunities to submit such a dispute to local courts, as affirmed by Respondent, are merely hypothetical and of no practical moment.

83. Claimants point to a press article where Mr. Rosatti, Respondent's Attorney General, explains that it was absolutely impossible for the Argentine courts to settle disputes similar to investment disputes within the 18 month period.<sup>8</sup> Mr. Rosatti's statement was based on a study conducted by the Auditing Division of Argentina's Attorney General, at a time when Mr. Rosatti was acting Attorney General. That study analysed 1,600 proceedings commenced against the Federal Government of the Republic of Argentina during the five year period of time from 1985 to 2000. The disputes considered in the study were similar to disputes arising from the violation of a BIT in as much as the amounts claimed were significant and also because that they concerned adversarial proceedings that entailed a trial phase or final hearing. Based on this study the average duration of a proceeding would be six (6) years and one month. Claimants produce a letter from the "Dirección Nacional de Auditoría" dated September 7, 2011, suggesting that a request made by a lawyer (not acting on Claimants' behalf) for delivery of a copy of the research was denied purportedly because the relevant documentation was not available in the archives of that institution. It was also stated that the research had to be expanded to a much broader sample of decisions, which in turn gives rise to logistical concerns, as well as issues pertaining to the protection of fiscal and banking secrets.

84. Claimants observe that Respondent remained silent when faced with these facts and did not even try to object or to offer more recent and favourable statistics that somehow mitigate the proffered evidence. Claimants in this connection further aver that because Respondent is perfectly aware of the futility of pursuing judicial remedies in local courts within an 18 month timeframe, Respondent attempts to convince the Tribunal that the 18 month target may be reached through other means, *i.e.* remedies *other* than ordinary proceedings.

85. Claimants note that Respondent relies in large part on Prof. Mata's description of a number of remedies to secure the protection of an investor, completed by further explanations given at the hearing. However, they also observe that Prof. Mata confuses the remedies available to AGBA with the rights of the investors under the BIT. The investors lack standing to bring any of the expedited summary actions under the Concession Contract signed with AGBA. Those remedies, which are available

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<sup>8</sup> Horacio D. Rosatti, *Los tratados bilaterales de inversión, el arbitraje internacional obligatorio y el sistema constitucional argentino*, in *La Ley*, Buenos Aires, October 15, 2003, footnote 18.



before domestic courts, are intended to be used by the Concessionaire and not by the investors. Moreover, as AGBA's experience in pursuing such claims demonstrates, neither the administrative nor the court proceedings would have been at all adjudicated within 18 months. Prof. Mata also misses the point that Claimants do not want to prevent or avoid damages; they seek damages for the violation of the BIT. As of the time that the Contract had been terminated and the service transferred to the new concessionaire, one of the fundamental assumptions at the basis of Prof. Mata's Report became moot.

86. The first category of possible remedies listed in Prof. Mata's Report is an action for the protection of constitutional rights (action for *Amparo*). Such proceeding is, in principle, reserved for the prompt adjudication of clear violations of constitutional rights, laws or treaties. It does not extend to pecuniary claims. Claimants further explain that an *Amparo* action is inadmissible in the absence of obvious arbitrariness or illegality, in cases requiring a protracted final hearing and the extensive analysis of evidentiary issues. The expedited procedures governing *Amparo* actions are to be adjudicated only for purposes of addressing simple and clear legal issues. As the file demonstrates in this case, only by proffering considerable oral (witness) and documentary evidence will the Claimants be able to air all relevant issue pertaining to liability and damages and thus prosecute a comprehensive action seeking relief for the loss of their investment.

87. According to Prof. Mata the subject matter of an *Amparo* action is defined as the remedy suitable to restrain obvious unlawful or arbitrary conduct. Prof. Mata's understanding of an *Amparo* proceeding clearly established that such a proceeding could hardly be suitable for an action as has been filed before this Tribunal although Prof. Mata does not so testify. After the crisis of 2001/02, the courts hearing those actions solely decided on the return of funds in US\$ to bank customers, but they did not order the payments of any interest or grant of any relief for damages. Bank customers seeking such relief had to resort to independent ordinary proceedings. Indeed the Argentine Supreme Court has ruled that an *Amparo* action is not appropriate for purposes of assessing complex factual disputes or the application of law to facts whether a plaintiff suffered pecuniary or liquidated damages. Prof. Mata confirmed at the hearing that in cases of losses to be compensated through compensatory damages, relief only could be sought pursuant to ordinary proceedings before a court of law. An *Amparo* action cannot be brought where the claimant seeks damages.

88. Section 43 of the Argentine Constitution of 1994 establishes the restrictions on *Amparo* actions and the proscription against bringing such a claim where damages are sought. Such a proceeding may be brought as to acts or omissions on the part of the State that "presently or imminently harm, restrict, alter or threaten to violate, with

obvious arbitrariness or illegality, rights or guarantees recognized in this Constitution.” An *Amparo* action may be brought against wrongful government actions of the type described. Its purpose is to avoid the effects of such actions rather than to compensate the aggrieved parties for wrongs caused by their effects.

89. Claimants assert that at the hearing, Prof. Mata further explained that an *Amparo* action can do more than address the protection of constitutional rights. It can also be used to seek a declaration that an administrative decision is null and void because it is unconstitutional. An *Amparo* proceeding also can suspend the effects of such an administrative decision and even allow economic compensation.<sup>9</sup> Such compensation, however, does not extend to a compensation of damages. It refers to cases where banks were required to return deposits that they held in accounts. Such judgments had been rendered only against banks and were limited to the return of property. Claimants assert that Respondent’s expert cannot instruct the Tribunal on a single *Amparo* action concerning the compensation of damages payable by the State. Claimants point to the Expert’s statement excluding such an action from those capable of providing protection and resulting in a damages award.

90. Claimants also recall that if an *Amparo* action is used to annul an administrative decision claimed to be unconstitutional, such a proceeding is materially different from an action brought before an arbitral tribunal under a BIT. A claim under a BIT under no analysis of law or fact can seek the annulment of an administrative ruling. Therefore, Claimants conclude, an *Amparo* action seeking such a declaration is inapposite to Article X(2) of the BIT.

91. Claimants further explain that from a procedural perspective as well, an *Amparo* action is not an adequate means to file claims that investors would assert. The *Amparo* action is restricted to acts or omissions by public authorities impairing with manifest arbitrariness or illegality constitutional rights or guarantees that require no significant debate or analysis of evidence. Because of the complex nature and character of an investment dispute, it is impossible for an *Amparo* action to be suitable for the airing and resolution of a matter of this nature. Examples of this proposition can be found in the set of judgments that Respondent presented. For instance, in the case No. 220/04, it is ruled that an *Amparo* action is reserved for clearly exceptional circumstances. There are excluded from its scope any dispute requiring discussion and evidence, and any other dispute for which other suitable means are available for the Respondent’s protection. Numerous other judgments that Respondent presented contain similar statements. In 2006 AGBA filed an *Amparo* seeking to obtain a declaration of unconstitutionality, but the judge decided that the subject-matter of the dispute only gave rise to an ordinary administrative action. AGBA also filed a nullity

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<sup>9</sup> TR-E, Day 1 p. 136/16-137/2.

action at the same time, which again was only of a purely declaratory nature. Both actions have been pending for more than five years and, to Claimants' knowledge both still remain in the evidentiary phase of the proceedings.

92. The second category of possible actions that Respondent presented relates to expedited summary proceedings, which constitute an exceptional procedural means arising from a claim brought against an act or omission committed by a private party. In the instant case Claimants are seeking damages for the alleged actions of the Provincial Government: Therefore, such procedure would be inapposite. The investors had no opportunity to bring an expedited summary proceeding before an Argentine Court based upon allegations of discriminatory and expropriatory actions. Claimants note that Prof. Mata admits that ordinary proceedings are the proper procedural means for purposes of bringing such a case, as a more extensive trial and evidence phases are required.

93. Claimants also note that at the hearing Prof. Mata admitted that the only cases in which such actions were permitted are those established pursuant to Action 321 of the Argentine Code of Civil and Commercial Procedure. According to Prof. Mata, these cases may include actions based on the law of a treaty if the treaty so provides; he added that the 18 month rule of the BIT "points to an expedited summary solution to obtain compensation for damages."<sup>10</sup> Claimants observe that nothing in the BIT provides that any claim under the BIT may be brought pursuant to summary proceeding. The 18 month rule does not imply such a commitment because it does not compel Argentine Courts to settle a dispute within this period of time; it merely states that if the courts fail to reach a decision within this timeframe, the investor can refer the matter to international arbitration. Based on the description provided in Prof. Mata's Report, such an expedited summary action is by far incompatible with the complexities endemic to an investment claim. Such an action is neither suitable nor viable as an alternative to be filed before an Argentine Court.

94. As indicative of a third type of an alternative court procedure Prof. Mata mentions the principle of useless procedural steps ("ritualismo inútil") that would allow avoiding the filing of an administrative claim before bringing an action against the Province for the violation of the BIT. Indeed, in the Argentine Republic, before bringing an action against the State, the plaintiff must first file an administrative claim. There exists a number of exceptions, none of which are applicable, in Claimants' view, to the instant case. Therefore, if the investors had decided to bring an action for damages arising from the violation of the BIT before an Argentine Court, they would have had to exhaust all administrative remedies available to them as a condition precedent to bring such action. Thus, such an ordinary proceeding and the

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<sup>10</sup> TR-E, Day 1, p. 91/16-19.

prior administrative action would have to come to closure in less than 18 months. Prof. Mata explains that while in principle an administrative claim must be filed before the filing of a complaint, this might be avoided under the “useless procedural step” doctrine, which could also apply when litigation would take at least 5 years to be resolved, instead of the 18 months as required in the BIT. Claimants state, however, that even such acceleration, purely hypothetical in the absence of case law relating to investment disputes, could not at all sustain a claim for damages within an 18 month window. They also note that the concept was excluded by Prof. Mata at the hearing when he admitted that the doctrine does not apply to claims filed before courts. It simply refers to a possible elimination of prior administrative proceedings required before going to court, which does not at all concern any aspect of Claimants’ claims under the BIT. It would also be a pure speculation to think that such a device would offer an exemption from costs, which Prof. Mata confirmed were of 3%, a percentage that in Claimants’ view would result in the amount of U.S. \$ 6 million.

95. In a fourth category Prof. Mata affirms that the shareholders had standing to bring possessory actions or actions *in rem* (“acciones posesorias y reales”) against a disturbance of their property by the Provincial State. However, in this case, AGBA as Concessionaire is the property, and it holds the property that is the subject-matter of the Concession. Accordingly, Claimants could not have brought a possessory action against the State unless the disturbance of their possession is a discriminatory and arbitrary action without any legal title, even where such actions were apparent and elaborate evidentiary proffers were not necessary. The termination decree deprived AGBA of the bare possession of the property. Although it has been challenged, this Decree is presumed legally valid until annulled in court. Therefore, a possessory action could not apply because the Decree constituted a legal title. The Province took possession of the property of the Concession after the termination of the Contract. The validity of the termination and the damages arising from such termination must therefore be addressed in a proceeding other than through a possessory action. After the termination of the Contract neither AGBA nor its shareholders could refuse to return the items held in possession, while reserving their rights to challenge such a measure and to seek damages. Faced with the Decree terminating the Contract, AGBA had no means to resist the deprivation of the use of the property of the Concession. Claimants further assert that Prof. Mata also rejected this methodology at the hearing as inadequate for purposes of framing a claim for damages. While explaining the potential usefulness of such an action under specific circumstances, Prof. Mata admitted that it has nothing to do with relief in the form of compensatory damages. Claimants admit that such an action would be available for the Concessionaire who has been deprived of its assets, but not for Claimants who do not expect to recover any assets pertaining to the Concession.

96. As a fifth possible procedural recourse, Prof. Mata mentions an action for a declaratory judgment of certainty (“acción declarativa de certeza”). Its mere description disqualifies it as an available remedy. Indeed, it is a residual action, when no other judicial remedy is available. It is an action that seeks to do away with an uncertainty of law by virtue of a declaratory judgment. The action thus has a preventive nature. It does not require the existence of an actual harm and it does not open the door for petitioning a damages award. Prof. Mata explained at the hearing that this action merely seeks issuance of a declaratory judgment that may serve as a basis for establishing damages at a subsequent stage. Claimants state that the issue here is different because the dispute involves defining whether the BIT was violated and, if so, determining the damages to be paid to the investors in the form of compensatory damages.

97. The sixth category of purportedly prospective actions consists of prohibitory injunctive relief (“prohibición de innovar”), also called, as occurred at the hearing, “precautionary measures” (“medidas cautelares”). Prohibitory injunctive relief or *medidas cautelares* must derive from a pending underlying action. *Medidas cautelares* alone cannot constitute a cause of action or proceeding. Furthermore, the underlying proceeding must be one where damages as such are sought. It is axiomatic that a *medida cautelar* cannot serve as a condition precedent to any action, nor can it constitute a decision on the merits as referenced to in Article X(3)(a) of the BIT. While Prof. Mata confirmed at the hearing that in certain cases damages may be awarded, such award would be exceptional and provisional, because such measures (i) are always ancillary to a main legal action, (ii) do not entail a decision on the merits and (iii) are contingent on the final judgment rendered in the main legal action.

98. Finally, in a seventh category Claimants close the enumeration of the instruments Prof. Mata identifies in his Report as would be potential suitable remedies for Claimants by referencing the *Amparo* action for administrative default or delay (“amparo por mora administrativa”). This proceeding is a specific type of *Amparo* action that applies where administratively no response issues to a properly filed complaint. Claimants opine that it is hard to see how this remedy may be considered as the predicate action under the BIT. For such an *Amparo* action to meet the condition precedent requirement, the investor first should have brought an administrative claim, which would then have been left unanswered. The nature of such an administrative claim remains undefined, nor is it at all clear how this additional remedy would provide for any abbreviation of 18 month window under the BIT. At the hearing Prof. Mata acknowledged that it did not constitute a judicial proceeding but rather a method designed to elicit a response from an otherwise unresponsive administrative rubric. The proceeding bears no relationship to a judicial proceeding.

99. Claimants thus state in sum that none of the remedies described in Prof. Mata's Report satisfies their right to claim damages for the losses suffered based on violations of the BIT, nor could any such remedy satisfy the requirement to settle the dispute within 18 months. They also observe that in light of Prof. Mata's explanation at the hearing, based on his own testimony, of all of the expedited proceedings provided for under Argentine law only the "expedited summary action" was open to Claimants. He introduced an additional remedy consisting of direct recourse to the Supreme Court noting that, apart from these remedies, only an ordinary proceeding would be viable.

100. Claimants advance that the alternative of an original action brought before the Supreme Court came to light (*i.e.* was raised) for the first time during the hearing. It had not been contemplated or otherwise raised or suggested in Prof. Mata's Report as one of the expedited procedural remedies. Prof. Mata's Report referred to Article 117 of the Argentine Constitution, but the Republic of Argentina is not mentioned in that Article as a possible defendant. Only the provinces are mentioned. According to the Supreme Court practice, it is not possible to bring an action directly before the Supreme Court against both the sovereign and a province. The Supreme Court may only exercise appellate jurisdiction as provided by Article 116. A proceeding directly initiated before the Supreme Court pursuant to Article 117 would be an ordinary proceeding that is incapable of being settled within 18 months. Hence, an action directly brought to the Supreme Court is not a suitable remedy for purposes of meeting the predicate under the BIT.

101. Consequently, Claimants conclude that Prof. Mata's Report and his testimony at the hearing demonstrate that a claim of the kind pending in this proceeding can only be brought in ordinary judicial actions and before an administrative court in the City of Buenos Aires. Argentine laws provide for two types of proceedings regarding claims against the Government. Some claims may be brought before administrative authorities where they are handled by a Government agency and not by a court. Such an action does not comply with Article X(2) of the BIT because it is not submitted to a "competent tribunal." A claim against the sovereign has to be heard by the Federal Administrative Courts. These courts exercise exclusive jurisdiction as to such claims. Thus, the prerequisite for submitting the dispute to a domestic court as provided in Article X (2) and (3a) of the BIT consists of filing a claim with an Argentine federal administrative court. Yet, as has been amply demonstrated, no judgment can be obtained in that tribunal in the first instance within 18 months.

102. Prof. Mata found support for the possibility of reaching a decision within 18 months in Sections 34 and 36 of the Argentine Code of Civil and Commercial Procedure, which provide for expedited court proceedings. Claimants observe that the resulting obligation to render a prompt decision has been in force since 1968 and has yet to prove that it may mitigate overburdened dockets. The provisions of the BIT

may not be used to argue that a decision can be obtained within 18 months because of the particular diligence Argentine courts exercise when faced with a BIT based claim. This likelihood is all the more so because Article X of the BIT does not impose an obligation on Argentine courts to settle the dispute within 18 months. When affirming that this deadline somehow shall be met, both Respondent and Prof. Mata base their conclusion on pure hypothesis and speculation.

103. In their Answer to questions raised by the Tribunal at the end of the hearing, Claimants also affirmed that prior recourse to local courts can only make sense if the action is deemed by the investor to be capable of satisfying its interests. Obtaining a mere declaration of a breach is hardly enough; the investor needs a decision that binds the breaching State to pay compensation. The requirement of first resorting to local courts would be both senseless and futile if, upon compliance, the investor would still fail to obtain what it lawfully pursues, *i.e.* compensation for damages. In such a case or any other, the purpose of prior recourse to local courts would never be achieved if the actions filed before the local courts and before the arbitral tribunal were different. A local judge cannot possibly adjudicate a dispute if the claim to be settled is not before him or her. Therefore, if the claim before the arbitral tribunal is for damages, it would be insufficient to seize a domestic court with a declaratory action only. The action referred to in Article X (2) and (3) must be of the same kind.

104. In any event, even where it is assumed that Respondent's arguments are true and accurate, Claimants still would be fully denied access to domestic courts. As early as when Respondent received the notices of dispute in 2005/06 it first asserted in its very answer that only AGBA would have legal standing to bring an action in its capacity as Concessionaire. Claimants underscore that Respondent's position is inconsistent, initially arguing that the AGBA shareholders could not bring their own claims before courts, but now asserting that Claimants have multiple remedies available to resort to litigation in Argentina. This is an additional factor showing that the effective submission of the dispute to the Argentine Courts is hypothetical.

105. In response to another question posed by the Tribunal, Claimants explain that the emergency laws caused proceedings before the local courts to be suspended and this suspension prevented the enforcement of any possible award of damages. As this issue also was mentioned by Prof. Mata, it is noted that Decree 214/2002 was issued 10 years ago. The provisions of Article 12 on suspension of proceedings remained effective for 180 days. The emergency now has been extended until December 31, 2013.<sup>11</sup> The emergency laws did not hinder thousands of *Amparo* claims from being presented. Precautionary measures were suspended as well as enforcement against the Federal State for 180 days. The Government deemed that any judicial claim would be

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<sup>11</sup> Law 26,729, cf. TR-E, Day 1 p. 45/19-22, 46/1-9.

inconsistent with the “preservation of social peace,” referred to in one of the recitals to Decree 320/2002 dated February 15, 2002, which amended Section 12 of Decree 214/2002, restricting the possibility of bringing legal action that were deemed contrary to social peace. Such limitations also were applicable to agreements concluded with concessionaires’ shareholders, Decree 1090/2002 and Resolution 308/2002 prohibited access to renegotiation to all who filed claims before local courts. In light of these provisions of the emergency legislation it cannot be asserted that foreign investors were allowed to resort without any restrictions to local courts. It is hypothetically possible that Claimants might not have been prevented from filing a claim in an ordinary proceeding in 2006 or in 2007. However, in such a scenario, it is impossible to imagine that a claim would have been solved within 18 months. For Claimants, the situation would not have been any different than it was when it was presented by the *Abaclat* Tribunal.<sup>12</sup> At that time the *Abaclat* Tribunal admitted that any claim for compensatory damages was doomed to fail because the emergency laws prevented the State from reaching any in-court or out-of-court or private settlement. Indeed, even were the claimants to obtain a favourable judgment from the local courts, the Government would be prevented from paying it.

C. The Tribunal’s findings

1. *The purpose and relevance of understanding the 18 month rule*

106. The Parties have expressed diverging views over the importance and the purpose of the 18 month rule.

107. When considering the purpose of the 18 month rule as it is emerging from the analysis of the BIT and the explanations provided by the Parties, the Tribunal has to start by referencing the fundamental principle contained in Article 31 of the Vienna Convention providing that a treaty be “interpreted in good faith and in the light of its object and purpose” and that such interpretation must be in accordance with the terms of the treaty in their context. This principle based on purpose and good faith gives rise to the principle of effectiveness requiring an interpretation that has an effective meaning in relation to the objective of the legal provision under examination. Article X (2) and (3) of the BIT thus have to be interpreted according to these principles.

108. Article X(2) does not set a mandatory obligation. When stating that “the dispute [...] shall [...] be submitted to the competent tribunals” of the Host State, it

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<sup>12</sup>*Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 586 and 588.



seems to require that once a dispute had been raised, and the time period for negotiating a settlement had elapsed, the dispute must be brought to court at the initiative of either party. But such an understanding goes too far. What these words mean is enlightened by the provisions of Article X(3). Indeed, based on letter *a*), recourse to local courts is a requirement for access to international arbitration. But it is not more. The party raising the dispute can also decide not to go before domestic courts and to run the risk that later access to international arbitration might be denied. As stated in letter *b*), the parties can also agree to accede directly to international arbitration, in which case they dispose of the requirement of Article X(2). These points are sufficient to show that the 18 month rule is different from a requirement to exhaust local remedies, even if some analogy is possible on other points.<sup>13</sup>

109. Before considering the meaning of Article X (2) and (3), it becomes necessary to determine whether Respondent is not prevented by the principle of estoppel or any similar rule based on the fundamental principle of good faith to raise an objection based upon non-compliance with the requirement of Article X(2) when Respondent itself had the opportunity to bring the dispute before its competent tribunals but failed to do so. The provision states indeed in clear terms that the dispute shall be submitted to domestic courts of the Host State “at the request of either party.”<sup>14</sup> Therefore, based on the plain meaning of this language, Respondent not only had an actual opportunity but also an obligation itself to take the initiative to get its own courts involved.

110. Nonetheless, even if the requirement of Article X(2) is not applicable to Claimants alone, it would still follow from the terms of Article X(3) that there is a bar to international arbitration if none of the parties comply with the 18 month rule. If Respondent has not done so, Claimants are not thus provided with free leave to move to arbitration. Accordingly, it also follows that one party cannot claim that it is not or no longer bound by the requirement of Article X(2) because the other party did not take any action. This provision opens an alternative possibility to bring the dispute before local courts, but it does not say more. Moreover, the Argentine Republic had drawn Claimants’ attention to this provision at a very early stage of the proceeding, in response to Claimants’ filing of the notice of dispute, in the Attorney General’s letters sent to each Claimant on March 24, 2006. The point remains, however, that Respondent had an opportunity to request from its local courts at least a declaratory judgment, which in Claimants’ view was insufficient for them because their claim is based primarily on an action for the compensatory damages. Because Respondent has

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<sup>13</sup> For the Tribunal in *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 104, and for the Tribunal in *Gas Natural SDG S.A. v. The Argentine Republic*, ICSID/ARB/03/10, Decision on Preliminary Questions on Jurisdiction of June 17, 2005, No. 30, the rule is not comparable to the local remedies rule, whereas for the *Wintershall* Tribunal it is, cf. *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 124-126.

<sup>14</sup> Prof. Mata acknowledged that it would be possible for the State to introduce “action of *lesividad*” and request that a decree considered as not legitimate or illegal be rescinded; TR-E, Day 1, p. 141/3-142/4.

a right to seek a declaratory ruling, it does not appear convincing for Respondent to then turn around and object to Claimants' position that they could have asked for such a judgment when this form of relief clearly did not meet their interests, which are focused on pecuniary damages.

111. Under the circumstances of this case, submission to domestic courts of the Argentine Republic appears, on the face of the terms of Article X(2) of the BIT, as a necessary precondition for the right to submit the dispute to international arbitration. This reading of Article X(2), however, does not answer the question of whether in light of its meaning, (i) this provision was applicable to Claimants, and (ii) did in fact impose on them an obligation to comply with its terms if they wanted to have access to international arbitration.

112. This question has been understood as raising a point of debate concerning the distinction to be made between a jurisdictional issue and a question of admissibility of a claim brought before an international arbitration tribunal generally and before an ICSID tribunal more particularly. It is contended that jurisdiction is an element pertaining to the tribunal and not of a claim. Conversely, admissibility is an element of a claim but not one that pertains to a tribunal.<sup>15</sup> Jurisdiction is fixed by treaty and cannot be altered by the parties to the dispute.<sup>16</sup> The parties, however, may acquiesce in any breach of a requirement of admissibility; such acquiescence would "cure" the breach.<sup>17</sup> In other words, defects as to admissibility can be waived or cured by acquiescence, while jurisdictional insufficiencies cannot be equally remedied.<sup>18</sup> However, even if such categories were to be adopted, which appears to be an extremely delicate proposition as a matter of comparative law,<sup>19</sup> the question whether a particular legal issue falls in one and not the other is contingent on the meaning of the relevant provisions of the BIT. This latter consideration is all that matters.

113. Developing such categories may have theoretical appeal but adds nothing to the interpretation of the provisions on dispute resolution of BITs. Thus, the *Hochtief* Tribunal inquired whether the 18 month period is a requirement of the kind which the Host State could accept or otherwise acquiesce to its non-compliance, and whether it

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<sup>15</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 90.

<sup>16</sup> *Ibid.*, No. 92.

<sup>17</sup> *Ibid.*, No. 94.

<sup>18</sup> *Ibid.*, No. 95.

<sup>19</sup> Thus, it is stated in *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 90, that a claim might be taken as "inadmissible" on the ground of *lis alibi pendens* or *forum non conveniens*. This had also been suggested as an analogy in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID/ARB/02/6, Decision on Objections to Jurisdiction of January 29, 2004, No. 170, footnote 95. However, if this appears correct from a Common Law perspective, it is certainly more than doubtful as a matter of Civil Law where the *lis alibi pendens* exception clearly affects jurisdiction. In *Benvenuti et Bonfant v. The Government of The People's Republic of Congo*, ICSID/ARB/77/2, Award of August 8, 1980, No. 1.13 and 1.14, *lis pendens* was considered as a problem of jurisdiction.

had in fact done so. The Tribunal determined that it deemed this provision as one “going to the admissibility of the claim rather than the jurisdiction of the Tribunal.”<sup>20</sup> Significantly, the Tribunal does not articulate the reasons for its conclusion that the 18 month rule constitutes a matter of admissibility. It further concluded that the limits of its jurisdiction are set by the Argentina-Germany BIT, but that on the basis of the MFN clause contained in that BIT, claimant had the right to rely on the procedures set out in the provision on dispute resolution of the Argentina-Chile BIT (including the “fork in the road provision”).<sup>21</sup>

114. For this Tribunal, there is no reason to adhere to the conclusion and findings of the *Hochtief* Tribunal and to shift the 18 month requirement from a jurisdictional issue to question of admissibility and then to conclude that it cannot be complied with by virtue of an agreement or by acquiescence. The 18 month rule of the Argentine-Spain BIT is part of the offer to arbitrate contained in Article X and, upon its acceptance by the investor, would trigger the jurisdiction of this Tribunal were all requirements complied.<sup>22</sup>

115. The distinction has been developed in greater detail by the *Abaclat* Tribunal in its Decision on Jurisdiction.<sup>23</sup> The approach chosen by that Tribunal merits examination and strict scrutiny.

116. The *Abaclat* Tribunal observes that a salient feature of admissibility demonstrates that a lack of admissibility means that the claim was neither fit nor mature for judicial treatment, while a lack of jurisdiction *strict sensu* means that the claim could not at all have been brought before the body called upon.<sup>24</sup> Such a distinction contributes more to the confusion than to any elicitation of the issue. If the claim is not mature for judicial treatment it cannot be brought before the designated judicial body either, which means that it satisfies both requirements of unavailability and irredeemably dilutes the suggested distinction.

117. The *Abaclat* Tribunal also suggests that want of admissibility may “usually” not be subject to review by another body, but the non-review suggested by this “usually” does not apply to a decision refusing arbitral jurisdiction.<sup>25</sup> The correctness of such a general statement should be tested within the framework of the applicable legal provisions governing review of arbitral decisions. In the ICSID system, a

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<sup>20</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 96.

<sup>21</sup> *Ibid.*, No. 99.

<sup>22</sup> In *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011, No. 91, 94, the similar requirement in Article 8(3) of the Argentina-Italy BIT was qualified as a “jurisdictional requirement.”

<sup>23</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011.

<sup>24</sup> *Ibid.*, No. 247(i).

<sup>25</sup> *Ibid.*, No. 247(ii).

decision stating that a claim lacks admissibility may be brought before an annulment committee based on one of the grounds listed in Article 52(1) of the Convention and in particular when the claimant alleges that the tribunal had “manifestly exceeded its powers” (lit. b). This feature of ICSID practice renders both the distinction wrong in theory and useless in practice.

118. The *Abaclat* Tribunal further expanded on the issue by contending that in case admissibility is refused the defect giving rise to refusal may be cured and the claim resubmitted, while the same does not hold true when jurisdiction has been denied by the same Tribunal.<sup>26</sup> Again, the practical utility of this theoretical distinction at best is suspect. If an ICSID Award is issued holding that the claim is not admissible, it may be indeed possible to cure the defect and to resubmit the case. The “re-submitted” claim, however, will be aired before a new tribunal. But where jurisdiction has been denied, the same procedural outcome is possible if the denial was caused by a lack of consent that was later granted, thus allowing for the case to be filed before a different tribunal. The *Waste Management II* Tribunal highlights and underscores the proposition that a jurisdictional insufficiency can be redressed pursuant to a new filing:

“In international litigation the withdrawal of a claim does not, unless otherwise agreed, amount to a waiver of any underlying rights of the withdrawing party. Neither does a claim which fails for want of jurisdiction prejudice underlying rights: *if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant State recommencing its action.*”<sup>27</sup> (emphasis supplied).

Similar reasoning led the *TSA* Tribunal to observe that from a formal point of view, a claim prematurely filed in an ICSID proceeding where the 18 month requirement in the Dutch-Argentina BIT had not yet elapsed could be rejected for lack of jurisdiction and then resubmitted as an ICSID arbitration upon maturation of the term. While the Tribunal perhaps understandably rejected such a solution as “highly formalistic,” it dealt with the issue as jurisdictional and not an admissibility concern.<sup>28</sup>

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<sup>26</sup> *Ibid.*, No. 247(iii).

<sup>27</sup> *Waste Management, Inc. II v. United Mexican States*, ICSID/ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings of June 26, 2002, No. 36, also quoted in: *Cementownia Nowa Huta S.A. v. Republic of Turkey*, ICSID/ARB(AF)/06/02, Award of September 17, 2009, No. 109.

<sup>28</sup> *TSA Spectrum de Argentina S.A. v. The Argentine Republic*, ICSID/ARB/05/5, Award of December 19, 2008, No. 110-112.

119. The *Abaclat* Tribunal, however, found the distinction to be pivotal when analysing predicate conditions to the filing of an international arbitration. The Tribunal's language commands consideration:

“[...] that the negotiation and 18 months litigation requirements *relate to the conditions for implementation of Argentina's consent to ICSID jurisdiction and arbitration, and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration*. Thus, any non-compliance with such requirements may not lead to a lack of ICSID jurisdiction, and only – if at all – to a lack of admissibility of the claim, [...]”<sup>29</sup> (emphasis supplied)

The Tribunal further concluded:

“The negotiation and litigation requirement provided in Articles 8(1) and (2) of the BIT does not condition Argentina's consent to ICSID jurisdiction and arbitration, and merely relates to the circumstances under which such consent is to be given full effect and be implemented.”<sup>30</sup>

120. The Tribunal in that case saw a distinction between conditioning consent to ICSID jurisdiction to the fulfilment of a precondition, and conditioning the effective implementation of such consent, *i.e.*, the possibility to resort to ICSID arbitration upon fulfilment of such a precondition.<sup>31</sup> But as the Tribunal rightly noted, the first part of that distinction makes “little sense” in light of Argentina's adherence to the ICSID Convention and its acceptance of ICSID arbitration in the BIT.<sup>32</sup> All that matters is whether Argentina's consent was subject to preconditions, irrespective of whether they are of a general nature or limited to particular cases, or the extent to which they relate to “circumstances” concerning consent. Nothing is added in qualifying such preconditions as relating to the consent's “effective implementation” – a novel term or conceptual category that the *Abaclat* Tribunal confects but does not fully articulate, let alone engage in any sustained analysis concerning the term's juridical genesis. In this same vein, the term “implementation” is nowhere defined and only appears to serve as a foundation for the inference that consent is to be assumed. Similarly, the manner, if any, in which “implementation” of consent, in sharp relief with the question of whether there is actual consent, touches or concerns the nature of the conditions precedent also remains obscured by the analysis. Put simply, no guidance is offered suggesting how such implementation is subject to “circumstances” that should be understood as different from the consent's underlying conditions.

121. When analysing Article 8 of the Argentina-Italy BIT, as did the *Abaclat* Tribunal, or Article X of the Argentina-Spain BIT, it becomes clear that the conditions

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<sup>29</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 496.

<sup>30</sup> *Ibid.*, No. 500(iii), 501(v).

<sup>31</sup> *Ibid.*, No. 494.

<sup>32</sup> *Ibid.*, No. 495.

or preconditions for triggering access to international arbitration are enunciated in the relevant sub-paragraphs of these provisions. There is no indication whatsoever on whether any of these requirements should be qualified as a fundamental exigency, and therefore as jurisdictional, or merely as relevant for the consent's "effective implementation," and therefore to be dealt with as a matter of admissibility only.<sup>33</sup> Indeed, neither Article 8 of the Argentina-Italy BIT nor Article X of the Argentina-Spain BIT at all reference the word "implementation." The plain meaning and language of the respective Articles is silent as to the nature and character of the conditions precedent to the filing of an international arbitration as "jurisdictional."

122. Finally, the *Abaclat* Tribunal inquires whether in light of the undisputed fact that claimants had not submitted their dispute to the Argentine courts "whether Claimants should have done so"<sup>34</sup> and after examination of the matter it concluded that "[...] the disregard by Claimants of the 18 months litigation requirement does not preclude them from resorting to ICSID arbitration."<sup>35</sup>

123. Thus, "resorting to ICSID arbitration" clearly means "access to ICSID jurisdiction" after compliance with jurisdictional requirements. The 18 month rule, whether it has to be observed or may be disregarded under particular circumstances, is a prerequisite for arbitral jurisdiction and not merely a "circumstance" for providing full effect and implementation for a consent *a priori* determined as valid and enforceable. In fact, the *Abaclat* Tribunal does not show otherwise when arriving at the interpretation of the relevant elements of the 18 month rule.<sup>36</sup>

124. Similarly, the *Desert Line* Tribunal began by classifying the *res judicata* objection of the fork in the road rule as "one of admissibility rather than jurisdiction", which does not affect the tribunal "having jurisdiction" but raises the question whether it should decline to exercise it.<sup>37</sup> Having adopted an "approach to jurisdictional issues",<sup>38</sup> the Tribunal concluded that the objection "does not bar the Arbitral Tribunal from having jurisdiction in the present case."<sup>39</sup>

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<sup>33</sup> When explaining the legal power to exercise the judicial or arbitral function, the Minority Arbitrator in the *Abaclat* case noted: "Any limits to this power, whether inherent or consensual, i.e. stipulated in the jurisdictional title (consent within certain limits, or subject to reservations or conditions relating to the powers of the organ) are jurisdictional by essence." Cf. *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, Dissenting Opinion of Prof. Abi-Saab, No. 126. He also noted that requirements that under general international law are considered as requirements of admissibility become conventionally jurisdictional when they are inserted in the jurisdictional title (No. 23).

<sup>34</sup> *Ibid.*, No. 576.

<sup>35</sup> *Ibid.*, No. 590, also No. 580.

<sup>36</sup> On one other point, the *Abaclat* Tribunal seems to have been misguided by its focus on the nature of a ground for admissibility attributed to the 18 month rule, when stating that the wording of Article 8 of the Argentine-Italy BIT "does not suffice to draw specific conclusions with regard to the consequences of non-compliance with the order established by Article 8." It clearly does because it then precludes access to international arbitration, but it does so in terms of jurisdiction and not of admissibility of claims as the Tribunal wanted to understand the issue.

<sup>37</sup> *Desert Line Projects LLC v. The Republic of Yemen*, ICSID/ARB/05/17, Award of February 6, 2008, No. 128.

<sup>38</sup> *Ibid.*, No. 132.

<sup>39</sup> *Ibid.*, No. 138.

125. Jurisdiction in the judicial or adjudicative context means the authority to render legal decisions. It includes consideration of the sphere of such authority, *i.e.* the scope of the judicial competence. Whether such jurisdiction and competence is awarded in a particular factual setting depends upon the applicable legal provisions. If the exercise of such authority requires compliance with certain conditions, these conditions are prerequisites to the exercise of a tribunal's jurisdiction and competence. This principle also must apply when a particular condition relates to the nature of a claim and thus raises a question as to the claim's admissibility. If the applicable provision on dispute resolution qualifies such condition as a requirement to be complied with before the tribunal can affirm its jurisdiction, the provision then must also pertain to jurisdiction.<sup>40</sup> No theoretical assumption can remove from that condition its jurisdictional character merely by qualifying it pursuant to a legal fiction a condition of admissibility with the effect that any form of non-compliance could be waived or cured by acquiescence. This jurisdictional element is all the more present when jurisdiction is based on consent, as it must be under the ICSID Convention.

126. Moreover, the ICSID Convention does not contain a concept akin to "admissibility" of claims.<sup>41</sup> The Convention distinguishes between jurisdiction and the merits of claims. To the extent that the lack of "admissibility" is asserted as an objection at the jurisdictional stage, it is dealt with at that stage within a jurisdictional framework or in the context of the Tribunal's competence with respect to at least one or all of its elements (*rationes temporis, loci, personae, et materiae*).<sup>42</sup> If it is not so addressed, it is merged with the merits, and thus examined, if at all, at that stage.<sup>43</sup>

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<sup>40</sup> Cf. *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 262, stating that a failure to respect a precondition to the Host State's consent to arbitrate "cannot but lead to the conclusion that the Tribunal lacks jurisdiction." The same point was made in *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 36.

<sup>41</sup> As stated in *CMS Gas Transmission Company v. The Argentine Republic*, ICSID/ARB/01/8, Decision on Objections to Jurisdiction of July 17, 2003, No. 41: "The distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence." These terms are repeated in *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID/ARB/01/3, Decision on Jurisdiction of January 14, 2004, No. 33.

<sup>42</sup> Such hypothesis seems to be covered by the words "for other reasons" contained in Arbitration Rule 41(1) in relation to an objection that would be directed, not against the jurisdiction of the Centre, but against the competence of the Tribunal.

<sup>43</sup> This is the outcome in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID/ARB/02/6, Decision on Objections to Jurisdiction of January 29, 2004, where the Tribunal accepted its jurisdiction under the BIT with respect to a contractual dispute but had to address the effect of an exclusive jurisdiction forum selection clause contained in the contract and "affecting the substance of SGS's claim" (No. 149). For the Tribunal, the question was not whether it had jurisdiction, but whether it was proper to allow the parties to comply with the contractual forum clause (No. 154). When so holding, the Tribunal considered that its own decision on SGS' claim to payment to be brought before the chosen court would be "premature" (No. 155, 162) and that it must await the determination of the amount payable in accordance with the contractually-agreed process (No. 163). Accordingly, it decided to stay the proceeding pending this determination (No. 175). Thus, while affirming its jurisdiction without reservation, the Tribunal decided to abate the proceeding on the merits of the contractual claim as long as one of its issues was not yet resolved through the contractually agreed process of litigation. Similarly, in *The Rompetrol Group N.V. v. Romania*, ICSID/ARB/06/3, Decision on Objections on

127. Therefore, there is no point in classifying the 18 month rule as a matter of admissibility governed by procedural rules that could be modified by the Tribunal according to the needs and specificities of each particular proceeding.

128. There is also no moment to subscribe to the proposition that “procedural obstacles” are not jurisdictional requirements and “may be disregarded where appropriate.”<sup>44</sup> The *Wintershall* Tribunal aptly rejected this premise labelling it an “unqualified formulation,”<sup>45</sup> and observed that when the 18 month rule imposes an obligation and not a mere option, non-compliance “cannot possibly be described as a mere ‘defect of form.’”<sup>46</sup> It also rightly observed that the cases usually referred to in support of the proposition that a condition precedent may readily be disavowed with prejudice relate to provisions on periods reserved for purposes of reaching a settlement and not to mandatory terms requiring the pursuit of remedies in local courts.<sup>47</sup> Even in the case of a provision requiring a negotiation period it has been concluded that such condition precedent is “very much a jurisdictional one.”<sup>48</sup>

129. When misguided theoretical constructs are set aside, the determinative issue is plainly reduced to the object and purpose of the system provided for in Article X (2) and (3).<sup>49</sup> The core question can be posed in two ways; (i) were Claimants required to submit the dispute to the competent tribunals of the Republic of Argentina before resorting to ICSID arbitration? or (ii) “was Argentina deprived of a fair opportunity to address the dispute within the framework of its own domestic legal system because of Claimants’ disregard of the 18 months litigation requirement”?<sup>50</sup>

130. For the present Tribunal, the clear wording of the relevant provisions of Article X and the equally lucid suggestion as to its purpose that Respondent has advanced (to which Claimants did not object *per se*), lead to the conclusion that resort to domestic courts is a precondition to be met before resorting to international

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Jurisdiction and Admissibility of April 18, 2008, No. 112-114, an objection as to the admissibility of the substantive content of claimant’s complaint was merged with the merits.

<sup>44</sup> As asserted by Prof. Schreuer when acting as claimants’ Expert before the *Wintershall* Tribunal, cf. *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 133.

<sup>45</sup> *Ibid.*, No. 143.

<sup>46</sup> *Ibid.*, No. 139.

<sup>47</sup> Cf. *Ibid.*, No. 133-153.

<sup>48</sup> *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID/ARB/01/3, Decision on Jurisdiction of January 14, 2004, No. 88. Non-compliance with such condition precludes jurisdiction to consider the claim, cf. *Antoine Goetz et consorts c. République du Burundi*, CIRDI/ARB/95/3, Award of February 10, 1999, No. 93, using the term “irrecevable” (in French). The jurisdictional nature of the requirement is also supported and extensively discussed in light of other, supporting but also diverging ICSID decisions, in *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID/ARB/08/4, Award on Jurisdiction of December 15, 2010, No. 140-157.

<sup>49</sup> Cf., in similar terms, with respect to Article 8 of the Argentina-Italy BIT, *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 580.

<sup>50</sup> As addressed in *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 581.



arbitration. As stated by the *ICS* Tribunal when considering the UK-Argentine BIT, the words “shall be submitted” leave “no ambiguity as to the mandatory character” of the rule,<sup>51</sup> which “cannot be satisfied by anything less than what it explicitly calls for”.<sup>52</sup> In the words of the *Wintershall* Tribunal addressing a counterpart provision, Article 10(2) of the Argentine-Germany BIT:

“Thus, the submission of the dispute to an International Arbitral Tribunal is conditional upon prior fulfilment of the provision contained in Article 10(2) unless the parties to the dispute agree otherwise.”<sup>53</sup>

The Tribunal further writes:

“[...] it becomes a condition of Argentine’s ‘consent’ – which is, in effect, Argentina’s “offer” to arbitrate disputes under the BIT, but only upon acceptance and compliance by an investor of the provisions *inter alia* of Article 10(2); an investor (like the Claimant) can accept the ‘offer’ only as so conditioned.”<sup>54</sup>

The referenced pronouncements notwithstanding, any construction of the prescribed terms of the 18 month rule must comport with the language’s context and also needs to be harmonized with the purpose and objective of the clause, as prescribed in Article 31(1) of the Vienna Convention. Even where it is acknowledged that this rule imposes an obligation on the investor, it must still be applied in a way that allows its meaning to prevail so that its intended purpose and objective are preserved and not frustrated. Such obligation cannot be imposed on the investor if it does not serve its purpose in the context of the whole system of access to arbitration provided in Article X.

131. The 18 month rule is a second step on the procedural progression towards international arbitration. It would be void of meaning if it were merely duplicative of the first step articulated in Article X(1). This latter provision offers the Parties an opportunity to reach an amicable settlement. It does not require the taking of any action or, if it were to be construed as requiring a minimum of a good faith effort, it nevertheless does not prescribe any sanction or penalty in the event of non-compliance. If the 18 month rule is to be accorded a reasonable interpretation, the requirement of Article X(2) must demand more from each party. If its operational is to be achieved, it requires that the investor submit the dispute to the competent courts of the Host State. But it also requires that the Host State allows its courts to operate in a manner that the opportunity to reach a suitable remedy is provided in efficient terms.

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<sup>51</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 247.

<sup>52</sup> *Ibid.*, No. 251.

<sup>53</sup> *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 122, and for the development No. 116-122.

<sup>54</sup> *Ibid.*, No. 116.

The requirements embodied in Article X(2) are, and should be, bilateral. If the Host State shall not be deprived of a “fair opportunity”<sup>55</sup> to address the dispute through its own courts, the same objective must be ensured in favour of the investor, who equally cannot be deprived of a “fair opportunity” to have the dispute examined by the competent domestic courts. In the words of the *TSA Tribunal*, the remedy available to the investor must “give him a fair chance of obtaining satisfaction at the national level within the said time frame.”<sup>56</sup> Thus, the proper interpretation of the meaning of the 18 month rule is that it requires more from the Host State than merely to avoid that the rule becomes “completely ineffective” or represents a “futility” or even an “obvious futility”, or “futility or otherwise,” as the terms are used by the *ICS Tribunal*.<sup>57</sup> The Host State must assume it's part of the obligation embodied in the 18 month rule, which places the threshold above the floor requirement of avoiding “futility or otherwise.”

132. Contrary to Respondent’s arguments, the record before this Tribunal demonstrates that the 18 month rule is not supported by a policy of high priority. When studying the series of BITs signed by the Argentine Republic and submitted to the Tribunal, it is evident that in fact there was no BIT concluded after the BIT with Spain that contained a comparable 18 month rule. Hence, any assertion that the 18 month rule is one of great public importance and policy, simply is belied by the very chronological history of BITs that the Republic of Argentina has executed. The Tribunal understands that such a rule was included in the Argentina-Germany BIT of 1993,<sup>58</sup> and in two other BITs executed with the Netherlands in 1992 and with the Republic of Korea in 1994,<sup>59</sup> none of which form part of the Tribunal’s record. Moreover, even as of the time that the Spain-Argentina BIT was executed in 1991, other BITs were executed that did not contain any such rule.<sup>60</sup>

133. When analysing treaty law retrospectively with the benefit of hindsight, the preferred solution is manifestly the “fork in the road” system. This scenario would be akin to having the Argentine Republic abandon the 18 month rule as of the execution

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<sup>55</sup> In the terms of *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 581.

<sup>56</sup> *TSA Spectrum de Argentina S.A. v. The Argentine Republic*, ICSID/ARB/05/5, Award of December 19, 2008, No. 110.

<sup>57</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 269, 273. Adopting such a low and unrealistic threshold, the *ICS Tribunal* did not proceed with an analysis of the availability of remedies within the Argentine legal system, although it had obtained reports that “extensively analyse this issue”, causing an “open and legitimate debate” between the Parties’ experts (No. 269).

<sup>58</sup> Cf. *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 1, 121.

<sup>59</sup> Cf. Annex 1 to *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012.

<sup>60</sup> Which was understood as a “lack of consistency” by the Tribunal in *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 105.

of its BIT with Spain.<sup>61</sup> From this same perspective, it would make sense to conclude that such rule was considered useless or even futile. This line of reasoning, however, is of no moment to this Tribunal, which is called to interpret the 18 month rule of Article X (2) and (3) of the Argentine-Spain BIT as agreed upon by these two Contracting States.<sup>62</sup> This rule is to be taken as it stands, notwithstanding the precise degree of priority accorded to it since 1991 and placed on it today as a matter of investment policy between these states or beyond.

134. There is little to add to what already has been stated by the *Maffezini* Tribunal:

“the Contracting Parties to the BIT – Argentina and Spain – wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration.”<sup>63</sup>

This Tribunal has no reason to doubt that a similar statement, as stated by Respondent before other ICSID Tribunals<sup>64</sup> and again in the instant case, represents the original intention of the Contracting States of the Argentina-Spain BIT. There is no possible doubt either that the deference to domestic courts of the Host State is an “obstacle” on the way to reach the level of international arbitration. But this is what the Contracting States wanted when negotiating and signing their BIT.

135. When further considering the purpose of the 18 month rule, the Tribunal has to consider the principle of *effectiveness* as a complementary focus for the interpretation of this provision. Respondent agrees that the system provided by Article X(2) is not to be compared to a simple “waiting period.” Any interpretation must entail a formal submission to the domestic courts so that these tribunals may effectively analyse the dispute. In further analysing the provisions of Article X(3)(a), such domestic proceedings must be of a nature to possibly reach a decision on the substance within 18 months. This provision does not require an adjudication to issue.<sup>65</sup> Yet, a party must be granted an opportunity or a chance to have the court reach an adjudicatory phase, otherwise the entire system would be meaningless.

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<sup>61</sup> This is the conclusion drawn in *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 57, adding that for Spain, it was not the preferred solution (No. 57-59).

<sup>62</sup> See, for the same position, *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 128.

<sup>63</sup> *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 35.

<sup>64</sup> Cf., among others, *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 104, where the Tribunal says that it “concur[s]” with Respondent in recognizing this intention, but nevertheless objects that Argentina had not presented any evidence beyond its affirmations of such policy (No. 105).

<sup>65</sup> *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 28 s., 30.

136. If there is no such opportunity of an adjudicatory ruling, the provision would not only impose an additional waiting period for no ostensible purpose, but it would also have the added prejudice of causing claimants to disclose the evidence underlying their claim while the Host State would be allowed, as another tribunal put it, “to assess the claim, gather evidence, and prepare a defence to a possible international arbitration claim.”<sup>66</sup> In addition to the mere result of having to wait another 18 months, Claimants would also have to suffer unequal and unfair treatment, as they would be required to present their case, while Respondent would be free from having to disclose its legal and factual defences to the claim, and simultaneously allowed to gather evidence supporting the investor’s case in preparation of the prospective and likely arbitration. Certainly, such a reading of the 18 month rule would be conducive to asymmetrical treatment advantaging the Host State to the claimant’s detriment, a result not contemplated by the Article X rubric.

137. This reading of the rule also establishes that as far as this Tribunal is concerned, any interpretation of the 18 month rule cannot be based on a theoretical musing pursuant to which the rule is deemed useless and, therefore, to be disregarded because it “is difficult to see the rationale for imposing, in the terms used in Article 10(3)(a), a duty to spend a period of 18 month with the dispute listed on the docket of domestic courts as a precondition for the reference to arbitration.”<sup>67</sup> Certainly, the rule may not be disregarded based upon the likelihood of a “pointless litigation” even were the parties to spend 18 months in a proceeding where one or both may decide in advance to reject any decision that a court may issue.<sup>68</sup> And what if, under the circumstances, it would appear that a domestic court would not just let the parties “spend a period of 18 months” with their case merely listed on the docket? And why should the requirement be lifted merely because the investor is not willing to agree to a suitable remedy even if the domestic judge makes an effort to reach such a result?

138. The Contracting States to the BIT were certainly aware of the difficulties arising in most cases where a claimant would find itself in the courts of a Host State. These challenges notwithstanding, the parties agreed to include this requirement in their treaty and to defer access to international arbitration accordingly. This remedy may be considered an option less favourable to arbitration, but this consideration is not what matters. What matters is that the 18 month rule is part of the dispute resolution provision of the Argentine-Spain BIT. In any event, the Decision on jurisdiction issued by the *Hochtief* Tribunal cannot serve as persuasive authority

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<sup>66</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 269, footnote 298, *in fine*. The Tribunal adds that such purpose, among others, would go “beyond resolving the dispute”, thus admitting that it has nothing to do with the purpose and objective of the 18 month rule.

<sup>67</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 50, referring to Article 10 of the Argentine-Germany BIT.

<sup>68</sup> *Ibid.*, No. 51.

because in that case Tribunal advised that it did not need to decide the point of whether domestic litigation should always be an essential precondition or whether there exists an “implied right of unilateral reference to arbitration.”<sup>69</sup> In the absence of such a right a “problem arises”<sup>70</sup> whenever the precondition contained in the 18 month rule applies, although “its meaning is clear.”<sup>71</sup> This suggested questioning implies a hypothetical understanding of the rule that does not comply with its wording and purpose.

139. This Tribunal recognizes that the 18 month rule suggests the presence of an obstacle before access to international arbitration is granted and that it does not represent the most favourable option with respect to the efficient protection of international investment. It may even be said that it is “unusual,”<sup>72</sup> although it also has been suggested that it is “by no means an unusual clause” in BITs.<sup>73</sup> But such considerations have no weight when it comes to determining the meaning and best interpretation of a provision that the Contracting States agreed upon and that constitutes treaty law as long as it is in force.

140. The 18 month rule is also not susceptible to any interpretation that may only benefit an investor. The *Hochtief* Tribunal viewed the 18 month litigation period as “[providing] no inherent benefit [...] to the other party” other than the imposition of a period in which the parties may refine and reflect upon their respective positions.<sup>74</sup> While the *Hochtief* Tribunal duly accepts respondent’s position that the 18 month period provides the courts with an opportunity to resolve the dispute as being “true,” it nonetheless notes that the arbitrary limit of 18 months and the removal of any duty to accept the judgment of the local courts render the rule “to some extent perfunctory and insubstantial.” Additionally, adherence to the 18 month rule “would bring no necessary benefit” and “no necessary result other than the delay of the arbitration proceedings,” facts from which the Tribunal “derives some encouragement to believe that its decision is correct,”<sup>75</sup> which consists of accepting the MFN clause contained in the Argentina-Germany BIT with the effect of rendering inapplicable the 18 month requirement. The Tribunal’s reasoning is not supported by evidence relating to the

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<sup>69</sup> *Ibid.*, No. 54.

<sup>70</sup> *Ibid.*, No. 53.

<sup>71</sup> *Ibid.*, No. 52. The Dissenting Opinion of Arbitrator Chr. Thomas recalls that the 18 months period “is plainly a product of compromise between the States Parties” and that their choice of a period of 18 months, described as “arbitrary” by the Majority (No. 88 of the Decision) had the purpose to permit a Contracting Party’s legal system to at least have an opportunity to address the dispute (No. 7).

<sup>72</sup> *Ibid.*, No. 54. Another Tribunal thought useful to qualify the requirement as “curious” and “nonsensical from a practical point of view”, although the Tribunal had no reason to address the issue and did therefore not proceed to a serious examination of the matter; cf. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID/ARB/03/24, Decision on Jurisdiction of February 8, 2005, No. 224.

<sup>73</sup> *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 125.

<sup>74</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 87.

<sup>75</sup> *Ibid.*, No. 88 (for all quotes).

possible operation of the 18 month rule before Argentina's domestic courts. And while it is focusing on the benefit available to the investor, it does not take into account the Host State's position that the local courts will thus be granted an opportunity to find a suitable remedy, although that position is characterized as "true."<sup>76</sup>

141. While it is correct to understand that the meaning of the 18 month rule has to be determined in light of the efficiency of the rule, there is no point in interpreting this provision on the extent to which it provides the investor with a "benefit." This rule was agreed upon in order to reach a common purpose that the Contracting States sought to achieve, albeit as an "obvious compromise."<sup>77</sup> There is no indication, however, that such purpose or objective is exclusively focused on the interests of or possible benefits to the investor. As detailed above, while the ICSID Convention and the BITs are certainly leading instruments for the promotion of private international investments, they also have as their objective and purpose to provide for a reasonable and negotiated balance between the interests of prospective investors and those of the Host States. As the *CMS* Tribunal observed, the scope of a given bilateral treaty "should normally be understood and interpreted as attending the concerns of both parties."<sup>78</sup> A unilateral approach that benefits investors does not comply with the prevailing understanding of investment treaty law.

142. Having canvassed the basic meaning of the purpose and objective of the second step towards a potential arbitration under Article X, the Tribunal, before proceeding with the examination of more specific elements, must raise the question whether different or additional canons of interpretation must be applied in order to establish a different balance or relationship between the respective interests of the Host State and of the investor, other than the one resulting from this analysis. ICSID case-law establishes yet another effort to interpret the 18 month rule conducive towards a result favouring easier access to international arbitration, in some cases even rendering it possible for the investor to disregard the requirements set by these provisions.

143. Indeed, for the *Abaclat* Tribunal, the question of whether investor's non-compliance with these requirements deprives the Host State of a "fair opportunity" to have the dispute examined by its domestic courts, "in turn requires a weighting of the

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<sup>76</sup> The Dissenting Arbitrator Chr. Thomas states that "one cannot rule out the possibility that the local court could uphold the investor's claim that the measures complained of violate municipal law or that a contested legal right claimed to exist under that law does in fact exist. Even if such findings did not lead to a settlement, they would enhance the prospects of success in any subsequent international claim." (No. 8)

<sup>77</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 57.

<sup>78</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID/ARB/01/8, Award of May 12, 2005, No. 360.

interests of the Parties,” which includes, on the part of the investor, consideration of claimants’ interest “in being provided with an efficient dispute resolution mechanism.”<sup>79</sup> In a first step, it is stated correctly that the opportunity to address the dispute through the domestic judicial system must not be theoretical, “but there must be a real chance in practice that the Host State [...] would address the issue in a way that could lead to an effective resolution of the dispute.”<sup>80</sup> For the present Tribunal, however, to reach this understanding, there is no need to introduce any further “weighting of the interests of the Parties,” in addition to what results in any way from the purpose and the required efficient meaning of the provision.

144. For the *Abaclat* Tribunal, a step further would be the alternative hypothesis of an acceptable disregard of the 18 month rule and of the opportunity it provides for an examination of the dispute by local courts, “where, based on the overall circumstances of the case, it appears that such opportunity [...] could not have led to an effective resolution of the dispute within the 18 month time frame.” In such a case, “it would be unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation requirement,” because “such disregard would not have caused any real harm to the Host State.”<sup>81</sup> A claim brought before local courts would have been suited only if this could have been done “in such a way as to effectively resolve the dispute.”<sup>82</sup>

145. First, this Tribunal is compelled to underscore that this interpretation does not comport with the plain language of the 18 month rule (whether contained in the Argentine-Italy BIT or the Argentine-Spain BIT), which does not impose an obligation on the part of local courts or the Host State in general to adjudicate the merits of a judicial proceeding within 18 months. This objective is a goal and the implementation of the provisions of Article X (2) and (3) shall not prevent such a result from being achieved, but it is not a requirement that must be met in order to render the 18 month rule applicable. The interpretation suggested does not comply with the rule’s purpose, which is to offer the domestic judicial system an opportunity to find a suitable remedy, and nothing more.

146. Secondly, and more importantly, the *Abaclat* Tribunal does not state any legal reasoning, juridical principle, or precedent that would ascribe a normative component for the “weighting of the interests of the Parties” test to be added to the application of the 18 month rule. Neither the purpose, objective, nor policy underlying the rule give rise to the propriety of such a standard. In fact, the Tribunal engaged in its own

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<sup>79</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 582.

<sup>80</sup> *Ibid.*, No. 582.

<sup>81</sup> *Ibid.*, No. 583.

<sup>82</sup> *Ibid.*, No. 585.

exegesis beyond its own balancing of interests test in stating that claimants' interest to be protected concerning their claim was "their interest of being able to submit it to arbitration"<sup>83</sup> and that such interest was satisfied only when it was possible to address the claim in such a way "as to effectively resolve the dispute."<sup>84</sup> If these premises constituted the underlying conditions of Article X (2) and (3), resort to local courts could never occur and the interests of the Host State would be disregarded. Indeed, the dispute resolution system would be rendered dysfunctional. This interpretation could always be understood as restricting the investor's ability to submit the claim to arbitration because it would never be established from the very commencement that the dispute would be "effectively resolved."

147. As far as this Tribunal is concerned, if there is to be any "weighing of the interests of the Parties" to be considered for purposes of interpreting Article X (2) and (3) of the BIT, it is the weighing of interests as negotiated and approved by the Contracting States of the BIT. These Parties to the BIT have made an assessment of the terms that best suited them at the time of the negotiations and most effectively met their needs with respect to an international dispute resolution system that could attach to contentions arising from investments within their national territory. Perhaps the Contracting States may decide in the future that such a brand of dispute resolution should yield to a change galvanized by a more expansive policy favouring access to arbitration. Decisional-law constructs, however, such as the "weighing of the interests" test cannot merely be imposed as an amendment to treaty language that an Arbitral Tribunal elects to engraft. As the *ICS* Tribunal warned, "judicially-crafted exceptions must find support in more than a tribunal's personal policy analysis of the provisions at issue."<sup>85</sup>

148. If it is thus accepted that the system of Article X (2) and (3) of the BIT contains a treaty obligation for the investor to submit its dispute to domestic courts, it must also be accepted that as far as the Host State is concerned, the same system contains a treaty obligation to keep its courts available for this purpose. This bilateral requirement is more than just part of the required effectiveness of the 18 month rule. It also forms part of a requirement based on the acknowledged principle of good faith. In the context of the 18 month rule, this principle of bilateralism holds that the Host State is precluded from insisting on the investor's obligation to resort to domestic courts if the investor is not able to fulfil such obligation because of the unavailability of courts capable of handling such disputes that may reasonably contemplate on adjudication on the substance of the dispute within 18 months.

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<sup>83</sup> *Ibid.*, No. 584.

<sup>84</sup> *Ibid.*, No. 585.

<sup>85</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 265.



149. The issue concerning what constitutes the relevant timeframe for performance of the requirements contained in the 18 month rule is now ripe for discussion. While it is one thing to conclude that the interpretation of Article X (2) and (3) must in good faith be based on the object and purpose that constituted the guiding factors for the Contracting States when they negotiated and concluded the BIT, it is yet another thing to determine the time-frame in which the requirements contained in the 18 month rule must be fulfilled. The moment when the Contracting Parties' intent and purpose emerged and was fixed in its legal form in Article X of the BIT is not the time when the requirements of the 18 month rule are to be performed. The *Wintershall* Tribunal holds that the "principle of contemporaneity" is not relevant.<sup>86</sup> This is basically correct when the issue under consideration relates to the meaning of the rule. But such principle, if adopted, must govern the conduct of the Parties as to the workings of the 18 month rule. On this point, the reasons articulated by the *Wintershall* Tribunal are not convincing to this Tribunal. In that case it was stated that claimants did not proffer any evidence that "when the BIT was entered into" the 18 month rule was "incapable of being complied with (at the start) for the reason that the legal system or the judiciary in Argentina was not efficient or receptive to claims by foreign investors," while the state of the legal system or the state of the courts in Argentina from January 2002 onwards "is of little relevance."<sup>87</sup> If this proposition were adopted as true, the consequences would be absurd, *e.g.* Argentina could have rendered its courts completely unavailable shortly after 1993, when the Argentina-Germany BIT was concluded and the German investors would have been obligated *ad infinitum* to submit their case to these courts and to bear on the economic burden of such useless proceedings. Clearly, the *Wintershall* Tribunal did not examine the obligations implied in the 18 month rule as one to be performed by the Host State's judicial system.

150. The *ICS* Tribunal decided that it "simply cannot conclude that recourse to the Argentine courts would have been completely ineffective at resolving the dispute."<sup>88</sup> The record before this Tribunal is materially distinguishable in large measure because this issue relating to the bilateral obligations of the 18 month rule has been presented to this Tribunal in the form of pleadings and expert-witness testimony (written and oral).<sup>89</sup> Further, the Parties were given an opportunity to address questions on this matter presented by the Tribunal during and after the hearing. This matter has to be more closely examined in the following sections.

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<sup>86</sup> *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 129.

<sup>87</sup> *Ibid.*, No. 129.

<sup>88</sup> *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA No. 2010-9, Award on Jurisdiction of February 10, 2012, No. 269.

<sup>89</sup> In the proceeding before the *ICS* Tribunal, no cross-examination of expert witnesses had apparently taken place at the Jurisdiction Hearing (cf. *Ibid.*, No. 38, 42, 269).

2. *The requirement of submission of the “dispute” to the “competent tribunals” of the Host State*

151. The first element of importance is the reference in Article X(2) to the obligation (“shall”) of the party to the dispute to submit it to the “competent tribunals” of the Contracting Party where the investment was made, with the possible segway, referred to in Article X(3), so that the tribunal seized with the matter may reach a decision “on the substance” within 18 months. The correct understanding of the concept of “competence” is important in this respect. As further confirmed in Article X(3)(a), the proceeding conducted before the competent tribunals must be a “judicial proceeding.” The term “competence” therefore only refers to an institution exercising the functions of a court or a comparable body having jurisdiction.

152. In order to have the 18 month rule effectively put in operation it must be possible to submit the dispute to a tribunal having “competence” in all respects necessary to allow a litigation to proceed on the “substance.” Even when not proceeding at this stage with the aim of reaching a full definition of this latter term, the Tribunal has to make a first step here in stating that in order to allow exercising jurisdiction with respect to the “substance,” the party required to submit the dispute to domestic courts must be able to find a court having “competence” without being left with doubts and legal uncertainty, and this in respect of all aspects of competence *ratione loci, temporis, materiae et personae*.

153. There is no dispute on the competence *ratione loci* of courts available in the Province of Buenos Aires. The controversy dividing the Parties relates to the availability of such courts notwithstanding the emergency laws; the admissibility of an action brought by Claimants in their capacity as investors and shareholders of AGBA; and the nature of actions that might possibly be submitted to such courts. The first issue raises a question pertaining to the competence *ratione temporis* of the Argentine courts, which for designated time-frames were not permitted to exercise jurisdiction as a result of the country’s state of emergency (a). The second issue concerns the local courts’ competence *ratione personae* regarding actions brought by parties acting as investors and shareholders of AGBA (b). The third aspect relates to the nature of the dispute to be submitted to domestic courts under Article X of the BIT, which is closely linked to the concept of “substance” of the dispute as used in this provision; this matter will be addressed in the next section (3).

- a) The effects of the emergency laws on the operation of Argentina’s courts

154. The *Abaclat* Tribunal identified two reasons for its view that the investors’ disregard of the 18 month requirement did not preclude them from resorting to ICSID

arbitration, both grounds related to the Emergency Laws. First, it noted that claims seeking compensatory damages were destined to fail (and therefore presumably would never be part of a merits hearing) because these Laws and the related legislation “prohibited the Argentine government from entering into any juridical, extra-juridical or private transaction.” Thus, even were claimants to have prevailed, the government would still have faced the impossibility of performance, *i.e.* fulfilling the liquidated judgment.<sup>90</sup> Assuming this assertion to be correct, it goes far beyond the requirements of Article 8 of the Argentina-Italy BIT and of those of Article X of the Argentina-Spain BIT. There is indeed no requirement of a possibility to reach a transaction or of the ability of the Host State to approve such a settlement. Neither is the obligation to submit the dispute to local courts subject to a requirement that the Argentine Government would have the wherewithal, means, or ability (physical or juridical) to tender the payment in compliance with a judgment. Such requirements are all the more disconcerting because they do not apply as conditions to effective submission to international arbitration either.

155. The question thus to be addressed is whether the emergency legislation prevented Argentine courts from exercising their jurisdiction with respect to a dispute arising from an investment governed by the Argentine-Spain BIT. The Tribunal has received no evidence to the effect that the emergency legislation would have precluded Argentina’s Courts from examining such a dispute. This legislation certainly had the effect of restricting the range of possible outcomes, at least in as much as the State was bound not to enter a settlement nor to accept any enforcement of a liquidated damages judgment. Article 12 of Decree 214/2002 suspended compliance with any precautionary measure in a legal action initiated against the Government and it also suspended the enforcement of any judgment. However, this suspension was limited to 180 days as of the date of the Decree’s entry into force. It has not been demonstrated that the extension of the state of emergency also had the effect of extending this 180 day time frame. Moreover, such suspension of court measures and decisions was exclusively directed at the financial industry sector concerning specific transactions such as loans, debts, bonds, deposits or financial rescheduling, thus not covering disputes over investments like the one in the instant case. There also may have existed provisions proscribing access to any renegotiation, as contended by Claimants in their Answer to the Tribunal’s question: a stage where new documentary evidence was no longer admissible. But such restrictions do not demonstrate that submission of Claimants’ dispute to domestic courts was impossible or did not provide any opportunity to reach a fair result. There is insufficient evidence demonstrating that the Government “was seeking to prevent any judicial interference with the emergency legislation,” thus causing a “serious problem” were an investor

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<sup>90</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 585.

required to “go to domestic courts to challenge the very same measures,” as affirmed by the *BG Group* Tribunal in light of its finding that BG Group’s claims were admissible for arbitration although BG Group had not submitted the dispute to local courts as provided for by Article 8 (1) and (2) of the UK-Argentina BIT.<sup>91</sup> Indeed, when this conclusion was reached, the 180 day suspension period had long since elapsed, and the Tribunal did not explain whether the dispute under consideration related to the financial system which was at the core of the preservation provisions of the emergency legislation.

156. In light of the limited evidence received covering all of the practical aspects, consequences, and implications of the emergency legislation, it does not appear inconceivable that Claimants possibly may have initiated a proceeding seeking a declaration that the emergency law was unconstitutional regarding the prosecution of a claim arising from the Argentina-Spain BIT.<sup>92</sup> Such a proceeding would have been, however, a far cry from one satisfying the requirement for a “fair opportunity” to reach a decision on the substance according to the provisions of Article X of the BIT. At the outset, such a declaration would have to be completed and conceptually complemented by another declaration stating that the measures taken with respect to Claimants’ investment did not comply with the protective provisions of the BIT. Second, a claim for compensation could have been brought only after both such declarations had issued. This effort was not only “highly unlikely”<sup>93</sup> but actually impossible based upon the operational time frame of ordinary local courts, as shall be explained below.

b) Competence of local courts requires Claimants’ *jus standi*

157. Respondent contends that because Claimants had the opportunity to bring this dispute before domestic courts does not mean that, in turn, Argentina – as a party to such potential lawsuit – would not have the right to raise any objection it may have against, for example, Claimants’ *jus standi* or otherwise. That Respondent may have such a right under the laws of the Republic of Argentina may be correct. If so,

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<sup>91</sup> *BG Group Plc. v. The Argentine Republic*, Final Award of December 24, 2007, No. 153, 156. The Award was vacated by the US Court of Appeals, District of Columbia Circuit, on January 17, 2012 (No. 11-7021), for lack of “arbitrability”, Claimant having failed to submit the dispute to judicial proceedings in Argentina and to wait 18 months before filing for arbitration.

<sup>92</sup> There is no reason to mitigate somehow such an initiative by contending that the “Argentine Government could have arranged for an examination of the constitutionality of the Emergency Law”, but “did apparently not see the need to proceed with such examination”, as stated in *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 586. This had been “arranged” long ago by the Argentine judiciary when seized with thousands of claims under *Amparo*. As to decisions rendered by the Supreme Court, cf. *CMS Gas Transmission Company v. The Argentine Republic*, ICSID/ARB/01/8, Award of May 12, 2005, No. 215 s.

<sup>93</sup> *Abaclat and Others v. The Argentine Republic*, ICSID/ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011, No. 585.

however, the proposition merely begs the question of whether such a proceeding would have met the strictures of Article X(2) of the BIT.

158. For this Tribunal, it clearly does not. Access to a “competent tribunal” as provided for in Article X(2) necessarily implies access to a “competent” court *ratione personae* to hear the dispute, which means that Claimants’ *jus standi* is admitted and cannot be denied on a ground based on domestic law, which would find no legal support in the BIT. It does not make sense to assert that Claimants were under an obligation to submit the dispute to domestic courts (under circumstances to be further examined below) only to object to the exercise of the courts’ competence based on lack of *jus standi*. Admissibility is a prerequisite for compliance with the obligation set forth in Article X(2), the content of which will have to be further addressed below.

159. Article X(2) requires as one of its operational features that the competent tribunal where an investment dispute would have to be submitted prior to access to arbitration must be a tribunal where the investor is admitted as a party having *jus standi* to proceed. This requirement does not preclude a domestic court, *arguendo*, from denying Claimants’ capacity as an investor within the meaning of the BIT. But such a court cannot object to Claimants’ standing under the BIT for reasons exclusively based on domestic law. In other words, there is no point for the Host State to argue that remedies are available to the investors before domestic courts while also arguing that the same investors have no *jus standi* to resort to litigation before these very same domestic courts.

160. The requirement of submitting the dispute to the competent tribunals of the Host State is intended, as strongly and correctly advocated by Respondent, to provide for an opportunity to arrive at a suitable remedy to the dispute. In order to allow for this objective, the proceeding to be followed before those tribunals must have the effect of bringing to the court for purposes of adjudication the substance of the dispute. The provisions of Article X clearly support such an understanding. Article X(3)(a) provides leave to an international arbitral tribunal, at the request of either party to the contention, “when no decision has been reached on the substance 18 months after the judicial proceeding provided for in paragraph 2 of this article began.” The party seeking to submit the dispute to local courts must act accordingly only to the extent that it has access to a tribunal that is competent to exercise jurisdiction over the “substance” of the dispute. The same provision also means, together with Article X(2), that the requesting party is entitled to have access to a local court competent to hear the dispute on the merits. Such right is directly based on Article X of the BIT and cannot be restricted or rendered a theoretical construct on the basis of additional requirements derived from the domestic law.

161. This analysis leads to the proposition that the local court requirement cannot compel an investor-claimant to submit its case to a tribunal before which it has no access or where there is a risk that access may be successfully opposed by the adverse party. This proposition does not raise an issue of access as Respondent referenced in its Answers to the questions raised by the Tribunal. There is no doubt left that a foreign investor has “access” in the traditional meaning of the term, as guaranteed by the Constitution to every citizen. Respondent suggested, however, that Claimants would have to accept as a condition precedent within the meaning of Article X(2) submitting the dispute to a local court where Respondent then could object to Claimants’ *jus standi*. In this connection, Prof. Mata stated at the hearing that the investor would have to demonstrate that, before an Argentine local court, in addition to his quality as an investor, “he has a legitimate standing to take action.”<sup>94</sup> As stated in the discussion of the concept of “competence” of local courts, such a hypothesis is excluded because the framework of Article X (2) and (3) require such tribunal to be able to exercise jurisdiction with respect to the “substance” of the dispute. Claimants cannot be required to submit their dispute to courts where they do not enjoy *jus standi* under the local law applicable to such courts. This proposition also stands in striking contrast to Respondent’s statement on the basic purpose of the provision concerning access to local courts in an effort to arrive at a suitable remedy that may avert international arbitration. This objective would be impossible to achieve *ab ovo* were the Host State allowed to invoke from the very commencement of the litigation that the investor has no *jus standi* before the court and succeed in this assertion. Even if such an objection could be invoked and subsequently rejected, the time expended in the proceeding would have to be calculated as falling within the 18 month time frame and would thus render the timely issuance of a decision on the merits all the less likely.

162. Throughout the course of this proceeding, it has been Respondent’s position that Claimants lack standing to sue before Argentine’s Courts as investors under the BIT concerning rights that belong to AGBA. Respondent referred to Section 75, paragraph 22, of the Argentine Constitution to assert that treaties are superior to laws and that therefore, Article X(2) of the BIT is directly enforceable in Argentina. Nonetheless, Respondent also has affirmed as early as in the letters sent on May 24, 2006, *i.e.* prior to the date on which local court proceedings could have been brought pursuant to Article X(2), that nothing in the very same provision, together with Section 31 of the Constitution, “can lead to the conclusion that a foreign investor is thereby granted standing to sue,” which means that “in this case, in view of the rights claimed, the action must be brought by AGBA.”

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<sup>94</sup> TR-E, Day 1, p. 63/24 s., 109/17-19, 134/17 s.

163. This position has been confirmed and it is reflected in Respondent's second objection to the Tribunal's jurisdiction. The arguments that Respondent asserts in support of this objection include the proposition that under Argentine domestic law, Claimants as shareholders of AGBA lack standing to act in their own name in support of rights that are considered to belong to AGBA and not to the shareholders. Indeed, Respondent asserts that no provision of Argentine corporate law allows a shareholder to bring a claim on behalf of the corporation. The ownership of shares in AGBA does not authorize Claimants to bring any derivative action by invoking the rights of the company. The necessary consequence is that Claimants *jus standi* would have been denied before the competent courts of the Argentine Republic, with the effect that their claim would not have been heard on the merits for this reason.<sup>95</sup> Such position affirmed under the Argentine domestic law renders ineffective and thus useless any attempt to resort to domestic courts for purposes of finding a suitable remedy on the substance of the dispute that Claimants brought as investors and shareholders. In the opinion of the Tribunal, the Respondent cannot have it both ways. By advancing and continuously maintaining this position, it effectively denied that its courts were competent to entertain the Claimants' claim under the BIT. It cannot now contend otherwise.

3. *The nature of the "dispute" to be decided "on the substance" within 18 months*

164. After stating in paragraph 2 of Article X that the "dispute" shall be submitted to the competent tribunals of the Host State, paragraph 3(a) prescribes submission of the dispute to an international arbitral tribunal if "no decision has been reached on the substance" and this "18 months after the judicial proceeding provided for in paragraph 2 of this article began." This requirement may only make sense when the court seized had been accorded the opportunity to adjudicate the substance of the dispute. This requirement contemplates that the tribunal before whom the case is pending, shall have jurisdiction to preside over the substance of the alleged BIT infractions. Put simply, the fundamental architecture and objective of Article X (2) and (3) would be frustrated were the local courts foreclosed procedurally from a merits adjudication. The meaning of the term "decision on the substance" constituted a point of contention for the Parties and, therefore, shall be submitted to sustained analysis.

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<sup>95</sup> When he was asked whether it is possible that shareholders can bring an action before Argentine courts on the basis of damages sustained in their investment, Respondent's Expert, Prof. Nissen, answered: "On the basis of the corporation law of Argentina, which is the one legislative norm that governs this and governs every single resident of Argentina, the answer is no." TR-E, Day 2, p. 179/14-18.

- a) The “substance” cannot be reached through proceedings of an ancillary nature.

165. A “decision on the substance” as in keeping with Article X(3) of the BIT must relate to the dispute as submitted in an effort to reach a settlement as provided for in paragraph 1. The rule on prior submission to domestic courts has as its objective allowing courts the opportunity to fashion a suitable remedy based upon the relief requested by Claimants.

166. Therefore, an adjudication that only yields a provisional or precautionary measure does not in any way constitute a proceeding within the meaning of Article X (2) and (3) of the BIT. Likewise, an action for injunctive relief (“medidas cautelares”) is subordinate to an action for damages and, therefore, cannot constitute a condition for the filing of an Article X proceeding. The procedural significance of such a measure is materially different from the decision making of a local court under the conditions of Article X (2) and (3) of the BIT. Even if, under extraordinary circumstances a tribunal may sometimes award, according to Prof. Mata, compensation for damages (as a temporary advance payment) when the award for damages might not be payable when the final decision issues as happens in practice,<sup>96</sup> a tribunal shall refrain from thus proceeding “when it comes to contracts and investments.”<sup>97</sup> In light of this expert testimony, such precautionary measures will under any analysis not reach the substance of a dispute.

167. The same analysis and conclusion applies with respect to declaratory relief.<sup>98</sup> Declaratory relief is inapposite to the case before this Tribunal. Here Claimants seek damages for past acts and not a decree proscribing future conduct. As Prof. Mata stated at the hearing, such an action can be settled through an expedited procedure and it serves to challenge the validity of actions undertaken by the administration, but it cannot include an award of damages, which would have to be requested in another and subsequent procedure.<sup>99</sup>

168. Already when Claimants first gave notice of their dispute on December 21, 2005 and on January 24, 2006, they sought, *inter alia*, compensation for damages caused as a result of the actions of the Respondent from 2002 onwards, which, Claimants alleged, had breached the rights under the BIT. By the time that notice of intention to commence arbitral proceedings was given on September 5 and 6, 2006, Claimants referred in addition to the fact that, by decree, the Governor of the Province of Buenos Aires had terminated the Concession Contract with AGBA. Thus, “the

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<sup>96</sup> TR-E, Day 1, p. 98/12-21; Prof. Mata’s Report, No. 55.

<sup>97</sup> TR-E, Day 1, p. 98/14 s.

<sup>98</sup> Cf. Prof. Mata’s Report, No 42-47.

<sup>99</sup> Cf. TR-E, Day 1, p. 96/8-25 – 98/2.



dispute” referred to in Article X was, from the outset, a dispute concerning compensation for damages allegedly caused to the Claimants’ investments protected under the BIT as a result of the actions of the Respondent. The dispute concerned actions that had already been taken by the Respondent, which, if found to give rise to breaches of the BIT, could only be redressed by compensatory damages and not by precautionary or injunctive relief.

169. Equally of no relevance is the *Amparo* action for administrative default or delay, which serves to accelerate an answer to be provided by the administration to the requesting party. This has nothing to do with an investment dispute brought before local courts and not before an administrative agency. Moreover, it requires prior submission of a claim, which is not the subject matter of this case: a proceeding relating to Article X of the BIT. As Prof. Mata confirmed at the hearing, it has nothing to do with a judicial action.<sup>100</sup>

170. Similarly, the principle of “useless step” is of no moment in this case. There is no ordinary proceeding preceded by a prior administrative claim that then may be circumvented by dint of asserting that it constitutes a “useless” procedural step. As Prof. Mata very candidly acknowledged, this remedy has “nothing to do with a judicial procedure,”<sup>101</sup> and “does not reduce the time required for judicial procedures.”<sup>102</sup>

171. A proceeding otherwise ancillary to an action brought by an investor is a possessory action or action *in rem*, or *quasi in rem* which would be available for the Concessionaire who has been deprived of its assets, but not to Claimants when seeking compensation for damages and not recovering lost assets. As Prof. Mata testified, such a proceeding “has nothing to do with compensation for damages.”<sup>103</sup>

172. Prof. Mata thus acknowledged that none of these so-called alternative remedies is suitable to be tried by a foreign investor before the local courts of Argentina. The Expert recognized the hypothetical nature of the alternatives he had identified. He further admitted that they did not constitute a judicial proceeding capable of giving rise to a judgment for compensatory damages, as here pursued by Claimants. The Tribunal shares Prof. Mata’s conclusion.

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<sup>100</sup> TR-E, Day 1, p. 99/18-22.

<sup>101</sup> TR-E, Day 1, p. 94/12 s.

<sup>102</sup> TR-E, Day 1, p. 94/18 s.

<sup>103</sup> TR-E, Day 1, p. 95/25 – 96/1.

- b) The “substance” cannot be reached pursuant to summary or expedited proceedings.

173. The remedies mentioned above and noted in Prof. Mata’s oral and written testimony are unavailing as to Article X(2) of the BIT because they are based on expedited procedural rules requiring abbreviated procedural junctures that are inimical to the complex configuration of most investment disputes. This fundamental procedural incompatibility is particularly patent in proceedings for injunctive relief or expedited summary actions.<sup>104</sup> Indeed, Prof. Mata testified:

“The action taken before court can be a very expedited action and the judges, under article 36 of the judicial code, can simplify litigation and require little evidence in fact.”<sup>105</sup>

Referring to the same provision, Prof. Mata confirmed:

“that judges do have the possibility, and they have very powerful means at their disposal to expedite matters.”<sup>106</sup>

“They have the duty to provide for the economy of the procedure in all cases.”<sup>107</sup>

However, no explanation was given by the Expert on how such an accelerated procedure would comply with a judicial examination of an investment dispute like the one in the instant case, which requires an extensive trial stage and an important amount of evidence. A decision “on the substance” as mandated in Article X(3)(a) requires manifestly a full examination of the rights invoked upon penalty of limiting the analysis of contested factual and legal issue to a surface treatment that would deny the parties of the appropriate due process consideration.

- c) The “substance” cannot be reached by a declaratory judgment.

174. The remaining question to be addressed is whether a decision on the substance of the dispute may be reached where the judgment would only award declaratory relief. Respondent vigorously answers this query in the affirmative in its Answer to one of the questions raised by the Tribunal, asking whether “an action leading to a declaratory judgment on the merits” complies with the requirements of Article X(2) of the BIT. A motion under Article 322 of the Federal Code of Civil and Commercial Procedure would allow an investor to submit to local courts the claim for a declaration

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<sup>104</sup> For the examination of such actions, very short periods of time and few procedural acts are provided for, and the dispute must require urgent judicial consideration. Cf. Prof. Mata’s Report, No. 27-30.

<sup>105</sup> TR-E, Day 1, p. 112/3-7. While this statement refers to lawsuits at the national level, similar solutions are to be found in the procedural law of the Province of Buenos Aires; cf. Prof. Mata’s Report, No. 77.

<sup>106</sup> TR-E, Day 1, p. 114/11-13.

<sup>107</sup> TR-E, Day 1, p. 129/1-3.

that a given measure taken by the Government or one of its subdivisions adversely affects its rights under the BIT, and that it requests a judicial decision on the conformity of such measure with the BIT. When further explaining such proceeding, Respondent refers, however, to situations where additional remedies, as compensation for damages, are not claimed at that time because damages deriving from the contested measures did not exist when the dispute was submitted to domestic courts.

175. To be sure a motion for a declaratory judgment would comply with the stricture and objective of Article X(2) of the BIT where the motion seeks to prevent damages from occurring. This would be the case *e.g.* when a declaratory judgment claim is filed before damage has been caused as a result of the impugned governmental action. Prof. Mata distinguished between two sets of proceedings. A first set included all administrative and judicial remedies available to prevent damage. A second set of three or four procedures were identified that contemplate compensatory damages.<sup>108</sup>

176. The prosecution of a cause seeking the prevention of damages, most likely in the form of prohibitory injunctive relief is poles apart from the case *sub judice*. It does not answer the question how such motion for a declaratory judgment on an alleged violation of the BIT could comply with Article X(2) where the dispute, as pled by the claimant, includes, as in the instant case, from the very beginning of the submission of the notice of dispute, a claim for compensation of damages.

177. The *Amparo* action for the protection of constitutional rights (including treaties) has been extensively cited and commented as a device most useful with respect to Article X (2) and (3) of the BIT. Such a proceeding is of a purely declaratory nature. According to the practice briefed to the Tribunal, it does not encompass relief for damages or payments except in the cases where banks were ordered to return funds to customers.<sup>109</sup> The purpose of such an action is to avoid harm and the risk of future damages. It in no way represents an actual claim for pecuniary damages. By nature, proceedings for injunctive relief operate on short notice and contemplate limited parameters for the development and presentation of evidentiary issues.<sup>110</sup> The Tribunal has not found any material support for a more expansive construction of *Amparo* actions in Respondent's submissions on this issue, as this shall be further explained below. Moreover, an *Amparo* action, if adopted, and as stated in Section 43 of the Constitution, can go no further than to declare that a particular law or legal rule is unconstitutional or that it breaches a treaty and violates

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<sup>108</sup> TR-E, Day 1, p. 111/25 – 112/10, 115/20-23.

<sup>109</sup> Cf. Prof. Mata's statement at the hearing, TR-E, Day 1, p. 136/16 – 137/2.

<sup>110</sup> As Prof. Mata explained, this is an "extraordinary action, which is characterized by minimum procedural requirements and little need for debate" (Report, No. 19).

for this reason the Constitution. Such a declaration does not include a statement in regard of its effects on the legal relationship involved in the particular case.

178. In describing declaratory actions as suitable proceedings for purposes of Article X, Respondent seems to distinguish between the claim asserting the prayer for relief and the “dispute” representing the operative facts from which the actual claims emerge. The Tribunal notes, however, that Article X of the BIT does not support such an interpretation. The “dispute”, as referred to in paragraph 2, is the “dispute within the meaning of paragraph 1”, and this definition remains the same in paragraph 3. It is thus the dispute that is submitted by a Contracting Party or by the investor to the other party in an attempt to reach an amicable settlement. When such a dispute includes a request for compensatory damages, as it does in this case, the claim necessarily is included in the subject matter of the dispute to be submitted to local courts if the effort to reach an amicable settlement failed after six months.

179. Article X (2) and (3), when referring to “the dispute”, address the subject matter of the contention in its entirety. It does not entail a reference only to a part of the dispute. If it had referred only to part of the dispute, then, after maturation of the 18 month process before local courts based solely on a motion for a declaratory judgment, Claimants again would find themselves in the awkward posture of having to reinitiate anew the entire six month and 18 month process with the remaining parts of the claim. In short, piecemeal submissions are not contemplated by the Article X rubric and in any event would only be conducive to redundant and inefficient proceedings. Article X, neither expressly nor implicitly, provides for this scenario. Throughout its text, the dispute as the core concern of this Article is used in the singular form and there is no suggestion whatsoever that a claimant would have to submit claims to competent local tribunals on multiple occasions. In this case the dispute has been articulated by Claimants in its broadest sense as early as the date of the notices of dispute with emphasis placed on the losses suffered by Claimants. If Article X(2) is to be accorded full force and effect, the entire dispute must be brought before Argentine Courts in order to provide for a decision on the “substance.”

180. The *Wintershall* Tribunal noted, without further elaborating the matter, that the 18 month rule of the Argentina-Germany BIT does not mention the type of relief that should be sought before domestic courts. The Tribunal also observed that the BIT does not require that it should be the same or similar to the relief sought in international arbitration.<sup>111</sup> This general statement may be correct to a certain extent only because procedural requirements may have the effect that the remedy sought before a domestic judge may differ from an application to an arbitral tribunal. But this

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<sup>111</sup> *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID/ARB/04/14, Award of December 8, 2008, No. 118, 196.

proposition is not the decisive point. The key-concept in Article X of the BIT is the “dispute”, not the relief requested. There is no indication whatsoever that the investor should not be entitled to present its dispute “in full” before a domestic court. The *Wintershall* Tribunal therefore correctly noted that the 18 month rule is premised on the submission of “the *entire dispute* for resolution in local courts.”<sup>112</sup>

181. Likewise, a distinction may be made between the “dispute” and a claim or cause of action. Article X of the BIT does not require that the same cause of action must be brought before the domestic court and the subsequent international arbitral tribunal. As the *Maffezini* Tribunal observed, the submission of a dispute does not necessarily have to coincide with the presentation of a formal claim.<sup>113</sup> It also has been noted that the action brought before a local court need not allege a breach of the BIT; it is sufficient that the dispute relates to an investment made under the BIT. The claim before the local courts must be “coextensive” with a dispute relating to investments made under the BIT.<sup>114</sup> The nature of the “dispute” brought before domestic courts may be broad. The objective of the judicial filing is indeed to provide the domestic court with an opportunity to fashion a suitable remedy that may obviate international arbitration. For such a result to be reached, it is not necessary for the domestic court to adjudicate the claim within the framework of the BIT. What is required, however, is that the cause of action to be adjudicated at the domestic level be of such a nature as to allow for the resolution of the dispute to the same extent as if the claim had been brought before an international arbitration under the BIT. As the *Wintershall* Tribunal stated, it must be possible to bring the “entire dispute” before the competent local court.

182. This Tribunal therefore concludes that to the extent the dispute as raised by a party entails a request for compensatory damages, in addition to a claim for a declaration on an alleged violation of the BIT, both categories of the claim constitute part of the same dispute. When the investor is required to observe the obligation to submit the dispute to local courts pursuant to Article X, this requirement only can be met when both the declaratory and the compensatory claims are susceptible to submission before the domestic courts of the Host State. This predicate does not necessarily require that the same court would have to address both claims so long as it can be reasonably expected that the 18 month timeframe will be respected.

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<sup>112</sup> *Ibid.*, No. 160(2, *in fine*), emphasis added.

<sup>113</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 97.

<sup>114</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID/ARB/97/3, Decision on Annulment of July 3, 2002, No. 55.

d) What *fora* for claims for compensation of damages?

183. When asked to explain the relevance of the various remedies suggested in his Report in light of the Article X(2) requirements, Prof. Mata acknowledged that for purposes of securing an adjudication on a compensatory damages claim before Argentine domestic courts, only an expedited summary action would be available.<sup>115</sup> He added an action based on the BIT and brought directly before the Supreme Court.<sup>116</sup> He also noted that “perhaps a precautionary measure could be obtained,”<sup>117</sup> adding: “but truly I believe that in order to obtain compensation of their damages, the most important remedies are the ones I mentioned.”<sup>118</sup>

184. When invited to address the issue of injunctive relief (precautionary measures), Prof. Mata first mentioned the scenario where such a measure would be of a preventive nature and that courts would be amenable to expediting a decision, but he also admitted that such measure is subject to the final recognition of the claim by the court.<sup>119</sup> Ultimately, such measure would still have to be followed by a proceeding on the merits.

185. Second, another alternative would be for Prof. Mata to raise the precautionary issue autonomously within the 18 month period.<sup>120</sup> With respect to the possibility of a decision on the merits where damages are included, Prof. Mata testified that he “would resort to the expedited procedural remedies.”<sup>121</sup> This alternative is not to be understood as a type of provisional measure but rather as an expedited summary action that would permit, in Prof. Mata’s words, “that the local court would have to try and uphold the terms of the treaty and come to a decision through some sort of expedited remedy.”<sup>122</sup>

186. Prof. Mata acknowledged that his Report was not focused on the issue of compensatory damages:

“In the range of different procedural avenues I referred to in my report, I was not referring to things that are related specifically to damages, rather I was referring to all of the different avenues of recourse available to the subjects of public administration.”<sup>123</sup>

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<sup>115</sup> TR-E, Day 1, p. 85/1-23

<sup>116</sup> TR-E, Day 1, p. 85/13-23.

<sup>117</sup> TR-E, Day 1, 86/5-10.

<sup>118</sup> TR-E, Day 1, p. 86/10-13.

<sup>119</sup> Cf. TR-E, Day 1, p. 87/6 – 88/5.

<sup>120</sup> TR-E, Day 1, p. 88/5-14.

<sup>121</sup> TR-E, Day 1, p. 88/14-18. See also Prof. Mata’s Report, No. 27-30.

<sup>122</sup> TR-E, Day 1, p. 89/12-14.

<sup>123</sup> TR-E, Day 1, p. 96/25 – 97/5.

187. When asked to identify the remedies that would allow courts to settle on damages, Prof. Mata testified:

“In a final decision, yes, the three I mentioned; in other words, very expedited action, original action before the court, or even an ordinary judgment, with a special requirement that the decision would have to be made within 18 months. The other remedies available are in order to prevent damages, but there, as well as in the protection of constitutional rights, you can obtain precautionary measures with a provisional setting of damages.”<sup>124</sup>

188. An expedited action would be based on Article 321 of the Code of Civil and Commercial Procedure, which requires a legal ground allowing for the prosecution of the claim pursuant to this provision. In this connection, Prof. Mata referenced the article of the BIT that mentions the 18 months, “which in any way points to an expedited summary solution to obtain compensation for damages”.<sup>125</sup> This premise notwithstanding, Prof. Mata had to admit that the BIT neither provides for an obligation to be placed on Argentina’s Courts to fashion a remedy within 18 months nor does it require that an adjudication on the merits necessarily comprise compensatory damages.<sup>126</sup> Therefore, Article X of the BIT cannot constitute a basis for requiring local courts of the Host State to act through a summary or expedited proceeding. The Tribunal has to conclude that the evidence is extremely weak to support a position that there would have been a reasonable chance that the claims brought by Claimants, as initially defined in the notices of dispute, would have been adjudicated on the merits pursuant to an expedited summary proceeding. Moreover, this conclusion is further bolstered when considering the nature and complexity of a claim brought under a BIT and the investor’s fundamental right that its action be processed consonant with due process. While insisting that Argentina’s courts enjoyed the means with which to expedite a proceeding, Prof. Mata did not at all examine whether such an approach was compatible with the requirement for proper and fair handling of complex cases concerning international investment law.<sup>127</sup>

189. When Prof. Mata referred to an “original action before the court,”<sup>128</sup> he must have referred to a direct action brought before the Supreme Court under Article 117 of the Constitution.<sup>129</sup> This provision follows Article 116, which enumerates the cases that the Supreme Court is empowered to hear and those proceedings arising “under the treaties made with foreign nations.” According to the first part of Article 117, the Supreme Court shall have appellate jurisdiction in such actions. An appellate

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<sup>124</sup> TR-E, Day 1, p. 116/25 – 117/10.

<sup>125</sup> TR-E, Day 1, p. 91/16-19.

<sup>126</sup> TR-E, Day 1, p. 91/20 – 92/4.

<sup>127</sup> Prof. Mata’s Report does not consider the dispute as it was brought before this Tribunal in relation to the expedited procedural remedies under Argentine Law. In light of his definition of the purpose of the Report (No. 2), he was not asked to do so.

<sup>128</sup> TR-E, Day 1, p. 117/2 s., 138/1-6.

<sup>129</sup> See also Prof. Mata, TR-E, Day 1, p. 85/19-23.

submission of an investment claim to the Supreme Court would not constitute a remedy pursuant to Article X(2) of the BIT. Article 117, however, contains an exception in its second part, which reads:

“but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province shall be a party, the Court shall have original and exclusive jurisdiction.”

Addressing the issue admittedly “over and beyond what I have written in my report”, Prof. Mata explained:

“article 117 of our national constitution makes it possible for claims to be submitted when a party is a province or a foreigner, and this is a possible path which in my opinion was never resorted to in order to try to obtain the highest court of the land in intervening.”<sup>130</sup>

190. This statement is as clear as is Article 117 of the Constitution on the point that on the sovereign’s side, only a province can form part of a proceeding. Such a direct action before the Supreme Court cannot involve the State. Yet the State’s involvement is precisely what Article X(2) requires. The record before this Tribunal is devoid of any evidence suggesting precedent where an investor first filed a claim before Argentine local courts as a predicate to bringing the claim before an international arbitral tribunal. Prof. Mata’s testimony amply comports with the Tribunal’s understanding of the evidence before it:

“Unfortunately, in Argentina’s judicial experience, there is no existence of this direct claim brought by investors before Argentinian justice.”<sup>131</sup>

The Tribunal concludes that such an action before the Supreme Court is not a remedy to be considered as satisfying the requirements of Article X. An ordinary action before a competent local court is the only remedy available to a foreign investor seeking to bring a claim against the Republic of Argentina who is seeking to meet a local court jurisdictional predicate pursuant to a BIT. The question then remains whether such an action has any likelihood to be adjudicated within 18 months in keeping with Article X (2) and (3) of the BIT?

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<sup>130</sup> TR-E, Day 1, p. 66/22 – 67/4. See also a similar but less clear statement in TR-E, Day 1, p. 138/23 – 139/1, stating that “you would have to ask the province and you would have to ask the national state, and both of them would have to be brought before the court.”

<sup>131</sup> TR-E, Day 1, p. 133/23-134/1.



e) The 18 month requirement with respect to ordinary court proceedings

191. It is not contested that Article X(3)(a) does not place on a competent tribunal before whom an investment dispute is pending a requirement to render a decision on the substance within 18 months. This proposition is settled. The rule merely states that if an adjudication is not achieved within this time frame, either party (claimant or respondent) may submit the dispute to an international arbitral tribunal. There is uncertainty when the question is reformulated as whether such an adjudication on the substance would comply with the 18 month rule where the case is on appeal. The Tribunal is inclined to follow Respondent's understanding that the 18 month rule is limited to a first instance adjudication on the merits as a stricture extending to appellate recourse would likely have included appropriate language.<sup>132</sup> As to this narrow proposition, this Tribunal confirms the view taken by the *Maffezini* Tribunal.<sup>133</sup> In any event, the "finality" of a domestic decision is, without more, not by itself dispositive. Indeed, Article X(3)(a) provides for bringing the dispute to international arbitration if it "persists" although a decision on the substance had been reached at the domestic level. In other words, a decision rendered by a domestic court has no *res judicata* effect on an arbitral tribunal notwithstanding compliance with the test that would otherwise cause *res judicata* effect to attach under the domestic law of the Host State.<sup>134</sup>

192. The rule contains an additional element that is of consequence in this case. The procedure to be set in motion when the dispute is submitted to the competent domestic court should be of a nature that allows the issuance of a decision on the substance within 18 months. If no such result can be reasonably expected, such a proceeding would be of no moment because at the expiration of the 18 month period, the investor shall be free to pursue its claim in an international arbitration. An investor would certainly do so after not having reached an adjudication before local courts. Therefore, as a matter of principle, the requirement of Article X(2) can only impose a duty on an investor to the extent that the Host State can meet its obligation of making available a competent court capable of meeting the target of rendering a decision on the substance within 18 months.

193. However, this pronouncement must be coupled with the previously articulated acknowledgement that Article X(3) does not set forth an obligation compelling local courts to render a decision on the substance within 18 months. The plain language of Article X(3)(a), providing for international arbitration "when" no decision on the substance is reached within 18 months, clearly contemplates the possibility that

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<sup>132</sup> Cf. TR-E, Day 1, p. 152/7-17.

<sup>133</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 28.

<sup>134</sup> Cf. *Ibid.*, No. 27, 29, 33.

domestic courts may not dispose of the dispute within that timeframe.<sup>135</sup> Therefore, the correct ruling is that the mechanism provided for in Article X (2) and (3) can be required of an investor only to the extent that the investor is not excluded from filing a claim before a competent tribunal of the Host State, which in turn functions pursuant to rules and working conditions that under reasonable circumstances and given the complexity of an investment dispute may reach a decision on the substance within an 18 month period. If, to the contrary, there is no likelihood that even under the most favourable circumstances a decision on the merits shall not be forthcoming, even at first instance, the requirement in Article X (2) and (3a) would be deprived of its meaning and “*effet utile*.” If this latter outcome is one that an investor is to expect, it would not make any sense to file a proceeding that presumably would require evidentiary showings and extensive briefing. In this regard, the proceeding itself would be inconsequential and the time passed similar to a waiting period. Even Respondent admitted that the goal of the provisions in Article X (2) and (3) of the BIT did not purport to be a waiting period.

194. The question that the Tribunal considers must be addressed in this regard is quite different from an *a priori* assessment that the requirement of resort to local courts is “pointless” – to use the term employed by the *Hochtief Tribunal*<sup>136</sup> – or lacks utility. Rather, this Tribunal is seeking to determine the application of the Treaty language in Article X (2) and (3), which contemplates the availability of a competent tribunal of the Host State that may, upon the submission of the dispute to it, be expected to render a decision on the substance of that dispute within 18 months. The question whether there is such a tribunal is to be determined by this Tribunal on the basis of the evidence presented to it. The principle of effectiveness or “*effet utile*” thus mandates that this requirement be applied and not that it may be disregarded. With that observation in mind, it is now possible to turn to the evidence.

195. By reference to the remedies available for compensatory damages, Prof. Mata acknowledged that “we do not have any experience on compensation for damages before Argentinean courts.”<sup>137</sup> Respondent also acknowledged:

“[...] it is quite true that there was never a case of any investor who brought a claim under a BIT in order to comply with this requirement.”<sup>138</sup>

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<sup>135</sup> As it was observed in *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 104, the rule does not require a prior final decision of the courts, nor even a prior decision of a court at any level. It simply requires the passing of time or the persistence of the dispute after a decision by a court.

<sup>136</sup> *Hochtief AG v. The Argentine Republic*, ICSID/ARB/07/31, Decision on Jurisdiction of October 24, 2011, No. 51.

<sup>137</sup> TR-E, Day 1, p. 86/22-24. Prof. Mata also said that “in my professional experience I do [not] know that foreign investors, on the basis of what is provided for in the investment treaty, in other cases, have resorted to Argentinian justice within the deadline set in the treaty in order to submit a claim to local courts.” (TR-E, Day 1, p. 66/2-8). The Tribunal notes that the word “not” is to be added in the English version in light of the Spanish original: TR-S, Day 1, p. 79/13.

Thus, the debate about a filing of an investment claim before local courts becomes theoretical.

196. The Tribunal finds that Claimants have furnished important evidence based upon the results of a statistical study undertaken within the office of Argentina's Attorney General. Indeed, Mr. Rosatti commented on this study while serving as Argentina's Attorney General. The study covered about 1600 proceedings directed against the Federal Government from 1985 to 2000 similar in nature and complexity to investment disputes. The study yielded two significant propositions. First, the average time in which a ruling on the merits took place was six years and one month. Second, none of the cases considered was adjudicated on the merits at the trial court level within 18 months. It is important to note here that this evidence is uncontroverted. In fact, Respondent has not objected to its content. In addition, Respondent has not disputed the factual basis or any assumption upon which the study is premised. Respondent also has refrained from objecting to the study's methodology, content, conclusions, or quality. In this connection, Respondent did not offer a more recent study or analysis that would somehow mitigate the 1985 to 2000 findings with facts of more contemporary vintage. In light of this uncontested evidence, the Tribunal can draw no conclusion other than to admit that the average duration of proceedings involving the State far exceeds 18 months and that it is extremely rare, if not altogether impossible, to have a proceeding of the nature of an investment dispute conclude, even at the trial court level, within 18 months.

197. The Tribunal examined the collection of judgments filed by Respondent for purposes of demonstrating that claims as in this case can be handled by Argentine courts within 18 months. The Tribunal's own analysis does not allow for such a conclusion. In most copies of the original judgments the commencement date of the proceeding is simply not specified. Respondent has indeed referenced such based dates in the English language summary, but with no supporting information. Three of the ninety cases contained in that summary went over 18 months.<sup>139</sup> In four cases, the claim was declared moot and in four others it was admitted by Respondent. These cases are therefore useless to support Respondent's demonstration. The only case relating to a claim for damages appeared to be frivolous. That action lasted more than 16 months. The complaint concerned a dispute about a difference in the calculation of a compensation payment. The case eventually was dismissed.<sup>140</sup>

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<sup>138</sup> TR-E, Day 1, p. 152/24 – 153/2. The proceeding referred to (but not exhibited) by Claimants in their Answer to the Tribunal's Questions dated March 20, 2012 at No. 59 does not affect this admission, as it sought declaratory relief and not compensation for damages.

<sup>139</sup> No. 3, 31, 32.

<sup>140</sup> No. 53.

198. A considerable number of the judgments have as their subject matter precautionary measures, data protection, public employment, appeals, and *Amparo* actions for delay, none of which can be compared to proceedings designed to reach a (i) “decision on the substance” (ii) in an investment dispute as referred to in Article X of the BIT. More than half of the judgments filed were *Amparo* actions on a great variety of subjects, most of them involving requests for the enforcement and regulations of laws and requests to declare particular statutes unconstitutional. None of these represent cases at all comparable to the action *sub judice*. None of the *Amparo* judgments relate to violations of international treaties or BITs. Respondent at no time has averred that the cases submitted are comparable in complexity to the proceeding before this Tribunal. Contrary to Respondent’s broad assertions, which are nowhere supported by evidence pending before the Tribunal, the judgments thus filed in fact confirm that there does not exist any evidence from which a Tribunal may reasonably infer that an action would be capable of being processed in conformance with the 18 month rule. To the contrary, the record supports Claimants’ contention that it cannot. This Tribunal agrees with Claimants on this point and so holds.

199. The Tribunal also has the benefit of the experience arising from the judicial action that AGBA filed in 2006. While Respondent contends that these proceedings are of no relevance of reference and to the disposition of this case, it cannot deny that they represent a point of comparison. AGBA’s action of December 4, 2006, filed with the La Plata Contentious Administrative Court No. 2, primarily sought to have Decree 1666/06, which terminated the Concession Contract, declared null and void. The action was for declaratory relief as causes of action seeking compensatory damages were reserved for adjudication at a later time. Despite the very limited scope of that proceeding, the action is still pending after *five years*. Respondent did not object to this factual premise, nor did it attempt to demonstrate that this proceeding was exceptional in any regard and that therefore it was hardly representative of the norm. This “close to home” example demonstrates that a proceeding lasting 5 years is not to be understood as being extraordinary or otherwise somehow exceptional.

200. In light of the inadequacies of the alternative remedies suggested by Respondent and testified to by Prof. Mata in his Report, together with the lack of any evidence rebutting the results of the study undertaken within the Office of Argentina’s Attorney General (explicitly referenced in Mr. Rosatti’s article), the Tribunal must conclude that the Republic of Argentina has not undertaken any steps to make available proceedings before its domestic courts that would, even at a minimum level, meet the requirements of Article X (2) and (3) of the BIT.

201. A further topic sheds light on this lack of appropriate handling of investment disputes by domestic courts in the Argentine Republic. Actions where compensatory

damages are sought would be subject to a 3 per cent fee, as Prof. Mata testified,<sup>141</sup> which would correspond to an amount of US\$ 6.3 million based on the claim before this Tribunal.<sup>142</sup> The investor would have to pay this fee if the decision rendered by the Argentine court is adverse to him.<sup>143</sup> It follows for Prof. Mata that such liability would become part of the investor's claim for damages before an international tribunal.<sup>144</sup> However, this assertion is far from self-evident, as such claim does not find any legal support in any of the BIT provisions. Moreover, when asked about the attribution of costs in a scenario where no ruling has issued within the 18 month period, Prof. Mata testified that there is no legal text addressing the concern.<sup>145</sup> The issue concerning the attribution of costs in specific cases governed by a BIT containing an 18 month rule has been left unresolved. The absence of authority also confirms that the Republic of Argentina itself had not provided for the appropriate procedural framework to deal with claims to be submitted to its local courts under Article X(2) of the BIT.

#### 4. Conclusion

202. Based on the findings explained above, it appears that clearly none of the various possible alternative means for litigating before the domestic courts of the Argentine Republic, as presented by Respondent and supported by Prof. Mata, are suitable to meet the requirements of Article X (2) and (3) of the BIT. An investor-state dispute before the courts of Argentina would far exceed the 18 months fixed by Article X(3) of the BIT for purposes of reaching a "decision on the substance." A proceeding that can in no reasonable way be expected to reach that target is useless and unfair to the investor. Claimants were not required to engage in such a "proceeding" pursuant to the provisions of Article X (2) and (3) of the BIT. This conclusion is further supported by the Republic of Argentina's position under domestic law pursuant to which Claimants in any event would lack *jus standi* before the Republic's domestic courts because they are claiming rights allegedly belonging exclusively to AGBA and not to its shareholders. This matter has also to be examined in light of the Republic of Argentina's second objection to the Tribunal's jurisdiction.

203. In light of the foregoing conclusion, there is no need to examine whether the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the BIT is here applicable. As Claimants were not required to comply with the 18 month rule under the facts presented to this Tribunal, the question of the applicability of the MFN clause is moot.

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<sup>141</sup> Cf. Prof. Mata's Report, No. 71; TR-E, Day 1, p. 101/3-14.

<sup>142</sup> TR-E, Day 1, p. 101/9-14.

<sup>143</sup> Prof. Mata, TR-E, Day 1, p. 120/3-6.

<sup>144</sup> TR-E, Day 1, p. 120/6-9, 128/4-7.

<sup>145</sup> TR-E, Day 1, p. 127/15-19, 128/13 s.

### **III. Respondent's Second Objection: Claimants have no legal standing to bring claims for legal rights that belong to another entity**

#### *1. Respondent's position*

204. Respondent requests the Tribunal to reject Claimants' claim because neither general international law, the Argentina-Spain BIT, the ICSID Convention, nor Argentine law provide for indirect or derivative actions. Respondent notes that Claimants assert that both URBASER and CABB are shareholders of AGBA. These parties allege a series of breaches of the regulatory framework. They also acknowledge the contractual nature of the legal relationship on which their claims are based. They additionally contend that their investment in the Republic of Argentina consists of shares in AGBA. Claimants' investment is limited to their shares in AGBA and their claims must be confined to the protection of rights arising from those shares. The rights they seek to enforce do not belong to either Claimant but rather to AGBA. They are not parties to the Concession Contract.

205. Respondent also notes that Claimants assert that the investment is not limited to mere shares in AGBA. Specifically, Respondent asserts that Claimants failed to identify this additional part of the investment, simply because it does not exist. Claimants only complain, so the argument goes, over a series of guidelines and requirements established by the Government of the Province of Buenos Aires. But the resulting conditions were not imposed on Claimants. The purchase of Claimants' shares and attendant undertakings were voluntary acts. No one forced bidders to participate. Claimants knew and accepted the requirements and obligations in order to participate in that Concession.

206. Claimants contend that the investment consisted of AGBA stock and acknowledge that they are not asserting shareholder rights. Claimants' rights as Spanish investors persist. But they can only invoke their own rights. Claimants' attempt to disguise their claim as a "Treaty claim" when, in fact, it is a contractual cause of action over which this Tribunal has no jurisdiction. Respondent has prepared a list of the rights invoked by Claimants and has shown that all of them belong to AGBA. The only effort that Claimants have undertaken to demonstrate that their claims are Treaty claims is to quote BIT provisions. This is not enough. Claimants only have brought contractual claims that relate exclusively to AGBA's Concession Contract. Because they are claims concerning a Concession Contract to which Claimants are not parties and that contains a special forum selection clause, this Tribunal could not possibly have jurisdiction. The case submitted to an ICSID

Tribunal in *Impregilo* is largely identical to this case.<sup>146</sup> In that case the objection to jurisdiction in relation to contractual claims has been admitted. The *Impregilo* Tribunal did not find any element involving the Republic of Argentina's obligations under the BIT, nor evidence of a pattern of acts by State entities aimed at causing damage to *Impregilo* as an investor.

207. Respondent contends that Claimants are overlooking general international law that has excluded legal disputes whose essential basis is the performance of a contract as grounds for jurisdiction. A series of awards have confirmed this principle in the context of investment arbitration. State responsibility for breach of international law is distinct from the liability of a State for breach of contract.

208. Respondent understands Claimants' position as disregarding one of the most recognized and universally accepted general principles of law. All legal systems draw a distinction between companies and shareholders. Whenever a corporate right is undermined by a third party, it is the company, not the shareholder, that the law understands to have been affected. Claimants bring their claims based on alleged violations of rights that belong to AGBA. But they are legally separated from AGBA. Claimants have no legal standing to exercise certain rights vested in AGBA, of which they are but shareholders.

209. General international law does not provide for indirect actions. The rights invoked must be clearly vested in those who claim them. Claimants are not vested with the rights they claim because those rights belong to AGBA. A company's shareholders cannot complain of alleged violations of rights vested in the company in which they only hold shares. They are limited to bringing claims regarding direct damages to their specific rights. If this principle were not so, certain shareholders would be able to take advantage of potential benefits from derivative actions, to the detriment of other shareholders.

210. Respondent explains that the matter was considered in the *Barcelona Traction* case before the International Court of Justice. Even though *Barcelona Traction* was a diplomatic protection claim, Respondent submits that authority to be applicable to this dispute. Assuming that a distinction between diplomatic protection and investment protection is warranted, it bears no relation to the rights that can be asserted. Shareholders may only claim rights to which they were entitled as shareholders under domestic law. International tribunals have no jurisdiction over such rights. The European Court of Human Rights also has rejected the admissibility of indirect actions. Shareholders can only assert indirect where, in every single case, the claims are predicated on an express provision authorizing the filing of such claims. Indirect

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<sup>146</sup> Cf. *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011.

or derivative claims are *prima facie* inadmissible under general international law. They may be specially allowed, but these allowances constitute exceptions.

211. The extraordinary nature of such claims is recognized in NAFTA in a specific provision included in Art. 1117 NAFTA. Some BITs also include similar provisions. Such a rule would allow Claimants to invoke their indirect control in order to assert AGBA's rights. The Argentina-Spain BIT has no comparable provision. This BIT provides no room for modifying *sub silentio* the Host States' corporate law principles. While the BIT does protect shareholders, such protection does not imply that shareholders may claim rights to which they are not entitled. No provision in this BIT intends to modify the ownership of allegedly protected rights. The mere fact that the BIT has shares in companies identified as protected investments cannot mean that the corporate law of both States is being redrafted so as to allow shareholders to invoke the rights of the companies in which they hold shares.

212. Respondent further observes that the ICSID Convention does not allow for indirect or derivative claims to be filed. The scope of Article 25 may not be modified by the parties. The matter was considered during the Convention's negotiation, as many investors operate through domestic companies. But direct access to ICSID for controlling shareholders of domestic companies was rejected. Instead, Article 25(2)(b) was included, which provides for an exception in the case of locally incorporated companies under foreign control, in order to avoid leaving investors unprotected. If Claimants' claims were to be admitted, this provision would be futile.

213. In light of the referenced provision, the domestic company has legal standing if it is subject to foreign control. This provision cannot be deprived of its meaning. Indirect claims are thus contrary to the ICSID Convention. Claimants deny that this provision is the basis of their claim and argue that the language of this provision is not intended to preclude direct access to arbitration by shareholders. Respondent never has alleged this proposition. The shareholders categorically are precluded from invoking the rights of the company and Article 25(2)(b) does not provide for such authorization.

214. The Argentina-Spain BIT does not protect foreign investors who have indirect shareholdings in the companies on which the claim is based. The content of foreign investments is determined by the laws of the Host Contracting State. Article I(2) of the BIT only includes property and rights acquired by foreign investors. This BIT does not include indirect claims to be filed. Claimants may only rely on rights directly owned by them. The BIT refers to shares of stock or other forms of participation in companies. It does not protect mere shareholder interests in companies where they have an indirect shareholding. According to Respondent, Claimants' allegations are not grounded on any right but on their mere interests in AGBA. The Republic of



Argentina did not undermine any rights held by URBASER and CABB in their capacity as shareholders in AGBA. Claimants are insisting on rights not held by them but vested in AGBA. The BIT does not consider indirect shareholdings, controlled companies or owned by foreigners, or interests in companies to fall within the category of investments. Claimants' comments referred to cases that were not relevant or to BITs that include the term "indirect." The ICSID decisions on which Claimants rely are either irrelevant or they have been so rendered under BITs where the indirect shareholders and their interests in companies are expressly under the protection of the BIT. The BIT expressly states that "the content and scope of rights corresponding to the various categories of assets shall be determined by the laws and regulations of the Party in whose territory the investment is situated" (Art. I[2.2]). Claimants claim rights to which AGBA would be entitled, which would be derivative since they involve claims for rights of third parties to this arbitration. Neither the ICSID Convention nor this BIT provide for this type of action.

215. Respondent also argues that URBASER owns an indirect shareholding interest in AGBA through Urbaser Argentina SA. The BIT does not provide for such indirect shareholders or shareholder interests to be protected.

216. International law does not define shareholder rights. Resort should therefore be made to domestic law, as stated in *Barcelona Traction*. Claimants' shareholder interests in AGBA allows them to exercise the rights arising from the ownership of those shares, as defined by Argentine corporate law. But these rights do not comprise rights vested in AGBA.

217. The relevance of Argentina's law derives from Article 42 ICSID and Article I(2) of the BIT, as well as the decisions of the International Court of Justice. Argentine corporate law provides for a structural scheme of companies. The board of directors is responsible for the management and representation of the corporation. The board has legal standing to institute any proceeding that may be deemed fit to safeguard corporate assets. And the proceeds of corporate actions become part of the corporate assets. Only the corporation can defend its own interests. No provision of Argentine corporate law provides for a shareholder to bring a claim on behalf of the corporation. A derivative claim brought by a shareholder is an attempt to misappropriate assets belonging to the company and, therefore, is contrary to the interests of other shareholders and third parties. The ownership of shares in AGBA does not authorize Claimants to bring any derivative action pursuant to the doctrine of subrogation. Claimants' interests cannot be equated with AGBA's rights. Claimants brought neither a corporate action on AGBA's behalf, nor an individual action. Under the laws of the Republic of Argentina, it is not possible for anyone to subrogate their rights into the rights of another person, except under extraordinary circumstances. Argentine law does not allow for indirect claims to be filed. Respondent submitted a

Legal Opinion authored by Prof. Nissen that serves as a further explanation of these fundamental aspects of Argentine corporate law.

218. Respondent further argues that Claimants' claim is based on alleged breaches of contract that purportedly caused harm, mainly, to AGBA. But Claimants simply cannot ignore the relationships created between AGBA and its creditors, debtors, and third parties. AGBA's creditors fall into a category of persons who have a preferential right to be satisfied from corporate profits. Their claims are to be collected out of AGBA's assets. If Claimants' claim were to succeed, all rights held by AGBA's creditors would be undermined. Therefore, the collection of profits demanded by Claimants necessarily must go through a process where it is determined whether there are net profits of the company. Also, the shareholders must decide whether dividends must be paid from these profits. The principle that creditors have a preferential right to collect their claims is applicable to all corporations in a free market economy. Argentina's bondholders also have a preferential right. Claimants' strategy is to circumvent these corporate law principles. Were they to prevail before this Tribunal, Claimants would be allocated a share of those profits over which AGBA's creditors enjoy a preferential right. This would result in their unjust enrichment.

219. There is an actual risk that any amount recovered as a result of the claim would be added to the indirect shareholders' assets, resulting in direct harm to assets of AGBA (and all of its creditors, including bondholders and employees). Claimants' assets would increase, causing an unjust enrichment. Shareholders have no right to the preservation of the value of their interests. There is also a risk of double or multiple claims because AGBA was not precluded from filing an action before domestic courts in addition to Claimants' illegitimate claim. This could result in double recovery. Argentina corporate law proscribes such situations.

220. Every treaty admitting a type of action permitting shareholders to claim rights of a corporation in which they are serving as shareholders provides that both the investor and the domestic corporation shall (i) waive any other venue, and (ii) that any compensation awarded shall be payable to the domestic corporation. The Argentina-Spain BIT does not contemplate such an action, as Claimants initiated. The Tribunal must abide by the law applicable to this dispute, and only claims under such legislation should govern the rights of the Parties. If compensation is granted to Claimants, it will be detrimental to the rights of other shareholders. Claimants allege that they are merely seeking their respective pro rata share based upon their individual shareholder interest. This ad hoc solution does not comply with Argentine law. Shareholders do not hold rights *in rem* on a pro rata basis in relation to corporate assets. Claimants also argue that any detriment caused to an AGBA creditor give rise to liability on the part of the Province and not Claimants. This proposition misses the point that creditors' rights can only be exercised against AGBA. Directly

compensating indirect shareholders as if they had a preferential right over creditors has no legal ground. To the contrary, creditors have a preferential right to collect their claims. In any event, Claimants can only claim rights corresponding to them as shareholders under the Argentine law. This is not what they are doing in this case.

## 2. *Claimants' position*

221. Claimants argue that they prosecute their claim in their own name and based on the damage inflicted on their investment. The investment consisted of the acquisition and subscription of shares in AGBA in its capacity as Concessionaire. In most cases Claimants' acquisitions were made by them, but for a small percentage of URBASER's shares, their interest was acquired through its fully owned subsidiary in Argentina. The measures implemented by the Republic of Argentina had a detrimental effect on the concession granted to AGBA. The performance of the Concession Contract was AGBA's sole corporate purpose. Claimants assert no claim for the damages that AGBA itself sustained. Their claim arises from the damage they have suffered because their investment was destroyed. This damage, although related to AGBA, is separate and distinct from AGBA. Claimants' standing to sue does not exclude, nor is it incompatible with, a claim brought by the Concessionaire before a competent court. The Government exercised good faith and best efforts to promote privatization and investment. There can therefore be no dispute as to the standing of the investors to bring claims. The requirement to set up a local corporation and the corporation's incentives to attract investors would result in a material inconsistency were the shareholders not deemed to be investors for purposes of defending their interests pursuant to a legal dispute. CABB and URBASER were directly involved in the entire investment process. All stock subscriptions and acquisitions constitute one single investment made by Claimants.

222. The rights Claimants assert arise from the BIT and, even though part of the facts that have led to the filing of a claim also encompass breaches of contractual obligations by the Grantor, they constitute violations of obligations undertaken by the Republic of Argentina as a BIT signatory. Some of the actions that the Regulatory Agency and the Grantor have intentionally and systematically undertaken, so it is alleged, rise to the level of material breaches of contract. Additionally, they entail clear violations of the governing Regulatory Framework. Other measures complained of, as those arising from the Emergency Laws, are beyond the ambit of contractual disputes and are directly expropriatory. These violations of internationally acknowledged principles of protection are amply memorialized in the BIT.

223. In its analysis Respondent omits a significant part of the claims. The violations of the Regulatory Framework were breaches of contract, but they were also violations

of the rights of the investors under the BIT. The alleged breaches include the termination of the Concession Contract for political reasons and the adoption of emergency measures, plus the amendment to the Regulatory Framework approved in 2003. Claimants allege that no single element in their claim is “just a contract claim.” Respondent argues that a breach of contract may not be construed as a violation of a BIT. Respondent, however, acknowledges that the operative contractual instrument, the Concession Contract, forms part of the Regulatory Framework. This Framework had been presented to the investors as an incentivizing feature intended to attract their investment. Thus, the infringement of any of the contractual elements, so it is asserted, necessarily includes the violation of the Regulatory Framework applicable to the investment. Put simply, each forms part and parcel of one concept. It is hard to understand how Respondent intends to treat as mere contract claims what has been asserted as a material violation of the basic rights granted to the investors under the Regulatory Framework.

224. Respondent argues that Claimants are acting on behalf of the Concessionaire, AGBA. The investment was made in AGBA under the assumption and acknowledgement that AGBA was the Concessionaire. These are the indivisible elements of the same transaction. But Claimants do not fashion claims for the protection of their rights as shareholders. They act in furtherance of their own rights in their capacity as Spanish investors. Respondent refuses to acknowledge that Claimants act on their own behalf and in furtherance of their individual rights. It also refuses to note that Claimants’ legitimate expectations of benefits disappeared and that this frustration of expectations triggers the application of the BIT. Respondent elects to disavow all international awards that in similar circumstances have ruled for the investor and against the Host State. Many ICSID tribunals indeed have found that a breach of contract may as well be considered a breach of a BIT.

225. The Tribunal simply has to be satisfied that, if the Claimants’ allegations were proven to be correct, then the Tribunal has jurisdiction to consider them. Claimants have standing to bring an action under the BIT regardless of whether particular acts or omissions may be classified also as breaches of the Concession Contract. The primary classification of a dispute as an exclusively contract claim or referring to an investment matter depends on the Claimants’ allegations, unless such classification is *prima facie* unlikely. The facts as Claimants have presented them to this Tribunal allow for a *prima facie* case qualifying those alleged violations as likely related to an investment.

226. Respondent premises its allegations almost exclusively on the *Impregilo* Award that decided jurisdiction jointly with the merits. The position of this Tribunal is different. This Tribunal has to decide whether it has *prima facie* authority to hear the matters submitted to arbitration. The *Impregilo* Award limits the acceptance of the

objection that the Claimants' claim is only a contractual cause of action. Respondent ignores an important material fact in analysing *Impregilo* that is not present in this case. The *Impregilo* Award found that a jurisdictional clause in the Concession Contract does not prevent the parties from resorting to arbitration under a BIT. The existence of a jurisdiction clause in a contract in no way may affect the claims brought by the investors against the Host State of investment (which are not usually parties to that contract). The *Impregilo* Award resembles this case in as much as it states that the Argentine Republic's objection is upheld to the extent that contractual breaches do not simultaneously concern violations of rights under the BIT. Claimants disagree with *Impregilo* as to the existence of contractual claims separate and distinct from BIT violations. In this case, the Host State's conduct principally concerns violations of the investors' rights.

227. Claimants had no choice other than to purchase shares in a company organized in the Republic of Argentina. Claimants were free, but their choice and decision to invest were affected by the promises, representations, and commitments made to them as investors. The formula on how to set up the investment was designed and implemented by the Grantor. An Argentine corporation was to be incorporated within the Host-State's territory. This corporation's shares would be subscribed by the winning bidder. This procedure was so structured under the Bidding Terms and Conditions, and it was reiterated in the Concession Contract. That contract prescribed that the Concessionaire's sole purpose would be to perform the Contract. Respondent's position is that such a structure deprives foreign investors of the rights enshrined in the BIT signed by the Republic of Argentina. CABB took part in the bidding process and became the awardee; it was required to invest through the subscription of AGBA's stock. URBASER was subject to the same promises, representations, and commitments when it acquired stock. It did so at a very early stage, before takeover by the Concessionaire on December 15, 1999. URBASER's investment also is protected by the BIT.

228. Respondent does not offer juridical support for its argument that the ICSID Convention does not allow indirect or derivative claims to be filed. Respondent's reliance on *Barcelona Traction* is erroneous at its starting point, considering that the investors' claims for damage sustained directly by them in their investment are indirect claims. Respondent argues that a general principle of customary international law may not be repealed other than expressly, but it relies solely on *Barcelona Traction* for this proposition. It does not acknowledge that these are precisely the rights under the BIT. The purpose of Article 25(2) ICSID is to broaden the scope of jurisdiction. The partial indirect investment is for 1.0687% of AGBA only, which belongs to Urbaser Argentina SA. That entity in turn is entirely owned by URBASER. Respondent's position has been repeatedly rejected by other Arbitral Tribunals. For Respondent, the only distinction is that for diplomatic protection the State of

nationality of the aggrieved party files the action, whereas in a case of investor protection, it is the aggrieved party itself that does so. A doctrine exclusively based on diplomatic protection does not apply.

229. The rights of investors are regulated in the BITs. The Argentina-Spain BIT provides Claimants with their investor status. The BIT contains an international rule which allows claims by shareholders, even where they hold a minority stake.

230. Claimants' position is that the BIT protection applies to both direct and indirect participations in companies. Claimants further assert that Respondent is confusing indirect participations with indirect claims. When discussing derivative claims, Respondent refers to damage caused to AGBA. When discussing indirect participations, Respondent refers to Claimants' indirect shareholding in AGBA. CABB has a direct 20% interest, and URBASER 26.3425%, to which an indirect interest of 1.0687% is to be added. All of these shareholder interests are BIT-protected. Only this 1.0687% constitutes an indirect stake of URBASER, held by a company that in turn is fully owned by URBASER. Indirect share interests also are protected as investment. The word "directly" used in Article 25(1) ICSID refers to the relationship between the dispute and the investment, not to the relationship between the investment and the claimant investor. The language of Article 25(2)(b) is not intended to preclude direct access to arbitration by shareholders. The language of the Argentina-Spain BIT makes no such distinction. It leaves room for all types of assets and all forms of participation in companies.

231. Respondent places considerable emphasis and weight on the definition of investments in the Argentina-Spain BIT. Respondent argues that the BIT exclusively refers to "shares and other forms of participation in companies" (Art. I[2]), whereas Claimants' indirect claim is not grounded on any right but on their mere interest in AGBA. Claimants note, however, that the rule quoted above includes "other forms of participations as investments" and the definition on top of that provision refers to "any kind of assets." No distinction between "direct claims" and "derivative claims" is made or otherwise suggested by the operative BIT provisions. Respondent's distinction is, so say Claimants, consequently groundless.

232. Claimants emphasize that their claim is not based on their shareholder rights but rather on their investor rights. Respondent denies shareholder standing to assert a claim in its own name for rights that belong to the company in which the shares are held. But as Claimants are not asserting shareholder rights and claims, then it follows that the jurisdictional challenge cannot be based on arguments that relate to shareholder rights and claims. Respondent chose to distort the terms of the claims.

233. Respondent argues that stockholders or the creditors would sustain damages were Claimants' claim allowed to succeed. This proposition, however, rests on a slim reed. The Republic of Argentina signed BITs. Respondent's domestic law provisions cannot preclude protection afforded by an international treaty or otherwise authorize treaty violation pursuant to organic law or executive decree. Respondent cannot rely on AGBA and the rights its mere existence creates as to third parties in order to deprive the investors of their rights under an international treaty. These issues have no bearing on jurisdiction. The fact that the Concessionaire was affected and harmed does not keep the investors from filing a claim under a BIT. This Tribunal has jurisdiction notwithstanding and without prejudice to the jurisdiction of the local courts, over a different type of action that may be brought by other parties or by the investors themselves but in their capacity as shareholders, asserting shareholder rights. Thus, claims filed by other shareholders or actions based on preferential rights and the avoidance of double recovery are issues to be dealt with in the framework of domestic law, but they cannot be raised as obstacles to the investor's protection as safeguarded by the BIT and to be protected by the Host State.

234. Damages are not equal to dividends. Claimants seek damages from the person who caused the damage. When assessing the losses sustained by the shareholders, the Concessionaire's obligations are to be taken into account, as with any other responsibility regarding third parties, no differently. Claimants invested in the Republic of Argentina under a Regulatory Framework that has been repeatedly violated. They claim the strict repair of damage directly affecting their equity as compensatory damages arising from breach of the commitments undertaken in the BIT. Thus, Claimants conclude therefore that Respondent's second objection must be dismissed.

### 3. *The Tribunal's findings*

235. The Tribunal notes at the outset that it is for Claimants to state the claims they are submitting to this arbitral jurisdiction. It is for them to say what they consider to be the "dispute" arising between them and the Republic of Argentina.

236. Claimants repeatedly have stated that they are prosecuting claims in their own names and in their individual rights. They have denied – and this has been acknowledged by Respondent – that they are asserting shareholder rights in AGBA of any kind. This is confirmed in the presentation of their claim in the Memorial on the Merits. Claimants' Prayer for Relief seeking compensation for damages is exclusively based on provisions of the BIT, *i.e.* Articles III(1), IV(1) and V.

237. Claimants also deny that their claim is at all derived from claims AGBA may have against the Republic of Argentina, the Province of Buenos Aires, or any other third party. Respondent insists on the derivative or indirect nature of Claimants' claim. Respondent's objection, however, is directed against a claim that is not before this Tribunal. Claimants repeatedly have stated that their claim is not based on any legal ground that would allow a shareholder of AGBA to raise a claim based on behalf of AGBA or pursuant to a hypothetical legal title that would allow a shareholder to raise in its own name a claim that is based on a relationship to which the company alone is party, and not the shareholders. Claimants have not brought such a claim before this Tribunal, nor did they assert any shareholder rights that would not be compatible with Argentine corporate law. This renders moot Respondent's extensively debated argument of asserting that Claimants were lacking title to invoke their shareholder rights for the purpose of bringing a claim before this Tribunal that belongs to AGBA and not to them.

238. In as much as Respondent's objection is taken as it stands, *i.e.* that Claimants have no legal standing to bring before this Tribunal indirect or derivative actions based on legal rights that belong to another person, as AGBA, it is sufficient to acknowledge that Claimants do not raise such a claim and therefore dismiss the objection.

239. Respondent's explanations demonstrate, however, that its objection has a broader scope. Respondent contends that Claimants not only have no title to claim legal rights belonging to AGBA, but that they have no other title to bring any of their claims before this Tribunal.

240. Respondent notes that Claimants' arguments and evidence in support of their claim show that their claim is entirely based on legal rights of a contractual nature over which this Tribunal has no jurisdiction. These rights are arising from alleged violations of the Concession Contract and/or based on changes in the Regulatory Framework, all of them constituting rights that belong to AGBA. For Respondent, this has been convincingly demonstrated in the Award rendered in the case brought by *Impregilo*, another shareholder of AGBA, before an ICSID Tribunal, where *Impregilo's* claims were considered in most part as purely contractual and therefore not under the Tribunal's jurisdiction as it is determined by the ICSID Convention and the Argentine-Spain BIT.<sup>147</sup>

241. However, in this regard as well, Respondent objects to Claimants' legal standing as to a claim that is not before this Tribunal. Claimants accept that part of the harm they have suffered and the corresponding relief to which they are entitled may

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<sup>147</sup> *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011.



be of a contractual nature. However, they have also argued that such contractual claims are not included in the relief requested from this Tribunal. Respondent objects that Claimants have no legal standing to claim for legal rights based on contract while Claimants have clearly stated that their claim does not comprise any such claim. Respondent's objection is therefore equally moot in this regard and dismissed by the Tribunal.

242. This finding notwithstanding, Respondent's objection has another facet that is revealed when contending that Claimants' claim is purely contractual. This objection also means that because of its contractual nature, Claimants have no claim to submit to this Tribunal in their alleged capacity as investors under the Argentina-Spain BIT. Respondent submits that the investment made by Claimants comprises exclusively rights and assets related to their shareholder interest and that, in addition, their rights as shareholders do not include any title to claim for rights belonging to the company. As no such right to which AGBA is entitled exclusively is submitted to this Tribunal, Respondent concludes that Claimants are not holding any investment in relation to the Concession which would allow a claim to be brought under the BIT.

243. Respondent's position is that the Argentina-Spain BIT accepts as an investment made by a foreign national in the form of an acquisition of shares only the rights attached to shareholder status under the domestic laws of the Host State, whereas the assets used for such an acquisition are not considered as an investment to the extent they created rights and obligations to which the company is exclusively entitled, but not the shareholders. In this connection the shareholders receive the economic benefit of their funding, if any, pursuant to any increase in the value of their shares and the dividends attached to them. This position, argued on the basis of domestic corporate law, has the effect, however, that the foreign funder of the capital provided to allow the Concessionaire to operate under the Concession is not included in the range of the rules and guarantees for protection of the BIT because its funding does not qualify as an investment.

244. The Tribunal notes that Respondent's basis to argue this position is to be found in its understanding of the role of domestic corporate law governing investments by foreign partners, but modest consideration has been accorded to the purpose of the BIT and the need for economic support that investments require if a Host State wants to receive them. Indeed, setting aside black letter domestic corporate law, what is the economic likelihood of success of a position requiring foreign investors to operate in the Host State's territory through an investment vehicle structured under domestic corporate law, if this has the effect of taking the shareholders' investment out of the BIT's protection?

245. The question that remains to be addressed in connection with Respondent's second objection is whether Claimants have, as they assert, a legal title to submit a claim exclusively based on their status as investors under the BIT.

246. Article I(2) of the BIT is unequivocal in stating that an investment includes ("such as") "shares and other forms of participation in companies." The Contracting States did not limit the scope of this provision to cases where the foreign investor holds a 100% or otherwise controlling shareholder interest in a company incorporated in the Host State. This Article expressly states that any definition provided with respect to particular items is listed as being understood "but not exclusively."

247. In relation to Impregilo's shares in AGBA, the *Impregilo* Tribunal concluded from Article 1(1)(b) of the Argentina-Italy BIT<sup>148</sup> that if AGBA was subjected to expropriation or unfair treatment with respect to its concession "such action must also be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT."<sup>149</sup> As the Tribunal also noted, there is substantial case-law establishing that claims such as those presented by Impregilo enjoy protection under the applicable BITs. The issue before this Tribunal is identical to that case. And the fact that the pertinent provision of the Argentina-Italy BIT mentions expressly that the notion of "shares" and "participation in a company" includes "minority or indirect interest," does not appear in any way at variance compared with Article I(2) of the Argentina-Spain BIT, which, while not mentioning "indirect interest" as being included, clearly does not at all exclude such interest from the scope of the provision. Moreover, it uses the words "but not exclusively" before listing the investments "in particular." This BIT is thus comparable with the Argentina-Germany BIT that has been interpreted by the *Siemens* Tribunal as covering a wide gamut of "investments", including "indirect investments", further stating that the treaty does not require intermediate entities between the investment and the ultimate owner of the company.<sup>150</sup>

248. The fact that shares of a company represent legal rights and obligations in relation to the corporation does not preclude them from having other vested rights. Shares are qualified as a "kind of assets" and are therefore an investment which by definition is not limited to nor even focused on rights under corporate law. Article I(2) of the BIT does not restrict the rights attached to shares exclusively to shareholders' rights concerning the company and other shareholders. It merely states that "shares"

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<sup>148</sup> This provision is slightly more explicit than the corresponding rule in the Argentina-Spain BIT and reads as follows: "(b) shares of stock, interests or any other form of participation, including minority or indirect interest, in a company established in the territory of each Contracting Party."

<sup>149</sup> *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011, No. 138 and further No. 245 s.

<sup>150</sup> *Siemens A.G. v. The Argentine Republic*, ICSID/ARB/02/8, Decision on Jurisdiction of August 3, 2004, No. 137, 150.

are an “investment”, which means that they come under the protection guarantees of the BIT. The rights under the BIT have a legal standing of their own, which are governed exclusively by international treaty law and cannot be altered by the domestic law of the Contracting States. Therefore, the definition of “shares” as an “investment” holds irrespective whether under domestic law, the only rights attached to these titles are related to the company’s standing and operation.

249. Many other ICSID Decisions and Awards have considered this type of objection and rejected it. The leading ruling, often quoted in other decisions, appears to be the statement made by the *Siemens* Tribunal with respect to the Argentina-Germany BIT, which is on this point comparable to the Argentine-Spain BIT, as it does not contain an explicit reference to direct or indirect investment. It would be of little interest to repeat again what has been stated in all of these decisions, beyond of what has been noted above.<sup>151</sup>

250. Such an indirect investment also may be held through a subsidiary company holding shares in the local company that serves as the “investment vehicle” in practice.<sup>152</sup> The Tribunal further observes that because Claimants’ investment as shareholders of AGBA is covered by the BIT, this reasoning also must apply to URBASER’s holding of 1,0687 % AGBA’s shares by Urbaser Argentina S.A., a company which is under its 100% control. The Argentina-Spain BIT does not exclude from indirect investments shareholder interest in companies incorporated in the Host State that are holding in turn shares in another domestic company.<sup>153</sup>

251. This being said, the Tribunal also notes that if the rights related to shares include rights of their holders for protection of its investment under the BIT, they may

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<sup>151</sup> Cf., among others, *CEMEX Caracas Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID/ARB/08/15, Decision on Jurisdiction of December 30, 2010 No. 149-158; *Joseph Charles Lemire v. Ukraine*, ICSID/ARB/06/18, Award of March 28, 2011, No. 39; *Sempra Energy International v. The Argentine Republic*, ICSID/ARB/02/16, Decision on the Request for Annulment of the Award of June 29, 2010, No. 102 s.; *Ioannis Kardassopoulos v. Georgia*, ICSID/ARB/05/18, Decision on Jurisdiction of July 6, 2007, No. 124; *Continental Casualty Company v. The Argentine Republic*, ICSID/ARB/03/9, Decision on Jurisdiction of February 22, 2006, No. 76-86; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID/ARB/03/19, Decision on Jurisdiction of August 3, 2006, No. 46-51; *Gas Natural SDG S.A. v. The Argentine Republic*, ICSID/ARB/03/10, Decision on Preliminary Questions on Jurisdiction of June 17, 2005, No. 34; *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID/ARB/01/3, Decision on Jurisdiction of January 14, 2004, No. 38-49; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID/ARB/01/8, Decision on Objections to Jurisdiction of July 17, 2003, No. 36-68; *Azurix Corp. v. The Argentine Republic*, ICSID/ARB/01/12, Decision on Jurisdiction of December 8, 2003, No. 59-66, 73 s., Decision on the Application for Annulment of September 1, 2009, No. 76-130.

<sup>152</sup> Cf. *CEMEX Caracas Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID/ARB/08/15, Decision on Jurisdiction of December 30, 2010 No. 156-158; *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID/ARB/01/3, Decision on Jurisdiction of January 14, 2004, No. 50-56.

<sup>153</sup> This makes a significant difference in comparison to the Award of April 21, 2006, *Berschader v. Russian Federation*, Stockholm Chamber of Commerce, No. 080/2004, where foreign shareholders were holding their shares in a foreign company which was itself entitled to claim protection under the BIT (No. 129, 135, 140-150). This had been noted in *CEMEX Caracas investments B.V. v. Bolivarian Republic of Venezuela*, ICSID/ARB/08/15, Decision on Jurisdiction of December 30, 2010, No. 154.

include other rights that are of a nature purely based on domestic law, for which this Tribunal has no competence. Claimants do not claim such rights. Indeed they assert that their claims exclusively are based on the BIT. The crucial point here is that Claimants are acting under their own rights as investors through shares acquired in AGBA under the BIT, rights that are different from any rights attached to their shares under domestic law.

252. The Tribunal equally dismisses this objection to the extent that it purports to assert that Claimants' claims are of a purely contractual nature and unrelated to rights under the BIT, all the more as this BIT does not contain an umbrella clause. These claims, if qualified as contractual in "nature", could not be brought by Claimants as they would involve matters dealt with in the Concession Contract to which neither Claimant is a party. There would be no basis in the BIT for examining such claims by this Tribunal and that is why Claimants contend that they are not raising any such claims.<sup>154</sup> Claimants also argue, however, that their investment had suffered from unjustified or discriminatory measures, was not afforded fair and equitable treatment, and was subject to illegal and discriminatory expropriation – all these concerns raising issues under the BIT, to which the dispute resolution provision of Article X of the BIT fully applies. BIT provisions are triggered even though certain issues may also raise contractual rights or obligations under domestic law that are not within the competence of this Tribunal. This finding also means that exclusively contractual claims do not come under this Tribunal's competence; however, such an issue, if included in Respondent's objection, is moot as it is admitted by Claimants that they do not raise such claims before this Tribunal.

253. The Tribunal is aware of the risk that the proceeding in the instant case and the parallel proceedings initiated by AGBA before domestic courts in the Republic of Argentina could lead to a recovery for damages in both proceedings, which could ultimately, at least theoretically, raise an issue of double recovery in favour of Claimants as investors and shareholders of AGBA, as well as a conflict in interest with AGBA's other creditors who are not parties, at least, to any of the referenced proceedings. Such a risk, however, is inherent in many investment disputes that also raise, directly or indirectly, a possible option for recovery on the purely domestic level. This configuration does not in any way constitute a restriction on the jurisdiction of this Tribunal pursuant to the Argentina-Spain BIT. Hence, as stated by the *Impregilo* Tribunal,<sup>155</sup> if compensation were granted to AGBA at the domestic level, this would affect the claims brought under the BIT, and conversely, compensation under the BIT may affect claims submitted by AGBA before Argentine

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<sup>154</sup> The situation on this point is the same as for the Tribunal in *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011, No. 185.

<sup>155</sup> *Impregilo S.p.A. v. The Argentine Republic*, ICSID/ARB/07/17, Award of June 21, 2011, No. 139.

courts.<sup>156</sup> The issue will, if necessary, be addressed at a later stage of this proceeding, along with the merits of the dispute.

254. In reaching this conclusion, the Tribunal wishes to emphasize that while its jurisdiction is limited to claims brought by Claimants under the BIT for damage suffered by them arising from their investment in the form of shares in AGBA, the Tribunal does not have jurisdiction over any AGBA claims, any claims arising from damage suffered by AGBA, or any claims premised on damages suffered by other AGBA shareholders. Although AGBA is not a party to this proceeding, the Tribunal has nevertheless jurisdiction to consider and issue factual findings regarding the conduct of the parties to the Concession Contract, including AGBA, to the extent that such findings may be relevant to the Tribunal's consideration of arguments advanced by either Claimants or Respondent.

#### **IV. Respondent's Third Objection: The investment invoked by Claimants is not a protected investment under the Argentina-Spain BIT**

##### **A. Preliminary matters**

255. This last objection is divided into three parts. First, Respondent contends that URBASER's investment was not in compliance with the laws of Argentina when it acquired all of Dycasa's shares in AGBA through an agreement concluded on September 28, 2001, although part of these shares had been classified as non-transferable for a period of six years after the entry into force of the Concession Contract, subject to authorization from the Grantor to that effect. Second, Respondent stated in its Reply on Objections to Jurisdiction that it recently had learned that CABB also had engaged in an illegal transfer of AGBA's shares when it transferred its shareholder interest to URBASER S.A., Aguas de Bilbao S.A., BBK and Sociedad para la Promoción y Reversión Industrial (SPRI) through participation agreements that imply serious violations of the law governing the holding and transfer of shares in AGBA. Third, Respondent objects that CABB had no standing to resort to ICSID Arbitration without the prior express authorization of the Kingdom of Spain, which it did not request nor obtain.

256. Claimants assert as a preliminary matter that these objections had been untimely raised. While the first objection was raised in Respondent's Memorial on Objections to Jurisdiction, the other two objections were submitted in Respondent's

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<sup>156</sup> Cf. also *Azurix Corp. v. The Argentine Republic*, ICSID/ARB/01/12, Decision on Jurisdiction of December 8, 2003, No. 101, Decision on the Application for Annulment of September 1, 2009, No. 113 s.

Reply on Objections to Jurisdiction only, in such a manner that their belatedness is even more serious. Claimants note that Arbitration Rule 41(1) provides that objections to jurisdiction must be raised as soon as possible. When the Parties agreed upon a time frame for the filing of submissions on jurisdictional objections, according to Claimants the Parties had stipulated and agreed that these submissions would relate to the two objections Respondent had mentioned at an early stage in its response to the Request for Arbitration and not for the purposes of raising new jurisdictional issues for the first time. In Claimants' view, these grounds suffice to dismiss all of these objections as untimely according to Arbitration Rule 41(1).

257. The Tribunal observes that the Parties had agreed, with the Tribunal's approval, that this proceeding would be governed by the ICSID Convention, the Arbitration Rules and the provisions of the Procedural Agreement, as well as any other agreement that the Parties may reach in the future (No. 5 of the Procedural Agreement). Claimants rightly observe that for Arbitration Rule 41(1) the primary rule is that jurisdictional objections be made "as early as possible." However, the secondary rule is that such objections shall be raised no later than at the end of the time-limit for the counter-memorial. This second rule overrides any possible sanction of an objection for not having been raised as early as possible but still within this second time-limit. In any event, the applicable rules in the instant case are those of the Procedural Agreement, where, under Number 14, the sequence of the filing of the Parties' submissions is stated. It is provided in that paragraph of the Procedural Agreement that the Republic of Argentina shall file its Memorial on Objections to the Jurisdiction of the Centre sixty days following receipt of the Claimants' Memorial on the Merits (sub-para. 3). Further, "once the objections to the jurisdiction have been raised," Claimants may file a Counter-memorial on Objections to Jurisdiction (sub-para. 4). No determination is made concerning which objections specified by Respondent at an earlier stage shall be dealt with exclusively in the Memorial on Objections to the Jurisdiction. It was therefore proper for Respondent to include in this Memorial any jurisdictional objection it elected to raise.

258. The next question is then whether Respondent's Reply could properly raise new objections to jurisdiction not previously raised. The Procedural Agreement provides that only upon the request of a party and after consultation with the other party, will the Tribunal decide whether a second exchange of briefs shall take place at the jurisdictional stage (sub-para. 5). In the absence of any further indication as to the possible content of Respondent's Reply, it cannot be concluded that the Procedural Agreement did prevent Respondent from raising additional jurisdictional objections in its second submission on this matter. Moreover, Respondent contends that it did find support for parts of its objections in documents only very recently made available, that triggers application of Arbitration Rule 41(1) *in fine*. All parts of Respondent's Third Objection are therefore to be examined by the Tribunal. It may be added that under

Arbitration Rule 41(2), in any event, “the Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.”<sup>157</sup>

259. Respondent’s basic position in this respect is that compliance with the laws of the Host State is a fundamental requirement of the Argentina-Spain BIT, as contained in Article I(2), which states that the term “investment” shall mean “any kind of assets, such as property and rights of every kind, acquired or effected in accordance with the legislation of the country receiving the investment.” Similar terms can be found in Article III of the BIT. Respondent adds that the reference to its laws must include administrative regulations, court decisions, as well as the Bidding Terms, the Concession Contract, and the Regulatory Framework, which are all part of Argentine law.

260. The Tribunal is fully aware of the basic requirement that an investment is required to be made in compliance with the laws of the Host State in order to be accorded the protection provided by the BIT. The Tribunal is also aware of the fact that the illegal or irregular exercise of rights attached to assets representing an investment under the BIT cannot lead to a disqualification as a valid investment, but must be dealt with through the pertinent mechanisms for the resolution of disputes that may be applicable under the circumstances. The requirement for compliance with the laws of the Host State is focused on the entry and the initiation of the investment. The subsequent conduct and operation of the investment is relevant within the framework of the application of the BIT and comes under the Tribunal’s jurisdiction on the merits. The borderline of the distinction to be drawn is not always easy. As the explanations detailed below establish, this Tribunal does not need to develop abstractly the analysis of this matter.

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<sup>157</sup> Cf. *Azurix Corp. v. The Argentine Republic*, ICSID/ARB/01/12, Decision on Jurisdiction of December 8, 2003, No. 68.

B. The transfer of AGBA shares held by Dycasa S.A. to URBASER S.A.

I. *Respondent's position*

261. Respondent explains that on September 28, 2001, URBASER acquired all of the shares held by Dycasa S.A., a company governed by the laws of the Republic of Argentina, in AGBA. URBASER accordingly became the holder of 27.42% of AGBA's shares, in violation of the legal provisions of the Concession. This Contract provided in Article 2.3.3 as follows:

“Additionally, fifty-one per cent (51%) of the voting share capital of the concessionaire, including the minimum percentage required to be owned by the Operator and excluding the shares allocated to the ESOP, shall be represented by nominative shares which may not be transferred during the first six (6) years of the Concession, unless upon the prior and express approval of the Executive Branch. This authorization shall not be granted, however, for the transfer of the percentage of shares owned by the Operator pursuant to Article 2.3.2. The aforementioned restrictions shall also apply to any increases in the Concessionaire's capital.”

A similar provision was contained in the Bidding Terms and in AGBA's By-laws (Art. 4.5 and 4.6). In Respondent's view, Claimants' argument that the shares were transferable but subject to approval is misleading. The applicable provisions establish the requirement of a prior and express approval. There is no reference to a tacit or tolerated approval.

262. Respondent notes that URBASER acknowledged that it had purchased from Dycasa 2,099,052 non-transferable shares and had informed the Grantor of said transfer, while ORAB merely had been notified. There was thus no authorization neither requested nor granted. AGBA's letter to ORAB of September 30, 2002 explained that it was a mere reorganization of the same group, not requiring authorization. This shows at least that URBASER was aware of the requirement, as AGBA submitted the matter to ORAB for advice. On October 21, 2002, however, the Rules and Regulations Department of ORAB rendered an opinion and did raise objections. ORAB noted that prior and express approval should have been granted not by ORAB but by the Executive Branch of the Province of Buenos Aires.

263. The transfer of these shares was supposed to be made no earlier than on December 7, 2005, when the six year term had elapsed. The agreement with Dycasa was completed on September 28, 2001. In Respondent's view, URBASER was aware of its illegal behaviour when it stated in a Note describing AGBA's successive stock transfers that Dycasa had to remain formally the shareholder of record of the 2,099,952 non-transferable shares. It is thus established for Respondent that this



transfer of shares took place in September 2001, when it was illegal. URBASER increased its share interest in AGBA in an illegal and fraudulent manner. Respondent concludes that the Tribunal should declare its lack of competence regarding a claim arising from such an unlawful manoeuvre.

## 2. *Claimants' position*

264. Claimants state in reply that there was no illegal transfer of Dycasa's shares in AGBA. Claimants note at the outset that Respondent wrongly states that URBASER acquired Dycasa's shares and thus became the holder of 27.42% of AGBA's shares, all of which were obtained in violation of the Concession. Before September 28, 2001, URBASER already was the holder of 16.8748% shares; and from Dycasa's shares, 2,641,878 were free-transferable and only 2,099,952 subject to authorization, representing 4.66656% of AGBA's equity. Therefore, the challenge only is limited to 4.66656%, leaving the remaining 22.74564% unaffected.

265. Claimants observe that Respondent focuses mainly on an opinion issued by the Rules and Regulations Department of ORAB of October 21, 2002, stating that approval was to be given by the Grantor and was still missing. But this opinion does not say more than that approval is also required for transfers of shares among companies of the same group. Respondent fails to make reference to other opinions and documents that demonstrate that URBASER acted with diligence and transparency, that there was a general opinion in favour of the transfer, and that any decision became useless as after six years following the takeover shares could be freely transferred.

266. Moreover, Claimants refer to a Report of the Under-Secretary of Public Services dated February 5, 2003 (*sic*, not 2002 as stated in the document),<sup>158</sup> noting that granting such request would not pose a problem. The Report of the Government's General Advisory Office dated February 28, 2003<sup>159</sup> explained that the Executive may issue the relevant Decree. Claimants did find in AGBA's file further documents showing that no objection was raised regarding the transfer of shares, but merely that information was requested. Consequently, ORAB's Note of April 21, 2003 stated that the Agency was aware that the transfer occurred and it requested information so that the Grantor may assess whether the authorization should be granted. In response to another Note from ORAB, dated November 10, 2003, further information was supplied in AGBA's Note of May 11, 2005. Through a Note of ORAB of July 29, 2005, the case was then filed with the Under-Secretary of Public Services. There was no subsequent request for documentation or resolution. And six years after the

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<sup>158</sup> Cf. TR-E, Day 2, p. 218/5-22, 280/16-25, 288/5-7, 289/4-10.

<sup>159</sup> On the corrected identification of that date, cf. TR-E, Day 2, p. 220/16-22, 280/11-13, 289/11-15.

takeover, during which time the approval for the transfer was taking place, the approval was no longer required. As such, the Grantor rendered no decision.

267. In a Note of March 31, 2006, AGBA informed of this the Under-Secretary of Public Services of the Province of Buenos Aires, identifying each of its shareholders along with its share interest. CABB appeared holding 20%, URBASER 26.3434% and Urbaser Argentina 1.0687%. The Concessionaire also stated that since January 4, 2006, the distinction between transferable and non-transferable stock was inapplicable. The Under-Secretary agreed with this last remark in its Note to ORAB of April 20, 2006, relating to Impregilo, stating that the original request has become moot. The Grantor was fully aware of the transfer and ultimately concluded that the approval was no longer required. The acquisition of shares of Dycasa by URBASER was completely transparent. In Claimants' view, Respondent's challenge is groundless.

### 3. *The Tribunal's findings*

268. The Tribunal finds it important to distinguish clearly between the agreement reached between Dycasa and URBASER, where Dycasa undertook to transfer its shares in AGBA to URBASER, and the actual transfer of the same shares with the effect of transferring shares from Dycasa to URBASER.

269. From the Parties' submissions and the references contained in various documents, it appears that the agreement on this transfer of shares as concluded between these two companies is contained in a document dated September 28, 2001. This document, however, has not been produced and does not form part of the Tribunal's record. The same transfer of shares is referred to in a letter sent to the AGBA Board of Directors on November 28, 2001 by companies having share interests in AGBA, according to which they represent that they consent to the transfer of 4,741,829 class "D" shares from Dycasa to URBASER, and to another transfer of class "C" shares from Impregilo S.p.A. and Iglys S.A. to Impregilo International Infrastructures N.V. This letter has been submitted by Claimants. It necessarily implies that the agreement between the shareholders involved had been reached prior to this communication sent to AGBA on November 28, 2001.

270. The Expert Report presented by Prof. R.M. Manóvil also stated that on September 28, 2001, URBASER and Dycasa entered into a stock purchase and sale agreement concerning class "D" shares of AGBA (No 4.16). The Expert further explained that the shareholders' information concerning this transaction and other transfers of shares was sent to AGBA on the same day (No. 4.18, 5.18). When faced with the request to produce this document, Claimants explained that Prof. Manóvil in

fact actually intended to refer to the letter dated November 28, 2001, and that the agreement in relation to the transfer of shares of September 28, 2001, albeit mentioned in his Report, had not been provided to him. At the hearing, Prof. Manóvil acknowledged the confusion<sup>160</sup> but stated that it had no impact on his conclusions because the mechanics involved are the same, *i.e.* the execution of a stock purchase agreement being followed by the notification to the corporation of the transfer of shares.<sup>161</sup>

271. Claimants also submitted to the Tribunal a “Letter describing AGBA’s successive stock transfers.” This document does not present any letter format, as it lacks any indication concerning the author, the addressee, and its date. It was declared to be a summary prepared by Claimants.<sup>162</sup> It contains a detailed listing of the changes in AGBA’s share ownership between 1999 and 2006; its conclusions explain the specifics of URBASER’s shareholder interest in AGBA and the fact that this company qualifies as an investor. The document indicates that a stock purchase agreement was signed on September 28, 2001 between URBASER and Dycasa for the transfer of 4,741,829 of AGBA’s class “D” shares, and that this document was followed by a letter by AGBA’s shareholders dated November 28, 2001, informing of the transfer of shares (which is then described).

272. Although the Tribunal did not see the agreement of September 28, 2001, there is clear evidence that such agreement was concluded on that date and then followed by a communication of the details of the transfer of shares agreed upon as addressed to the company AGBA two months later, on November 28, 2001. This level of knowledge also suggests that the Tribunal has not been presented with the details, if any, of the agreed transfer of Dycasa’s shares and, in particular, the 2,099,952 shares qualified either as non-transferable or as being subject to authorization, representing 4.66656% of AGBA’s equity. Other documents provide clarification.

273. In the letter sent by the shareholders to the Board of Directors of AGBA on November 28, 2001, it was stated that it was the understanding of the undersigned:

“that the Authorization of the competent authority overseeing AGBA’s Concession Contract (the ‘Concession Contract’) shall be solely required for the transfer of the following shares subject matter of the transfers, subject to the limitations set out in Article 4.7 of the Bylaws and Section 2.3 of the Concession Contract, [...]: (i) with regard to the Transfer from DYCASA to URBASER, 4.666560%; [...].” [The omitted parts relate to the transfer of shares of Impregilo].

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<sup>160</sup> TR-E, Day 2, p. 200/23-203/9, 203/21-205/2, 213/17-214/7, 237/11-246/11, 265/13-24.

<sup>161</sup> TR-E, Day 2, p. 212/15-17, 214/12-20.

<sup>162</sup> TR-E, Day 2, p. 257/1-20, 258/16-22.

It was thus the understanding of the authors of the communication, including Dycasa S.A. and URBASER, that the transfer of the 2,099,952 shares held by Dycasa was subject to authorization within the limits contained in Section 2.3 of the Concession Contract and Article 4.7 of the Bylaws. These facts also establish that the agreement of September 28, 2001 could not on its own operate the transfer of these shares, assuming that this would have been its content. As stated by Prof. Manóvil, such authorization was a condition for the enforcement of the agreement, *i.e.* to have the ownership of the shares actually transferred and rendered effective vis-à-vis the corporation.<sup>163</sup>

274. This was also the understanding of Mr. O. P. Biancuzzo, Executive Vice President of AGBA, when he wrote on September 30, 2002 to the Agency (ORAB) to inform it about the transfer of shares between Dycasa and URBASER. In this respect, the letter drew a distinction, stating that Dycasa S.A. “(1) has transferred 2,641,877.2 non-endorsable nominative Class D shares [...]” and “(2) intends to transfer 2,099,952.1 non-endorsable nominative shares [...],” these latter shares being “subject to an agreement to keep a non-transferable interest in AGBA.”<sup>164</sup> When describing the details of the operation, the letter again explains that Dycasa had transferred to URBASER all of its freely transferable shares, while URBASER “intends to acquire Dycasa’s non-transferable interest,” represented by 2,099,952.1 shares. The letter further states that the transfer of shares agreed upon by Dycasa and URBASER does not amount to a change in AGBA’s share ownership, because it takes place as part of a mere restructuring of the business group to which both of these companies belong. The author of the letter concludes that he understands that the intended transfer of a non-transferable interest is but the corollary of the transaction previously considered and approved by the Bidder and that he believes that no subsequent authorization under the Concession Contract should be required. AGBA’s representative did not conclude, however, that he considered the transfer as authorized and thus to be finalized. He stated that he did submit the matter to ORAB for its consideration, or through it to the consideration of the body empowered to analyse the question.

275. In its reply dated October 21, 2002, ORAB stated that prior and express approval of the transfer of these shares should be granted not by ORAB but by the Executive Branch of the Province of Buenos Aires. Claimants quote various other official statements, referred to above, which support, more or less clearly, the granting

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<sup>163</sup> TR-E, Day 2, p. 212/15-17, 214/15-20.

<sup>164</sup> The distinction between the given numbers of transferable and non-transferable shares of Dycasa S.A. has not been disputed before the Tribunal. Under the Bidding Terms, the non-transferable shares had to represent 51% of the voting capital stock (Sec. 3.2) and the details of the stock participation of each bidding member was to be determined in a relationship agreement between the members, which had to be filed with the Prequalification Bid (Sec. 4.2.1[h]) and listed in Annex 5 (Sec. 3.2). The respective portions of non-transferable shares were identified in AGBA’s By-laws (Sec. 4.5). Dycasa S.A. became holder of a portion of such non-transferable shares when it became shareholder of AGBA through the acquisition of the stockholding of Sideco Americana S.A., as authorized by Decree No. 757 dated March 27, 2002 (cf. also the Report of Prof. Manóvil, No. 4.8-4.15).

of such authorization. However, none of them actually issued such authorization or officially declared that it was not required. The certificate provided by AGBA confirming that Dycasa and URBASER were part of the same economic group did not produce such effect either, nor did the suggestion prevail, as supported by Prof. Bianchi,<sup>165</sup> that there did not exist a restriction on transfer of shares where it occurred between those who were already AGBA's shareholders.

276. The documents submitted to the Tribunal provide evidence that by letter dated "November 2002" Dycasa S.A. informed AGBA that it had transferred 2.641.878 class "D" shares to URBASER and that it requested this transfer to be recorded in the Shareholder Register. By virtue of decisions taken by AGBA's Board of Directors and recorded in its Minutes, this was done on December 4, 2003, when Stock Certificate No. 12 was issued in favour of URBASER for 2,641,878 class "D" shares, while Stock Certificate No. 11 was delivered to Dycasa S.A. for its remaining 2,099,951 shares. Consequently, Stock Certificate No. 6, representing Dycasa's initial holding of 4,741,829 shares was cancelled.

277. Hence, Dycasa S.A. in 2003 remained an owner of 2,099,951 shares that were only transferable upon authorization. The Tribunal's record is devoid of any evidence that would show a change of the ownership structure of AGBA until 2006. Claimants' Note describing AGBA's successive stock transfers does not record any movement in 2004 and 2005. It explains the events occurring in 2006, which are supported by the documents submitted to the Tribunal. By letter of February 13, 2006, Dycasa S.A. informed AGBA that it had transferred 2.099.952 class "D" shares to URBASER and that it requested this transfer to be recorded in the Shareholder Register. Based on the Board of Directors instructions of March 14, 2006, Stock Certificate No. 11 was revoked and Stock Certificate No. 13 issued in the name of URBASER, and representing the same number of shares. Through its letter dated March 27, 2006, AGBA informed ORAB accordingly, stating that the six year time limit provided for in the Concession Contract had passed and that therefore, these 2.099.952 shares had become freely transferable, raising URBASER's participation in AGBA's shareholding to 26,34%. As well, Prof. Manóvil observed that in the registry of shares there was no inscription or entry concerning the transfer of shares requiring authorization before the time period of six years had elapsed, which means that no violation of a legal norm occurred.<sup>166</sup>

278. The conclusion to be drawn from these factual findings is that the transfer of these 2.099.952 shares from Dycasa to URBASER became effective on March 14, 2006 only. To the extent this transfer implies an increase in URBASER's investment in

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<sup>165</sup> Prof. Bianchi's Second Opinion, No. 29-39; TR-E, Day 2, p. 294/8-295/10.

<sup>166</sup> TR-E, Day 2, p. 224/18-225/3.

AGBA, it took effect not earlier than at this date. It follows that no violation of Article 2.3.3 of the Concession Contract and of the parallel provisions in the other instruments relating to the Concession did occur, as the six year time limit had elapsed when the transfer of these shares became effective. The Tribunal also finds that these provisions did apply to the transfer of shares only; they did not in any way prohibit or declare illegal a contractual undertaking concluded earlier in view of such transfer to become operative when possible in the future.

279. In light of these factual elements relating to the transfer of shares and the actual handling by the shareholders involved, the Tribunal finds that Respondent's objection based on an alleged abuse or fraud must fail. The transfers as realized and as envisioned regarding the non-transferable shares of Dycasa was transparent and known to AGBA and the Agency in the years 2001/02. No objection based on fraud or similar grounds had ever been raised on anyone's part or behalf. The Grantor was entitled to invoke its right under Section 14.1.3(o) of the Concession Contract to terminate the Contract by reason of a non-authorized transfer of shares. If it did not so act it may be assumed that this omission was justified because there was no ground for such termination and certainly no cause for any suspicion of fraud possibly committed by AGBA's shareholders.

280. In its descriptive Note on the AGBA's shareholder changes, Claimants admit that in relation to the transfer of shares agreed upon on September 28, 2001, "the truth is that the transfer of only 2,641,878 shares – those that could be freely transferred – was actually formalized, and 'on paper' Dycasa was required to keep title to the other 2,099,952 non-transferable shares until the restriction was no longer effective, that is, until February 2006." They add that because this "privately-executed agreement" was "unenforceable against third parties (the Grantor and the ORAB, among others) in terms of ownership of the non-transferable shares, Dycasa continued to appear as a shareholder solely for formal corporate purposes, as stated in the duly submitted stock purchase agreement." The same Note adds as a legal interpretation not developed in Claimants' submissions that nevertheless, URBASER had acquired on September 28, 2001 Dycasa's whole interest in AGBA, on the basis of an agreement governed by Section 35 of the Corporate Law whereby Dycasa S.A. brings in as a third party a partner with respect to the interest that this shareholder owns in the company. In Claimants' view, this statutory concept of a "partner's partner" would make possible the qualification of URBASER as an investor in terms of Article I(2) of the BIT, which includes in the concept of investment "shares and any other form of participation in a company." Proceeding on this same line of argument, Prof. Manóvil referred to the concept of the partner's partner<sup>167</sup> and to a sort of internal partnership ("sociedad

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<sup>167</sup> Report No. 5.26-5.32; TR-E, Day 2, p. 251/19-22.

accidental o en participación”),<sup>168</sup> with the effect that the transfer of shares was actually carried out between the parties, while with regard to AGBA, it had to be completed by an authorization, the notification of this authorization to the company, and its inscription in the registry of shares.<sup>169</sup>

281. The Tribunal does not share this view. As it is admitted in the same Note, the share transfer concerning the 2,099,952 shares was unenforceable against third parties and it could not, therefore, constitute an investment in the relation to the Republic of Argentina as Host State under the BIT, as long as the transfer did not become legally valid and effective. And for such transfer to take place, the registration on the shareholders’ registry was required.<sup>170</sup> Even if one would qualify URBASER as “partner” of Dycasa S.A. when this company was still holding its second package of shares, such partnership would exclusively relate to the internal relations between these two companies, but not create any “form of participation” in AGBA for which such agreement would be, based on Claimants’ own admission, unenforceable. Further, the legal construction presented in the above mentioned Note necessarily supports the ill-advised conclusion that it would be possible for the same group of shares to be held by two different investors, one who is holding the property and another who appears as its “partner.” This scenario certainly is not one that Article I(2) of the BIT intends to cover. There is no language whatsoever in the BIT that regards this scenario as an asset within the meaning of Article I(2), which asset has to be acquired by a prospective and not-yet confirmed transferee of AGBA’s shares. Therefore, URBASER S.A. cannot be considered to be a shareholder in relation to shares in which it had an “economic interest” only, as long as their transfer had not been undertaken legally and effectively. As Prof. Nissen told the Tribunal, there is no distinction between shareholder rights that are undisclosed and formal shareholders in Argentine corporate law.<sup>171</sup> In any event, Claimants’ argument on this line of reasoning is moot because the stock purchase agreement that would constitute the legal basis for such a transfer of an “economic interest” has not been submitted to the Tribunal.

282. The Tribunal thus arrives at two conclusions. First, the acquisition of the shares of Dycasa S.A. by URBASER was legally carried out. No illegal act was committed regarding the transfer of the initially non-transferable 2,099,952 shares, because such transfer became effective in March 2006 only, after the moment when the six year term during which an authorization was required had elapsed. In this respect, Respondent’s objection must be dismissed.

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<sup>168</sup> TR-E, Day 2, p. 269/17-271/13.

<sup>169</sup> Report No. 5.15-5.21, TR-E, Day 2, p. 246/17-247/19, 250/2-251/18, 272/9-20, 333/18-335/7.

<sup>170</sup> Cf. Prof. Manóvil and Nissen, TR-E, Day 2, p. 333/24-335/14.

<sup>171</sup> TR-E, Day 2, p. 174/1-11.

283. Second, the fact that this transfer occurred in March 2006 only also means that the increase in the investment of URBASER that was represented by these 2,099,952 shares became effective after the January 24, 2006 date, when URBASER's Notice of the dispute was filed with the Government of the Republic of Argentina, but still more than a year before the Request for Arbitration was filed in July 2007. The Tribunal finds that the relevant date for determining the assets composing the investment is the filing of the Request for arbitration. The fact that URBASER had chosen to commit itself contractually with a third party to make such an investment at an earlier stage in no way affects this point, which is concerned with the date on which the investment was actually made for the purpose of Article X of the BIT. This means that the 2,099,952 shares transferred to URBASER in March 2006 are part of the latter's investment and, consequently, included in the scope of this Tribunal's jurisdiction. Whether, and if so, to what extent, there were thereafter alleged breaches of the BIT that did actually have an effect on the value of these shares, as registered in March 2006, and caused harm to URBASER is to be determined at the merits phase of this proceeding.

C. CABB's shareholder interest in AGBA and its participation agreements concluded with third parties

1. *Respondent's position*

284. Respondent notes that CABB was the Technical Operator of the Concession granted to AGBA. The identity of the Operator was very important because it was holding a key-position in the operation of the Concession. It was in line with this role that the Operator was required to hold a 20% interest in the capital and voting rights, and that its shares were absolutely non-transferable, no authorization being possible for any transfer. The share interest of the Operator is addressed in Section 2.3.2 of the Concession Contract, which reads:

“Operator is required to be the holder of a minimum 20% of the nominative shares and voting rights of the Concessionaire, which shall be non-transferable for the first six (6) years. After the expiration of said term, Operator may reduce its holding with the prior approval of Grantor, provided Operator holds no less than 10% of the nominative shares and voting rights of the Concessionaire. After the first 12 (twelve) years of the Concession, Operator may freely transfer its holding. The restrictions set forth herein shall also apply in the event of increases in Concessionaire's capital.”

For Respondent, the importance of the *intuitu personae* of the Technical Operator's identity cannot be sufficiently stressed. Its unique standing is the reason why its



shares must represent a 20% minimum holding that shall not be transferred during the first 6 years of the Concession.

285. Respondent was thus surprised when it learned that CABB had proceeded to arrange transfers by means of participation agreements in favour of Urbaser, Aguas de Bilbao SA, the Consorcio Bilbao Bizkaia (BBK), and Sociedad para la Promoción y Reconversión Industrial (SPRI). In Respondent's view, CABB acted in blatant bad faith when entering into such agreements with companies of unknown technical competence behind the Agency and the Grantor. On the basis of the information recently discovered, Respondent declares to have sufficient grounds to assert that CABB violated the laws applicable to the Concession. Respondent further avers that CABB concealed those agreements. The documentation that Claimants have yet to submit, in Respondent's view, shall confirm these illegal transfers.

286. Respondent learned that these agreements had been concluded by a publication in *El País* of January 9, 2006, where BBK and SPRI were named as shareholders in AGBA. Respondent concluded from this information that CABB transferred its responsibility to pension funds, thus emphatically violating all its commitments.

287. Respondent also discovered in the 2001 Audit Report of the Basque Court of Accounts on Consorcio de Aguas Bilbao-Bizkaia ("Informe de Fiscalización"), issued on March 17, 2003, that the Consortium's budgets have contemplated no allocation of funds to complete the referenced acquisitions:

"[...] los presupuestos del Consorcio no han contemplado consignación presupuestaria alguna para hacer frente a la citada toma de participación."  
(page 55)

Thus, more than two years after the Concession was granted, CABB still had not allocated any funds. This hiatus is reflected in the Minutes of CABB's General Assembly of February 22, 1999 where it was decided that no funds from the Consortium would be allocated in the event the concession were to be granted:

"indica el Presidente que, tal como se acordó por la Asamblea, en ningún caso se aportará capital procedente del Consorcio en la sociedad a constituir en caso de resultar adjudicatarios."

The Audit Report explains that CABB entered into 10 participation agreements with various companies for a total amount of 3,735 million pesetas. Respondent complains that these transactions were not disclosed to the Province of Buenos Aires for information nor authorized by CABB's General Meeting (as this should have been done under CABB's bylaws). It further explains that the Audit Report states that CABB had subscribed for 22.2% of the stock capital, which, in violation of the

Concession, was transferred in full to third parties, such as URBASER, Aguas de Bilbao SA, BBK, and SPRI, to such an extent that CABB's actual participation was zero.

288. Respondent explains that the Report demonstrates that CABB never paid for its shares in AGBA. CABB explained to the Court of Accounts that the acquisition was made by means of participation agreements, with no funds coming from the Consortium's budget. The acquisitions were formal, all rights and obligations being assigned to companies that were notably solvent. CABB admitted before the highest regulatory agency of the Basque Country that it made no contribution in connection with its shareholder interest in AGBA regarding its interest in AGBA as a matter of mere formality, while the actual shares were in the hands of "other companies." Respondent submits that this conduct violates Sections 2.3.1 and 2.3.2 of the Concession Contract. CABB also incurred in significant legal irregularities. The Basque Agency noted that CABB's activities in Argentina were not accompanied by the compulsory legal and economic reports, the participation agreements were not approved by the General Meeting, and that CABB was banned from participating in the bidding process for the Concession in question because it could only act within the scope of the municipal districts it comprises.

289. Respondent complains that CABB intentionally withheld from the Republic of Argentina and this Tribunal the existence of side agreements with Urbaser, Aguas de Bilbao SA, BBK, and SPRI. CABB did not have its holding of 20% that it assigned to third parties, without informing the authorities in Argentina. Claimants' failure to submit the documentation requested on July 27, 2011 evidences their deliberate intention of concealing these participation agreements and shows their bad faith. CABB overtly infringed the laws applicable to the Concession, committing wilful fraud against the Grantor. Had CABB's violations risen to the Grantor's attention, it would have constituted sufficient grounds for termination of the contract because of the Concessionaire's fault (Section 14.1.3).

290. Respondent concludes that CABB manifestly acted in violation of the laws of the Republic of Argentina and the provisions of the Concession Contract. Respondent thus objects to CABB's alleged standing as an investor protected by the BIT.

## 2. *Claimants' position*

291. Claimants reject Respondent's objection by stating that CABB did not transfer its shares in AGBA. Respondent's whole argumentation fails because accounts in participation agreements, governed by Spanish law, do not require the transfer of shares, which are held by the managing partner who is the only person to have a relationship with respect to the other shareholders and the Concessionaire. These

types of agreements represent just another kind of financing that belongs to CABB's internal affairs. The operation based on such agreements was held legally valid and it did not have the effect of transferring CABB's shares in AGBA to any third party. Respondent's objection is therefore totally inadmissible.

292. Claimants explain that accounts in participation agreements are a means of financing and a legitimate practice expressly admitted and governed under Spanish Laws, recognized by Spanish courts, and widely used in business. Such an agreement is entered into by a managing entity and a non-managing entity pursuant to which the former receives capital contributions from the latter, for purposes of dedicating them to its business or commercial activity. There are at least two parties, a manager or managing partner, and a participant. Based on Sections 239-243 of the Spanish Commercial Code, the key elements of the legal regime are: (i) contributions of funds that become the property of the managing partner; (ii) no formal or material type of publicity; (iii) the managing partner retains the ownership of its business; (iv) a right of the participant to share in the profits earned in such percentage as may be agreed. Essential is the existence of one single managing partner who retains ownership of the business. It follows from this that such participation agreements do not grant to the participant management powers or any capacity to act as a shareholder. It does not take part in the decision-making process of a company at any level. The participant has the same relation with the company as that of a bank that grants a loan to one of the company's shareholders, which means that it has no relation at all.

293. Claimants have submitted one account in participation agreement, concluded between CABB and URBASER on May 23, 2000, retaining all others because they involve third parties (presumably Aguas de Bilbao SA, BBK, and SPRI). It is submitted that this agreement is sufficient to demonstrate that it is nothing more than a source of financing.

294. Referring to Respondent's position, which leads to the idea that the purpose of such agreement was to maintain formal ownership of shares, while its true title has been transferred to a third party, Claimants note that quite to the contrary, the participation agreement between CABB and URBASER expressly states that the management of the activity shall be exclusively vested in CABB. Participants (like URBASER) are not allowed to participate in the management of the business. They may have a share in the profits/losses of the business, but not in the business itself. No transfer of ownership or change in the shareholder's identity is contemplated. The participant does not take part in the decision-making process. The business remains in the hands of the manager-owner.

295. Claimants note that CABB always has remained the owner of its shares in AGBA. The agreement concluded with URBASER S.A. refers to CABB's actual

ownership and states in Recital 2 that CABB's actual interest in AGBA is of 22.22% (which corresponds to 20% when ESOP is excluded). CABB had made direct contributions to AGBA's capital out of its bank accounts. CABB took an active role in the Concessionaire by serving on its Board of Directors and as Operator. Claimants note that since 2000, the annual accounts of CABB evidence this shareholder interest (Sec. 6.3, 6.4).

296. Claimants observe that Respondent's challenge is based on the Audit Report of the Basque Court of Accounts dated March 17, 2003, which had to be prepared in compliance with Spanish law. The BIT only provides that the investment be made in accordance with the legislation of the Host State. Respondent is therefore not entitled to go beyond the requirements of that legislation. The irregularities to which Respondent pointed were not considered important. In the Report of 2008 it was stated that the gaps and deficiencies noted earlier had been reduced to a significant extent. Moreover, CABB's auditors raised no objections concerning the investment and the relevant records in CABB's accounts.

297. Claimants further underscore that CABB's General Assembly, at a special meeting dated February 24, 1999, approved CABB's participation in the bidding process. The acquisition of AGBA's shares has been authorized by CABB's General Assembly.

298. When Respondent refers to the February 1999 Assembly where it was said that no funds pertaining to CABB should be allocated to the Company, it referred to a remark of the President, which in fact meant that CABB would finance its contribution in AGBA with external funds. Accordingly, the contribution was not to be made out of CABB's budget. As of December 31, 2001, it was accounted as extra-budgetary funds. Starting in 2002, it was also recorded as budgetary funds.

### 3. *The Tribunal's findings*

299. This second part of Respondent's third objection concerns CABB's title as shareholder in AGBA, which is among other things (in Respondent's view) a prerequisite for its legal standing in this proceeding. Both Argentine authorities and AGBA acknowledge that CABB operated since the beginning of its involvement as one of AGBA's shareholders, and, even more specifically, as its Technical Operator. The dispute relates to the conclusion drawn by Respondent from the accounts participation agreements that had, in Respondent's view, the effect of causing CABB's shareholder interest to be transferred to the beneficiaries of these agreements who also assumed the burden of financing CABB's participation in AGBA. As to the actual payment for CABB's shareholder interest tendered to AGBA, Respondent has

not in any way rebutted Claimants' statement and evidence that CABB had tendered this contribution to AGBA's capital from its own bank account.

300. While Respondent mentioned ten such agreements, the Tribunal recognizes only two of them, and expresses its regret that Claimants were not willing to submit more than one of those exemplars. The figure of ten agreements was gleaned from the 2001 Audit Report issued by the Tribunal Vasco de Cuentas Públicas of March 17, 2003. That Report referred to all of CABB's involvements based on such agreements, also covering participations relating to CABB's investment in Uruguay. The part of the list relating to AGBA mentions only two such participation agreements, one with URBASER, presented to this Tribunal, and the other with Aguas de Bilabao S.A., a company in which CABB kept a 51% shareholder interest. In light of the presentation of these participation agreements, which can be found in various other similar reports, the Tribunal finds that they certainly contain the same financial and legal characteristics, and that from the two agreements concerning CABB's involvement in AGBA, the one submitted to the Tribunal and executed with URBASER can be construed as offering sufficient evidence of the content of such agreements, in addition to the information contained in CABB's financial statements.

301. The surprise that Respondent voiced does not seem fully realistic to the extent that it relates to the simple fact that CABB's financing with respect to its shareholder interest was sourced by third parties. Indeed, this outsourcing of CABB's participation in AGBA was expressly stated in the Minutes of the General Assembly of CABB dated February 24, 1999, which are of public record. The same Assembly was expressly mentioned in the recitals of AGBA's By-laws, which were set up on December 2, 1999, making clear that it was at this Assembly that CABB's participation in AGBA was decided. The Board of Directors of AGBA, the Agency as AGBA's controlling authority, and the Grantor were at liberty to request access to those Minutes for consultation.

302. There could be no surprise either regarding the existence of legal arrangements that CABB undertook as to this third party funding. When submitting to strict scrutiny the accounts participation agreement concluded with URBASER, it appears clearly that the undertakings agreed upon related primarily to the financial contribution of URBASER S.A. as participant ("Cuentapartícipe"), including both the provision of funds and the sharing of benefits in proportion to 11.11% of CABB's involvement (Art. 1 and 2). This participation also includes the sharing of losses in the same proportion (Art. 6.3). CABB was not permitted to encumber its shareholder interest in any way without URBASER S.A.'s authorization, CABB was bound to have the shares deposited with URBASER S.A.. To the extent that the deposit was legally impossible, the deposit was to be made with a third-party that URBASER S.A. was to designate (Art. 4.2).

303. Contrary to Respondent's allegations, this agreement does not contain any provision providing for a full or even partial transfer of shares in AGBA to URBASER S.A. as the funding participant. Respondent's submissions do not contain any analysis of that agreement. Similarly, Respondent has not directed the Tribunal to any specific provision that might be in conflict with CABB's position as investor and Operator.

304. In particular, Respondent's assertion that all of CABB's rights and obligations had been assigned to third parties and that the actual shares were in the hands of "other companies", and that therefore CABB had violated Sections 2.3.1 and 2.3.2 of the Concession Contract, finds no support in the accounts participation agreement. Indeed Respondent does not point the Tribunal to any provision that would have had such effect. There has been no indication either that CABB in this regard had violated an obligation to disclose information, which would have provided the Grantor with the right to terminate the Concession Contract (Sec. 14.1.3[i]), as sustained by Prof. Mata.<sup>172</sup> This Expert did not mention any such provision, nor that CABB was not a party to this Contract.

305. Moreover, the agreement expressly provided that any management activity remained exclusively in CABB's hands (Art. 5.1). Under AGBA's by-laws, the exercise of such activity, in particular when related to its position as Technical Operator, required CABB to hold a minimum 20% interest in AGBA's shares. CABB had never abandoned even a part of such an interest in AGBA and Respondent does not go as far in arguing its objection that CABB had released its "actual stockholding" to any third party. Further, even if it were assumed that there was a hidden third party governing CABB's participation in AGBA, as seems to be Respondent's understanding, this Tribunal has found no factual support whatsoever for such contention: Respondent's contention is all the more implausible because any activity within AGBA was expressly defined as CABB's responsibility.<sup>173</sup> There is therefore no possible comparison with the case submitted to the *Inceysa* Tribunal where the investor engaged in fraudulent conduct.<sup>174</sup> Likewise, this case can be meaningfully distinguished from the facts before the *Fraport* Tribunal. The cases are materially distinguishable and, therefore, inapposite. In that proceeding, the investor secretly

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<sup>172</sup> TR-E, Day 1, p. 79/11-80/1.

<sup>173</sup> It may be noted that the "intuitu personae" determination of the Technical Operator is not as strongly confined to CABB as contended by Respondent when taking account of the provisions of Section 3.3.4 of the Bidding Terms allowing the requirements to be met by the Operator to be fulfilled by other member companies of its same economic group.

<sup>174</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID/ARB/03/26, Award of August 2, 2006, No. 240-244.

arranged for the management and control of the investment and this conduct was deemed egregious and in violation of the laws of the Host State.<sup>175</sup>

306. For these reasons, Respondent fails in its objection that CABB had arranged transfers of its shares to third parties by means of participation agreements. As no such transfer of shares had been undertaken, be it *de facto* or *de jure*, Respondent also fails in its contention that CABB had violated Sections 2.3.1 and 2.3.2 of the Concession Contract. While it asserts that CABB acted in violation of the laws of the Argentine Republic, Respondent does not refer to any provision, other than rules of the Concession Contract governing the transfer of shares. Indeed, this Contract, AGBA's by-laws and the Bidding Terms do not contain any provision precluding arrangements made by shareholders concerning the funding and sharing of benefits or losses in connection with their respective shares. Consequently, Respondent's objection based on an allegedly concealed transfer of shares by CABB to third parties must be dismissed.

307. As to the mere funding of capital supporting CABB's shareholder interests, it may be added that neither the BIT nor the ICSID Convention contain any restriction requiring any qualifying the origin of funds. Article I(2) of the BIT covers "any kind of assets," irrespective of whether the asset was the product of outsourcing. The ICSID Convention does not require either an "investment" to be financed from capital of any particular origin.

D. CABB's legal standing as a public entity not acting with the authorization of the Kingdom of Spain

I. *Respondent's position*

308. Respondent states that CABB is a constituent subdivision or agency of the Kingdom of Spain. It follows that, according to Article 25 (1) and (3) ICSID Convention, Spain as a Contracting State had to consent to submit this controversy to arbitration, if it had not notified the Centre that previous consent was not necessary. Both appointment and State approval requirements must be met if a constituent subdivision or agency is acting as claimant or respondent in an ICSID arbitration. In case of an agency acting as a separate entity but entrusted with official governmental functions, what matters is whether the agency performs public functions on behalf of the Contracting State or of one of its constituent subdivisions.

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<sup>175</sup> *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID/ARB/03/25, Award of August 16, 2007, No. 394-404. This Award, referred to by Respondent, has been annulled on December 23, 2010.

309. Respondent contends that CABB is included in these two concepts and falls under Article 25(3) ICSID. It should have been appointed by Spain and must have its approval. Because neither condition ripened, CABB's claim is fatally compromised.

310. Respondent further explains that under the special territorial organization of the Spanish State, municipalities enjoy autonomous self-government as to their respective interests and have full legal capacity. Their autonomy is guaranteed. Municipalities are territorial public administrations and more than just geopolitical subdivision. Thus, they are vested with a public character that is autonomous or quasi-autonomous. As stated in Section 25.2.1 of Law No. 7/1985, their ambit of autonomous authority includes water supply and sewerage and waste water treatment. Section 85 of Law No. 7/1985 provides that municipalities may adopt different forms of organization. Here, the limited consortium form has been chosen (Sec. 87 of Law No. 7/1985).

311. Regional Law No. 3/1995 for Bizkaia governs the nature of consortia as public agencies, and their purpose, which is to pursue public interest by performing public functions (Sec. 2.1). Consortia have legal personality (Sec. 2) and administrative powers (Sec. 4). CABB was created in 1967 between a series of municipalities of the Bizkaia territory for the installation and management of the local interest services. In 1972 its objectives were broadened. Ultimately, the by-laws were governed by Regional Law No. 3/1995. The by-laws state that the consortium is formed by a series of municipalities and that it will remain a local entity as it has been since its inception (Sec. 1). It includes a long list of administrative powers (Sec. 4) and its economic regime is subject to the rules of local entities (Sec. 31).

312. Respondent adds that municipalities have the obligation to provide supply and sewerage public services within their territory. They may provide such services directly or by creating a series of entities contemplated in Section 85 of the Law on Basis of Local Regime. In this case, it was decided to create a consortium as an administrative cooperation mechanism to join efforts in order to reduce costs that could not have been assumed by small municipalities. The consortium adopted the legal form enunciated in Section 87 of Law No. 7/1985 and Section 110 of Decree No. 781/1986 and it was admitted territorially in Bizkaia through Regional Law No. 3/1995. Such rules highlight its nature as a local public entity with territorial and administrative organizational purposes, focusing on a group of municipalities and consequently integrated in the organization of the Spanish State.

313. CABB is a local public entity created for inter-municipality administrative cooperation purposes and integrated in the territorial organizational structure of the State. It is not a private entity driven by trade, commerce, or other business purpose, or by a profit motive. Therefore, concludes Respondent, it is not admitted to ICSID



arbitration without the previous approval of the Kingdom of Spain. The lack of approval is hardly controverted. Its normative status as a condition precedent is also not questions. It must of necessity follow that because there was no such approval forthcoming, CABB has no legal standing in this proceeding.

## 2. *Claimants' position*

314. Claimants explain that CABB's participation in this arbitration cannot be framed under the concept or characterization of a political subdivision or public agency within the meaning of Article 25 (1) and (3) of the ICSID Convention, as Respondent argues. The political subdivisions and public agencies that are subject to consent under Article 25 (1) and (3) are those of the Host State. As Article 25(1) expressly states, these provisions only apply to subdivisions/agencies of the Host State. They refer to subdivisions or agencies of the Host State as opposed to those of the Claimant's investor state. The "national of another Contracting State" is the investor. The fact that the same provision applies to claimant and to respondent does not mean that it applies equally when a political subdivision or public agency participates in a dispute as an investor. The cases where the prior authorization of the State is required are those where subdivisions/agencies wish to initiate proceedings against an investor.

315. Claimants note that Respondent's objections are based on other considerations concerning CABB that are not correct. CABB is a public agency as stated in the Request for Arbitration. Its by-laws so state. Until it submitted its Reply, after five years, CABB's public nature had never caused Respondent a problem. The public nature of CABB does not preclude it from taking part as Claimant in this case, as it is acting as subject to private law. CABB is not integrated in the territorial structure of Spain. Municipalities are so integrated, but consortia are not. CABB did not act as an agent of Spain but on an equal footing with any other private individual or legal entity. This status had been examined and confirmed by several reports prepared in relation to the investment in Uruguay. The Report submitted by Prof. D. Tomás Ramón Fernández in this proceeding equally confirms this nature of CABB's activity. Indeed, CABB pursues a private activity subject to the same law as applies to other private persons with whom it may compete. CABB acted within the scope of private law and did not act in the exercise of any public duty or as an agent of Spain.

316. Claimants note that in order to determine an investor's standing it is not its nature that matters, but the capacity in which it acts. CABB has standing in this arbitration. It is an entity with legal personality which is distinct and separate from that of its constituents, the municipalities and the Basque Government. Its activities coincide with those of private entities. The fact that the Concessionaire's activity

meets a public interest does not prevent private entities from being awarded the concession. Moreover, award of the concession does not foist on the activities a public nature. What is relevant are the concrete actions giving rise to this arbitration. CABB is entitled to carry out activities of this type outside the territory of the member municipalities provided that it does so under private law. To such extent, CABB's actions in Argentina are the same as those of any individual investor. Therefore, CABB appears in this arbitration with the same rights and duties as any other private investor.

317. Claimants further explain the regularity and legality of the investments made by CABB abroad. They note that the same issue was raised when CABB took part in a bidding process in Uruguay, when CABB's capacity to operate outside its territory was challenged by other companies. CABB followed the advice of legal experts at that time and was then convinced that it had the required capacity also to invest in Argentina. In fact, its participation was never questioned in the bidding process in the Republic of Argentina or by the Province. A recent expert opinion filed by Claimants with this Tribunal and prepared by Prof. Tomás Ramón Fernández confirms the same position.

318. Claimants also affirm the regularity of CABB's consent to submit the dispute to arbitration. In its submission of July 27, 2011, Respondent requested documents on this point, *i.e.* the Minutes of the General Assembly approving the decision to submit the dispute to arbitration and to grant powers of attorney to the undersigned lawyers. Claimants complain that the Republic of Argentina did so more than four years after it received the Request for Arbitration. The requested document already was attached to this Request as Exhibit 2. CABB's by-laws were attached to the Memorial on the Merits. Further approvals to form part of this arbitral proceeding can be gleaned from the Minutes of the Meeting held by CABB's Board of Directors on December 20, 2005, the Minutes of the General Assembly of October 30, 2006, and from an official Decree included in the notary document issued on December 5, 2006. The Annual Report for fiscal year 2006 also refers to the arbitration. Claimants reassert that both CABB's Assembly and Board of Directors are acquainted with this arbitration proceeding.

### 3. *The Tribunal's findings*

319. Respondent's objection places great weight on what it understands to be the public nature of CABB's principal purpose and activities, *i.e.* the installation and management of the local interest services in the Bizkaia region. The Parties admit that CABB's legal personality and capacity to act are governed by the rules of private international law of the Republic of Argentina and Spanish Law. CABB's roles as

shareholder of AGBA and as its Technical Operator were subject to the laws of the Republic of Argentina. However, these facts hardly give rise to the full picture. Indeed, in order to understand CABB's legal status in the Republic of Argentina, there must be acknowledgement of actions undertaken in connection with acts made and the recognition of CABB's legal status in this country. The Tribunal first refers to AGBA's by-laws contained in a notary's deed dated December 2, 1999,<sup>176</sup> where the capacity of CABB's representative and its authority to incorporate AGBA as a domestic investment vehicle was amply recognized. The validity of this legal document and its content concerning CABB never has been contested or made the subject of an annulment proceeding: It is not included in Respondent's objection relating to CABB's authority to participate in this proceeding. Second, the Tribunal also takes note of the notary certificate of May 26, 1999 recognizing CABB as a legal entity admitted for registration in conformity with Article 123 of Law 19.550 in the Province of Buenos Aires. The Tribunal has no reason to doubt the authenticity of this document. If this document were illegal or otherwise deprived of its legal effect, it would seem that it should become the object of a proceeding leading to its annulment. It retains its legal status unless otherwise decreed by a competent authority. No such proceeding has been reported to the Tribunal or otherwise forms part of this cause. Moreover, Respondent did not object to the existence or to the validity of this document. Therefore, these two legal documents, both drawn up as authentic instruments administered by notaries admitted to act under the laws of the Republic of Argentina provide legal confirmation based on Argentine Law that CABB had and still has the legal capacity to act under the laws of Argentina and particularly as shareholder of AGBA and, at all times material to this proceeding, as Technical Operator of this corporation.

320. The Tribunal further observes that Respondent never raised objections to the capacity of CABB to be involved within the national territory of the Republic of Argentina and in particular as a shareholder and Technical Operator of AGBA. When CABB acted as bidder, it could do so only when it had full legal capacity to undertake commitments under the terms of the Bidding Conditions (Sec. 3.1.1) and to contract in the Province of Buenos Aires (Sec. 3.4.2): The documentation of the Bid had to include a certified copy of the current by-laws or corporate charter (Sec. 4.2.1[i]), as well as evidence of the decision to participate in the bidding competition made by the competent corporate representatives in accordance with the by-laws (Sec. 4.2.1[k]), all these requirements being applicable "separately and independently" (Sec. 4.2.1, opening part) to each member of a group of bidders filing a joint application. Moreover, for foreign companies or entities acting as members of the Awardee, it was required that they demonstrate that they had followed the procedure as required in

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<sup>176</sup> It can be assumed that AGBA's by-laws were recorded in a public registry and thus accessible to the public, as this is standard procedure for all by-laws of companies (cf. Prof. Nissen, TR-E, Day 2, p. 191/16-192/1).

Article 123 of Law No. 19.550 (Sec. 7.2.2[a] and 8.1). This was the purpose of the notary certificate recognizing CABB as a legal entity admitted for registration as mentioned above. Thus, at that time already, Respondent had the opportunity to receive full documentation to ensure that CABB was acting within its own statutory framework. CABB's bid for its becoming part of the Licensee and its role as the Technical Operator was accepted. This acceptance could not have taken place if the Granting Authority had not received all of the required confirmations or validations. CABB's selection was then confirmed in Decree No. 2907 of October 22, 1999 of the Executive Branch of the Province of Buenos Aires, where the joint attribution of Region B of Concession Area No. 2 to CABB and three other companies was decided.

321. In light of this overwhelming evidence, there is no room left to argue, from the perspective of Argentine law, that CABB had somehow acted "ultra vires" and illegally to the extent it engaged in activities outside the territory of its member municipalities. CABB's legal capacity to do so was fully recognized and effective within the territory of the Republic of Argentina. If it has been contested, it was so for the single purpose of this arbitral proceeding only.

322. In any event, the Tribunal observes that even if at its inception CABB's activities may have been wholly focused on services to be provided to its member municipalities, there does not exist any legal prohibition for CABB to develop activities beyond such territorial scope. Respondent argues on the general level of the public nature of CABB's main purpose and activity and confers to this entity a strictly territorial and state-integrated function concerning water supply. But Respondent does not demonstrate that, and if so in which manner, the Spanish Government was involved in this activity as part of CABB.<sup>177</sup> Also, it does not establish nor contend that as a matter of international law CABB appears from a structural as well as a functional point of view, as a company placed under the control and management of the Kingdom of Spain.<sup>178</sup>

323. Even a surface glance at CABB's by-laws shows a different picture. Thus, while Article 6 on CABB's General Purposes defines in paragraph 1 that the provision of water supply and sewerage to the member municipalities constitutes its "primary mission," the same Article goes on to say that it can also do so for the benefit of "other local public services" (para. 2). It further states that CABB also can carry out supplementary or derivative activities that may enhance the effective fulfilment of the general purposes (para. 3) and that are subject to the General Assembly's approval (Art. 19 No. 15). Article 8 includes in the list of "competencies" services in non-

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<sup>177</sup> An involvement that has been firmly denied by Prof. Fernández, cf. TR-E, Day 2, p. 353/8-354/10.

<sup>178</sup> Cf., on this matter, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID/ARB/02/13, Decision on Jurisdiction of November 9, 2004, No. 30-35; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID/ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000, No. 71-89.

member municipalities (No. 10) and “the provision of advisory and assistance services and the construction, implementation, and running of facilities, the drawing up of reports and similar actions concerning the matters of water supply and sewage at the request of any public or private entity under conditions set up by the Director’s Committee” (No. 11).<sup>179</sup> While one may insist, as Respondent does, on CABB’s focus on the local scale of operation to the benefit of its member municipalities, it does not constitute a ban for services provided above that range, including those performed abroad, as this had been done in Uruguay and Argentina. The Legal Opinion filed by Respondent and written by Attorneys Ana-María Fernández Rico and José Manuel Gómez Piñeda, states “with total respect and consideration to any dissenting view,” and does not offer a different proposition. The authors insist on CABB’s public nature and affirm that CABB is “integrated into the organization of the Spanish State,” but they do so merely by referring to the fact that the municipalities forming the entity belong to a territory that is part of Spain. They neither mention nor discuss Articles 6 and 8 of the by-laws, which address the standing of the entity to provide services outside its main sphere of activity.<sup>180</sup> These provisions are examined in the Expert Opinion of Prof. Tomás Ramón Fernández, filed by Claimants.

324. This Opinion also focuses on a different aspect, excluded by Respondent and its Experts. Indeed, even when admitting, *arguendo*, that CABB’s representatives would have acted above the range of activities based on its by-laws, this conduct does not demonstrate that CABB would lack legal capacity to participate in legal undertakings concerning such activities above its competencies as defined in the by-laws. CABB’s full legal personality and capacity to engage in commitments as stated in Article 3 with reference to Spanish Law is not restricted to activities and contracts covered by the objectives defined in its by-laws. Article 3.2 of Regional Law No. 3/1995 for Bizkaia, to which Article 3 of CABB’s by-laws refer, does not contain any such restriction. If its representatives are acting beyond CABB’s legitimate scope, they may have to assume responsibility within the entity, but it would not affect the validity of the undertakings made with third parties. This issue need not be further discussed, as Respondent did not address it, nor did Respondent affirm that it raised concerns in relation to the validity of CABB’s undertakings. In any event, as demonstrated above, CABB’s legal personality and capacity to enter into agreements relating to its shareholder configuration and the technical operation of the Concession have been fully recognized in the Republic of Argentina. This is all that matters.

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<sup>179</sup> As Prof. Fernández explained at the hearing, it is “an additional activity or derived from the main mission assigned to the consortium” (TR-E, Day 2, p. 350/19 s.).

<sup>180</sup> Prof. Mata’s explanations contained in his Report do not go beyond what has been stated in the Opinion provided by these two Spanish Attorneys (cf. No. 132-135). He confirmed at the hearing that he does not qualify as an Expert as to the issues raised under Spanish Law (cf. TR-E, Day 1, p. 105/5-16). He nevertheless testified orally that he had no doubt that a public agency can act under of private law (TR-E, Day 1, p. 107/12-14), but that, when doing so, its identity as a public agency remains (TR-E, Day 1, p. 123/21-23).

325. When Respondent's objection to CABB's legal standing is interpreted more narrowly as contesting CABB's capacity to participate and to be represented in this proceeding as governed by the ICSID Convention, the rules pertaining to the conduct of such a proceeding have to be examined.

326. In this regard, Respondent's objection implies a most singular reading of Article 25(3) of the ICSID Convention, that is strictly based on the literal understanding of the terms "constituent subdivision or agency of a Contracting State," which, taken in isolation, could refer to such subdivision or entity irrespective of whether it belongs to the Host State or to the State of the investor. However, as the provision also sets forth, it applies to the "consent" of such subdivision or entity. The basic rule on consent to ICSID jurisdiction is Article 25(1), where the expression "constituent subdivision or agency of a Contracting State" is related exclusively to the Host State. In relation to the Contracting State of the investor, the same rule does not use these terms and merely refers to "a national." It results clearly from the combined reading of both provisions that the approval requirement set out in Article 25(3) can relate only to subdivisions and entities of a Contracting State involved in an ICSID arbitration as Host State of an investment. If such approval is required it is because the subdivision or agency concerned will become a party to the proceeding in addition or instead of the Contracting State to which it belongs. This scenario has no parallel setting on the investor side

327. Therefore, this Tribunal finds that the requirement of prior approval as stated in Article 25(3) does not apply to CABB. This interpretation also must have been Respondent's position when it received the Notice of Arbitration and did not object that it contained no mention of an approval based on Article 25(3) as this would have been required by Article 2(1)(c) Institution Rule if Respondent's more recent understanding were correct.

328. This does not mean that CABB's standing generally is such that it need not secure approval to participate in ICSID arbitration. It is less than clear whether Respondent's objection addresses CABB's purported failure to receive authorization to bring an arbitration claim before ICSID also concerns this aspect of the question relating to CABB's legal standing. If it does, it would be deprived of any basis on the face of the act dressed up by the Notary Public of Bilbao recording the Board of Directors' decision to submit the dispute involving CABB to arbitration under the ICSID Convention and to grant the necessary power of attorney. This document was filed with the Secretary-General of ICSID together with the Request for Arbitration. It had as its objective the compliance with Institution Rule 2(1)(f) and 2(2), which provides, in case the requesting party is a juridical person, that it has taken all necessary actions to authorize the request and to deliver the supporting documentation together with the Request. The decision of the Board of Directors of April 24, 2007

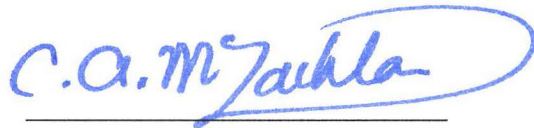
was attached to the notaries act exhibited with the Request for Arbitration. Neither at that time nor at any time later did this document attract any opposition, be it from the Secretary-General under its scrutiny in view of the registration of the Request, nor later by Respondent. Therefore, Respondent's objection also fails in this issue.

329. The Tribunal therefore arrives at the conclusion that CABB has legal standing in this ICSID proceeding and that the third objection raised by Respondent accordingly must be dismissed.

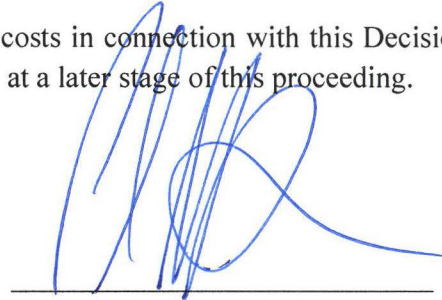
**V. Decision**

330. Based on the reasons stated, the Tribunal decides:

1. To reject all of Respondent's objections and to assert that the Centre has jurisdiction and the Tribunal has competence over this dispute.
2. The determination and attribution of costs in connection with this Decision is reserved for a decision made by this Tribunal at a later stage of this proceeding.



Professor Campbell McLachlan QC  
Arbitrator



Professor Pedro J. Martinez-Fraga  
Arbitrator



Professor Andreas Bucher  
President of the Tribunal