INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the arbitration proceeding between

CASINOS AUSTRIA INTERNATIONAL GMBH AND CASINOS AUSTRIA AKTIENGESELLSCHAFT

Claimants

AND

ARGENTINE REPUBLIC

Respondent

ICSID Case No. ARB/14/32

AWARD

Members of the Tribunal

Prof. Dr. Hans van Houtte, President

Prof. Dr. Stephan W. Schill, Arbitrator

Dr. Santiago Torres Bernárdez, Arbitrator

Secretary of the Tribunal

Ms. Alicia Martín Blanco

Date of dispatch to the Parties: 5 November 2021

REPRESENTATION OF THE PARTIES

Representing Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft:

KNOETZL HAUGENEDER NETAL
Rechtsanwälte GmbH
Mr. Florian Haugeneder
Mr. Emmanuel Kaufman
Herrengasse 1
A-1010 Vienna
Austria

Representing the Argentine Republic:

Dr. Carlos Alberto Zannini
Procurador del Tesoro de la Nación
Dr. Horacio Pedro Diez
Dr. Sebastián Antonio Soler
Subprocuradores del Tesoro de la Nación
Procuración del Tesoro de la Nación
Posadas 1641, CP 1112
Buenos Aires
Argentine Republic

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LIST OF ABBREVIATIONS

ARS	Argentine Peso
Bianchi IV	Fourth Expert Report of Alberto B. Bianchi, dated 3 December 2018
BIT	Agreement between the Republic of Austria and the Republic of Argentina for the Promotion and Protection of Investments, signed on 7 August 1992 and in force since 1 January 1995
Boldt	Boldt S.A.
BPAS	Banco de Préstamos y Asistencia Social
Cachi Valle	Cachi Valle Aventuras S.A.
CAI	Casinos Austria International GmbH
CAIH	Casinos Austria International Holding GmbH
CAPEX	Capital Expenditure
CASAG	Casinos Austria Aktiengesellschaft
CCL	Contado con Liquidación (Implied ARS-USD Exchange Rate)
CEMA I	Expert Report of José P. Dapena, Germán Coloma, and Agustín Flah, dated 14 March 2016
Centre or ICSID	International Centre for Settlement of Investment Disputes
Claimants' Memorial on the Merits	Claimants' Memorial on the Merits, dated 2 October 2015
Claimants' Post-Hearing Brief	Claimants' Post-Hearing Brief, dated 24 January 2020
Claimants' Reply on the Merits	Claimants' Reply on the Merits, dated 3 December 2018
CMG	Complejo Monumento Güemes S.A.
Dapena II	Expert Report of José P. Dapena, dated 23 May 2019
DCF	Discounted Cash Flow
DEK	Dek S.A.
EBITDA	Earnings Before Interest, Taxes, Depreciation, and Amortisation
EMBI+	Emerging Markets Bond Index Plus
Emsenor	Emsenor S.R.L.
ENJASA	Entretenimientos y Juegos de Azar S.A.
ENREJA	Ente Regulador del Juego de Azar
EV	Enterprise Value
FATF	Financial Action Task Force

García Pullés IV	Fourth Legal Expert Opinion by Dr. Fernando García Pullés, dated 3 December 2018
ICJ	International Court of Justice
Iberlux	Iberlux International S.A.
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
L&E	Leisure & Entertainment S.A.
Marcer I	Expert Report of Ernesto Alberto Marcer, dated 14 March 2016
Marcer II	Second Expert Report of Ernesto Alberto Marcer, dated 27 May 2019
NAFTA	North American Free Trade Agreement
New Star	New Star S.R.L.
OECD	Organisation for Economic Co-operation and Development
Prodec	Prodec S.A.
Respondent's Counter-Memorial on the Merits	Respondent's Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, dated 15 March 2016
Respondent's Post-Hearing Brief	Respondent's Post-Hearing Brief, dated 24 January 2020
Respondent's Rejoinder on the Merits	Respondent's Rejoinder on the Merits, dated 27 May 2019
Rosen I	Expert Report of Howard N. Rosen and Jennifer Vanderhart, FTI Consulting Inc., dated 2 October 2015
Rosen II	Expert Report of Howard N. Rosen, dated 3 December 2018
Sigar	Sigar S.A.
Transcript	Transcript of the Hearing on the Merits
UNIREN	Unidad de Revisión y Renegociación de Contratos y Licencias otorgadas por la Administración
UTE	Unión Transitoria de Empresas
VCLT	Vienna Convention on the Law of Treaties
Video Drome	Video Drome S.A.
WACC	Weighted Average Capital Cost
WS	Witness Statement

I. INTRODUCTION

1. The present dispute arises out of the revocation, in 2013, of an exclusive 30-year license granted in 1999 to the Argentine company Entretenimientos y Juegos de Azar S.A. ("**ENJASA**") for the operation of gaming facilities and lottery activities in the Argentine Province of Salta. ENJASA had been established by the Government of the Province of Salta as part of the process of privatizing the Province's gaming and lottery sector and developing tourism in the region. Following a public tender and various changes in the ownership structure, ENJASA became majority owned and controlled by Claimants, Casinos Austria International GmbH ("**CAI**"), a limited liability company established under the laws of Austria, and Casinos Austria Aktiengesellschaft ("**CASAG**"), a share-company established under the laws of Austria (jointly "**Casinos**" or "**Claimants**"). Claimants are operators of casinos and games of chance in a number of jurisdictions all over the world. CAI is a subsidiary of CASAG and its international arm of gaming operations.[1] Claimants held majority ownership and exercised control of ENJASA through Leisure & Entertainment S.A. ("**L&E**"), a stock corporation under Argentine law, in which Claimants were majority shareholders.

2. Claimants contend that the revocation of ENJASA's license, followed by the transfer of its gaming and lottery operations and personnel to a number of new gaming operators, was an arbitrary exercise of power of the Ente Regulador del Juego de Azar ("**ENREJA**"), the Province's regulatory authority for the gaming sector, was politically motivated in order to benefit local gaming operators and to increase the Province's revenue from gaming, and effectively destroyed Claimants' investment in Argentina. Claimants invoke the violation of their rights as foreign investors under the Agreement between the Republic of Austria and the Republic of Argentina for the Promotion and Protection of Investments ("**BIT**"), which was signed on 7 August 1992 and entered into force on 1 January 1995,[2] in particular their right not to be expropriated without compensation, to receive fair and equitable treatment, and to enjoy national treatment. They seek, as a result of this conduct, damages from the Argentine Republic ("**Argentina**" or "**Respondent**") in an amount exceeding USD 50 million.

[1] Claimants' Post-Hearing Brief, para. 3.
[2] Exhibit C-002.

3. Respondent, by contrast, claims that the revocation of ENJASA's license was a legitimate sanction that was provided for by the regulatory framework in place in the Province of Salta, was imposed by ENREJA in observance of administrative due process, and was motivated by both ENJASA's repeated and prolonged non-compliance with rules to prevent money laundering in the gaming sector and the involvement by ENJASA of other operators of gaming activities in the Province without ENREJA's authorization. ENJASA's conduct, Respondent claims, constituted grave and repeated violations of the regulatory framework in place, which justified the revocation of its exclusive operating license. Respondent therefore rejects any claim for breach of the BIT.

4. Following objections by Respondent to the Centre's jurisdictions and to the Tribunal's competence, the Tribunal determined, in its Decision on Jurisdiction of 29 June 2018, that the Centre had jurisdiction, and the Tribunal competence, under Article 25(1) of the ICSID Convention in connection with the BIT over Claimants' claims for breach of Article 2(1) (fair and equitable treatment) and Article 4(1)-(3) (rules on expropriation) of the BIT, but that it would not entertain claims for breach of Article 3(1) (national treatment) of the BIT. The Tribunal found in particular that Claimants had made, in the form of their indirect participation through L&E in ENJASA, an investment in Argentina in the sense of both the BIT and Article 25(1) of the ICSID Convention, and that the Parties had validly consented to the jurisdiction of the Centre under the BIT. By the present Award, the Tribunal decides on Claimants' claims on the merits, as far as the Tribunal has found them to be under its competence.

II. PROCEDURAL HISTORY

5. On 4 December 2014, the International Centre for Settlement of Investment Disputes ("**ICSID**" or "**Centre**") received a request for arbitration from Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft against the Argentine Republic (the "Request").

6. On 18 December 2014, the Secretary-General of ICSID registered the Request in accordance with Article 36 of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

7. By correspondence of 3 December 2014, 29 December 2014, 13 January 2015, and 15 January 2015, the Parties agreed that the Tribunal would be comprised of three arbitrators; one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the Parties.

8. By letter of 13 January 2015, Claimants appointed Prof. Dr. Stephan Schill, a national of Germany, as an arbitrator in this case. Prof. Schill accepted his appointment on 26 January 2015.

9. By letter of 13 February 2015, Respondent appointed Dr. Santiago Torres Bernárdez, a national of Spain, as arbitrator in this case. Dr. Torres Bernárdez accepted his appointment on 23 February 2015.

10. On 31 March 2015, Claimants informed the Secretary-General that the Parties had reached an agreement to appoint Prof. Dr. Hans van Houtte, a national of Belgium, as President of the Tribunal. Respondent confirmed the agreement on the same date. Prof. van Houtte accepted his appointment on 3 April 2015.

11. On 6 April 2015, the Secretary-General, in accordance with Rule 6 of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Giuliana Canè, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. Following Ms. Canè's departure from the Centre, on 15 January 2016, in accordance with ICSID Administrative and Financial Regulation 25, the Secretary-General appointed Ms. Alicia Martín Blanco, ICSID Legal Counsel, as Secretary of the Tribunal.

12. In accordance with ICSID Arbitration Rules 13(1) and 20(1), the Tribunal held a first session and preliminary procedural consultation with the Parties on 5 June 2015 by teleconference.

13. Following the first session, on 23 June 2015, the Tribunal issued Procedural Order No. 1 recording the agreements of the Parties and the Tribunal's decisions on procedural matters. Procedural Order No. 1 provided, inter alia, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Paris, France. Procedural Order No. 1 also set out the schedule of the proceedings included as Annex A to that order.

14. On 2 October 2015, Claimants submitted their Memorial on the Merits.

15. On 11 February 2016, the Tribunal issued Procedural Order No. 2 on document production.

16. On 15 March 2016, Respondent submitted her Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits. It included a request to treat the objections to the jurisdiction of the Centre and/or the competence of the Tribunal as a preliminary matter.

17. On 8 April 2016, Claimants presented observations in opposition to Respondent's request to bifurcate the proceeding.

18. Having considered the Parties' observations, on 25 April 2016, the Tribunal issued Procedural Order No. 3 ruling that Respondent's objections would be heard as a preliminary question.

19. On 26 July 2016, Claimants submitted their Counter-Memorial on Jurisdiction.

20. On 11 October 2016, Respondent filed her Reply on Objections to Jurisdiction.

21. On 23 December 2016, Claimants filed their Rejoinder on Jurisdiction.

22. On 13 March 2017, the Tribunal issued Procedural Order No. 4 on the organization of the hearing on jurisdiction.

23. A hearing on jurisdiction was held in Paris, France, from 23 to 25 March 2017.

24. On 23 June 2017, the Parties submitted simultaneous Post-Hearing Briefs on jurisdiction.

25. On 29 June 2018, the Tribunal issued its Decision on Jurisdiction. The operative part of the Decision provides as follows:

> 341. On the basis of the reasoning above, the Tribunal decides:
>
> 1) that it has jurisdiction over the present dispute insofar as Claimants' claims for breach of Articles 2(1) and 4(1)-(3) of the Argentina-Austria BIT are concerned;
>
> 2) that it has no jurisdiction over the present dispute insofar as claims for breach of Article3(1) of the Argentina-Austria BIT are concerned;
>
> 3) that both Parties will within two months as from the issuance of this Decision take all required measures to withdraw the domestic proceedings relating to the present dispute and inform the Tribunal of their actions;

4) that a decision on costs is reserved for subsequent determination.

26. The Tribunal's Decision on Jurisdiction forms part of the Award and is attached hereto. A more detailed procedural history of the jurisdictional phase can be found in the Decision on Jurisdiction.

27. On 29 August 2018, in accordance with the Tribunal's order in its Decision on Jurisdiction to take all required measures to withdraw the domestic proceedings relating to the present dispute, the Parties informed the Tribunal that they had filed their respective withdrawals.

28. Following consultations with the Parties, an amended procedural calendar, including the hearing weeks, was approved by the Tribunal on 30 October 2018.

29. In accordance with the amended procedural calendar, Claimants submitted their Reply on the Merits on 3 December 2018.

30. Following a newly amended procedural calendar, on 27 May 2019, Respondent filed its Rejoinder on the Merits.

31. On 9 July 2019, the Tribunal instructed the Parties to submit a timetable for the notification of the witnesses and experts to be examined at the hearing, the Parties' agreements on the organization of the hearing, the last opportunity to request leave to submit new documents for the purpose of direct or cross-examination, the submission of skeleton arguments and of a joint electronic hearing bundle, and the pre-hearing conference call.

32. On 11 July 2019, the Parties notified the Tribunal of their agreed schedule regarding the steps prior to the hearing, and on 19 July 2019, the Parties submitted their respective lists of witnesses and experts called to testify at the hearing.

33. On 5 August 2019, unable to reach an agreement regarding the agenda for the hearing on the merits, each Party sent their respective proposals.

34. On 12 August 2019, each Party filed a request for the Tribunal to decide on the admissibility of new documents.

35. On 13 August 2019, the President held a pre-hearing organizational meeting with the Parties by telephone conference. The following persons participated in the call:

Tribunal:	
Prof. Dr. Hans van Houtte	President
ICSID Secretariat:	
Ms. Alicia Martín Blanco	Secretary of the Tribunal
On behalf of Claimants:	
Mr. Florian Haugeneder	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
Mr. Emmanuel Kaufman	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
Mrs. Selma Tirić	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
Mr. Nicolás Caffo	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
On behalf of Respondent:	
Ms. María Teresa Gianelli	Procuración del Tesoro de la Nación
Ms. María Alejandra Etchegorry	Procuración del Tesoro de la Nación
Ms. Valeria Etchegorry	Procuración del Tesoro de la Nación
Ms. Soledad Romero Caporale	Procuración del Tesoro de la Nación
Mr. José Martín Ryb	Procuración del Tesoro de la Nación

36. On 16 August 2019, the Parties respectively filed their observations on the other Party's request to admit new documents.

37. On 23 August 2019, the Tribunal issued Procedural Order No. 5 outlining the organization of the hearing on the merits, including a request for the Parties to indicate the reasons why Mr. Petersen (for Claimants) and Messrs. Marteau and Mata (for Respondent) would not be available to attend the hearing or otherwise provide oral testimony, and a request for Claimants to submit a document indicating the amounts of the fines paid compared to the results of each operational unit. The Tribunal also took note of the Parties' agreement not to submit skeleton arguments.

38. By email of 27 August 2019, the Tribunal informed the Parties of its decision regarding the admissibility of new documents.

39. On 27 August 2019, each Party informed the Tribunal of the reasons why Mr. Petersen (for Claimants) and Messrs. Marteau and Mata (for Respondent) would not be able to attend the hearing. On the same date, the Parties also submitted their joint schedule for the hearing and estimated witness and expert examination time.

40. On 28 August 2019, as requested in Procedural Order No. 5, Claimants submitted a table indicating the amounts of the fines imposed on ENJASA compared to the results of ENJASA's operational units.

41. On 29 August 2019, Claimants requested the Tribunal to reconsider its decision of 27 August 2019 to reject the evidence relating to Mr. Benvenuto's written statement.

Respondent submitted a reply to Claimants' letter on the same date. The Tribunal addressed this request during the hearing on the merits.

42. The Tribunal held a hearing on the merits from 2 to 13 September 2019 in Paris. Present at the hearing were:

Tribunal:	
Prof. Dr. Hans van Houtte	President
Prof. Dr. Stephan W. Schill	Co-Arbitrator
Dr. Santiago Torres Bernárdez	Co-Arbitrator
ICSID Secretariat:	
Ms. Alicia Martín Blanco	Secretary of the Tribunal
On behalf of Claimants:	
Counsel:	
Mr. Florian Haugeneder	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
Mr. Emmanuel Kaufman	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
Mrs. Selma Tirić	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
Mr. Nicolás Caffo	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
Mr. Peter Behyl	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
Ms. Julia Hildebrandt	Knoetzl Haugeneder Netal Rechtsanwälte GmbH
Parties:	
Mr. Christoph Zurucker-Burda	Casinos Austria International
Ms. Claudia Dotter	Casinos Austria
Witnesses:	
Mr. Gustavo Anselmi	CODERE and Textil Médica
Mr. Juan Pablo Ortiz Fernandez	ENJASA
Mr. Claudio Sergio Frade	Lo Bruno Estructuras S.A.
Mr. Alexander Tucek	Retired (formerly Casinos Austria International)
Mr. Andreas Schreiner	
Mr. José Antonio Ocantos	Candioti Gatto Bicain & Ocantos
Mr. Juan Ignacio Gómez Naar	Gomez Naar y Asociados
Mr. Thomas Kellner	Casinos Austria International
Experts:	
Mr. Howard Rosen	Secretariat International
Mr. Eddie Tobis	FTI Consulting
Mr. Fernando García Pullés	Estudio O'Farrell
Mr. Alberto B. Bianchi	Bianchi, Galarce & Castro Videla
Mr. Liban Kusa	Bruchou, Fernández Madero & Lombardi
On behalf of Respondent:	
Parties:	
Ms. María Teresa Gianelli	Procuración del Tesoro de la Nación
Ms. María Alejandra Etchegorry	Procuración del Tesoro de la Nación
Ms. María Soledad Romero Caporale	Procuración del Tesoro de la Nación
Mr. Juan Manuel Falabella	Procuración del Tesoro de la Nación
Ms. Annabella Sandri Fuentes	Procuración del Tesoro de la Nación
Mr. José Martín Ryb	Procuración del Tesoro de la Nación
Ms. Cintia Emilse Yaryura	Procuración del Tesoro de la Nación

Mr. Julián Darmún	Procuración del Tesoro de la Nación
Mr. Francisco Javier García Elorrio	Procuración del Tesoro de la Nación
Ms. Natalia Paola Guillén	Procuración del Tesoro de la Nación
Mr. Nicolás Duhalde	Procuración del Tesoro de la Nación
Mr. Braian Joachim	Procuración del Tesoro de la Nación
Mr. Nicolás Grosse	Procuración del Tesoro de la Nación
Ms. Adriana Marcela Cusmano	Procuración del Tesoro de la Nación
Mr. Emiliano Gabriel Leanza	Procuración del Tesoro de la Nación
Ms. Cintia Pamela Calletti	Fiscal de Estado de la Provincia de Salta
Witnesses:	
Ms. Silvina M.C. Cainelli	ENREJA
Ms. María Josefina Courel	ENREJA
Ms. María Verónica Courel Salas	ENREJA
Mr. Federico A. Saravia Sylvester	ENREJA
Experts:	
Mr. Ernesto Alberto Marcer	Expert
Mr. Zenón Alberto Biagosch	Expert
Mr. Guillermo Coombes	Assistant to Mr. Biagosch
Mr. Hernán Del Debbio	Assistant to Mr. Biagosch
Mr. José Pablo Amadeo Dapena	Expert
Court Reporters:	
Ms. Elizabeth Cicoria	Spanish-Language Court Reporter
Ms. Luciana Sosa	Spanish-Language Court Reporter
Ms. Anne-Marie Stallard	English-Language Court Reporter
Interpreters:	
Ms. Anna Sophia Chapman	English-Spanish Interpreter
Mr. Jesus Getan Bornn	English-Spanish Interpreter
Ms. Roxana Dazin	English-Spanish Interpreter

43. The following witnesses and experts were examined at the hearing on the merits:

Claimants' Witnesses:	
Mr. Gustavo Anselmi	CODERE and Textil Médica
Mr. Juan Pablo Ortíz Fernández	ENJASA
Mr. Claudio Sergio Frade	Lo Bruno Estructuras S.A.
Mr. Alexander Tucek	Retired (formerly Casinos Austria International)
Mr. Andreas Schreiner	
Mr. José Antonio Ocantos	Candioti Gatto Bicain & Ocantos
Mr. Juan Ignacio Gómez Naar	Gómez Naar y Asociados
Mr. Thomas Kellner	Casinos Austria International
Claimants' Experts:	
Mr. Howard Rosen	Secretariat International
Mr. Fernando García Pullés	Estudio O'Farrell
Mr. Alberto B. Bianchi	Bianchi, Galarce & Castro Videla
Mr. Liban Kusa	Bruchou, Fernández Madero & Lombardi
Respondent's Witnesses:	
Ms. Silvina M.C. Cainelli	ENREJA
Ms. María Josefina Courel	ENREJA
Ms. María Verónica Courel Salas	ENREJA
Mr. Federico A. Saravia Sylvester	ENREJA

Respondent's Experts:	
Mr. Ernesto Alberto Marcer	Expert
Mr. Zenón Alberto Biagosch	Expert
Mr. José Pablo Amadeo Dapena	Expert

44. The Parties filed their joint revised transcripts on 26 November 2019.

45. On 27 December 2019, Claimants wrote to the Tribunal informing them that they planned to attach "an updated version of Exhibit C-299 with one additional worksheet, i.e., the 'Control Sheet'", to their Post-Hearing Brief.

46. On 3 January 2020, the Tribunal invited Claimants to transmit the new version of Exhibit C-299 to Respondent, and invited Respondent to file comments on Claimants' communication of 27 December 2019 by 10 January 2020, which the Parties did. Respondent argued that Exhibit C-299 included new calculations and should therefore not be admitted at such a late stage in the proceeding. In the event that it was admitted, Respondent requested the opportunity to make substantial observations, including new calculations by Professor Dapena, after the filing of the Post-Hearing Briefs.

47. On 20 January 2020, Claimants submitted a response to Respondent's observations of 10 January 2020. According to Claimants, there were no new calculations in the new version of C-299, and no new data or new assumptions in the additional worksheet. Therefore, they submit, there was no basis for the argument that a substantive review would be required in the event of their admission into the record.

48. On 22 January 2020, Respondent requested the opportunity to respond to Claimants' letter of 20 January 2020. The Tribunal granted Respondent's request for leave to respond by 30 January 2020, and reassured the Parties that, should Claimants be allowed to submit an updated version of Exhibit C-299 and the corresponding control sheet, as requested on 27 December 2019, the Parties would be afforded a procedural opportunity to submit comments on the newly admitted materials after the Post-Hearing Briefs. Since the Parties submitted their comments on the new materials *de bene esse*, there was no need for the Tribunal to afford a further opportunity to submit comments once the new materials (and the comments) were admitted into the record (see *infra* para. 55).

49. The Parties filed their Post-Hearing Briefs on 24 January 2020.

50. On 30 January 2020, Respondent submitted its response to Claimants' communication of 20 January 2020. Respondent indicated that it followed from the preliminary review conducted by Professor Dapena that the new spreadsheet was not a mere updated version of Exhibit C-299. Additionally, Respondent noted that in their Post-Hearing Brief, Claimants had included the title "1.9. Update of Exhibit C-299", and cited materials not included in the record. Respondent reiterated its objection to the late presentation of a new spreadsheet as well as its request for a substantive review in the event of its admission into the record. Respondent further requested the exclusion from Claimants' Post-Hearing Brief of section IV.1.9 and paragraph 484 together with its footnotes 604 and 605 because section IV.1.9 referred to the new spreadsheet on which admissibility the Tribunal had not yet ruled, and because paragraph 484 and footnotes 604 and 605 referred to pages of a document that were not on the record. On 31 January 2020, Claimants requested an opportunity to respond, by 4 February 2020, to Respondent's observations. The Tribunal granted Claimants' request, and on 4 February 2020, Claimants filed a letter in response to Respondent's letter of 30 January 2020. Claimants requested that the Tribunal authorize the submission of "the updated version of C-299" and reject the request relating to the deletion of paragraph 484 of its Post-Hearing Brief. According to Claimants, "the wording of paragraph 484 represents Mr. Rosen's explanations in his reports as well as during the Hearing of the Merits. As a result, there is no basis to delete the full paragraph." Claimants acknowledged that there was a clerical mistake in footnotes 604 and 605 in that they contained references to CL-036 that had been "inadvertently not deleted" and were not part of the record. Claimants stated that they would submit a corrected version of the footnotes.

51. By email of 17 March 2020, the Tribunal notified its decision to the Parties, as follows:

> The Tribunal refers to (i) the Claimants' communications of December 27, 2019, January 20 and February 4, 2020, and to (ii) the Respondent's communications of January 10 and 29, 2020.
>
> In their communications, the Claimants request that they be allowed to submit "*an updated version of Exhibit C-299 with one additional worksheet, i.e. the "Control Sheet*", and indicate that they would have no objection to the Respondent producing a similar worksheet. According to the Claimants, the Control Sheet would allow the Tribunal "*to calculate the impact on Mr Howard Rosen's DCF Model when selecting different approaches to specific parameters of the calculation.*" The Claimants contend that that there are no new calculations in the new version of C-299, and no new data, assumptions,

calculations or valuation model in the Control Sheet, which only function is "*to allow the Tribunal to toggle between the different views of the experts on specific parameters discussed by them.*" The Claimants further contend that all the parameters considered have already been discussed among the experts. As a consequence, should the Control Sheet be admitted, "*the Argentine Republic should not use such opportunity to re-open the discussion about Mr Rosen's expert reports*". Finally, the Claimants request that the Respondent's application to exclude certain portions of the Claimants' Post-Hearing Brief be rejected.

In its communications, the Respondent contends that the President's questions at the hearing do not enable the Claimants to submit a new spreadsheet at this stage of the proceeding, that the Control Sheet is not merely an updated version of C-299 given that it includes new calculations not previously submitted and that, should the new spreadsheet be admitted into the record, the Respondent should be given the opportunity to make substantial observations – including Professor Dapena's own calculations. The Respondent further requests the exclusion of section IV.1.9, as well as paragraph 484 together with its footnotes 604 and 605, from the Claimants' Post-Hearing Brief.

The Tribunal considers that, should it become relevant to its decision on the merits, it could be useful to be able to consult a document that enables it to choose between the different opinions of the damages experts on the various parameters discussed. In the absence of a joint document of the Parties, the Tribunal would admit separate documents – or one document supplemented by both Parties' comments thereon. In order to make this decision:

1. On March 24, 2020, the Claimants shall submit the updated version of Exhibit C-299 as well as the Control Sheet ("CCS").
2. On April 21, 2020, the Respondent shall submit its responsive document on CCS as well as, if so wish, its own version of a control sheet ("RCS").
3. On May 5, 2020, the Claimants shall submit a reply to the Respondent's comments on the CCS as well as any comments on admissibility they may have on the RCS, if submitted.
4. On May 19, 2020, the Respondent shall provide a reply to the Claimants' comments on the RCS.

All the above submissions shall be considered to have been filed *de bene esse*. For the time being, the Tribunal confirms that these documents are not admitted into the record. The Tribunal reserves in full its powers to decide upon their admission or non-admission following consideration of the Parties' complete briefing on this issue.

Regarding the portions of the Claimants' Post-Hearing Brief which exclusion has been requested by the Respondent, the Tribunal understands that the admissibility of section IV.1.9 will follow the

> admissibility of the updated version of Exhibit C-299 and of the Control Sheet. Regarding paragraph 484 and footnotes 604-605, the Tribunal is satisfied with the Claimants' explanations and requests that the referred paragraph be corrected. The Tribunal requests that the Claimants submit the amended pages of the Post-Hearing Brief in both languages, without changing the paragraph numbers of the non-amended paragraphs, once the Tribunal has decided on the admissibility of the updated version of Exhibit C-299 and of the Control Sheet. Should the Respondent maintain an objection to paragraph 484 and footnotes 604-605, it shall indicate so within seven days from receipt of the amended pages of the Claimants' Post-Hearing Brief.

52. On 23 March 2020, Claimants filed an updated version of Exhibit C-299, including the control sheet.

53. On 21 April 2020, Respondent submitted its responsive document on Claimants' control sheet as well as its own version of a control sheet.

54. On 1 May 2020, Respondent submitted a request for an extension to file the last round of comments on Claimants' and Respondent's control sheets. Claimants submitted a response on 4 May 2020. On the same day, the Tribunal decided to grant a short extension for the Parties to file their respective presentations. Claimants' deadline was extended from 5 May to 12 May 2020, and Respondent's deadline was extended from 19 May to 29 May 2020. Both Parties complied and filed their respective submissions in accordance with the Tribunal's instructions.

55. On 30 July 2020, the Tribunal notified its decision to the Parties, as follows:

> The Tribunal refers to its communication of March 17, 2020 requesting that the Parties make the following submissions *de bene esse*, which the Parties did on March 24, April 21, May 12 and May 29, 2020, respectively:
>
> 1. The Claimants were requested to submit the updated version of Exhibit C-299 as well as the Control Sheet ("CCS").
> 2. The Respondent was requested to submit its responsive document on CCS as well as, if so wished, its own version of a control sheet ("RCS").
> 3. The Claimants were requested to submit a reply to the Respondent's comments on the CCS as well as any comments on admissibility they might have on the RCS, if submitted.
> 4. The Respondent was requested to submit a reply to the Claimants' comments on the RCS.
>
> The Tribunal has decided to accept these submissions into the record. As a consequence, the Tribunal also confirms the admissibility of

> section IV.1.9 of the Claimants' Post-Hearing Brief. The Tribunal clarifies that its decision on admissibility is without prejudice to the Tribunal's decision on the probative value of any of these documents.
>
> Finally, the Tribunal reminds the Claimants of its decision regarding paragraph 484 and footnotes 604-605 of the Claimants' Post-Hearing Brief, and requests that the Claimants submit the amended pages of the Post-Hearing Brief in both languages, without changing the paragraph numbers of the non-amended paragraphs, by Wednesday, August 5, 2020. Should the Respondent maintain an objection to paragraph 484 and footnotes 604-605, it shall indicate so within seven days from receipt of the amended pages of the Claimants' Post-Hearing Brief.

56. Claimants wrote to the Tribunal on 4 August 2020 indicating they had already submitted an amended version of their Post-Hearing Brief containing the requested corrections to paragraph 484 and footnotes 604-605 on 20 February 2020, and noted that Respondent had not objected to the submission of these amendments.

57. On 11 August 2020, Respondent submitted a word document with corrections to paragraph 484 and footnotes 604 and 605 of Claimants' Post-Hearing Brief. The Tribunal notes that these corrections reflected, apart from minor, but immaterial differences, the corrections Claimants had submitted on 4 August 2020.

58. On 30 June 2021, the Tribunal invited the Parties to submit a joint proposal regarding the contents of their respective costs statements, which the Parties did on 7 July 2021.

59. The Parties submitted their respective costs' statements on 30 July 2021. Following the Tribunal's invitation, on 17 August 2021, Respondent filed comments on Claimants' costs statement, and Claimants filed comments on Respondent's comments on 24 August 2021. On the same day, and also pursuant to the Tribunal's invitation, Respondent filed a clarification of its communication of 17 August 2021.

60. The proceeding was declared closed on 5 October 2021.

III. REQUESTS FOR RELIEF

Claimants' Requests for Relief

61. Claimants request that the Tribunal render an award, stating that:

> 1. The Argentine Republic has breached Articles 4(1) and (2) of the BIT by unlawfully expropriating Claimants' investment.

2. The Argentine Republic has breached Article 4(3) of the BIT by unlawfully expropriating the license and the gaming operations of Claimants' subsidiary ENJASA.
3. The Argentine Republic has breached Article 2(1) of the BIT by failing to accord fair and equitable treatment.
4. The Argentine Republic is liable to pay damages for the breach of the Articles 2(1), 4(1), 4(2) and 4(3) of the BIT.
5. The Argentine Republic shall pay not less than USD 51,919,998 to Claimants.
6. The Argentine Republic is ordered to pay to the Claimants interest at a rate of 6% compounded annually from 13 August 2013 until full payment.
7. The Argentine Republic shall pay to Claimants all costs, expenses and fees (including internal costs) relating to this arbitration and appropriate interest thereon.[3]

Respondent's Requests for Relief

62. Respondent requests the Tribunal to

(a) reject each and every one of the claims put forward by Claimants;
(b) order Claimants to pay for all costs and expenses arising from these arbitration proceedings, and
(c) grant the Argentine Republic such further relief as the Tribunal may deem fit.[4]

IV. FACTUAL BACKGROUND OF THE DISPUTE

63. Most of the facts underlying the present dispute are uncontested between the Parties. This is due not least to the fact that gaming in the Province of Salta is a highly regulated and formalized sector of the economy, with the different administrative proceedings affecting ENJASA being documented in detail, as the large record submitted in the proceedings attests. What the Parties differ on are certain undocumented facts, which principally concern the motive for ENREJA revoking ENJASA's license, and their legal assessment

[3] Claimants' Post-Hearing Brief, para. 584.
[4] Respondent's Post-Hearing Brief, para. 358.

of the revocation. The present section provides a summary of those largely uncontested facts.

A. The Privatization of the Gaming Sector in the Province of Salta

64. In accordance with Articles 75 and 99 of the National Constitution of Argentina, the regulation of games of chance falls outside the scope of competence of the Federal Government. Such regulation is thus the competence of the respective Provinces.[5]

65. Since the 1970s, gaming facilities and lottery activities in the Province of Salta, which is located in the Northwestern part of Argentina, were operated directly by, or under the control of, Banco de Préstamos y Asistencia Social ("**BPAS**"), an autonomous entity fully owned by the Province of Salta.[6] When it was in charge of the gaming sector in Salta, BPAS had issued a number of licenses for the operation of slot machine halls to individuals and companies.[7]

66. In December 1995, the Province of Salta passed the "Principles for the Restructuring of BPAS" as part of its Law No. 6836. This Law foresaw the restructuring of BPAS, including the possible privatization of BPAS' gaming and lottery operations, which was necessary to attract substantial private investments.[8]

67. On 7 September 1998, the Executive of the Province of Salta passed Decree No. 2126/98. It addressed the necessity of constant investments for the continuous development of the gaming sector and also created ENJASA, a company with limited liability under Argentine law in order to manage, commercialize, and exploit games of chance in the Province of Salta.[9] ENJASA was to have a duration of 30 years.

68. Law No. 7020 of the Province of Salta, which entered into force on 30 December 1998, provides the principal regulatory framework for the gaming and lottery sector in the Province.[10] The Law created ENREJA as the regulatory agency to oversee the gaming and lottery sector within the Province (Art. 31). ENREJA was to issue operating rules and oversee compliance with the applicable laws and regulations (Arts. 3, 32, and 33).

[5] Claimants' Post-Hearing Brief, para. 18.
[6] Claimants' Memorial on the Merits, paras. 10-14; Respondent's Counter-Memorial on the Merits, paras. 134-135.
[7] Claimants' Reply on the Merits, paras 84-86; Respondent's Counter-Memorial on the Merits, para. 135.
[8] Exhibit C-045.
[9] Claimants' Memorial on the Merits, paras. 19-24; Respondent's Counter-Memorial on the Merits, paras. 137-139.
[10] Claimants' Memorial on the Merits, paras. 25-27; Respondent's Counter-Memorial on the Merits, paras. 140-147. For the text of Law No 7020, see Exhibit C-048.

The regulatory framework, inter alia, prohibited the hiring of operators without the authorization of ENREJA and required the appointment in each gaming facility of a person responsible for overseeing and implementing anti-money laundering measures (Art. 5). ENREJA also disposed of disciplinary and sanctioning powers, which included the issuance of warnings, the imposition of fines, disqualification, and the suspension and revocation of operating licenses (Art. 13).[11] Operating licenses, however, were not issued by ENREJA, but by the Government of the Province of Salta (Art. 4).

69. On 1 September 1999, the Executive of the Province of Salta conferred an exclusive license to ENJASA for the operation of games of chance by Decree No. 3616/99.[12] The terms of this License, which was granted for a term of 30 years, provided that any breach of the conditions of the License, of Law No. 7020, and of any regulation issued by ENREJA were to be sanctioned pursuant to Law No. 7020 (see Art. 5.1 of the License). The License furthermore specified that it would be extinct or forfeited, inter alia, in case of non-payment of the license fee, non-compliance with the obligations imposed under Article 5 of Law No. 7020, exploitation of any games of chance without prior authorization by ENREJA, (full or partial) cession or transfer of the operations covered by the License without prior authorization of the Executive, and bankruptcy of the licensee (Art. 6). The impact the grant of an exclusive operating license to ENJASA had on licenses issued previously by BPAS to slot machines operators is a matter of controversy between the Parties.

70. Equally on 1 September 1999, the Ministry of Production and Employment of the Province of Salta approved the Call for a National and International Public Tender to offer 90% of ENJASA's shares (the so-called "Class A-shares") for sale.[13] Participants in the tender needed to have at least ten years of experience in the operation of casinos and games of chance. Moreover, they had to submit an investment plan that included the number of employees to be hired, a tourism development program, and the amount of investments to be made, and stipulate a yearly license fee to be paid to the Province for the term of the License. The remaining 10% of ENJASA's shares (the so-called "Class

[11] The Parties disagree, however, whether Article 13 of Law No. 7020 continued to stay in force when Law No. 7020 was amended in May 2001. For details, see *infra* paras. 176-177, 254-255.
[12] Claimants' Memorial on the Merits, paras. 28-30; Respondent's Counter-Memorial on the Merits, paras. 148-157. For the text of Decree No. 3616/99 containing the License, see Exhibit C-049.
[13] Resolution No. 411/99; Claimants' Memorial on the Merits, paras. 31-34; Respondent's Counter-Memorial on the Merits, paras. 158-162.

B-shares") continued to be held by the Province of Salta under a joint ownership participation program for former BPAS employees.

71. The only participant in the public tender was the Unión Transitoria de Empresas ("**UTE"**), a joint venture under Argentine law, consisting of Casinos Austria International Holding GmbH ("**CAIH**") (5%), Boldt S.A. ("**Boldt**") (5%) and Iberlux International S.A. ("**Iberlux**") (90%). The UTE's bid included the offer to pay an annual license fee for the 30-year period (consisting initially of payments of USD 2,200,000 for the first three years and USD 3,500,000 for the following 27 years) and a commitment to invest USD 20,770,000 into tourism development in the Province of Salta, namely into the construction of a five-star hotel and the establishment of hoteling and gastronomy schools as well as of a fund for the promotion of tourism and culture. Following a request by the Ministry of Production and Employment of the Province, the bid was revised, resulting in an offer with higher annual payments for the License of USD 2,500,000 per year for the first three years, and USD 4,100,000 per year for the following 27 years.[14]

72. On 31 January 2000, the tender was awarded to the UTE by Resolution No. 20/00. On 15 February 2000, by Decree No. 419/00, the Executive of the Province of Salta[15] approved the Transfer Agreement which transferred the tendered shares in ENJASA to the UTE. The Transfer Agreement also extended the sanctions of Law No. 7020 to the buyer's breaches of the Transfer Agreement, the bid, or any other documentation that formed part of the tender.[16]

B. Development of Claimants' Investment

73. The UTE shortly thereafter requested ENREJA to authorize the transfer of its shares in ENJASA to L&E, a stock corporation under Argentine law, which was formed by the members of the UTE in accordance with their respective participation in the UTE (i.e., CAIH with 5%, Boldt with 5%, and Iberlux with 90%). ENREJA authorized this transfer, and consequently L&E was registered as the owner of the Class A-shares of ENJASA in the company register.[17]

[14] Claimants' Memorial on the Merits, paras. 35-38; Respondent's Counter-Memorial on the Merits, paras. 163-167.
[15] Claimants' Memorial on the Merits, para. 40; Respondent's Counter-Memorial on the Merits, paras. 169-175.
[16] Transfer Agreement, Art. 7.1.2 (Exhibit ARA-11).
[17] Claimants' Memorial on the Merits, para. 50; Respondent's Counter-Memorial on the Merits, para. 176.

74. The ownership structure of the shareholding in L&E changed over the course of the years.[18] In 2001, Iberlux purchased the shares in L&E held by Boldt, thus increasing its participation to 95%. In February 2007, CAIH, which initially held 5% of the shares in L&E, increased its participation to 60% as a result of purchasing 55% of L&E shares from Iberlux. On 26 March 2010, pursuant to an internal structuring, CAIH transferred its (then) 60% of L&E shares to CAI.

75. Also the shareholdership in respect of ENJASA changed over the years. On 19 October 2009, most of the beneficiaries of the joint ownership participation program authorized the Government of Salta to sell their parts in the Class B-shares in ENJASA. On 4 November 2009, L&E purchased almost all of these shares in ENJASA with the exception of a minor participation that remained with the Province of Salta because some of the former employees of BPAS had not agreed to the sale of their shares in ENJASA to L&E.[19]

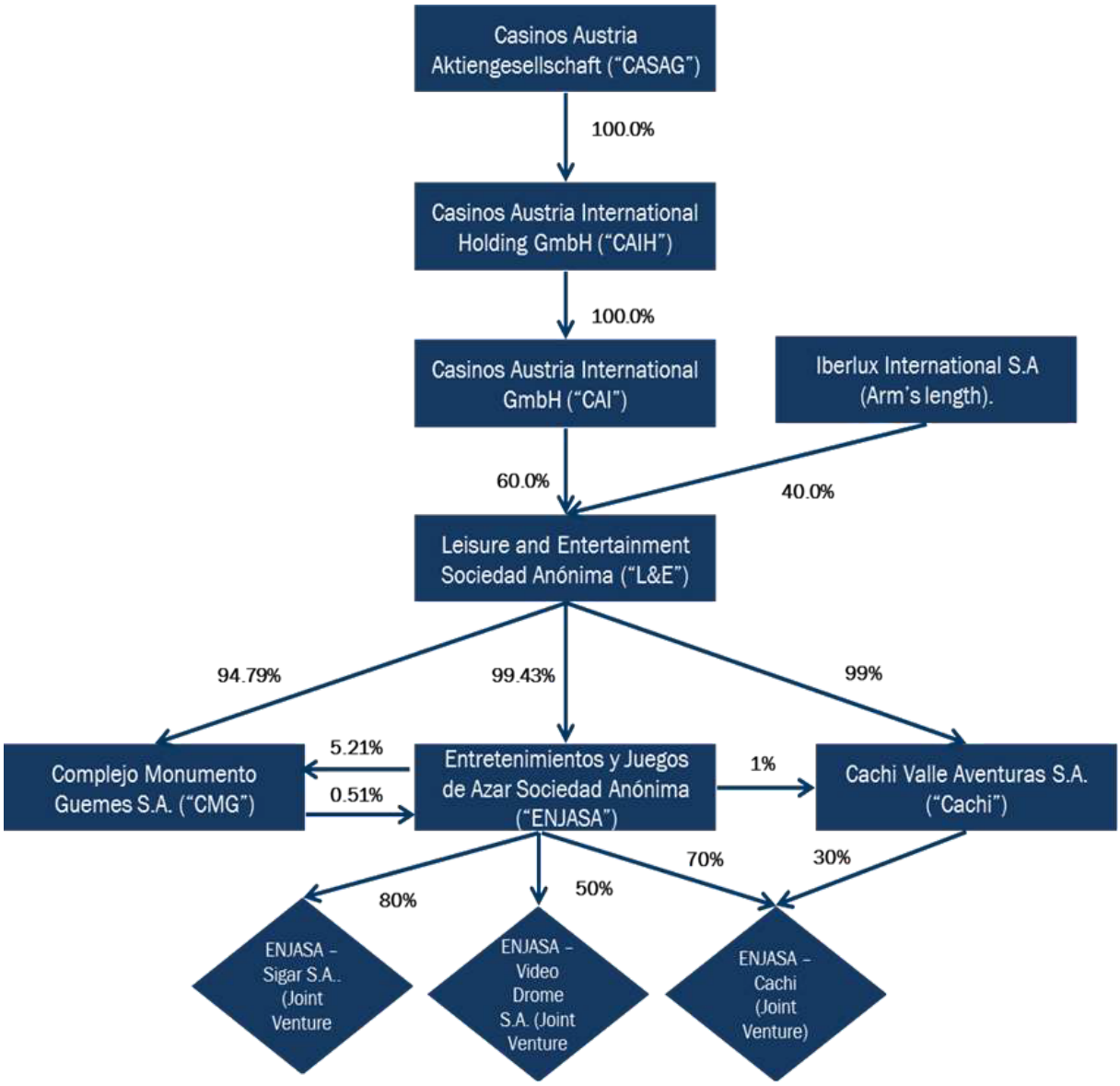
76. At the end of 2009, Complejo Monumento Güemes S.A. ("**CMG**"), a stock corporation under Argentine law, which was jointly owned by L&E (94.79%) and ENJASA (5.21%), received a minor participation in ENJASA in exchange for transferring to ENJASA the good will ('*fondo de commercio*') in the five-star hotel in the City of Salta that had been built by CMG in fulfilment of the UTE's investment obligations under the Transfer Agreement.[20]

77. Moreover, L&E established Cachi Valle Aventuras S.A. ("**Cachi Valle**"), a stock corporation under Argentine law, in order to develop and administer real estate projects and to promote tourism in Salta. L&E held 99% of the shares of Cachi Valle, while ENJASA held the remaining 1% of the shares.[21] Cachi Valle was the owner of the building in which the five-star hotel, as well as one casino, Casino Salta, were located.[22]

[18] Claimants' Memorial on the Merits, paras. 50-56.
[19] Claimants' Memorial on the Merits, paras. 57-62; Respondent's Counter-Memorial on the Merits, para. 177. Of the aggregate shares of ENJASA, 90.56% were Class A-shares, which all were acquired by L&E. 9.44% of the aggregate shares were Class B-shares, of which L&E acquired 98,80%. In their submissions and expert reports, the Parties made abstraction of the 0.12% of ENJASA's shares that L&E did not own and assumed a 100% shareholding of L&E in ENJASA. Following the Parties' position, the Tribunal likewise makes the same assumption.
[20] Claimants' Memorial on the Merits, para. 60, footnote 85; Claimants' Post-Hearing Brief, para. 12.
[21] Claimants' Post-Hearing Brief, paras. 12-13.
[22] Rosen I, footnote 122.

Cachi Valle made those premises available for the operation of Casino Salta under a joint venture agreement in which ENJASA had a 70% and Cachi Valle a 30% participation.[23]

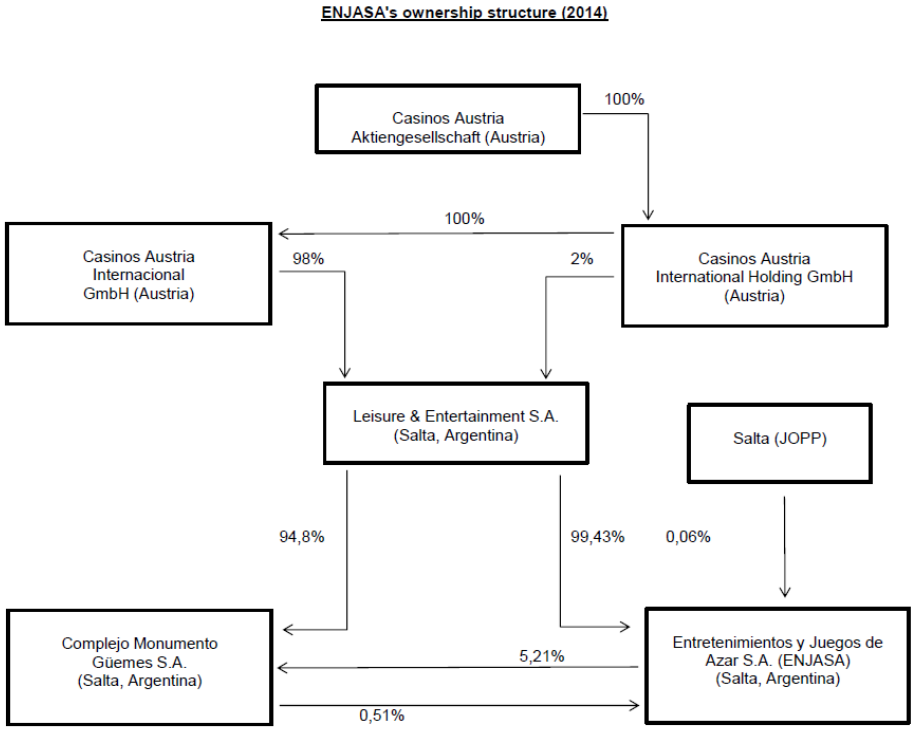
78. As a result of the above transactions, and taking into account a capital increase that had taken place in the meantime, the ownership structure in ENJASA therefore looked as follows as of 13 August 2013, when ENJASA's operating license for games of chance was revoked:[24]



79. The shareholder structure underwent further changes after August 2013. On 15 November 2013, CAI purchased the remaining 40% of the shares in L&E from Iberlux and became the 100% shareholder of L&E. It then transferred 2% of the shares in L&E

[23] Claimants' Memorial on the Merits, paras. 101-103.
[24] Claimants' Post-Hearing Brief, para. 13 (reproducing a graph from Rosen I, p. 16 (Exhibit C-26)).

to CAIH, whose sole shareholder is CASAG. Thus, at present, CAI directly holds 98% of L&E. CASAG in turn indirectly holds 2% of L&E through its participation in CAIH and the remaining 98% through its participation in CAI. Consequently, CASAG indirectly controls 100% of L&E. Through L&E, CAI and CASAG in turn indirectly hold 99.94% of ENJASA's shares. The resulting ownership structure in ENJASA looks as follows:[25]



80. The above group of companies further developed the gaming, lottery, and tourism sector in the Province of Salta. In August 2013, when its operating license was revoked, ENJASA had become one of the most significant employers in the Province. It operated four casinos, 15 slot machine halls, 14 lottery games, 1,376 slot machines, and 46 live games tables; it employed around 750 employees and had a network of 700 lottery agencies and 11 local lottery branches.[26]

81. ENJASA had also invested more than USD 20,000,000 into the construction of the Sheraton Hotel Salta, the first five-star hotel in the region, which opened in August 2005.[27] The construction of the hotel was part of the investment program that was

[25] Exhibit C-017.
[26] Claimants' Post-Hearing Brief, para. 58.
[27] Claimants' Memorial on the Merits, paras. 124-125.

promised as part of the privatization process. In addition, ENJASA sponsored two schools, one for hotel trade and one for gastronomy, and created the "ENJASA Foundation" for the promotion and research of cultural, tourist, hotel and gourmet activities in the Province of Salta, in fulfilment of the promises made in the course of the privatization of ENJASA.[28] Respondent agrees that all obligations to invest in tourism undertaken under the Transfer Agreement by the UTE have been fulfilled.[29]

C. Development of Regulatory Framework and License Fee in the Province of Salta

82. The regulatory framework under which ENJASA operated games of chance in the Province of Salta consisted of a combination of different legal instruments. These included the License itself, which had been granted to ENJASA by the Province of Salta, the statutory framework established under Law No. 7020, and regulations to implement that Law, which were passed by ENREJA.

83. ENJASA's exclusive license provided, in its Article 5, that any breach of Law No. 7020 or of regulations issued by ENREJA were to be sanctioned with the penalties and sentencing provided for in Law No. 7020. The License also provided that the determination of any penalty was subject to

> the gravity of the offense, the damage caused upon the legal certainty, the morality and good customs, the consequences suffered by the Provincial Government and/or individuals, the social upheaval caused and the infringer's records of relapses.[30]

84. Law No. 7020, inter alia, contained a prohibition for license holders for games of chance to engage "operators" without ENREJA's authorization and imposed duties in respect of anti-money laundering (Art. 5). It further laid down the extent of ENREJA's sanctioning powers (Arts. 13 and 41) and contained provisions on the determination of sanctions (Arts. 42, 43, 45, 48), as well as a statute of limitations (Art. 49). The relevant provisions of Law No. 7020 are as follows:

> **Article 5**
>
> The licensee's business shall be subject to this law. The licensee shall be responsible for the selection and employment of the methods for the exploitation and maintenance to secure compliance with the provisions set

[28] Claimants' Memorial on the Merits, paras. 121-133.
[29] See Respondent's Counter-Memorial on the Merits, para. 182.
[30] Exhibit C-049.

forth hereunder, and in no event it shall be authorized to engage operators without the authorization by [ENREJA], which shall establish the requirements and conditions to be complied with by each operator.

The licensee shall appoint an individual who shall be in charge of the anti-money laundering tasks and who shall be responsible for:

a) Centralizing all the information concerning customers, transactions known, suspected or having reasons to suspect.

b) Reporting any transaction where the individual's transaction has no reasonable relationship with the development of business activities likely to be declared.

c) Identifying through the Identity Document or Passport all those customers to which a check is drawn or a transfer is made to offshore accounts for amounts in excess of ten thousand pesos ($10,000.00).

Article 13

The violations or breaches to this law, its regulations, to the license agreement and to all the regulations enacted by [ENREJA], shall be punished by [ENREJA] with: a) Warning b) Fine c) Inability to operate d) Suspension of the License e) License Revocation.

The penalties above shall be applied taking into consideration due proportionality between the penalties and the violation, notwithstanding the criminal liability and misdemeanor liability.[31]

Article 40

Individuals and/or legal persons that with or without authorization, for profit or not carry out [games of chance] in violation of one or more rules hereof, its regulatory decree and [ENREJA's] resolutions, shall be liable to administrative penalties, without prejudice to the misdemeanor and criminal penalties and the civil liability that may be applicable.

Article 41

[ENREJA] may impose jointly or indistinctly the penalties of fine, inability to operate and closure.

Article 42

The fine shall consist in payment of a sum of money from one hundred pesos ($ 100) to one hundred thousand pesos ($ 100,000).

Article 43

The inability to operate games of chance by an individual or legal person may not exceed the term of one year.

[31] In addition to the sanctions laid down in Article 13 of Law No. 7020, non-compliance with the obligations under Article 5 of the Law No. 7020 could lead to extinction and forfeiture of the License under the terms of the License. See License, Articles 5.1 and 6 (Exhibit C-049). However, such "extinction" and "forfeiture" could only be decided by the Executive, not by ENREJA. See Resolution No. 240/13, p. 33 (Exhibit C-031).

Article 45

Whenever the violation is committed by reason of the exploitation of an agency, premises or business location, closure thereof may be ordered which may not exceed thirty (30) days.

Temporary closure may be ordered for a maximum term of ten (10) days extendable by another term, whenever it is deemed advisable by reason of the gravity of the factual events.

Article 48

For purposes of the graduation of the penalties, [ENREJA] shall bear in mind the gravity of the offense, the damage caused upon the legal certainty, the morality and good customs, the consequences suffered by the Provincial Government and/or individuals, the social upheaval caused and the infringer's records of relapses.

Article 49

Statutes of limitation applicable to the actions and penalties shall be of one year. Actions shall be barred by the statutes of limitation as from the date of the event and penalties as from execution of the resolution that imposes such penalty. Statutes of limitation shall be interrupted with the commencement of the summary investigation proceeding or the reiteration of the violation, and the amounts of penalties shall be cumulative.[32]

85. Articles 40-49 reproduced above were not yet part of Law No. 7020 when it was adopted in 1998. These provisions were introduced by Law No. 7133 of 9 May 2001 as amendments to Law No. 7020.

86. In addition to Law No. 7020, ENJASA's gaming activities were governed by administrative regulations enacted by ENREJA in the form of resolutions. Of particular importance for the present proceeding was ENREJA's Resolution No. 26/00, which was published in Salta's Official Bulletin on 8 June 2000.[33] It provided for details in respect of the rules on anti-money laundering laid down in Article 5 of Law No. 7020. Resolution No. 26/00 required that operators of games of chance had to keep a so-called "Anti-Money Laundering Book" (Art. 1), which had to be made available to ENREJA for inspection (Art. 2), and in which information on relevant transactions had to be recorded, including in particular the identity of involved players (Art. 3). Relevant transactions included payments made by check or money transfer exceeding the amount of Argentine Pesos (ARS) 10,000, as laid down in Art. 5 c) of Law 7020 (Art. 3), as well as any other

[32] Exhibit C-048.
[33] Exhibit C-180.

suspicious payment or transfer independently of the amount in question and the means of payment (Art. 6).

87. As of 1 May 2012, Resolution No. 26/00 was replaced by Resolution No. 90/12.[34] This Resolution laid down expressly as an instrument of combatting money laundering that any prize above ARS 10,000 had to be paid by check or wire transfer. Resolution No. 90/12 provides in relevant part:

> **Article 1**
>
> With the purpose of complying with the anti-money rules, set forth in Law No. 7020 as amended, the games of chance licensees and concessionaires shall:
>
> 1) Pay through check or wire transfers to accounts in foreign countries all prizes for amounts exceeding ARS 10,000. …

88. Not only the regulatory framework, but also the calculation of the operating fee that ENJASA had to pay to ENREJA changed over time.[35] Initially, the fee consisted of fixed annual amounts (see *supra* para. 71). This changed, however, when the operating fee was renegotiated as part of a broader effort of the new Governor, Mr. Juan Manuel Urtubey, who took office in December 2007, to renegotiate contracts concluded by the predecessor government of Mr. Juan Carlos Romero in order to maintain the financial benefits derived from those contracts for the Province, considering in particular the inflation and depreciation of the Argentina currency following the pesification of US dollar-denominated debt in the context of the country's economic and financial crisis in 2001/2002.[36]

89. Thus, in 2008, the license fee was renegotiated at the request of the Province of Salta through an agency created specifically for the review and renegotiation of public contracts and licenses, the so-called Unidad de Revisión y Renegociación de Contratos y Licencias otorgadas por la Administración ("**UNIREN**"). The change in conditions of ENJASA's gaming license was formalized in the so-called "Acta Acuerdo", an agreement concluded on 7 May 2008 between ENJASA and UNIREN and ratified by the Government of Salta on 11 August 2008 through Decree No. 3428/08.[37] The Acta Acuerdo changed the operating fee from a fixed to a dynamic fee, which was calculated

[34] Exhibit C-181.
[35] Claimants' Memorial on the Merits, paras. 134, 175-179; Respondent's Rejoinder on the Merits, paras. 51-53; Resolution No. 42/09, p.1 (Exhibit ARA-024).
[36] Claimants' Post-Hearing Brief, paras 94-95; Respondent's Rejoinder on the Merits, para. 39.
[37] Claimants' Memorial on the Merits, paras. 175-186; Respondent's Counter-Memorial on the Merits, paras. 178-184.

henceforth as a percentage of ENJASA's annual net income and which rose over the years in steps to 15% for lottery games and to 16% for live games and slot machines.[38]

90. The Acta Acuerdo also stated (i) that ENJASA and its controlling shareholder, L&E, had complied with their obligations to increase ENJASA's capital and invest in the tourism sector, (ii) that there had been no breaches of the Transfer Agreement, and (iii) that "in connection with the joint venture agreements … entered into by and between EN.J.A.S.A and Video Drome S.A. and Cachi Valle Aventura S.A. … no breach of the license terms has been incurred by the Licensee."[39]

91. Following the change in the way the annual fee was calculated, ENREJA introduced a new control system for ENJASA's gaming operations, which required all slot machines to be linked to a real-time online system that could be controlled by ENREJA. To this end, ENREJA introduced certain changes for the operation of slot machines, including in particular new technical requirements that the machines had to fulfil, and required the replacement of slot machines that did not comply with the new regulations.[40]

D. Investigations and Sanctions Prior to the Revocation of ENJASA's License

92. Compliance of ENJASA with the regulatory framework in place in the Province of Salta was ensured through the exercise of supervisory powers of ENREJA as laid down in Law No. 7020. To this end, ENREJA regularly made inquiries and conducted investigations into ENJASA's compliance with the regulatory framework in place. In a number of cases, ENREJA also imposed sanctions against ENJASA for breaches of the regulatory framework.

93. Before the conclusion of the Acta Acuerdo, ENJASA was sanctioned for breaching the regulatory framework on two occasions. In 2005, ENREJA fined ENJASA in the amount of ARS 20,000 for implementing unauthorized restrictions on bets in a lottery game.[41]

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[38] Memorandum of Agreement of 7 May 2008 (Exhibit C-131); Respondent's Counter-Memorial on the Merits, para. 181.

[39] Exhibit C-131_ENG. For the Tribunal's majority, the text of the Acta Acuerdo of 7 May 2008, which is incorporated in Decree No. 3428/08 of the Province of Salta, clearly confirm items (ii) and (iii). The Tribunal's majority does not accept, as the dissenting arbitrator does (Dissent, para. 184), that ENREJA, an administrative agency, can undo this confirmation in 2013 by Resolutions Nos. 240/13 and 315/13.

[40] Claimants' Memorial on the Merits, paras. 192-194; Claimants' Reply on the Merits, paras. 204-213; Respondent's Counter-Memorial on the Merits, paras. 181-184, 232-235; Respondent's Rejoinder on the Merits, paras. 51-71, 104-107.

[41] Exhibit C-239; Respondent's Counter-Memorial on the Merits, paras. 258-260; Respondent's Rejoinder on the Merits, paras. 126-134; Claimants' Memorial on the Merits, paras. 193-196.

In 2007, ENREJA fined ENJASA in the amount of ARS 10,000 for operating a slot machine without authorization.[42]

94. In the years between the conclusion of the Acta Acuerdo and the time when ENJASA's license was revoked, the number of administrative sanctions increased. Between 2007 and August 2013, ENREJA conducted several administrative inquiries into ENJASA's compliance with the regulatory framework in place and imposed several sanctions. Sanctions involved the following incidents.

- In Resolution No. 31/08 (dated 10 March 2008), ENREJA fined ENJASA in the amount of ARS 5,000 for issuing a check that did not contain the words "no a la orden", which makes the check non-transferable, as required by Resolution No. 26/00.[43]
- In Resolution No. 32/08 (dated 10 March 2008), ENREJA fined ENJASA in the amount of ARS 10,000 for the loss of the anti-money laundering book, for irregularities in recording payments, and for issuing transferable instead of non-transferable checks for paying out prizes.[44]
- In Resolution No. 232/08 (dated 18 November 2008), ENREJA fined ENJASA in the amount of ARS 62,000 because the payment of certain prizes of over ARS 10,000 at Casinos Golden Dream had not been made by check.[45]
- In Resolution No. 244/08 (dated 25 November 2008), ENREJA issued a warning against ENJASA because of the unauthorized removal of gaming devices from Casino Salta and Casino Rosario de la Frontera, and for irregularities in the results of poker tournaments.[46]
- In Resolution No. 286/09 (dated 16 December 2009), ENREJA fined ENJASA in the amount of ARS 15,000 for amending betting limits in Casino Golden Dreams without prior authorization.[47]

[42] Exhibit C-240; Respondent's Counter-Memorial on the Merits, paras. 261-264; Respondent's Rejoinder on the Merits, paras. 135-139.
[43] Resolution No. 31/08 (Exhibit C-150).
[44] Resolution No. 32/08, Exhibit C-151).
[45] Resolution No. 232/08 (Exhibit C-155); Claimants' Memorial on the Merits, footnote 238; Claimants' Reply on the Merits, footnote 702; Respondent's Rejoinder on the Merits, para. 121.
[46] Exhibit ARA-45; Respondent's Counter-Memorial on the Merits, paras. 281-285; Respondent's Rejoinder on the Merits, paras. 178-184.
[47] Resolution No. 286/09 (Exhibit C-153). See Claimants' Memorial on the Merits, para. 188, footnote 237; Respondent's Rejoinder on the Merits, para. 121.

- In Resolution No. 39/10 (dated 9 March 2010), ENREJA fined ENJASA in the amount of ARS 100,000 for holding a poker tournament at Casino Golden Dreams without authorization.[48]
- In Resolution No. 46/10 (dated 16 March 2010), ENREJA fined ENJASA in the amount of ARS 20,000 because a payment of over ARS 10,000 had not been made by check.[49] This Resolution was confirmed by Resolution No. 106/10 (dated 3 May 2010), which was issued to decide on a recourse for reconsideration that ENJASA had interposed against Resolution No. 46/10.[50]
- In Resolution No. 104/10 (dated 3 May 2010), ENREJA fined ENJASA in the amount of ARS 100,000 for paying a slot machine prize won on 13 December 2009 in Casinos Golden Dream in cash, rather than by check or wire transfer, and without properly recording it. In addition, ENREJA fined ENJASA in the amount of ARS 200,000 for paying a slot machine prize won on 4 January 2010 in Casinos Golden Dream in cash, rather than by check or wire transfer, and without properly recording it. ENREJA also formally warned ENJASA that violations of anti-money laundering rules could lead to an extinction or revocation of ENJASA's license.[51]
- In Resolutions Nos. 128/10, 129/10, and 130/10 (all dated 18 May 2010), as well as Resolutions Nos. 151/10, 152/10, and 153/10 (all dated 7 June 2010), ENREJA temporarily suspended the operation of certain gaming halls for periods between 7 and 13 days because of irregularities in the operation of slot machines.[52]
- In Resolution No. 161/10 (dated 15 June 2010), ENREJA fined ENJASA in the amount of ARS 172,000 for paying prizes exceeding ARS 10,000 in cash, rather than by check or wire transfer, and for failing to properly record the identities of certain winners of prizes.[53]

[48] Resolution 39/10 (Exhibit C-164). See Claimants' Memorial on the Merits, footnote 240; Claimants' Reply on the Merits, paras. 147-148; Respondent's Rejoinder on the Merits, para. 122.
[49] Resolution 106/10 (Exhibit C-156).
[50] Exhibit C 156; Respondent's Counter-Memorial on the Merits, paras. 295-299; Claimants' Post-Hearing Brief, para. 117.
[51] Resolution No. 104/10 (Exhibit C-152); Claimants' Memorial on the Merits, footnote 237; Claimants' Post-Hearing Brief, para. 117; Respondent's Rejoinder on the Merits, para. 122.
[52] Resolution No. 128/10 (Exhibit C-158); Resolution No. 129/10 (Exhibit C-159); Resolution No. 130/10 (Exhibit C-160); Resolution No. 151/10 (Exhibit C-161); Resolution No. 152/10 (Exhibit C-162); Resolution No. 153/10 (Exhibit C-163); Claimants' Memorial on the Merits, footnote 239; Respondent's Rejoinder on the Merits, para. 123.
[53] Resolution No. 161/10 (Exhibit C-157). See Claimants' Reply on the Merits, paras. 151-152; Claimants' Post-Hearing Brief, para. 117; Respondent's Rejoinder on the Merits, para. 123.

- In Resolution No. 200/10 (dated 27 July 2010), ENREJA fined ENJASA in the amount of ARS 200,000 for operating a slot machine hall in the town of Metán without the necessary authorization.[54]
- In Resolution No. 178/12 (dated 10 July 2012), ENREJA fined ENJASA in the amount of ARS 550,000 for irregularities in lottery drawings, which included the use of too many balls for a drawing, an incorrect publication of the winning ticket in another drawing, and other irregularities in further drawings.[55]
- In Resolution No. 161/13 (dated 28 May 2013), ENREJA fined ENJASA in the amount of ARS 200,000 for modifying prize limits without authorization in poker games at Casino Golden Dreams, and in the amount of ARS 500,000 for operating unauthorized jackpots in poker games at Casino Golden Dreams and Casino Salta.[56]

E. ENREJA's Investigations Leading up to the Revocation of ENJASA's License

95. On 11 December 2012, ENREJA opened three separate investigations into breaches by ENJASA of the regulations governing games of chance in the Province of Salta.[57] One investigation principally concerned charges for breach of the anti-money laundering rules in the administration of a lottery game by ENJASA (Resolution No. 380/12);[58] one concerned charges for breach of anti-money laundering rules in the operation of one of ENJASA's casinos (Resolution No. 381/12);[59] and one concerned charges for breach of the prohibition to hire operators without ENREJA's authorization (Resolution No. 384/12).[60]

1. Resolution No. 380/12

96. Resolution No. 380/12, which was notified to ENJASA on 11 December 2012, charged ENJASA with the following breaches of Article 5 c) of Law No. 7020 as well as of Resolutions Nos. 26/00 and 90/12:

[54] Resolution No. 200/10 (Exhibit C-165). See Claimants' Memorial on the Merits, para. 189; Respondent's Rejoinder on the Merits, para. 121.
[55] Resolution No. 178/12 (Exhibit C-166). See Claimants' Memorial on the Merits, footnote 241; Claimants' Reply on the Merits, paras. 209-212; Respondent's Rejoinder on the Merits, para. 121.
[56] Resolution No. 161/13 (Exhibit C-154). See Claimants' Memorial on the Merits, footnotes 237, 243; Respondent's Rejoinder on the Merits, para. 122.
[57] Claimants' Memorial on the Merits, paras. 228-236; Respondent's Counter-Memorial on the Merits, paras. 382-448.
[58] Exhibit C-172.
[59] Exhibit C-173.
[60] Exhibit C-174.

- Late registration and payment of an expired prize of ARS 11,080 won on 4 December 2011 in the lottery game "*Tómbola*";
- Failure properly to register in the anti-money laundering book the payment of a prize of ARS 12,000 won on 30 January 2012 and of a prize of ARS 15,000 won on 2 March 2012 in the lottery game "*Tómbola*"; and
- Failure properly to identify the personal data of the winner of a prize of ARS 11,480 won on a slot machine on 14 May 2012.[61]

97. ENJASA responded to this investigation on 2 January 2013.[62] It challenged ENREJA's allegations both on factual and legal grounds, and presented explanations to ENREJA for the conduct in question.

98. In respect of the prize won on 4 December 2011, ENJASA claimed that that prize, contrary to ENREJA's allegations, had not expired. While the payment of the prize had only been made and registered on 19 January 2012, i.e., more than one month after the prize was won, the winning lottery ticket, ENJASA claimed, had been submitted for payment two days after the lottery draw had taken place and, therefore, within the ten days period foreseen by the rules of the lottery game "*Tómbola*".[63] The delay in payment, ENJASA explained, had been due to a misunderstanding of the owner of the lottery agency, who happened to be the winner of the prize, but who mistakenly believed that the prize was going to be credited to the checking account of the lottery agency. After the winner complained to ENJASA that the amount had not been credited, the required information was submitted to ENJASA's local branch and sent to ENJASA's headquarters for registration in the anti-money laundering book. ENJASA therefore was of the view that the prize was paid in accordance with Article 3 of ENREJA's Resolution No. 26/00 and registered correctly in the anti-money laundering book after the check had been issued.[64]

99. In respect of the prize won on 30 January 2012, ENJASA submitted that its payment was not formally registered in the anti-money laundering book due to an administrative oversight, although all information required to make the registration had been collected, as ENREJA itself confirmed, in the course of an inspection conducted on 24 April 2012.

[61] Exhibit C-172.
[62] ENJASA's Answer to Charges of 2 January 2013 (Exhibit C-182).
[63] Claimants' Memorial on the Merits, para. 245; Claimants' Reply on the Merits, para. 309.
[64] Claimants' Memorial on the Merits, paras. 246-248; Claimants' Reply on the Merits, paras. 310-311.

ENJASA therefore considered that it had taken all necessary steps to fulfil the requirements for registration set up by ENREJA's Resolution No. 26/00.[65]

100. In respect of the prize won on 2 March 2012, ENJASA submitted that that prize had expired because it had not been submitted for payment within the ten days foreseen by the rules of the lottery game "*Tómbola*". As the prize had expired, no payment occurred. Consequently, no payment had to be registered in the anti-money laundering book. ENJASA further explained that ENREJA's allegation was triggered by a wrong entry in the accounts of ENJASA, which was caused by a bug in the electronic online registration system for lottery prizes and an error of ENJASA's staff, which was manually correcting ENJASA's accounting books. The error was corrected after ENREJA had issued Resolution No. 380/12.[66]

101. In respect of the payment of the prize of ARS 11,480 won on a slot machine on 14 May 2012, ENJASA submitted that that prize had been duly registered in the anti-money laundering book. ENJASA admitted that the information was incomplete when ENREJA reviewed the book on 16 May 2012. ENJASA submitted, however, that the missing information was completed on 17 May 2012; the check making the payment of the prize, in turn, was only issued after the missing information had been entered in the anti-money laundering book.[67] ENJASA therefore submitted that no breach of anti-money laundering rules had occurred.

2. Resolution No. 381/12

102. Resolution No. 381/12, which was notified to ENJASA on 11 December 2012, charged ENJASA with the following breaches of Article 5 of the Law No. 7020 as well as of Resolutions Nos. 26/00 and 90/12:

- Making payments between August and September 2011 in Casino Golden Dreams and Casino Salta in excess of ARS 10,000 in cash rather than by check; and

[65] Claimants' Memorial on the Merits, paras. 251-254; Claimants' Reply on the Merits, paras. 316-318; Claimants' Post-Hearing Brief, paras. 161-163.
[66] Claimants' Memorial on the Merits, paras. 255-262; Claimants' Reply on the Merits, paras. 319-323.
[67] Claimants' Memorial on the Merits, paras. 263-266; Claimants' Reply on the Merits, paras. 324-326; Claimants' Post-Hearing Brief, paras. 167-168; WS I Frade, para. 92 (Exhibit C-019).

– Making cash payments in September 2011 to two customers in Casino Salta that had not been registered in the anti-money laundering book and that differed from the amounts reported in the Casino's internal reports.[68]

103. ENJASA responded to this investigation on 2 January 2013.[69] It challenged ENREJA's allegations both on factual and legal grounds, and presented explanations to ENREJA for the conduct in question.

104. In respect of the cash payments made in Casino Golden Dreams and Casino Salta, ENJASA submitted that, at the relevant time in August and September 2011, no obligation existed to pay prizes above ARS 10,000 by check or international wire transfer and hence no registration of such payments was necessary in the anti-money laundering book. The requirement to pay amounts above ARS 10,000 by check or international wire transfer, ENJASA noted, was only introduced by Resolution No. 90/12, which entered into force on 1 May 2012, adding that ENREJA was not permitted to apply Resolution No. 90/12 retroactively.[70]

105. Moreover, even if a legal obligation to make payments of prizes by check had existed, ENJASA submitted that ENREJA's actions were time-barred pursuant to the one-year statute of limitations contained in Article 49 of Law No. 7020 because ENREJA had started the administrative inquiry more than one year after the alleged breaches.[71] This time-bar, ENJASA submitted, could only be interrupted by the initiation of an administrative inquiry or by the repetition of the breach in question, neither of which had in fact, nor was alleged to have, occurred.

106. Finally, ENJASA submitted that there was no factual basis to conclude that the payments made above ARS 10,000 actually concerned prizes won by casino customers. The information on which ENREJA's charges had been based – namely so-called "*Daily Reports*", *"Rating Card Forms*", and "*internal checks*" – provided no details of the prizes actually won by individual customers. The Daily Reports and the Rating Card Forms, on which ENREJA relied, only provided general estimates of the amounts won on each live game table. Internal checks were obtained against money deposited by customers in the casino's treasury. Although internal checks could be exchanged for chips at the gaming

[68] Exhibit C-173.
[69] ENJASA's Answer to Charges of 2 January 2013 (Exhibit C-183).
[70] Claimants' Memorial on the Merits, paras. 271-272; Claimants' Reply on the Merits, paras. 332-334.
[71] Claimants' Memorial on the Merits, paras. 273-276; Claimants' Reply on the Merits, para. 335.

tables, there was not necessarily a correlation between the amount of the internal checks and the chips a client subsequently cashed.[72] Moreover, no regulations in the Province of Salta forbade to use internal checks in casinos.[73]

107. In respect of the cash payments made to two unregistered customers, ENJASA submitted that it was unclear to it what legal rule had supposedly been breached. ENJASA pointed out that it did not have any obligation to pay an amount above ARS 10,000 by check at the time and that it was impossible to determine whether the amounts paid involved money won during live games or money that had been brought into the casino by the customer. As for money that had been shared between the two individuals, ENJASA observed that it was not uncommon for two individuals to pool their money for playing and at the end of the day distribute it again amongst them.[74]

3. Resolution No. 384/12

108. In Resolution No. 384/12, ENREJA charged ENJASA with having breached Article 5 of Law No. 7020 by sub-licensing the operations of several slot machine halls in different locations to third operators without ENREJA's approval.[75] The charges involved ENJASA having allowed:

(1) Emsenor S.R.L. ("**Emsenor**") to operate a slot machine hall in the city of Salvador Mazza;

(2) Mr. Navarrete to operate two slot machine halls in the cities of Tartagal and Salvador Mazza;

(3) Mr. Colloricchio to operate two slot machine halls in the cities of General Güemes and Rosario de la Frontera;

(4) Video Drome S.A. ("**Video Drome**") to operate slot machines at Casino Golden Dreams in the City of Salta (in a joint venture with ENJASA) and at five rented gaming halls in the cities of San Ramón de la Nueva Orán, Tartagal, Metán, J.V. González, and Rosario de la Frontera;

[72] Claimants' Memorial on the Merits, paras. 277-282; Claimants' Reply on the Merits, paras. 336-337.
[73] Claimants' Memorial on the Merits, paras. 283-286; Claimants' Reply on the Merits, paras. 338-339.
[74] Claimants' Memorial on the Merits, paras. 283-286; Claimants' Reply on the Merits, paras. 338-339.
[75] Claimants' Memorial on the Merits, para. 236; Claimants' Reply on the Merits, para. 253.

(5) Prodec S.A. ("**Prodec**") and its predecessor, Dek S.A. ("**DEK**"), to participate in the management of, and share profits from, tables for Caribbean poker at Casino Golden Dreams and Casino Salta; and

(6) New Star S.R.L. ("**New Star**") to operate slot machines in the cities of San Ramón de la Nueva Orán, Metán, Rosario de la Frontera, General Güemes, and Embarcación.[76]

109. Resolution No. 384/12 was notified to ENJASA on 7 June 2013.[77] ENJASA's response to the investigation under Resolution No. 384/12 followed on 28 June 2013.[78] ENJASA contended that the seven companies and individuals identified in Resolution No. 384/12 were either operators of slot machine halls that had received authorizations to operate by BPAS before ENJASA had been granted its exclusive license for games of chance or were not operators of games of chance at all, but merely providers of slot machines, premises for the operation of games of chance, or other hardware and software for games of chance that ENJASA operated. Specifically, ENJASA submitted the following:

110. Emsenor was not operating the slot machine hall in Salvador Mazza City; it merely had leased the premises in which the slot machine hall operated to ENJASA; the hall itself, however, was operated solely by ENJASA's personnel without any involvement of Emsenor. The fact that the monthly rent consisted of a payment of 10% of the income generated by the slot machines did not make Emsenor a partner or operator of the business, but reflected a common practice in lease agreements in Argentina to protect lessors against inflation.[79] Moreover, ENREJA had been notified of the lease agreement in 2004 and had approved the conditions. Emsenor's financial statements and bylaws further confirmed that Emsenor was not a gaming operator.[80]

111. Mr. Navarrete had been authorized to operate slot machine halls in Tartagal and Salvador Mazza by BPAS. ENREJA was fully aware that he continued to operate these slot machine halls: ENREJA was provided with a copy of the contract with ENJASA, which required Mr. Navarrete to obtain ENREJA's approval for new slot machines;[81] and

[76] Exhibit C-174.
[77] Claimants' Memorial on the Merits, para. 242; Claimants' Post-Hearing Brief, para. 144.
[78] ENJASA's Answer to Charges of 28 June 2013 (Exhibit C-184); Claimants' Memorial on the Merits, paras. 288-317.
[79] Claimants' Memorial on the Merits, paras. 291-296; Claimants' Reply on the Merits, paras. 342, 345-350.
[80] Claimants' Post-Hearing Brief, paras. 175-181.
[81] Claimants' Memorial on the Merits, paras. 297-299; Claimants' Reply on the Merits, paras. 342, 357-360.

ENREJA regularly was informed of the payment of Mr. Navarrete's share in the license fee, and had received the full roster of slot machines he operated.[82]

112. Mr. Colloricchio operated two slot machine halls on the basis of permits granted by BPAS to his predecessors from whom he had taken over their businesses on 17 September 2008 and 24 February 2009 respectively. On 19 March and 24 April 2009, ENJASA had duly informed ENREJA of these transfers and had received no objection. ENREJA had also been provided with a copy of the contract between Mr. Colloricchio and ENJASA, regularly had been informed of Mr. Colloricchio's share in the license fee, and also had received the full roster of slot machines operated by Mr. Colloricchio.[83]

113. Video Drome was only a provider of slot machines operated by ENJASA outside the City of Salta, but did not operate slot machine halls itself. The five contracts for the lease of slot machines with Video Drome, which had been submitted to ENREJA, stated that the halls were operated by ENJASA's employees and that Video Drome did not participate in the costs of the operation. The rent for the slot machines was between 30 and 35% of the gross income generated by the slot machines, i.e., the difference between the bets and the prizes paid.[84]

114. Prodec and its predecessor, DEK, were not operators of games of chance in Casino Salta; they merely supplied hardware and software for jackpot systems and poker gaming tables, which were operated by ENJASA's personnel.[85]

115. New Star, finally, was operating four slot machine halls (in San Ramón de la Nueva Orán, Metán, Rosario de la Frontera, and General Güemes) based on an authorization granted by BPAS.[86] ENREJA was fully aware that New Star had continued to operate the slot machine halls: it was provided with a copy of the contract between New Star and ENJASA and was regularly informed of the payment of New Star's share in the license fee. As regards the slot machine hall in Embarcación, New Star was merely leasing the premises to an operator who had been previously authorized by BPAS.

[82] Letter of 21 April 2014, p. 8 (Exhibit ARA-104); Claimants' Post-Hearing Brief, paras. 191-193.
[83] Claimants' Memorial on the Merits, paras. 300-304; Claimants' Reply on the Merits, paras. 342, 351-356. Claimants' Post-Hearing Brief, paras. 186-190.
[84] Claimants' Memorial on the Merits, paras. 305-308; Claimants' Reply on the Merits, paras. 342, 361-363. Claimants' Post-Hearing Brief, paras. 182-183.
[85] Claimants' Memorial on the Merits, paras. 309-311; Claimants' Reply on the Merits, paras. 342, 364-366; Claimants' Post-Hearing Brief, paras. 184-185.
[86] Claimants' Memorial on the Merits, paras. 312-314; Claimants' Reply on the Merits, paras. 342, 367-369.

F. Revocation of ENJASA's License and Subsequent Events

116. On 13 August 2013, ENREJA proceeded to issue and notify ENJASA of Resolution No. 240/13 in which it made a joint determination on the three investigations initiated by Resolutions Nos. 380/12, 381/12, and 384/12.[87] In respect of all three investigations, ENREJA concluded that the charges brought against ENJASA were well-founded and that ENJASA hence had violated its obligations under the regulatory framework. Finding that ENJASA had violated anti-money laundering provisions and had breached the obligation not to hire operators without ENREJA's authorization, ENREJA concluded that the appropriate sanction was the revocation of ENJASA's license.

117. On 13 August 2013, within 40 minutes after ENREJA had notified ENJASA of the revocation of its license, the President of ENREJA, Mr. Sergio Mendoza, and the Minister of Economy, Infrastructure, and Public Services of the Province of Salta, Mr. Carlos Parodi, held a joint press conference to inform the public about the revocation of ENJASA's license.[88] During the press conference, Mr. Mendoza stated, inter alia, that "ENJASA had an irresponsible attitude in the compliance with anti-money laundering provisions, breaching them in a systematic manner."[89]

118. Equally on 13 August 2013, by Decree No. 2348/13, the Governor of Salta ordered ENREJA to prepare a transition plan to transfer ENJASA's operations, including its employees, to new operators.[90]

119. On 28 August 2013, ENJASA filed a Recourse for Reconsideration of Resolution No. 240/13.[91] In this Recourse, ENJASA argued that Resolution No. 240/13 was unlawful and should be revoked. It claimed, inter alia, that several of the investigated instances, which were found to be in breach of the regulatory framework, had prescribed under the statute of limitations; that ENREJA had disregarded evidence submitted by ENJASA showing that ENJASA had not breached any anti-money laundering rules; and that ENJASA had not hired "operators" in the meaning of Law No. 7020, but merely contracted out certain services to third parties, or had engaged persons that were allowed to operate games of chance under pre-existing authorizations issued by BPAS. ENJASA

[87] Exhibit C-031. See Claimants' Memorial on the Merits, para. 31.
[88] Exhibit C-169.
[89] Ibid, p. 1 (English translation).
[90] Exhibit C-222. See Claimants' Memorial on the Merits, paras. 318-319; Respondent's Counter-Memorial on the Merits, paras. 478-480.
[91] Exhibit C-213. See Claimants' Memorial on the Merits, paras. 329-330; Respondent's Counter-Memorial on the Merits, paras. 466-470.

further claimed that Resolution No. 240/13 was issued in breach of its right to be heard and its right to offer and produce evidence, was issued without warning, that the Resolution's motivation was insufficient, was based on the retroactive application of certain regulatory rules, was arbitrary, and constituted a disproportionate reaction to minor breaches or mere human errors.

120. On 5 September 2013, ENJASA requested the First Instance Court of Salta, to suspend the implementation of Resolution No. 240/13 pending its Recourse for Reconsideration.[92] This request for interim relief was granted on 4 October 2013.[93]

121. On 15 November 2013, Claimants purchased the remaining 40% of the shares in L&E from Iberlux.[94]

122. On 19 November 2013, ENREJA dismissed ENJASA's Recourse for Reconsideration in Resolution No. 315/13.[95] On the same day, ENJASA shut down all of its gaming operations.[96]

123. On 20 November 2013, Mr. Tucek and Mr. Schreiner, two representatives of CAI, met with the representatives of ENREJA and of the Province of Salta to discuss the modalities of transition of ENJASA's operations to new operators and an offer made to Claimants to continue operating Casino Salta.[97]

124. On 20 November 2013, by Decree No. 3330/13, the Government of the Province of Salta approved the Temporary Plan for the exploitation of games of chance prepared by ENREJA.[98] The Plan established conditions for the issuance of licenses to new operators and contained a list of 11 individuals and companies that were to receive such licenses; the list included Video Drome, New Star, and Mr. Navarrete.

[92] Exhibit C-214; Exhibit ARA-77. See Claimants' Memorial on the Merits, para. 331; Respondent's Counter-Memorial on the Merits, paras. 481.
[93] Exhibit C-215, Exhibit ARA-78. See Claimants' Memorial on the Merits, para. 332; Respondent's Counter-Memorial on the Merits, paras. 481.
[94] Claimants' Memorial on the Merits, para. 55; Stock Purchase Agreement (Exhibit C-079); Respondent Counter-Memorial on the Merits, para. 660; Rosen I, para. 11.5.
[95] Exhibit C-032. See Claimants' Memorial on the Merits, paras. 342-346; Respondent's Counter-Memorial on the Merits, para. 471.
[96] Claimants' Post-Hearing Brief, para. 204.
[97] Claimants' Memorial on the Merits, paras. 356-357; Respondent's Rejoinder on the Merits, para. 381.
[98] Exhibit C-033. See Claimants' Memorial on the Merits, paras. 347-350; Respondent's Counter-Memorial on the Merits, paras. 490-492.

125. On 26 November 2013, ENJASA requested the extension of the interim relief granted by the First Instance Court of Salta, pending an Action for Annulment of Resolutions Nos. 240/13 and 315/13.[99] The request for interim relief was rejected on 23 December 2013.[100]

126. On 28 and 29 November 2013, by Resolutions Nos. 332–339/13, ENREJA implemented the Transition Plan, appointed on a provisional basis new operators in respect of three casinos (Casino Golden Dream, Casino Orán, and Casino Boulevard), 15 slot machine halls, and four lottery operations, and approved the transfer of ENJASA's employees to these new operators.[101]

127. On 3 December 2013, ENJASA filed another administrative recourse to suspend the revocation of the Licence and the transfer of the operations, which was rejected as inadmissible by Decree No. 1002/16 on 12 July 2016.[102]

128. On 12 December 2013, ENJASA filed further administrative recourses to revoke ENREJA's Resolutions Nos. 332–339/13, which implemented the Transition Plan.

129. On 30 December 2013, ENREJA passed Resolution No. 364/13 with which it implemented the Transition Plan for Casino Salta, granting a provisional permit to operate the casino to a joint venture consisting of New Star and Sigar S.A. ("**Sigar**") and transferring a number of ENJASA's employees to the joint venture.[103]

130. On 5 February 2014, ENJASA initiated proceedings before the First Instance Court of Salta against Resolutions Nos. 240/13 and 315/13 for the annulment of the revocation of its operating license.[104] It not only claimed that the revocation was contrary to domestic law, but also that it breached the BIT.[105]

131. On 30 April 2014, CAI put Respondent officially on notice of its claim under the BIT and invited it to participate in amicable consultations. By the same notice, it accepted the

[99] Exhibit ARA-153.
[100] Exhibit C-288.
[101] Exhibits C-034 through C-041. See Claimants' Memorial on the Merits, paras. 351-353; Respondent's Counter-Memorial on the Merits, para. 495.
[102] Exhibit C-289.
[103] Exhibit C-220. See Claimants' Memorial on the Merits, para. 358; Respondent's Counter-Memorial on the Merits, para. 497.
[104] Exhibit C-221. See Claimants' Memorial on the Merits, para. 361; Respondent's Counter-Memorial on the Merits, para. 472.
[105] Exhibit C-221, pp. 130-131.

commitment of Respondent to submit the dispute to arbitration under Article 8 of the BIT.[106]

132. On 29 May 2014, the Province of Salta, by Decree No. 1502/14, granted the new operators ten-year licenses.[107] On 24 June 2014, ENJASA filed a recourse for revocation of Decree No. 1502/14, which was dismissed on 12 July 2016.[108]

133. Pursuant to the Tribunal's Decision on Jurisdiction, the pending proceedings before the First Instance Court of Salta concerning the challenge of Resolutions Nos. 240/13 and 315/13 were withdrawn in August 2018.[109]

V. ARGUMENTS OF THE PARTIES ON LIABILITY

134. While the principal facts, including in particular the content of the administrative record in the relationship between ENJASA and ENREJA, which ultimately resulted in the revocation of ENJASA's license, are uncontested, the Parties differ in respect of the motives that underlie the revocation of the License and in their legal assessment of that revocation. The present section summarizes the Parties' arguments in this respect. These summaries are not intended to be a comprehensive survey of all the points made by the Parties, but rather identify the Parties' principal positions. However, in reaching its conclusions, the Tribunal has taken into consideration the full range of arguments advanced by the Parties both in their written and oral submissions.

A. Claimants' Arguments on the Facts

135. Claimants contend that the revocation of ENJASA's gaming license has to be assessed not as an isolated exercise of ENREJA's supervisory powers, but as part of a larger plot through which ENREJA and the Government of the Province of Salta aimed at ousting ENJASA, and by prolongation L&E and its shareholders, from the remainder of their 30-year monopoly in Salta's gaming sector. This was motivated, Claimants claim, by an interest on the side of the Province to redistribute ENJASA's business to domestic operators of games of chance at conditions that were economically more favorable to the

[106] Exhibit C-008.
[107] Exhibit C-176. See Claimants' Memorial on the Merits, para. 362; Respondent's Counter-Memorial on the Merits, para. 504.
[108] Exhibit C-289.
[109] Respondent's Counter-Memorial on the Merits, paras. 466-477; Respondent's Rejoinder on the Merits, paras. 376-378.

Province than the fees paid by ENJASA.[110] Claimants claim that, already for years, ENREJA had developed a pattern of harassment and heavy-handed controls of ENJASA in order to fabricate and collect violations of gaming regulations allegedly committed by ENJASA. Towards the end of 2012, the authorities in the Province of Salta then devised a concrete plan to oust ENJASA of its monopoly. This plan, Claimants contend, culminated in the revocation of ENJASA's exclusive license through Resolution No. 240/13, which ENREJA based on fabricated systematic and serious breaches of anti-money laundering rules, and the subsequent distribution of ENJASA's business to new operators. The revocation of ENJASA's license, Claimants claim, was arbitrary and unlawful and lacked any justification, as ENJASA in fact had not committed serious breaches of the regulatory framework in place in the Province of Salta.[111]

1. Plan to Oust ENJASA from Salta's Gaming Sector

a) Mounting Interferences with ENJASA's Operations Starting in 2007

136. In making their claim that the revocation of ENJASA's license was part of a larger, politically motivated plan to redistribute ENJASA's business in the gaming sector to local operators, Claimants draw on a large amount of circumstantial evidence. They claim that already in 2007, after Mr. Juan Manuel Urtubey took office as the new Governor of the Province of Salta, replacing his political rival, former Governor Mr. Juan Carlos Romero, there were indications that the Province wanted to get rid of "the Austrians."[112]

137. Starting in December 2007, following the takeover of Mr. Urtubey as new governor, Claimants claim, representatives of the Province of Salta and ENREJA began exerting pressure on ENJASA's operations. To start with, the Province of Salta insisted on renegotiating the conditions of ENJASA's gaming license, threatening to terminate ENJASA's license if ENJASA did not accept the modification of the license fee by paying a dynamic canon fee, instead of the previous fixed-fee arrangement. Claimants consider that ENJASA had no choice but to accept the new license fee in the Acta

[110] Claimants' Request for Arbitration, paras. 9-10; Claimants' Memorial on the Merits, paras. 320 and 322; Claimants' Reply, para. 115.
[111] Claimants' Memorial on the Merits, para. 327; Claimants' Reply on the Merits, paras. 214-267.
[112] Claimants' Reply on the Merits, para. 115; WS II Anselmi, para. 47 (Exhibit C-292); Transcript, Day 2, p. 207 (Tucek).

Acuerdo, which was concluded between ENJASA and UNIREN on 7 May 2008 and ratified by the Government of Salta on 11 August 2008.[113]

138. Claimants further submit that, following the conclusion of the Acta Acuerdo, ENREJA multiplied administrative inquiries against ENJASA relating to minor issues. These inquiries, in Claimants' view, were visibly aimed at finding minor formalistic mistakes made by ENJASA. ENREJA allegedly also imposed fines for circumstances discovered during its inspections that had occurred years before the conclusion of the Acta Acuerdo. Claimants consider that the sole purpose of these inspections and fines issued by ENREJA was to harass and exert pressure on ENJASA.[114]

139. Claimants also submit that ENREJA started interfering increasingly with ENJASA's conduct of lottery and slot machine operations. In respect of ENJASA's lottery operations, Claimants contend, ENREJA insisted on (i) the installation of a new CCTV system; (ii) replacing newly purchased equipment with equipment that was leased from the Province of Salta; and (iii) imposing disproportionate sanctions for old allegations and minor isolated incidents that were diligently addressed by ENJASA.[115] In connection with the operation of slot machines, Claimants contend, ENREJA started requiring an unrealistic and unreasonable minimum number of employees and technicians for their operation. ENREJA also required ENJASA to change a large number of slot machines by imposing new technical requirements. Moreover, Claimants point out, ENREJA increased the administrative formalities for the approval of new slot machines, while systematically delaying the approval of these slot machines.[116] Finally, Claimants claim, ENREJA introduced senseless administrative burdens on ENJASA with the purpose of causing minor clerical errors for which ENREJA could then impose harsh sanctions.[117]

140. As a consequence of the increasing controls and other conduct of ENREJA, Claimants submit, ENJASA had to make additional investments and ENJASA's management and personnel had to spend a substantial amount of their time in responding to ENREJA's harassment.[118]

[113] Claimants' Memorial on the Merits, paras. 157-180; Claimants' Reply on the Merits, paras. 112-128.
[114] Claimants' Memorial on the Merits, para. 189; Claimants' Reply on the Merits, paras. 140-153.
[115] Claimants' Memorial on the Merits, paras. 192-194; Claimants' Reply on the Merits, paras. 204-213.
[116] Claimants' Memorial on the Merits, paras. 195-206; Claimants' Reply on the Merits, paras. 154-203.
[117] Claimants' Reply on the Merits, paras. 200-203.
[118] Claimants' Memorial on the Merits, paras. 152-206; Claimants' Reply on the Merits, paras. 140-213, 558.

b) Administrative Inquiries and Sanctions from 2008 to May 2013

141. Claimants also submit that ENREJA increasing the number of investigations and sanctions for alleged breaches by ENJASA of the regulatory framework reflected the harassing attitude taken towards ENJASA and was part of a broader plan to oust it from the Province. Claimants specifically present arguments on the following sanctions that ENREJA imposed on ENJASA between March 2008 and May 2013:

- ENREJA's Resolution No. 31/08 (dated 10 March 2008) imposed a fine of ARS 5,000 because a check issued by ENJASA did not contain the addition "no a la orden" 30 months after this error was discovered during an inspection of the anti-money laundering book for lottery games on 13 July 2005.[119] Issuing a sanction after such a long time, Claimants point out, contravened Article 22 of ENREJA's internal rules, which required a decision within 15 days after initiating an administrative investigation. Moreover, Claimants submit, ENREJA disregarded that, while the words "no a la orden" were missing, the check had been "crossed", which had the exact same legal consequences, that is, to make the check non-transferable, as the wording that was required by Resolution No. 26/00.[120]
- ENREJA's Resolution No. 32/08 (dated 10 March 2008) fined ENJASA ARS 10,000 for the alleged loss of the anti-money laundering book, for alleged irregularities in recording payments, and for the alleged irregular issuance of checks for the payment of prizes.[121] ENJASA challenged the timeliness of the fine with respect to the issuance of checks. With respect to the loss of the anti-money laundering book, Claimants note, ENJASA's management diligently informed ENREJA as soon as it had learned about the loss and dismissed the individual responsible for the loss; in any event, no information had been lost as all entries to be made since the loss of the book had been kept by the individual in question in a separate excel sheet and were later copied into the new anti-money laundering book.[122]
- ENREJA's Resolution No. 232/08 (dated 18 November 2008) imposed fines in the amount of ARS 62,000 on ENJASA because a payment of over ARS 10,000 was

[119] Resolution No. 31/08 (Exhibit C-150).
[120] Claimants' Reply on the Merits, paras. 143-145.
[121] Resolution No. 32/08 (Exhibit C-151).
[122] Claimants' Reply on the Merits, paras. 146, 205-208.

not made by check, although at the time, Claimants contend, payment by check was not required.[123]

- ENREJA's Resolution No. 286/09 (dated 16 December 2009), which fined ENJASA ARS 15,000 for amending betting limits in Casino Golden Dreams without prior authorization, concerned minor formalistic errors which had not caused any prejudice to customers.[124]
- ENREJA's Resolution No. 39/10 (dated 9 March 2010), which fined ENJASA ARS 100,000 for holding an irregular poker tournament in one of its casinos, was issued 17 months after the tournament had taken place; moreover, the irregularity related to the fact that the poker tournament had been held on both a Tuesday and a Thursday, instead of only on a Thursday, as originally approved by ENREJA.[125]
- ENREJA's Resolution No. 46/10 (dated 16 March 2010), which was confirmed by Resolution No. 106/10 (dated 3 May 2010), imposed a fine of ARS 20,000 on ENJASA because a payment of over ARS 10,000 had not been made by check, although at the time, Claimants contend, payment by check was not required.[126] In addition, ENREJA imposed the fine almost two years after the event had taken place and therefore contrary to the one-year time limit that Article 49 of Law No. 7020 established.[127]
- ENREJA's Resolution No. 104/10 (dated 3 May 2010) fined ENJASA ARS 100,000 for making payments of prizes in cash, even though, Claimants contend, no obligation to do so existed at the time.[128]
- ENREJA's Resolutions Nos. 128/10, 129/10, and 130/10 (all dated 18 May 2010), as well as Resolutions Nos. 151/10, 152/10, and 153/10 (all dated 7 June 2010) temporarily suspended the operation of specific gambling halls for short periods between 7 and 13 days because of clerical errors in the slot machine rosters submitted to ENREJA.[129]

[123] Resolution No. 232/08 (Exhibit C-155). See Claimants' Memorial on the Merits, footnote 238; Claimants' Reply on the Merits, footnote 702.
[124] Resolution No. 286/09 (Exhibit C-153). See Claimants' Memorial on the Merits, para. 188, footnote 237.
[125] Resolution No. 39/10 (Exhibit C-164). See Claimants' Memorial on the Merits, footnote 240; Claimants' Reply on the Merits, paras. 147-148.
[126] Resolution No. 106/10 (Exhibit C-156).
[127] Claimants' Post-Hearing Brief, para. 119; Claimants' Reply on the Merits, paras. 149-150.
[128] Resolution No. 104/10 (Exhibit C-152). See Claimants' Memorial on the Merits, footnote 237.
[129] Resolution No. 128/10 (Exhibit C-158); Resolution No. 129/10 (Exhibit C-159); Resolution No. 130/10 (Exhibit C-160); Resolution No. 151/10 (Exhibit C-161); Resolution No. 152/10 (Exhibit C-162); Resolution No. 153/10 (Exhibit C-163). See Claimants' Memorial on the Merits, footnote 239.

- ENREJA's Resolution No. 161/10 (dated 15 June 2010) imposed a fine of ARS 172,000 on ENJASA for not making payments by check when, Claimants contend, there was no obligation to do so, and for three cases in which ENJASA had not requested an identification of the winners of prizes. In addition, the fine was imposed three years after the payments in questions had been made, thus violating Article 21(2) of ENREJA's internal rules.[130]
- ENREJA's Resolution No. 200/10 (dated 27 July 2010) imposed a fine of ARS 200,000 on ENJASA for opening a slot machine hall in the town of Metán without authorization, even though the hall had been opened in 2004 and had been audited regularly by ENREJA.[131]
- ENREJA's Resolution No. 178/12 (dated 10 July 2012) imposed a fine of ARS 550,000 for three minor and isolated incidents in lottery draws, namely the use of too many balls for a drawing, an incorrect publication of the winning ticket in another drawing, and other minor irregularities in further drawings, that were all immediately rectified by ENJASA and did not harm any customers.[132]
- ENREJA's Resolution No. 161/13 (dated 28 May 2013), which imposed on ENJASA the maximum fine of ARS 200,000 for modifying prize limits without authorization in poker games, as well as the maximum fine of ARS 500,000 for organizing an unauthorized jackpot, involved merely minor formalistic errors and did not cause any prejudice to ENJASA's customers.[133]

142. Overall, Claimants claim that ENREJA, between 2008 and May 2013, imposed fines on ENJASA in connection with events that partly had occurred years before the actual fines were imposed. Furthermore, many of the sanctions, in Claimants' view, lacked a legal basis. Others related to what Claimants describe as obviously minor, formal errors that did not affect the integrity of ENJASA's conduct and administration of games of chance and did not cause any prejudice to ENJASA's customers. Furthermore, the amounts of the fines imposed on ENJASA, Claimants contend, showed no relation to the facts they were allegedly based upon and increased without explanation from ARS 5,000 in 2008

[130] Resolution No. 161/10 (Exhibit C-157). See Claimants' Reply on the Merits, paras. 151-152; Claimants' Post-Hearing Brief, para. 117.
[131] Resolution No. 200/10 (Exhibit C-165). See Claimants' Memorial on the Merits, para. 189.
[132] Resolution No. 178/12 (Exhibit C-166). See Claimants' Memorial on the Merits, footnote 241; Claimants' Reply on the Merits, paras. 209-212.
[133] Resolution No. 161/13 (Exhibit C-154). See Claimants' Memorial on the Merits, footnotes 237, 243.

to ARS 500,000 in May 2013.[134] In any event, these prior incidents, Claimants contend, could not give rise to the conclusion that ENJASA had a history of disregarding the regulatory framework in place for operating games of chance, including in particular in respect of anti-money laundering. Rather, the fines imposed by ENREJA formed part of a pattern of harassing conduct that ENREJA had started after Mr. Urtubey had assumed office as Governor of the Province of Salta in 2007.

c) Role of Video Drome

143. As further support for their argument that the revocation of ENJASA's license was part of a plan to redistribute ENJASA's business among domestic operators, Claimants also draw attention to a letter of 23 November 2012, which was sent to ENREJA by Video Drome.[135] Claimants contend that Video Drome had suggested to ENREJA in that letter that it could operate gaming facilities in Salta at more favorable conditions than those in place with ENJASA. In Claimants' view, Video Drome's letter to ENREJA triggered the concrete decision to oust ENJASA from its position in the gaming sector in the Province of Salta by means of revoking ENJASA's license through Resolution No. 240/13.[136] This is supported, Claimants submit, by the fact that Video Drome was one of the companies to whom ENJASA's business was transferred after the revocation of the License. In addition, Claimants point out, the canon fee of 20%, which the Province ultimately obtained from all new operators, was in line with the proposal Video Drome made in its letter.[137]

144. In this context, Claimants also point out that ENJASA and Video Drome had been in a joint venture relating to slot machines installed in Casinos Golden Dreams and had concluded agreements for the lease of slot machines in other locations. The relationship, however, had turned sour due to various disputes concerning, inter alia, ENJASA's request to Video Drome to participate in the payment of the dynamic license fee negotiated in the Acta Acuerdo and to replace older with new slot machines, which would comply with ENREJA's new technical requirements. Since Video Drome had refused these requests, Claimants submit, ENJASA wanted to discontinue the joint venture and lease agreements which were due to expire by 31 December 2012.[138] It is against this

[134] Claimants' Memorial on the Merits, para. 191; Claimants' Post-Hearing Brief, para. 120.
[135] Letter of 23 November 2012 (Exhibit C-171).
[136] Claimants' Memorial on the Merits, paras. 225-227.
[137] Claimants' Memorial on the Merits, paras. 347-350; Claimants' Reply on the Merits, paras. 275-282, 392-430.
[138] See Claimants' Post-Hearing Brief, paras. 122-128.

background, Claimants contend, that Video Drome sent the letter of 23 November 2012 to ENREJA.

d) Political Motivation of the Revocation of ENJASA's License

145. Claimants further submit that political rivalries in the Province of Salta, which already explained the renegotiation of ENJASA's operating fee in 2008, also played a role in the revocation of ENJASA's license. To this end, Claimants claim that, during a meeting with representatives of the Government of the Province of Salta on 27 August 2013, they were informed that the real reason behind the revocation of ENJASA's license was the participation in L&E of Iberlux, which was allegedly held by a strawman of Mr. Romero, the former Governor of the Province of Salta and political rival of Mr. Urtubey.[139] It was following this meeting that Claimants purchased, on 15 November 2013, the remaining 40% of the shares in L&E from Iberlux.[140]

146. As further indication that the revocation of ENJASA's license was politically motivated, Claimants point to the close coordination between ENREJA and the Government of the Province of Salta in relation to the revocation of ENJASA's license. In particular, Claimants note that, on 13 August 2013, within 40 minutes after ENJASA had learned that the License had been revoked, the President of ENREJA, Mr. Sergio Mendoza, and the Minister of Economy, Infrastructure, and Public Services of the Province of Salta, Mr. Carlos Parodi, held a joint press conference, in which they claimed that ENJASA had systematically breached the anti-money laundering regulations in place. In Claimants' view, the two officials made clear that ENJASA was no longer relevant in the Province of Salta, stating that ENJASA "disappears from this story."[141] The two officials also suggested, Claimants submit, that any recourse by ENJASA against Resolution No. 240/13 would be futile.[142]

147. Claimants further contend that it was on the same day that the Governor of the Province of Salta instructed ENREJA to prepare a transition plan to appoint new operators.[143] One

[139] Claimants' Memorial on the Merits, paras. 334-336; Transcript, Day 2, p. 227 (Tucek).
[140] See *supra* para. 79.
[141] Claimants' Reply on the Merits, paras. 265-274; Claimants' Post-Hearing Brief, para. 146.
[142] Claimants' Reply on the Merits, para. 274.
[143] Resolution No. 2348/13 of 13 August 2013 (Exhibit C-222).

day after the revocation, on 14 August 2013, Claimants submit, the Governor publicly endorsed the revocation of ENJASA's license at a press conference.[144]

148. Similarly, Claimants consider that the incredibly quick implementation of the transition plan immediately following the issuance of Resolution No. 315/13 is illustrative of the intention of the Government of Salta to remove ENJASA from the local gaming market and to replace it with national operators.[145] In this context, Claimants point out, it was only one day after ENJASA's Request for Reconsideration had been dismissed, when, on 20 November 2013, the Government of Salta approved the transition plan for the exploitation of gaming in the Province and authorized 11 individuals and companies to take over the operation of casinos, slot machines, and lotteries.[146] Claimants also note that four of these entities, including Video Drome, were prior suppliers of equipment, and seven were pre-existing operators, including New Star and Mr. Navarrete. Between 20 and 29 November 2013, the Province of Salta then granted licenses to new operators for ENJASA's four casinos, 15 slot machine halls, and four lottery operations and definitely excluded ENJASA from these operations.[147]

149. Furthermore, Claimants point out that even though ENJASA had initiated, on 5 February 2014, proceedings in the domestic courts and requested the annulment of the revocation of ENJASA's license and the appointment of new operators, on 29 May 2014, the Government of Salta granted the new operators ten-year licenses in Decree No. 1502/14, without conducting a public tender.[148] This confirms, in Claimants' view, that the sole purpose of the revocation of ENJASA's license, and the transfer of its business and staff to the new operators, was an orchestrated action aimed at ousting ENJASA from Salta's gaming and lottery operations in order for the Province to benefit from more lucrative fees under newly issued licenses with operators other than ENJASA.[149]

150. Claimants also submit that they and ENJASA had undertaken all measures available to them to remedy the situation. In the weeks following the issuance of Resolution No. 240/13, CAI's representatives Mr. Tucek and Mr. Schreiner attended several meetings with representatives of the Province of Salta and of ENREJA. During these meetings,

[144] Interview of Mr. J.M. Urtubey, 14 August 2013, p. 1 (Exhibit C-212); Claimants' Post-Hearing Brief, para. 148.
[145] Claimants' Reply on the Merits, paras. 424-428.
[146] Decree No. 3330/13, Art. 1-2 (Exhibit C- 032).
[147] Claimants' Memorial on the Merits, paras. 347-350; Claimants' Reply on the Merits, paras. 420-425.
[148] Claimants' Memorial on the Merits, paras. 360-362; Claimants' Reply on the Merits, paras. 431-442.
[149] Claimants' Memorial on the Merits, para. 360; Claimants' Reply on the Merits, paras. 431-442.

Claimants contend, ENJASA's alleged non-compliance with the applicable gaming regulations was not even raised once. The only topic that the Provincial Government and ENREJA were arguably focusing on was the alleged involvement in ENJASA, through the shareholding of Iberlux in L&E, of Mr Carlos Juan Garramón, a supporter of the political rival of Governor Urtubey. It is also for this reason, Claimant submit, that CAI had purchased, on 15 November 2013, the remaining 40% of the shares in L&E from Iberlux as a sign of good will and of CAI's strong interest and commitment to continue ENJASA's operations in the Province of Salta.[150]

151. Claimants further point out that a few weeks after the revocation, in November 2013, Mr. Tucek and Mr. Schreiner of Casinos met with representatives of ENREJA and the Province of Salta to discuss the modalities of transition of ENJASA's operations to new operators. During that meeting, Claimants allege, they were offered the possibility to continue operating two casinos, namely Casino Salta and Casino Boulevard, provided they waived all claims against the Province, an offer they, however, declined.[151]

152. The proposal to continue operations on a reduced scale was unacceptable to Claimants. Casino Salta merely represented 2% of ENJASA's total revenues and Casino Boulevard even less. Moreover, Claimants note, they could only acquire new licenses for the two casinos in question if they forfeited, in return, all claims against ENREJA and the Province.[152] In Claimants' view, the fact that the Province and ENREJA offered them to continue operations on a reduced scale confirms that there was no genuine concern about ENJASA's alleged breaches of the applicable regulatory framework.

153. All of the above, in Claimants' view, support their submission that the revocation of the License was part of a politically motivated plan to oust ENJASA from its monopoly in the gaming sector in the Province of Salta and to redistribute its business under conditions that were more favorable for the Province than the conditions ENJASA was operating under.

2. The Revocation of ENJASA's License

154. The politically motivated plan to oust ENJASA from the gaming sector in Salta also becomes apparent, Claimants argue, when considering the revocation of ENJASA's

[150] Claimants' Reply on the Merits, paras. 401-402.
[151] Claimants' Memorial on the Merits, paras. 356-357.
[152] WS III Tucek, para. 598 (Exhibit C-290).

license. Claimants submit that there was neither a legal nor a factual basis for the underlying administrative inquiries and the breaches ENREJA found ENJASA had committed. In Claimants' view, the revocation of ENJASA's license was arbitrary, disproportionate, and politically orchestrated. In addition, Claimants' submit, due process was violated in the administrative proceedings leading to the revocation of ENJASA's license.

a) Charges Underlying Resolution No. 240/13

155. Claimants submit that there were no grounds for ENREJA to conclude that ENJASA had systematically breached the anti-money laundering regulations of the Province of Salta or hired third operators without ENREJA's authorization. Instead, the charges against ENJASA were fabricated and based on incidents that were either non-existent, consisted of minor errors, partly dated from years before the revocation of the License, or involved arbitrary interpretations or applications of the regulatory framework in place. Claimants concretize their submission in respect of the charges brought forward by ENREJA in the three investigations that Resolution No. 240/13 took as a basis for the revocation of ENJASA's license as laid down in the following sections.

(1) Allegations in Resolution No. 380/12

156. In respect of Resolution No. 380/12, in which ENREJA had charged ENJASA with having breached anti-money laundering rules in its lottery operations and by making a payment in respect of a prize won in a slot machine game, Claimants reiterate the same arguments that ENJASA had already made in answering to ENREJA's charges (see *supra* paras. 97-101). They therefore claim that no breach of anti-money laundering rules had occurred. At the most, minor administrative mistakes may have occurred in some of the instances investigated by ENREJA in Resolution No. 380/12.[153] To the extent ENREJA based the revocation of ENJASA's license on these instances, ENREJA had relied on an incorrect factual basis and had not taken into account the explanations ENJASA had furnished in response to ENREJA's investigation under Resolution No. 380/12. Claimants also point out that they submitted the winning ticket for the prize of ARS 11,080 in the present proceeding to prove that the prize indeed existed.[154] In

[153] Claimants' Memorial on the Merits, para. 233; Claimants' Reply on the Merits, para. 250.
[154] Claimants' Post-Hearing Brief, para, 315. For the ticket in question, see Exhibit C-393.

addition, the minor errors that had occurred could not be qualified as serious breaches of the regulatory framework in place.

(2) Allegations in Resolution No. 381/12

157. In respect of Resolution No. 381/12, which concerned alleged breaches of anti-money laundering rules in live games, Claimants reiterate the same arguments that ENJASA had already made in answering to ENREJA's charges (see *supra* paras. 103-107).

158. As for the charges relating to cash payments made to customers in August and September 2011, Claimants submit that, at the relevant time, no obligation had existed to pay prizes above ARS 10,000 by check or international wire transfer and to register the payments in the anti-money laundering book.[155] Consequently, ENREJA's conclusion that ENJASA had acted in breach of anti-money laundering rules by making cash payments was an arbitrary exercise of its supervisory powers.

159. In this context, Claimants observe that Law No. 7020 only required registering the identity of the recipient in case amounts above ARS 10,000 were paid by check, but did not oblige ENJASA to make all payments above ARS 10,000 by check. Similarly, Resolution No. 26/00 of 10 April 2000, which ENJASA also had to comply with, did not require payments of amounts above ARS 10,000 to be made by check. This only changed, Claimants point out, as from 1 May 2012, when Resolution No. 90/12 replaced Resolution No. 26/00.[156]

160. In Resolution No. 90/12, ENREJA introduced the obligation for ENJASA to pay prizes in excess of ARS 10,000 by check or via international wire transfer. The checks had to mention the beneficiary and, if the amount payable by check was in excess of ARS 50,000, the check was to be made non-transferable. Thus, Claimants submit, before the introduction of Resolution No. 90/12, no use of checks and identification of beneficiaries were required for payments above ARS 10,000.[157]

161. Claimants further observe that, at the relevant times, no federal law in Argentina required payments above ARS 10,000 to be made by check. Resolution No. 151/98 of the Federal Tax Authority and National Law No. 25,345 only refused tax deductions when certain

[155] Claimants' Memorial on the Merits, paras. 271-272; Claimants' Reply on the Merits, paras. 332-334.
[156] Resolution No. 90/12, Art. 1.1 (Exhibit C-181).
[157] Claimants' Reply on the Merits, paras. 236-248.

means of payment (such as non-transferrable checks) were not used.[158] To confirm that ENJASA had not breached anti-money laundering regulations, Claimants also refer to the fact that inspectors of Argentina's federal agency for the prevention of money laundering in 2013 did not find reasons to further investigate ENJASA for breaches of anti-money laundering laws.[159]

162. Nevertheless, and in spite of the clear regulations, Claimants submit, ENREJA stated in Resolution No. 381/12 that even before 1 May 2012 ENJASA had to make payments over ARS 10,000 by non-transferrable check and register the beneficiary in the anti-money laundering book. ENREJA's position, Claimants contend, could only be based upon a retroactive – and hence unlawful – application of Resolution No. 90/12 to facts that had occurred before 1 May 2012.[160]

163. Moreover, Claimants submit that even if a legal obligation to make payments of prizes by check had existed in August and September 2011, ENREJA's investigation under Resolution No. 381/12 against ENJASA was time-barred. Claimants contend that pursuant to Article 49 of Law No. 7020, actions related to administrative infringements were time-barred after one year from the date of the event in question; the statute of limitations could be interrupted only by the initiation of an administrative inquiry or by the repetition of the breach in question, both of which neither had in fact, nor was alleged to have, occurred. Instead, ENREJA had started the administrative inquiry in question more than one year after the alleged breaches.[161]

164. In this context, Claimants also submit that the five-year statute of limitations foreseen in Argentina's Federal Criminal Code was not applicable. This would entail a mistaken reliance on the ruling in *Filcrosa*, where the Argentine Supreme Court had decided that a longer statute of limitations established under local laws was inapplicable. *Filcrosa* did not, however, allow applying a longer statute of limitations under federal law, when local legislation imposed a shorter statute of limitations, as in the present case. Moreover, Claimants add, a five-year statute of limitations for criminal offences would also not apply, as none of the alleged regulatory breaches constituted crimes in the sense of Argentina's Criminal Code.[162]

[158] Claimants' Post-Hearing Brief, para. 45.
[159] Claimant Memorial, para. 241.
[160] See Resolutions Nos. 232/08, 46/10, 106/10, and 161/10.
[161] Claimants' Memorial on the Merits, paras. 273-276; Claimants' Reply on the Merits, paras. 335.
[162] Claimants' Reply on the Merits, paras. 371-375.

165. Furthermore, Claimants argue that there was no factual basis to conclude that the payments ENJASA had made above ARS 10,000 actually concerned prizes won by casino customers. The information on which ENREJA's charges were based – namely so-called "Daily Reports", "Rating Card Forms", and "internal checks" from August and September 2011 – provided no details on prizes actually won by individual customers. The Daily Reports and the Rating Card Forms only provided general estimates of the amounts won on each live game table. Internal checks were received against money deposited by customers in the casino's treasury. Although internal checks could be exchanged for chips at the gaming tables, there was not necessarily a correlation between the amount of the internal checks and the chips a client subsequently cashed.[163] Moreover, no regulation in the Province of Salta forbade the use of internal checks in casinos.[164]

166. In respect of ENREJA's charge relating to cash payments made in September 2011 to two customers in Casino Salta, Claimants reiterate that it was not clear what legal rule ENJASA's conduct violated. Claimants stress that ENJASA did not have any obligation at the time to make payments above ARS 10,000 by check.

167. Claimants also point out that it is impossible to determine whether the amounts paid involved money won during live games or money that had been brought into the casino by the customer. Furthermore, it was not uncommon for two individuals to pool their money for playing and, at the end of the day, distribute what was left over or obtained at the gaming table. In any event, Claimants submit, there was no basis for holding ENJASA responsible for their clients' behaviour.[165]

168. Claimants concede that ENREJA had already sanctioned ENJASA for having paid prizes above ARS 10,000 in cash instead of by check before Resolution No. 90/12 had entered into force, that is, when Resolution No. 26/00 still applied. However, Claimants point out, ENJASA had in fact challenged ENREJA's interpretation of Resolution No. 26/00 as requiring the making of payments above ARS 10,000 by check or international wire

[163] Claimants' Memorial on the Merits, paras. 277-282; Claimants' Reply on the Merits, paras. 336-337.
[164] Claimants' Memorial on the Merits, paras. 283-286; Claimants' Reply on the Merits, paras. 338-339.
[165] Claimants' Memorial on the Merits, paras. 283-286; Claimants' Reply on the Merits, paras. 338-339.

transfer several times.[166] ENJASA had only accepted to pay the fines in earlier administrative proceedings in order not to damage the relationship with ENREJA.

169. Claimants therefore conclude that the charges in Resolution No. 381/12 were based on either an incorrect interpretation of the regulatory framework in place at the time (Law No. 7020 and Resolution No. 26/00) or a retroactive application of Resolution No. 90/12, disregarded the statute of limitations in Article 49 of Law No. 7020, and involved mistakes in the investigations of the facts. The conduct targeted in Resolution No. 381/12 could therefore, Claimants contend, not serve as a basis for the finding of serious breaches of the applicable regulatory framework, which could justify the revocation of ENJASA's license.

(3) Allegations in Resolution No. 384/12

170. In respect of Resolution No. 384/12, which charged ENJASA with having breached Article 5 of the Law No. 7020 by sub-licensing the operations of several slot machine halls in different locations to third operators without requesting ENREJA's approval, and involving third operators in certain live games, Claimants equally reiterate the arguments that ENJASA had already made in answering to ENREJA's charges (see *supra* paras. 109-115), namely that some of the individuals and companies in question were operating slot machine halls under permits granted by the BPAS (Mr. Navarrete, Mr. Colloricchio, and New Star), while others were not operators of games of chance at all (Emsenor, Video Drome, Prodec, and DEK). Claimants moreover observe that ENREJA could see from the investment plans Mr. Navarrete and New Star had submitted to ENREJA after the revocation of ENJASA's license that both had been appointed as operators of slot machine halls by BPAS.[167]

171. Claimants further submit that ENJASA, although it had been granted an exclusive license, had accepted, at the request of both the Province of Salta and ENREJA, who otherwise feared social and political problems, that operators authorized by BPAS could continue operating and that their status would not be altered due to the exclusivity of the license granted to ENJASA.[168] Moreover, Claimants point out, ENREJA was aware of

[166] ENREJA's Answer of 28 October 2008, p. 1 (Exhibit ARA-212); Recourse for Revocation of 30 November 2009, p. 3 (Exhibit ARA-237); ENJASA's Answer to Charges re Resolution No. 381/12, p. 4 (Exhibit C-183); ENJASA's Recourse for Reconsideration, pp. 49 *et seq.* (Exhibit C-213); Claimants' Post-Hearing Brief, para. 118.
[167] Letter of 21 April 2014, p. 8 (Exhibit ARA-104); Claimants' Post-Hearing Brief, paras. 191-193.
[168] Claimants' Post-Hearing Brief, para. 65.

all contractual arrangements ENJASA had with these pre-existing operators concerning the operation of slot machines and had accepted that the fees from these operators would be paid to ENREJA through ENJASA. Claimants also maintain that ENREJA had, at all times, meticulously audited ENJASA's operations of slot machine halls and therefore had known about these arrangements all along.

172. Claimants also point out that Article 5 of Law No. 7020 forbids the licensee to appoint operators without ENREJA's authorisation, but does not provide a definition of what an "operator" is. Claimants argue that ENREJA made an unjustifiably broad interpretation of the term "operator" in Article 5 of Law No. 7020 if it included companies under that definition that merely rented property to ENJASA for the operation of a slot machine hall (Emsenor), that supplied hardware and software for games of chance to ENJASA (Prodec and DEK), or leased slot machines to ENJASA (Video Drome). In this context, Claimants further argue that one does not become an "operator" by the mere fact of sharing revenues and profits from gaming operations.

173. Claimants further point out that the Acta Acuerdo confirms that there had been no breaches of the applicable regulatory framework by ENJASA with respect to engaging some of those alleged operators.[169] Indeed, one of the parameters that was considered during the negotiations with UNIREN at the time was the level of regulatory compliance of ENJASA. Thus, Claimants note, Decree No. 3428/08, which approved the Acta Acuerdo, confirmed that ENJASA's compliance was examined.[170] Moreover, the Acta Acuerdo contained specific assurances about ENJASA's regulatory compliance, namely that (i) ENJASA had complied with the payment of the license fee; (ii) ENJASA had complied with its investment plan in the area of tourism and the increase of capital of ENJASA; (iii) there were no factual or legal circumstances that could constitute a breach of the terms of the public tender and transfer agreement through which ENJASA obtained the gaming license; and (iv) the joint ventures of ENJASA, inter alia with Video Drome, were not contrary to the terms of the License, but complied with Article 5 of Law No. 7020.[171]

174. Claimants finally observe that, as part of the transition plan, ENREJA had transferred 600 of ENJASA's employees to the companies that took over four casinos, 15 slot

[169] Claimants' Memorial on the Merits, paras. 180-181; Claimants' Reply on the Merits, paras. 129-139.
[170] Claimants' Reply on the Merits, paras. 130-132; Decree No. 3428/08 of the Province of Salta, Recitals 8 and 14 (Exhibit C-090).
[171] Claimants' Memorial on the Merits, para. 181; Claimants' Reply on the Merits, paras. 133-139.

machine halls, and four lottery operations from ENJASA. The large number of employees transferred, Claimants submit, indicates that no third parties had been operating ENJASA's sites. Claimants also note that ENREJA granted permits to the very same companies, namely Video Drome and New Star, and one individual, Mr. Navarrete, that had participated in what ENREJA claimed had been "serious breaches", namely the involvement of operators of games of chance without ENREJA's authorization.[172] All in all, the allegation that ENJASA had illegally appointed third party operators was thus, Claimants submit, merely a pretext to revoke ENJASA's license.[173]

b) The Revocation of the License Was Arbitrary and Disproportionate

175. Claimants conclude from the above that there was no legal justification to revoke ENJASA's license. ENREJA simply accepted the findings of the administrative inquiries described in Resolutions Nos. 380/12, 381/12, and 384/12, without addressing any of ENJASA's explanations and arguments. Resolution No. 240/13, through which ENJASA license was revoked, retroactively applied Resolution No. 90/12 to facts that had occurred before its entry into force and misrepresented the facts underlying each allegation. Claimants insist that ENJASA complied with the applicable anti-money laundering regulations and did not illegally transfer its gaming license to unauthorized operators. As a result, Claimants conclude, ENREJA's revocation of ENJASA's gaming license was arbitrary.[174]

176. Claimants also cast into doubt the legal basis on which ENJASA's license was terminated. Whereas ENREJA relied on Article 13 of Law No. 7020 to revoke ENJASA's license for breaches of Article 5 of Law No. 7020, the allegations made in Resolutions Nos. 380/12, 381/12, and 384/12, which Resolution No. 240/13 confirmed, concerned, Claimants submit, administrative infringements that could only be sanctioned pursuant to Article 41 of Law No. 7020 with fines, a closure of at most 30 days, or an inability to operate of at most one year. However, the revocation of the operating license was not a sanction foreseen in Article 41. Claimants therefore conclude that ENREJA's allegations, even if they had been true, could not lead to a revocation of ENJASA's license.[175]

[172] Claimants' Memorial on the Merits, paras. 350; Claimants' Reply on the Merits, paras. 425-427.
[173] Claimants' Memorial on the Merits, paras. 358-360; Claimants' Reply on the Merits, paras. 429-430.
[174] Claimants' Reply on the Merits, paras. 266, 305-382.
[175] Claimants' Reply on the Merits, paras. 385-386.

177. Claimants further contend that ENREJA could not have applied Article 13 of Law No. 7020, which provided for the revocation of the License as the most severe sanction, to sanction administrative infringements. Moreover, Article 13 had been repealed by Law No. 7133, which amended Law No. 7020.[176] This, Claimants submit, is a further reason for why ENREJA could not have revoked the License on the basis of Article 13 of Law No. 7020.[177]

178. Moreover, Claimants contend that irrespective of the question as to whether or not the breaches had occurred, the revocation of the License was in all events excessive. In this context, Claimants point to Article 48 of Law No. 7020, which establishes the principle of proportionality and lists the criteria for the graduation of sanctions (see *supra* para. 84). In Claimants' view, ENREJA did not take into account the proportionality required by the provincial regulations, nor did it take into account, or demonstrate the seriousness of, infringements ENJASA had allegedly committed. ENREJA did not consider how these infringements affected or may have affected the "legal certainty, the morality and good customs" mentioned in Article 48 of Law No 7020. To support their argument, Claimants refer to decisions from Argentina's federal agency in charge of anti-money laundering in cases that involved much more serious allegations, but limited the sanctions imposed to fines. This indicates, Claimants conclude, that the revocation of ENJASA's license was a disproportionate sanction.[178]

179. Finally, Claimants reject the argument that ENJASA's previous infringements justified the revocation of the License as a sanction under Article 48 of Law No. 7020, which allows imposing heavier sanctions in light of the licensee's "record of relapses."

c) Violation of ENJASA's Due Process Rights

180. Claimants further submit that the revocation of ENJASA's license, and the procedure leading up to it, violated elementary due process rights. In addition to the lack of any proportionality in, and the arbitrariness of, the decision ultimately made, ENREJA's conduct breached elementary due process guarantees by (i) not warning ENJASA about the possible consequences of the administrative inquiries; (ii) completely disregarding the facts underlying the allegations; (iii) failing to respect ENJASA's right to be heard by not addressing any of the factual explanations and legal arguments made by ENJASA

[176] Law No. 7133 of 19 April 2001 (Exhibit ARA-006); Transcript, Day 5, p. 18 (García Pullés).
[177] Claimants' Reply on the Merits, paras. 300-304.
[178] Claimants' Reply on the Merits, paras. 384-391.

in response to ENREJA's investigations; (iv) depriving ENJASA of a fair opportunity to present its defence, because the company was unable to review the complete file relating to the allegations made by ENREJA and was not given adequate time to respond to the administrative inquiries; and (v) revoking the License without adequate reasoning.[179]

181. Claimants submit in particular that ENREJA was obliged to alert ENJASA of the possible consequences of the administrative inquiries initiated by Resolutions Nos. 380/12, 381/12, and 384/12. ENREJA did not do so, however. Contrary to Respondent's contention, Resolutions Nos. 39/10, 104/10, and 161/10 did not contain sufficient warnings about a possible revocation of ENJASA's license arising out of the conduct investigated under Resolutions Nos. 380/12, 381/12, and 384/12. Moreover, by August 2013, when Resolution No. 240/13 was handed down, these earlier resolutions were three years old and were not mentioned or referenced in Resolutions Nos. 380/12, 381/12, and 384/12.[180]

182. Claimants further point out that ENJASA submitted, on 28 August 2013, an extensive Recourse for Reconsideration of Resolution No. 240/13, which contained detailed arguments of fact and law.[181] In this Recourse, ENJASA observed, for instance, that ENREJA had misinterpreted the involvement of the third operators and requested ENREJA to produce the permits of the BPAS authorizing these operators. Moreover, ENJASA submitted that Video Drome, Prodec, and DEK were not operating the games in question, but had only rented out slot machines or supplied hardware and software that ENJASA used to operate games of chance. Furthermore, ENJASA submitted that ENREJA had either misinterpreted Law No. 7020 and Resolution No. 26/00 by requesting that all payments above ARS 10,000 had to be made by check, or was retroactively applying Resolution No. 96/12 to conduct that had taken place before that Resolution entered into force.

183. On 19 November 2013, ENREJA denied ENJASA's Request for Reconsideration of Resolution No. 240/13 and confirmed the revocation of ENJASA's license by Resolution No. 315/13. In Claimants' view, Resolution No. 315/13 merely rubberstamped Resolution No. 240/13 and sweepingly disregarded or misrepresented ENJASA's

[179] Claimants' Memorial on the Merits, para. 328; Claimants' Reply on the Merits, paras. 283, 293-299.
[180] Claimants' Reply on the Merits, paras. 256-264.
[181] ENJASA's Recourse for Reconsideration (Exhibit C-213).

arguments, considering its Request for Reconsideration a mere "dilatory activity."[182] Claimants further point out that, for the first time in Resolution No. 315/13, ENREJA denied that Mr. Navarrete, Mr. Colloricchio, and New Star had been authorized to operate slot machine halls by BPAS.[183] ENREJA also pretended, Claimants contend, that, in accordance with Article 2 b) of UIF Resolution No. 199/11, any payment made to a gambler in a casino, must be considered a "prize", although this provision clearly distinguished between the payment of "prizes" and of other amounts.[184] All of this, Claimants submit, are further indications that due process was not respected, as ENJASA was, for the first time in Resolution No. 315/13, confronted with additional legal and factual arguments and allegations and could not respond to ENREJA.

B. Claimants' Analysis of the Law

184. In Claimants' view, the plan to oust ENJASA of its business in the gaming sector, which culminated in the revocation of its exclusive license, followed by the transfer of its operations and employees to new operators, destroyed Claimants' investment in the Argentine Republic, with no compensation being paid. This, Claimants argue, constitutes an unlawful expropriation in the sense of Article 4 of the BIT and breaches the obligation of the host State to provide fair and equitable treatment under Article 2(1) of the same treaty, as a result of which Claimants are entitled to damages. The Argentine Republic, Claimants add, is responsible for the actions of the authorities of the Province of Salta, which are attributable to her under international law, as already held by the Tribunal in its Decision on Jurisdiction.[185]

1. Applicable Law

185. Given that their action involves a claim for breach of the international law standards set forth in the BIT, Claimants contend that "[w]hen it comes to an issue of liability for a claim founded upon an investment treaty obligation, the applicable law is the investment treaty as supplemented by general international law."[186]

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[182] Claimants' Memorial on the Merits, paras. 342-346; Claimants' Reply on the Merits, paras. 393, 405-419, Claimants' Post-Hearing Brief, para. 204.
[183] Claimants' Reply on the Merits, para. 412.
[184] Claimants' Reply on the Merits, para. 416.
[185] Claimants' Reply on the Merits, paras. 462-464; Claimants' Post-Hearing Brief, paras. 462-464 (referring to the Decision on Jurisdiction, para. 288).
[186] Claimants' Reply on the Merits, para. 449.

186. Claimants stress that Respondent may not rely on her domestic legislation "as a justification for acts that are in violation of its treaty and other international law obligations."[187] This, Claimants argue, is confirmed by Article 27 of the Vienna Convention on the Law of Treaties ("**VCLT**"), by Articles 3 and 32 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"), as well as by "abundant and consistent authority of ICSID tribunals," which confirms that domestic law cannot justify the failure to comply with international law.[188]

187. Claimants further contend that domestic law is only relevant in determining a State's international responsibility as part of the factual matrix of the dispute, not as part of the governing law, as confirmed by numerous international courts and tribunals.[189] In this context, Claimants refer to several statements of the International Court of Justice ("**ICJ**") to this effect, inter alia in the *ELSI* case, where the Court said:

> Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.[190]

188. For Claimants, the above principle is not altered by the reference to the domestic law of the host State in Article 8(6) of the BIT, which states:

> The arbitral tribunal shall decide the dispute with reference to the laws of the Contracting Party involved in the dispute, including its private international law rules, the provisions of this Agreement and the terms of any specific agreements concluded in relation to such an investment, if any, as well as the applicable principles of international law.

189. This provision, Claimants argue, must be interpreted pursuant to the VCLT and has to be read together with Article 27 of the VCLT and customary international law, "both of

[187] Claimants' Memorial on the Merits, para. 365.
[188] Claimants' Memorial on the Merits, paras. 365-370; Claimants' Reply on the Merits, paras. 448-455; Claimants' Post-Hearing Brief, paras. 226-231.
[189] Reply on the Merits, paras. 456-458 (referring to *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL Award (5 March 2011) para. 197(ii) (Exhibit CL-130) and *Murphy Exploration & Production Company International v. Republic of Ecuador,* PCA Case No. 2012-16, Partial Award (6 May 2016) para. 361 (Exhibit CL-179)); Claimants' Post-Hearing Brief, para. 238.
[190] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989) [1989] ICJ Reports 15, 40, para. 73 (Exhibit ALRA-193). See Claimants' Reply on the Merits, para. 455; Claimants' Post-Hearing Brief, para. 235.

which prohibit a party to a treaty to invoke its national law as a justification for its failure to perform a treaty."[191]

190. Claimants further contest Respondent's assertion that, in order to be able to rely on Article 27 of the VCLT, Claimants must first establish a conflict between Argentine law and international law. According to Claimants, this assertion "disregards the principle according to which domestic law is not governing the question of liability under international law."[192]

2. Breach of Article 4 of the BIT

191. Claimants point out that Article 4 of the BIT protects both against expropriation and measures having an effect equivalent to expropriation, and therefore encompasses both direct and indirect or *de facto* expropriation.[193] According to Claimants, the revocation of ENJASA's license was an abuse of the regulatory powers of ENREJA and constituted an indirect expropriation of Claimants' investment in Argentina. Because of the revocation of ENJASA's license, Claimants claim to be entitled to damages because Respondent thereby permanently deprived them of their investment in Argentina without compensation in breach of Article 4(1) and (2) of the BIT. Claimants further claim to be entitled to damages pursuant to Article 4(3) of the BIT because the revocation of ENJASA's license qualifies as a direct taking of an asset (the License), which belongs to ENJASA, an Argentine company in which Claimants hold shares.

a) The Revocation of the License as an Abuse of Regulatory Powers

192. Claimants accept that customary international law recognizes a host State's "right to regulate or take measures affecting foreign investors' property interests without a finding of compensable expropriation," as long as such measures pursue a legitimate purpose, are aimed at the general welfare, are not discriminatory, fall within the scope of the State's general regulatory or administrative powers, and are in accordance with due process.[194]

193. According to Claimants, Respondent acknowledged that a State's regulatory measures must be "reasonable and proportionate," and so have many investment tribunals. In order

[191] Claimants' Reply on the Merits, para. 459.
[192] Claimants' Reply on the Merits, para. 460; Claimants' Post-Hearing Brief, paras. 226-239.
[193] Claimants' Memorial on the Merits, paras. 392-397; Claimants' Reply on the Merits, paras. 465-466; Claimants' Post-Hearing Brief, para. 241.
[194] Claimants' Reply on the Merits, para. 469; Claimants' Post-Hearing Brief, paras. 280-296.

to satisfy the principle of proportionality, a measure must be: (a) one that is suitable to achieve a legitimate purpose; (b) necessary for achieving that purpose in that no less burdensome measures would suffice; and (c) not excessive in that its advantages are outweighed by its disadvantages.[195] Claimants also stress that many commentators confirm that the principle of proportionality should be applied to determine whether an expropriation has taken place. Even a generally applicable regulation in the public interest may require compensation if it is obviously disproportionate.[196]

194. In the present case, Claimants argue that the revocation of ENJASA's license was not a regular exercise of ENREJA's supervisory powers under Law No. 7020, but instead was done "in bad faith, with the specific purpose of transferring ENJASA's gaming operations to local Argentine companies by fabricating and exaggerating factually incorrect accusations of non-compliance with gaming regulations."[197] In particular, Claimants contend that Resolution No. 240/13 was issued without any warning, specifically targeted Claimants' investment in Salta, and relied on breaches collected over a long period of time that, even if true, were marginal and without serious consequences.

195. Claimants further consider the revocation of the License to have been politically orchestrated, unlawful, arbitrary, and in breach of due process. According to Claimants, ENREJA applied regulations that had not been in force at the relevant time, disregarded the statute of limitations, and rendered any potential legal recourses moot.[198]

196. Moreover, Claimants point out that despite the obvious lack of gravity of the alleged infringements of the regulatory framework in place in the Province of Salta, Resolution No. 240/13 imposed, without warning, the harshest and most severe sanction available. Given that ENREJA could have resorted to less burdensome measures, the revocation of ENJASA's license was excessive, in violation of due process, and its issuance an abuse of ENREJA's regulatory powers. Therefore, Claimants conclude, the measures taken by

[195] Claimants' Reply on the Merits, paras. 470-477; Claimants' Post-Hearing Brief, paras. 287-290.
[196] See Claimants' Reply on the Merits, para. 471 (referring to *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) para. 195 (Exhibit CL-003) and *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (1 October 2011) para. 241 (Exhibit CL-016).
[197] Claimants' Reply on the Merits, para. 479; Claimants' Post-Hearing Brief, paras. 366-382.
[198] Claimants' Reply on the Merits, para. 480; Claimants' Post-Hearing Brief, paras. 366-382.

Respondent did not constitute a legitimate exercise of the host State's regulatory powers and failed to comply with the principle of proportionality.[199]

b) Substantial and Permanent Deprivation of Claimants' Investment

197. Claimants argue that a regulatory taking can be an indirect expropriation given that "disproportionate general regulations can be considered as expropriatory if there is a sufficient interference with the investor's rights."[200] Claimants identify two main criteria to determine whether a regulatory measure amounts to an indirect expropriation: the intensity of the effects of the measures on the investment and its duration.[201]

198. Regarding intensity, Claimants explain that the host State's interference with the investment must be substantial. The expropriatory effect of a regulatory measure is a question of degree, with tribunals using language such as "substantial deprivation", rendering an investment "useless", "effectively neutraliz[ing]" the investment, removing the ability to make use of economic rights, depriving the investment of "any real substance", eroding the investor's rights "to an extent that is violative", or constituting a "persistent or irreparable obstacle" to the use, enjoyment, or disposal of the investment.[202]

199. Claimants point out that whether the investor retains control of the investment is not the most accurate criterion to determine whether an indirect expropriation has taken place. An indirect expropriation leaves the investor's title untouched, but deprives it of the possibility of using the investment in a meaningful way.[203] Criteria such as whether the investor retains the investment's economic use or the benefit to be reasonably expected are more accurate. According to Claimants, the "decisive point for an expropriation is the destruction of the capability to reasonably use the investment in an economic sense."[204] In this case, Claimants contend that the Province's unlawful measures

[199] Claimants' Reply on the Merits, paras. 481-483; Claimants' Post-Hearing Brief, paras. 383-393.
[200] Claimants' Reply on the Merits, paras. 484-485 (relying inter alia on *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (1 October 2011) para. 243 (Exhibit CL-016); *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) para. 132 (Exhibit CL-194)). See also Claimants' Post-Hearing Brief, paras. 280-283.
[201] Claimants' Reply on the Merits, paras. 491, 496; Claimants' Post-Hearing Brief, paras. 244-245.
[202] Claimants' Reply on the Merits, paras. 486-492; Claimants' Post-Hearing Brief, paras. 247-249.
[203] Claimants' Reply on the Merits, para. 486; Claimants' Post-Hearing Brief, para. 250.
[204] Claimants' Reply on the Merits, paras. 493-495.

deprived Claimants of "all of the economic benefits of their shareholding in L&E and ENJASA."[205]

200. Claimants further point out that the fact that they formally retained title to their shareholding in L&E and ENJASA fails to take into consideration the essence of an indirect expropriation and does not detract from the fact that the economic use of the investment has been eradicated.[206] The same holds true, in Claimants' view, concerning the fact that ENJASA has not been deprived of the use of the five-star hotel, which was never profitable on a standalone basis, was constructed as a condition for Claimants' operations in the Province, and was not an asset having a significant independent commercial value after the revocation of the License. Finally, Claimants contend that Respondent's offer to continue operating two casinos was unrelated to the exclusive right to commercially exploit games of chance in the Province of Salta until 2029 under ENJASA's license. The offer to continue operating two casinos, in addition to never having been made in a formal fashion, only accounted for about 5% of ENJASA's revenues and was made subject to various unacceptable conditions, such as waiving any legal recourse against the revocation of ENJASA's license.[207]

201. Regarding duration, Claimants contend that, in addition to the intensity of the measure, tribunals have considered that the interference must not be merely transitional in order to amount to a compensable indirect expropriation.[208] In the present case, Claimants point out that the deprivation of the economic benefits attached to the shareholdings in L&E and ENJASA was permanent, as ENJASA had to shut down operations, rendering the purpose of the entire investment to operate games of chance in Salta impossible. As for the remaining assets of ENJASA, Claimants contend that they were ancillary and lost the capacity to generate profits following the revocation of ENJASA license.[209] In other words, the revocation of the License constituted "a permanent obstacle to Claimants' use and enjoyment of their investment,"[210] thus constituting an expropriation of Claimants' shareholding in ENJASA that was contrary to Article 4(1) and (2) of the BIT. The transfer

[205] Claimants' Reply on the Merits, para. 503.
[206] Claimants' Post-Hearing Brief, paras. 251-263.
[207] Claimants' Reply on the Merits, paras. 497-501.
[208] Claimants' Reply on the Merits, para. 496.
[209] Claimants' Reply on the Merits, para. 497.
[210] Claimants' Reply on the Merits, para. 502.

by ENREJA and the Province of Salta of ENJASA's gaming operations to local companies consolidated the expropriation.[211]

c) Expropriation of ENJASA's License Contrary to Article 4(3) of the BIT

202. Claimants further argue that, in addition to a claim for breach of Article 4(1) and (2) of the BIT, they also have a claim under Article 4(3) of the BIT for damages because the revocation of ENJASA's license and the forced transfer of its operations to local competitors constitute a direct taking of ENJASA's license that would entitle Claimants to damages.[212]

203. Article 4(3) of the BIT, in the English translation offered by Claimants, provides:

> Where a Contracting Party expropriates the assets of a company that, in accordance with the provisions of Article 1, paragraph 2 hereof, is deemed to be a company belonging to that Contracting Party, and in which the investor of the other Contracting Party has shares, the provisions set forth in paragraph 2 of this Article shall be applied by the former so as to guarantee the appropriate compensation of the investor.

204. According to Claimants, Article 4(3) of the BIT, read in conjunction with the broad definition of investment in Article 1 of the BIT, reveals that the BIT not only protects the shares an investor has in a local company against direct and indirect expropriations without compensation; it also protects individual assets of local companies in which a foreign investor holds shares against expropriation.[213] Claimants thus reject the interpretation of Article 4(3) of the BIT offered by Respondent, which is inspired by the limited protection customary international law offers to shareholders, as developed by the ICJ in *Barcelona Traction* and *Ahmadou Sadio Diallo*; such an interpretation, Claimants argue, has no place where a BIT expressly protects the individual assets of a company in which the investor holds shares, such as is the case with the BIT.[214]

205. Claimants further point out that provisions in other investment treaties that are similar to Article 4(3) of the BIT have been interpreted, in conjunction with the wide definition of investment included in those treaties, to the effect that "[w]hen such companies suffer expropriation it is not the shares which constitute the 'investment' of the other

[211] Claimants' Reply on the Merits, paras. 497, 502.
[212] Claimants' Reply on the Merits, para. 504; Claimants' Post-Hearing Brief, paras. 264-279.
[213] Claimants' Reply on the Merits, para. 506.
[214] Claimants' Reply on the Merits, paras. 506-508.

contracting party but the assets of the local company which are expropriated."[215] In such circumstances, the host State's obligation to compensate for the expropriation of the company's assets is owed to the investor in the local company, thus giving rise to claims by the shareholders, not by the local company.[216]

206. Claimants also contend that the interpretative tools of the VCLT do not lend support to Respondent's argument that Article 4(3) of the BIT, by providing shareholders direct protection against expropriation of the assets of the company, exclude the shareholder from relying on other standards of protection, such as fair and equitable treatment.[217] Neither the ordinary meaning of the terms of Article 4(3) of the BIT, nor the BIT's object and purpose, would support such an interpretation. It would go against the purpose of the BIT, Claimants contend, if the BIT was to protect assets of locally incorporated property only against expropriations, but denied protection granted to shareholders under other standards of treatment contained in the BIT.

207. As for the type of assets of a locally incorporated company that are protected against expropriations under Article 4(3) of the BIT, Claimants submit that Respondent's interpretation, which limits the protection of Article 4(3), based on the authentic version of the BIT in Spanish language, to "financial assets", contrary to the authentic version of the BIT in German language, which refers only to "assets", is not in conformity with Article 33 of the VCLT.[218] In particular, Claimants rely on Article 33(1) and (3) of the VCLT to argue that, except otherwise provided, the text of a treaty is equally authoritative in each authentic language, so that one may assume that one text reflects the will of the parties as expressed in the other languages. Only if, Claimants point out, a difference in meaning persists in different authentic texts, the meaning which best reconciles the texts in light of the treaty's object and purpose should be preferred, as laid down in Article 33(3) of the VCLT.

208. Thus, Claimants conclude, absent a provision to the contrary, the Spanish and German versions of the BIT are equally authoritative. The relevant German term, "*Vermögenswerte*", is used consistently in the BIT. It means "assets" and is also translated as such in Spanish ("*activos*") everywhere else in the BIT except in Article

[215] Claimants' Reply on the Merits, para. 510.
[216] See Claimants' Reply on the Merits, paras. 509-513 (relying inter alia on *RosInvestCo UK v. Russian Federation*, SCC Arbitration No. V (079/2005), Final Award (12 September 2010) para. 607 (Exhibit CL-103)).
[217] Claimants' Reply on the Merits, para. 514.
[218] Claimants' Reply on the Merits, paras. 515-524; Claimants' Post-Hearing Brief, paras. 266-277.

4(3). By contrast, the term "*activos financieros*" appears only in the Spanish version of Article 4(3) of the BIT, without any further definition or explanation. According to Claimants, an interpretation that limits the protection granted by Article 4(3) of the BIT to only one of the two authentic texts cannot be explained by the text or the object and purpose of the treaty. Instead, in light of the BIT's object and purpose, Article 4(3) of the BIT must be read as protecting "all assets of a locally incorporated company against expropriation," including ENJASA's license.[219] The term "*activos financieros*" is, Claimants conclude, in all likelihood a translation mistake.[220]

3. Fair and Equitable Treatment

209. Claimants further argue that the revocation of ENJASA's license results in a breach of the fair and equitable treatment standard included in Article 2(1) of the BIT.[221] Fair and equitable treatment, Claimants contend, is a standard with legal, not extra-legal, content the application of which depends on the facts of the case. Claimants explain how various tribunals have defined fair and equitable treatment and have given it specific meaning depending on the factual situations at hand.[222]

a) The Scope of the Fair and Equitable Treatment Standard

210. Claimants object to Respondent's understanding that the scope of fair and equitable treatment is contained in, and limited by, the minimum standard of treatment under customary international law. Moreover, the differences between how fair and equitable treatment is defined under the North-American Free Trade Agreement ("**NAFTA**") and the BIT make Respondent's reliance on NAFTA jurisprudence unavailing. Claimants contend that the reference to fair and equitable treatment in the BIT must be interpreted pursuant to the VCLT, and that "the overwhelming weight of legal authority and tribunals supports that the FET standard should be understood as an autonomous standard, whose precise meaning must be established on a case-by-case basis."[223]

[219] Claimants' Reply on the Merits, para. 524.
[220] Claimants' Reply on the Merits, paras. 521-523.
[221] Claimants' Memorial on the Merits, paras. 405 *et seq.*; Claimants' Reply on the Merits, paras. 525 *et seq.*; Claimants' Post-Hearing Brief, paras. 402 *et seq*.
[222] Claimants' Memorial on the Merits, paras. 406-410.
[223] Claimants' Reply on the Merits, paras. 527-538 (quote at para. 533); Claimants' Post-Hearing Brief, paras. 403-409.

b) The Content of the Fair and Equitable Treatment Standard

211. Claimants submit that, notwithstanding various nuances, there is a broadly shared understanding as to the elements that form part of the fair and equitable treatment standard, namely the protection of the investor's legitimate expectations, procedural propriety and due process, the prohibition of arbitrary conduct and the requirement of good faith, as well as freedom from coercion and harassment.[224]

212. Claimants also recall that the Tribunal observed in its Decision on Jurisdiction, that fair and equitable treatment

> has been interpreted, inter alia, to protect covered investors and their investments against the arbitrary exercise of public powers, as well as against harassment by public authorities, to require public authorities to administer the applicable law in good faith, to entitle foreign investors and their investments to due process and to protect an investor's legitimate expectations.[225]

213. Claimants further contend that the actions of the authorities in the Province of Salta have breached the above elements of fair and equitable treatment "in multiple ways," including by (1) failing to afford due process and procedural propriety; (2) engaging in coercion and harassment; (3) acting arbitrarily and in bad faith; and (4) frustrating Claimants' legitimate expectations.[226]

(1) Failure to Provide Due Process and Procedural Propriety

214. Claimants stress that several investment tribunals have interpreted fair and equitable treatment as requiring due process and procedural propriety in both administrative and judicial proceedings. To live up to administrative due process, "the administrative bodies need to conform to generally accepted requirements such as access to a file, reasonable notices, a reasonable opportunity to present one's case by making factual and legal submissions and submitting evidence."[227] Claimants contend that serious administrative negligence, inconsistencies, or idiosyncrasy can amount to a violation of fair and equitable treatment.[228]

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[224] Claimants' Memorial on the Merits, paras. 411-422; Claimants' Reply on the Merits, paras. 539-541; Claimants' Post-Hearing Brief, paras. 404, 409, 410-428.
[225] Claimants' Reply on the Merits, para. 542 (quoting the Tribunal's Decision on Jurisdiction, para. 242).
[226] Claimants' Memorial on the Merits, para. 423; Claimants' Reply on the Merits, para. 525; Claimants' Post-Hearing Brief, para. 429.
[227] Claimants' Reply on the Merits, para. 547.
[228] Claimants' Reply on the Merits, paras. 544-547; Claimants' Post-Hearing Brief, para. 422.

215. In the present case, Claimants argue that "both the context of Resolution No. 240/13 and the actual conduct of the administrative procedure show that ENREJA violated elementary due process rights, thereby breaching the fair and equitable treatment standard."[229] In particular, Claimants consider, due process would have required ENREJA to engage with and consider ENJASA's comments in the proceeding that led to the revocation of the License. However, ENJASA was prevented from addressing ENREJA's accusations in a meaningful way. In the administrative investigation relating to the alleged hiring of operators without ENREJA's authorization, ENJASA was notified of the charges only six months after the formal investigations had started and a few weeks before the License was actually revoked.[230] Moreover, ENJASA did not get complete access to ENREJA's files.[231] The evidence submitted by ENJASA was rejected without reason and submissions made by ENJASA were completely disregarded by ENREJA. Due process, Claimants note, not only requires giving a right to be heard, but also to consider submissions made in an administrative proceedings in a meaningful way.[232] ENREJA, however, distorted the facts and misapplied the local law, including by disregarding the applicable statute of limitations and applying anti-money laundering rules retroactively.[233] Besides, ENREJA failed to notify ENJASA in a timely manner of the risk of having its License revoked, thus depriving ENJASA of an opportunity to take measures to prevent such revocation.[234]

216. In sum, for Claimants, "the revocation of ENJASA's license was, as the facts show, an arbitrary act with the purpose of transferring Claimants' business to local companies. Neither the Provincial Government nor ENREJA were actually concerned about compliance with regulations. The allegations of non-compliance were a facade for an outright taking."[235]

(2) Coercion and Harassment

217. Claimants further point out that tribunals have recognized coercion and harassment as breaches of fair and equitable treatment.[236] In the present case, Claimants contend, "the

[229] Claimants' Reply on the Merits, para. 548; Claimants' Post-Hearing Brief, paras. 394-400, 420-422, 449-453.
[230] Claimants' Reply on the Merits, para. 551.
[231] Claimants' Reply on the Merits, para. 552; Claimants' Post-Hearing Brief, para. 399.
[232] Claimants' Reply on the Merits, paras. 295, 550; Claimants' Post-Hearing Brief, para. 400.
[233] Claimants' Memorial on the Merits, paras. 425-427; Claimants' Reply on the Merits, paras. 548-554.
[234] Claimants' Reply on the Merits, paras. 215, 256-264, 480-481.
[235] Claimants' Reply on the Merits, para. 549.
[236] Claimants' Reply on the Merits, paras. 555-556.

revocation of the license was the culmination of a pattern of harassment" that started after the change of government in Salta in December 2007, was conducted "with the sole purpose of preparing the transfer of Claimants' investment to local companies," and manifested itself in "heavy-handed and harassive controls of ENJASA" that focussed on "minimal formalistic human errors" and included fines related to events that had occurred years before the fines were imposed.[237] This, Claimants conclude, amounts to a violation of fair and equitable treatment contrary to Article 2(1) of the BIT.

(3) Arbitrary Conduct and Conduct in Bad Faith

218. Claimants also argue that investment tribunals have acknowledged the obligation to refrain from arbitrary conduct as a necessary element of fair and equitable treatment.[238] According to Claimants, a conduct is arbitrary "when it is founded on prejudice or bias without a rational explanation or without serving a legitimate purpose."[239]

219. Claimants moreover contend that the principle of good faith is a general principle of law that plays a "significant role in investment law," and that one "obvious application of the notion of good faith is the duty to act for cause, and not for purely arbitrary reasons of domestic politics."[240] Accordingly, bad faith would include

> the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and expulsion of an investment based on local favouritism.[241]

220. In the present case, Claimants contend that Respondent's "overall practice" that led to the revocation of ENJASA's license and to the transfer of its business to third operators was driven by "opportunistic reasons and domestic politics," as ENREJA availed itself of minor infringements accumulated over years to construe a pretext to revoke ENJASA's license and transfer its business to local operators. According to Claimants, this conclusion is supported by the fact that sub-licensing to local companies was one of the reasons for the revocation, yet parts of ENJASA's business were ultimately transferred to the very same local companies. Similarly, although, according to ENREJA,

[237] Claimants' Reply on the Merits, paras. 557-559.
[238] Claimants' Reply on the Merits, paras. 560-567; Claimants' Post-Hearing Brief, paras. 418-419.
[239] Claimants' Reply on the Merits, para. 562.
[240] Claimants' Reply on the Merits, paras. 563-564; Claimants' Post-Hearing Brief, paras. 413-416
[241] Claimants' Reply on the Merits, para. 565 (quoting *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award (12 November 2010) para. 300 (Exhibit CL-025)).

ENJASA's "lack of compliance" with the regulatory framework justified the revocation of the License, Claimants were later offered to continue operating two of the casinos ENJASA had operated before.[242]

(4) Failure to Provide Stability and Protect Claimants' Legitimate Expectations

221. Claimants finally point out that the overwhelming majority of tribunals have held that the investor's legitimate expectations constitute a key element of fair and equitable treatment.[243] The obligation to protect legitimate expectations does not stem from express language in the treaty, but "from another tenet of the rule of law, namely that justified hopes i.e. legitimate expectations, should not be unreasonably disappointed."[244] These expectations "arise out of the legal framework of the host state at the time the investment was made considering also any undertakings and representations made explicitly or implicitly by the host state."[245]

222. In the present case, Claimants submit, they relied, at the time of making their investment in Salta, upon "the Province's invitation to develop the Province's gaming sector in line with international best practices and with the know-how of a renowned international gaming operator."[246] Claimants contend that they had the legitimate expectation to exploit the License undisturbed and without harassment if they continued to operate in the same manner that had been confirmed to be lawful during the renegotiation of the license fee, as laid down in the Acta Acuerdo. This expectation, Claimants contend, was based on the issuance of an exclusive license for a period of 30 years until September 2029.[247]

223. Claimants contend that the Province's undertakings and policies were "completely reversed" with the change of government in Salta in 2007. According to Claimants, there was no legitimate regulatory interest to justify the revocation of the License. On the contrary, the only interest was to transfer ENJASA's license to local operators based on fabricated circumstances serving as a justification. Accordingly, Claimants contend, the

[242] Claimants' Memorial on the Merits, paras. 424, 431; Reply on the Merits, para. 566.
[243] Claimants' Memorial on the Merits, paras. 411-414; Claimants' Reply on the Merits, paras. 539-543, 568-579.
[244] Claimants' Reply on the Merits, para. 573.
[245] Claimants' Reply on the Merits, paras. 568-574.
[246] Claimants' Reply on the Merits, para. 575.
[247] Claimants' Reply on the Merits, paras. 575-577. See also Claimants' Post-Hearing Brief, paras. 439-441.

Province of Salta "consciously and overtly breached Claimants' expectations," thus breaching the fair and equitable treatment standard laid down in the BIT.[248]

C. Respondent's Analysis of the Facts

224. Respondent disagrees with Claimants' account of the reasons for, and the evaluation of, the revocation of ENJASA's license. Respondent submits that ENJASA had committed serious breaches of the anti-money laundering rules in the Province of Salta, which amply justified the revocation of ENJASA's license to operate games of chance. In Respondent's view, ENREJA's actions complied fully with the regulatory framework in place and thus constituted a lawful exercise of the host State's regulatory power that was in compliance with the provisions of the BIT.

1. Motives for Revoking ENJASA's Gaming License

225. Respondent submits that Claimants' theory that ENJASA's license was revoked to "get rid of the Austrians" who indirectly controlled ENJASA, and to eliminate the involvement of Mr. Garamon, a supporter of Governor Urtubey's political rival, who allegedly owned 40% of ENJASA through Iberlux, was plainly wrong. Respondent highlights that Claimants failed to provide evidence of any of these unfounded speculations. Respondent further points out that Claimants' witness Mr. Tucek, upon whose statement the underlying allegations were based, admitted at the hearing that he had no first-hand knowledge of the matter, but was just reproducing what he had been informed of by ENJASA's local staff.[249]

226. Respondent stresses instead that the motives for revoking ENJASA's license lay in the serious and frequent breaches of the applicable anti-money laundering regulations that ENJASA had committed. In this context, Respondent points to the necessity of anti-money laundering regulations and to the State's power to issue them. Furthermore, Respondent submits that Law No. 7020, which required approval of operators of games of chance and imposed on the licensee a certain number of duties, including the duty to exercise due diligence in relation to its customers and to record payments made in excess of ARS 10,000, was in full conformity with the recommendations made for casinos issued by the Financial Action Task Force ("**FATF**"), an inter-governmental body tasked to combat money laundering and terrorist financing. These recommendations insisted on

[248] Claimants' Reply on the Merits, para. 578.
[249] Transcript, Day 2, p. 229; Respondent's Post-Hearing Brief, paras. 13-14.

the need for authorities to regulate and control casino activities, to regulate the admission of operators of games of chance, and to establish mechanisms to know and track the transactions of players.[250]

227. Respondent submits that the decision to revoke ENJASA's license was the result of the company's frequent breaches of the anti-money laundering regulations in place, which had been introduced in Argentina as one of the consequences of the country's financial crisis that had occurred at the turn of the millennium. Especially since that grave social, economic, and institutional crisis, financial concerns were important for Argentina. Moreover, the Province of Salta, which borders three different countries (Paraguay, Bolivia, and Chile), was a well-known risk-area, especially since games of chance were forbidden in Bolivia. Respondent therefore insists that the Province of Salta was entitled to introduce efficient anti-money laundering regulations and to vest ENREJA with powers to monitor compliance with them and sanction any breaches.[251]

228. Respondent also rejects Claimants' allegations that ENJASA had started to become a subject of harassments by the Province of Salta when Mr. Urtubey took office in December 2007. In this context, Respondent first points out that the country's precarious financial situation in 2001/2002 had led to the enactment of an Emergency Law in 2002, which required the renegotiation of public service agreements and licenses.[252] It was in this context that the fee for ENJASA's license was renegotiated by the Province of Salta through UNIREN, an entity specifically created for this purpose. Respondent further stresses that the renegotiation of the license fee was a reasonable and legitimate measure in view of the economic situation of the country at the time.[253]

229. Respondent points out that UNIREN and ENJASA agreed upon a new license fee in the Acta Acuerdo, which was based on a different fee structure. Whereas originally a fixed annual amount in USD had been agreed upon, this was changed into a percentage of ENJASA's net income, which rose over time to 15% for lottery games and 16% for

[250] Respondent's Post-Hearing Brief, paras. 143-146; See 40 FATF Recommendations, Interpretative Note to Recommendations 5, 12 and 16 (20 June 2003) (Exhibit ARA-031) and Interpretative Note to Recommendations 22 and 23 (February 2012) (Exhibit JM-05).
[251] Respondent's Counter-Memorial on the Merits, paras. 213-243; Respondent's Rejoinder on the Merits, paras. 72-119.
[252] Law No. 25561 of 6 January 2002 (Exhibit ARA-17).
[253] Respondent's Counter-Memorial on the Merits, paras. 178-180; Respondent's Rejoinder on the Merits, paras. 36-40.

casinos and slot machines.[254] This change from a fixed fee to an income-based fee, Respondent submits, required stricter controls over ENJASA's earnings. It was to this end that ENREJA implemented an online information control system and introduced regulatory changes for the operation of slot machines.[255]

230. Respondent also notes that two administrative inquiries that resulted in sanctions of ENJASA's business operation pre-dated the appointment of Governor Urtubey. Thus, ENREJA's Resolution No. 15/05 (dated 16 March 2005) fined ENJASA for imposing unauthorized restrictions on bets. In respect of this investigation, ENJASA went from first denying the events to then alleging that it had been a victim of persecution by ENREJA before ultimately acknowledging the breaches in a request for suspension of the sanction imposed.[256] ENREJA's Resolution No. 104/07 (dated 11 September 2007), in turn, sanctioned ENJASA for operating a slot machine without authorization. In respect of this investigation, ENREJA considered that ENJASA's defence that the machine was running on a temporary trial basis could not justify ENJASA's failure to report the machine. ENJASA did not challenge the decision and paid the fine.[257] These two investigations, in Respondent's view, confirm that ENREJA had carried out administrative investigations well before Governor Urtubey took office in December 2007, thus discrediting Claimants' theory about the existence of a political plan to oust ENJASA of its business in Salta.[258]

231. As a further indication that there was no plan to oust ENJASA of its business, Respondent submits that, after ENJASA's license was revoked, gaming operators in the Province of Salta who complied with the legal and regulatory requirements were allowed to continue their activities by means of temporary non-exclusive permits. The interested parties had to demonstrate compliance with a series of requirements and submit their investment plans in order to obtain a final license to operate games of chance.[259] Respondent submits

[254] Memorandum of Agreement of 7 May 2008 (Exhibit C-131); Respondent's Counter-Memorial on the Merits, para. 181.
[255] Respondent's Counter-Memorial on the Merits, paras. 181-184, 232-235; Respondent's Rejoinder on the Merits, paras. 51-71, 104-107.
[256] Exhibit C-239; Respondent's Counter-Memorial on the Merits, paras. 258-260; Respondent's Rejoinder on the Merits, paras. 126-134.
[257] Exhibit C-240; Respondent's Counter-Memorial on the Merits, paras. 261-264; Respondent's Rejoinder on the Merits, paras. 135-139.
[258] Respondent's Post-Hearing Brief, para. 6.
[259] Respondent's Counter-Memorial on the Merits, paras. 478-505; Respondent's Rejoinder on the Merits, para. 379.

that Claimants had an opportunity to participate in this process, but decided not to do so.[260]

232. In Respondent's view, Claimants are distorting the facts, when they claim that ENREJA and the Province of Salta definitively transferred ENJASA's business to third-party operators in only ten days after the revocation of ENJASA's license. New licenses were in fact only awarded on 29 May 2014. The verification procedure, the temporary plan, the assessment of compliance with the technical, contractual, and legal requirements for the operation of games of chance, the approval of the investment plans, and the award of the final licenses thus took at least some nine months of intense activity after the issuance of Resolution No. 240/13.[261]

233. Respondent also rejects Claimants' criticism that the new licenses were granted without a public bidding process. ENJASA's license had also been granted in a direct manner and, unlike the new licenses, it was an exclusive license. The legal requirements to grant the new licenses were therefore met.[262]

234. Finally, Respondent rejects Claimants' criticism that the new licenses were awarded to third parties that had been categorized by ENREJA as previously existing operators of games of chance under arrangements with ENJASA for which authorizations by ENREJA were missing and that therefore were themselves in breach of Law No. 7020. The process following the revocation of ENJASA's license regularized these illegal operations of games of chance in the Province of Salta. Unlike in the past, ENREJA was now able to supervise the actual gaming operators. Respondent also offered Claimants the possibility to continue operating Casino Salta. However, Respondent points out, Claimants refused this proposal.[263]

235. In sum, Respondent submits, that no reasons other than breaches of the anti-money laundering regulations led to the revocation of ENJASA's license.

2. Administrative Inquiries and Sanctions between 2007 and May 2013

236. Respondent also submits that the administrative inquiries undertaken, and sanctions imposed, by ENREJA between 2007 and May 2013 prior to the investigations that

[260] Respondent's Rejoinder on the Merits, paras. 380-382.
[261] Respondent's Rejoinder on the Merits, paras. 383-402.
[262] Respondent's Counter-Memorial on the Merits, para. 505.
[263] Respondent's Rejoinder on the Merits, para. 406.

resulted in the revocation of ENJASA's license had revealed serious and repeated breaches by ENJASA of anti-money laundering and gaming regulations and were all justified. During this period ENREJA had conducted a number of investigations, which had found, inter alia, that ENJASA (i) repeatedly had breached anti-money laundering rules; (ii) had imposed unauthorized restrictions on bets; (iii) had operated slot machines without authorization; (iv) had amended betting limits without authorization; (v) had opened casinos without authorization; (vi) had breached rules concerning lottery games; and (vii) had amended prize limits without authorization.[264] In total, twenty-one sanctions had to be imposed on ENJASA for breaches of the regulatory framework in place prior to the revocation of the License.[265]

237. Respondent addresses the following investigations in more detail as follows:

- In ENREJA's Resolution No. 31/08 (dated 10 March 2008), which sanctioned ENJASA for issuing checks in breach of anti-money laundering rules, ENREJA rejected ENJASA's defence that the action was time-barred, considering that the initiation of an administrative inquiry in 2005 had stopped the statute of limitations and that the commission of the same breach, which was discovered in another inquiry, prevented the infringement from becoming time-barred; the fine ENREJA imposed also complied with the proportionality principle.[266]
- In ENREJA's Resolution No. 32/08 (dated 10 March 2008), which sanctioned ENJASA for the loss of the anti-money laundering book, for irregularities in recording payments, and for the irregular issuance of checks for the payment of prizes, ENREJA considered that a severe sanction was in place, inter alia in view of the delayed communication by ENJASA that the anti-money laundering book had been lost and considering ENJASA's record of prior infractions.[267]
- In ENREJA's Resolution No. 232/08 (dated 18 November 2008), which sanctioned ENJASA for making irregular payments of prizes in excess of ARS 10,000 in cash rather than by check at Casino Golden Dreams, ENREJA rejected ENJASA's defence that the law did not impose such an obligation, pointing out

[264] Respondent's Counter-Memorial on the Merits, paras. 252-355; Respondent's Rejoinder on the Merits, paras. 120-269.
[265] Respondent's Post-Hearing Brief, para. 27.
[266] Exhibit C-150. See Respondent's Counter-Memorial on the Merits, paras. 265-269; Respondent's Rejoinder on the Merits, paras. 140-149.
[267] Exhibit C-151. See Respondent's Counter-Memorial on the Merits, paras. 270-276; Respondent's Rejoinder on the Merits, paras. 150-169.

that ENJASA's interpretation of the law was completely at odds with its own prior statements and with the intended purpose of the law. The fine that was imposed took account of ENJASA's record of recidivism.[268]

- In ENREJA's Resolution No. 244/08 (dated 25 November 2008), which sanctioned ENJASA for the unauthorized removal of gaming devices from Casino Salta and Casino Rosario de la Frontera, and for irregularities in the results of poker tournaments, ENREJA considered mitigating factors and issued a warning rather than imposing a fine.[269]
- In ENREJA's Resolution No. 286/09 (dated 16 December 2009), which sanctioned ENJASA for amending betting limits in Casino Golden Dreams without prior authorization, ENJASA did not deny the facts under investigation, but alleged that the resolution initiating the administrative inquiry was null and void because of certain formal errors; ENREJA rejected ENJASA's defence and imposed a reduced fine, taking into consideration inter alia that ENJASA had no previous record for this particular type of infraction.[270]
- In ENREJA's Resolution No. 39/10 (dated 9 March 2010), which sanctioned ENJASA for holding an unauthorized poker tournament, ENREJA rejected ENJASA's arguments that the breach was an excusable error that was unintentionally committed by an employee of the casino; for ENREJA, the breach was caused by a dysfunctional internal organization and it warned ENJASA that such breaches could give rise to the termination of the License; the fine ENREJA imposed on ENJASA took into consideration that ENJASA had no previous records of this particular type of breach.[271]
- In ENREJA's Resolution No. 46/10 (dated 16 March 2010), which sanctioned ENJASA for breaching anti-money laundering rules by making irregular payments in Casino Golden Dreams of prizes in excess of ARS 10,000 in cash rather than by check, and which was confirmed by Resolution No. 106/10 (dated 3 May 2010), ENREJA rejected ENJASA's defence that the action was time-

[268] Exhibit C-155. See Respondent's Counter-Memorial on the Merits, paras. 277-280; Respondent's Rejoinder on the Merits, paras. 170-177.
[269] Exhibit ARA-45. See Respondent's Counter-Memorial on the Merits, paras. 281-285; Respondent's Rejoinder on the Merits, paras. 178-184.
[270] Exhibit C-153. See Respondent's Counter-Memorial on the Merits, paras. 286-289; Respondent's Rejoinder on the Merits, paras. 185-191
[271] Exhibit C-016. See Respondent's Counter-Memorial on the Merits, paras. 290-294; Respondent's Rejoinder on the Merits, paras. 192-203.

barred and that no obligation existed to pay prizes in excess of ARS 10,000 by check; ENREJA also took into consideration ENJASA's history of recidivism and imposed a fine.[272]

- In ENREJA's Resolution No. 104/10 (dated 3 May 2010), which sanctioned ENJASA for paying prizes in Casino Golden Dreams in excess of ARS 40,000 without properly recording them; ENJASA acknowledged the infringement, but invoked material errors of employees of the casino, who had not reported the matter to the authorities, as an excuse; for ENREJA, the responsibility for the breach rested solely with the operator and it imposed the maximum fine of ARS 300,000 (USD 77,160), taking into consideration the four prior administrative inquiries for similar breaches; ENREJA also warned ENJASA about "the effects that new breaches could have on the legal framework of the license" and admonished that, in case of new breaches, ENJASA could lose its License under Article 6 of Decree No. 3616/99.[273]
- In ENREJA's Resolutions Nos. 128/10,[274] 129/10,[275] and 130/10[276] (all dated 18 May 2010) and Resolutions Nos. 151/10,[277] 152/10,[278] and 153/10[279] (all dated 7 June 2010), which sanctioned ENJASA for irregularities in the operation of slot machines, ENREJA discovered, following inspections carried out between 2009 and 2010, that ENJASA had operated unauthorized slot machines and machines with betting amounts and prizes that differed from the ones approved by ENREJA; ENREJA rejected ENJASA's excuse that these breaches merely consisted of minor clerical errors and sanctioned ENJASA with partial and temporary suspensions of the License.[280]
- In ENREJA's Resolution No. 161/10 (dated 15 June 2010), which sanctioned ENJASA for paying prizes in excess of ARS 10,000 in cash, and for failing to identify the winners of a poker tournament in Casino Salta, ENREJA imposed a

[272] Exhibit ARA-168. See Respondent's Counter-Memorial on the Merits, paras. 295-299; Respondent's Rejoinder on the Merits, paras. 204-213.
[273] Exhibit C-152. See Respondent's Counter-Memorial on the Merits, paras. 300-306; Respondent's Rejoinder on the Merits, paras. 214-226.
[274] Exhibit C-158 (Casino Rosario de Lerma).
[275] Exhibit C-159 (Casino Salvador Mazza).
[276] Exhibit C-160 (Casino Cafayate).
[277] Exhibit C-161 (Casino JV Gonzalez).
[278] Exhibit C-162 (Casino Pichinal).
[279] Exhibit C-163 (Casino General Güemes).
[280] Respondent's Counter-Memorial on the Merits, paras. 307-340; Respondent's Rejoinder on the Merits, paras. 236-260.

fine, taking into consideration ENJASA's recidivism; ENREJA rejected ENJASA's request for reconsideration which alleged that too much time had lapsed between the breaches and the initiation of the administrative inquiry and that prizes in excess of ARS 10,000 did not have to be paid by check.[281]

- In ENREJA's Resolution No. 200/10 (dated 27 July 2010), which sanctioned ENJASA for opening a casino in the town of Metán without authorization, ENREJA informed ENJASA that it could revoke its License, but, as it felt that ENJASA had not acted with malice or in bad faith, only a fine was imposed under the condition that ENJASA would cure the breaches within 60 days.[282]
- In ENREJA's Resolution No. 178/12 (dated 10 July 2012), which sanctioned ENJASA for the use of the wrong number of balls in a lottery drawing, erroneous publications of results, and other irregularities in lottery games, ENREJA considered these breaches to be "very serious" as they would "hinder and adversely affect the transparency that must be maintained at all times, especially when the operation was granted by means of a State permit;"[283] ENREJA considered that ENJASA, while in good faith, had acted carelessly, negligently, and imprudently, imposing, Respondent submits, an appropriate fine, considering the number of breaches and their seriousness.[284]
- In ENREJA's Resolution No. 161/13 (dated 28 May 2013), which sanctioned ENJASA for modifying prize limits without requesting authorization and for operating unauthorized jackpots in Casino Golden Dreams and Casino Salta, ENREJA imposed the maximum fines of ARS 200,000 and 500,000, respectively, taking into consideration ENJASA's history of recidivism as demonstrated by similar breaches sanctioned in Resolutions Nos. 286/09, 128/09, 129/10, and 200/10.[285]

238. Respondent submits that the above Resolutions demonstrate that ENJASA had committed serious and repeated violations of the regulatory framework applicable to

[281] Exhibit C-154. See Respondent's Counter-Memorial on the Merits, paras. 341-346; Respondent's Rejoinder on the Merits, paras. 227-235.
[282] Exhibit C-165. See Respondent's Counter-Memorial on the Merits, paras. 346-347; Respondent's Rejoinder on the Merits, paras. 261-263.
[283] Respondent's Rejoinder on the Merits, para. 267.
[284] Exhibit C-166. See Respondent's Counter-Memorial on the Merits, paras. 348-351; Respondent's Rejoinder on the Merits, paras. 264-267.
[285] Exhibit C-154. See Respondent's Counter-Memorial on the Merits, paras. 352-355; Respondent's Rejoinder on the Merits, paras. 268-269.

operating games of chance even before the investigations that resulted in the revocation of ENJASA's license.[286] Respondent also points out that ENJASA's argument that certain mistakes by its employees were involuntary and due to the employees' lack of knowledge of specific regulations resulting from insufficient training is incompatible with the admission of Claimants' own witnesses that ENJASA's employees were trained, especially as regards anti-money laundering measures.[287]

239. Respondent also observes that ENJASA in most cases simply paid the fines, consenting to and accepting the interpretation of the rules that led to the application of such fines.[288] Only in five instances did ENJASA file an administrative appeal, but did not resort to domestic courts, thereby consenting to the administrative sanctions applied.[289]

240. Respondent concludes that the above Resolutions, with the inquiries and sanctions they encompass, demonstrate that ENREJA performed its regulatory control over ENJASA from the very beginning, and not only after Governor Urtubey took office in December 2007.[290] In its investigations, ENREJA followed a strict internal procedure, granting ENJASA an opportunity to file a defence and submit evidence. ENREJA acted within the scope of its powers, took action in due time, and imposed sanctions that were proportionate to the seriousness of the breach and that gradually increased in view of ENJASA's recidivism and lack of organization.[291]

241. Respondent also stresses that, contrary to Claimants' arguments, the Acta Acuerdo did not acknowledge that ENJASA had not committed any breaches of the regulatory framework in place. The second paragraph of the Acta Acuerdo merely acknowledged that (i) ENJASA and its controlling shareholder, L&E, had performed the capital increase and their investment in tourism, and (ii) there had been no breaches of the terms of

[286] Respondent Post-Hearing Brief, paras. 2, 21-22.
[287] Respondent Post-Hearing Brief, para. 20.
[288] Resolution No. 128/10 (Exhibit C-158); Resolution No. 130 (Exhibit C-160); Resolution No. 151/10 (Exhibit C-161); Resolution No. 152/10 (Exhibit C-162); Resolution No. 178/12 (Exhibit C-166); Resolution No. 200/10 (Exhibit C-165); Resolution No. 232/08 (Exhibit C-155); Resolution No. 244/08 (Exhibit ARA-45); Resolution No. 286/09 (Exhibit C-153); Resolution No. 39/10 (Exhibit C-164); Resolution No.104/07 (Exhibit C-240); Resolution No. 129/10 (Exhibit C-159); Resolution No. 153/10 (Exhibit C-163); Resolution No. 31/08 (Exhibit C-150).
[289] Resolution No. 104/10 (Exhibit C-152); Resolution No. 15/05 (Exhibit C-239); Resolution No. 161/10 (Exhibit C-157); Resolution No. 32/08 (Exhibit C-151); Resolution No. 43/10 (Exhibit ARA-43); Respondent Post-Hearing Brief, para. 32.
[290] Respondent's Rejoinder on the Merits, paras. 273-274.
[291] Respondent's Counter-Memorial on the Merits, paras. 363-375; Respondent's Rejoinder on the Merits, paras. 169, 273-284.

ENJASA's Stock Purchase Agreement.[292] The terms of the Acta Acuerdo, Respondent submits, are clear and restrictive. It contained no statement on any other type of breaches, let alone breaches after the Acta Acuerdo had been signed on 20 April 2008.[293]

3. The Revocation of ENJASA's License Constituted a Regular Exercise of ENREJA's Powers

242. Respondent further submits that the revocation of ENJASA's license did not, as submitted by Claimants, constitute an abuse of ENREJA's supervisory powers. On the contrary, in Respondent's view, the revocation of the License had taken place as part of the regular exercise of ENREJA's powers. The charges brought against ENJASA in the three investigations that lead to the issuance of Resolution No. 240/13 were all well-founded. The sanction imposed on ENJASA, that is, the revocation of its License, was justified and proportionate and did not violate any due process rights.

a) Charges Underlying Resolution No. 240/13

243. Respondent submits that ENREJA's conclusions in Resolution No. 240/13, which lead to the revocation of ENJASA's license, were derived from investigations into three sets of incidents that all qualified as serious breaches of the regulatory framework in place in the Province of Salta. In drawing its conclusions, ENREJA accurately had investigated the factual record and correctly had applied the regulatory framework in place. The serious breaches ENREJA found were an appropriate basis for revoking ENJASA's license.

(1) Allegations in Resolution No. 380/12

244. In respect of Resolution No. 380/12, in which ENREJA had charged ENJASA with having breached anti-money laundering rules in its lottery operations and by making a payment in respect of a prize won in a slot machine game, Respondent observes that Claimants do not dispute the facts giving rise to the breaches identified by ENREJA in Resolution No. 380/12; they merely attempt to evade their consequences by alleging that the breaches were due to unintentional human errors by those in charge of the respective games of chance. Respondent submits that these excuses are inadmissible.[294] A purported

[292] Memorandum of Agreement between UNIREN and ENJASA (7 May 2008) Second Item (Exhibit C-131); Respondent's Rejoinder on the Merits, para. 42.
[293] Respondent's Counter-Memorial on the Merits, para. 182, footnote 204; Respondent's Rejoinder on the Merits, paras. 41-45.
[294] Respondent's Rejoinder on the Merits, paras. 355-358.

human error by the lottery agent would not justify the late registration and payment of an expired prize; nor would the submission of the winning ticket together with Claimants' Reply on the Merits in the present proceeding cure ENJASA's failure to submit the ticket to ENREJA at the time of the investigation.[295]

(2) Allegations in Resolution No. 381/12

245. In respect of Resolution No. 381/12, which concerned breaches of anti-money laundering rules in live games, Respondent observes that spread sheets and records that ENJASA kept internally to control payments to gamblers at gaming tables at Casino Salta and Casino Golden Dreams revealed that, in the audited period, not fewer than 52 payments exceeding ARS 10,000 had been made for prizes won at live gaming tables. These payments had been made in cash or by means of "internal checks"; in addition, the required identification of the winners in the anti-money laundering book was insufficient, even though ENJASA, Respondent argues, had specific and detailed knowledge of the players' winnings and of the amounts paid thanks to the internal records they kept. According to Respondent, Claimants' contention that these records were kept only for statistical purposes lacks credibility. In other words, ENJASA, which held the records, could easily have complied with the legal requirements to make the proper registrations of the payments and of the identity of the players in the anti-money laundering book. However, Respondent submits, ENJASA totally disregarded the anti-money laundering rules in the instances underlying the investigation.[296] There was no excuse for ENJASA's failing to record payments in excess of ARS 10,000 in the anti-money laundering book.

246. Respondent also rejects Claimants' interpretation of the regulatory framework in place. For Respondent, it is beyond question that, since 1 May 2012, prizes in excess of ARS 10,000 had to be paid by non-transferable check. At this point, Resolution No. 26/00 was superseded by ENREJA's Resolution No. 90/12, which made explicit the obligations under Article 5 of Law No. 7020 of the licensee to (i) pay all prizes exceeding ARS 10,000 by check or wire transfer to foreign accounts; (ii) keep records of such payments and any other relevant information about clients where grounds to suspect money laundering existed; and (iii) appoint a person who is responsible for the functions and obligations established by regulations for games of chance. In addition, Resolution No.

[295] Respondent's Rejoinder on the Merits, paras. 350-354.
[296] Respondent's Counter-Memorial on the Merits, paras. 420-432; Respondent's Rejoinder on the Merits, paras. 329-338; Respondent's Post-Hearing Brief, para. 179.

90/12 expanded the term for the obligation to keep and preserve documents from 2 to 10 years and set new requirements for the payment of prizes by check for amounts of up to ARS 50,000.[297]

247. However, Respondent submits that already before the enactment of Resolution No. 90/12, ENREJA considered that ENJASA had an obligation to pay all prizes in excess of ARS 10,000 by check or wire transfer and to identify the individuals to whom such prizes were paid. Although the legislative texts did not state so expressly, in Respondent's view, Article 5 of Law No. 7020 and ENREJA's Resolution No. 26/00 already required that prizes in excess of ARS 10,000 had to be paid by non-transferable check.[298] Article 5 of Law No. 7020 imposed certain anti-money laundering measures on ENJASA whenever a quantitative, objective criterion – i.e., payment of prizes in excess of ARS 10,000 – or a qualitative criterion – i.e., the existence of "a suspicious transaction" – existed. In the first case, the identity of the beneficiary had to be registered and the check had to be non-transferrable; in the second case, the transaction needed to be reported. For Respondent, a comprehensive and harmonious interpretation of Article 5 of Law No. 7020, which respects its goal and purpose, thus required the licensee to pay all prizes in excess of ARS 10,000 by check or wire transfer.[299] Otherwise, it would simply be sufficient for the licensee to decide not to pay prizes by check or wire transfer to be exempt from the obligation to identify individuals, although such payment would be a suspicious transaction. Such an interpretation would, however, go against the very purpose of Law No. 7020.[300]

248. Respondent also points out that ENREJA had clarified this consequence of Article 5 of Law No. 7020 vis-à-vis ENJASA and had indicated to ENJASA, on different occasions, how payments to customers needed to be recorded.[301] Thus, ENREJA had insisted, in several of its earlier resolutions addressed to ENJASA, that payments over ARS 10,000 had to be made by check and demanded compliance with this requirement.[302] In addition, before Resolution No. 90/12 explicitly required to make payments of prizes above ARS

[297] Resolution 90/12 of 24 April 2012, applicable on 1 May 2012 (Art. 7); Respondent's Counter-Memorial on the Merits, para. 237.
[298] Respondent's Rejoinder on the Merits, para. 140.
[299] Respondent's Post-Hearing Brief, paras. 148-152.
[300] Respondent's Rejoinder on the Merits, paras. 173-175, 206-208, 213.
[301] Respondent's Rejoinder on the Merits, paras. 177, 279-280.
[302] For example, Resolution No. 32/08 (11 March 2008) (Exhibit C-151); Resolution No. 232/08 (18 November 2008) (Exhibit C-155); Resolution No. 104/10 (3 May 2010) (Exhibit C-152); Resolution No. 106/10 (3 May 2010) (Exhibit C-156); Resolution No. 161/10 (15 June 2010) (Exhibit C-157).

10,000 by check, ENJASA had expressly acknowledged that Article 5 of Law No. 7020 obliged it to do so.[303] ENJASA has also never challenged ENREJA's point of view, nor questioned the fines imposed because of violations of that requirement.[304]

249. In respect of the cash payments made in September 2011 to two customers in Casino Salta, Respondent argues that such payments by ENJASA to customers, one of which had not even played, encouraged players to play with third-party funds and, by prolongation, gave rise to money laundering. Such payments did therefore not comply with the anti-money laundering regulations either.[305]

250. Finally, Respondent rejects Claimants' argument that Article 49 of Law No. 7020 time-barred ENREJA's conduct because the administrative inquiry in question had started more than one year after the facts had occurred. Respondent submits that the one-year statute of limitations established by Article 49 of Law No. 7020 does not apply to breaches of Article 5. Instead, according to Respondent, the five-year time-bar in Articles 62 and 67 of the Criminal Code applied to sanctions taken on the basis of Article 13 of Law No. 7020. However, regardless of whether a one-year or a five-year statute of limitations applied, the repeated breaches by ENJASA of anti-money laundering rules, as found in ENREJA's Resolutions Nos. 31/08, 46/10, and 161/10, prevented the statute of limitations from expiring.[306] Due to ENJASA's successive failures to record prizes in excess of ARS 10,000 in violation of anti-money laundering rules, no statute of limitation would apply to the breaches identified by ENREJA in Resolution No. 381/12.

(3) Allegations in Resolution No. 384/12

251. In respect of the charges in Resolution No. 384/12 that ENJASA had hired operators without ENREJA's authorization contrary to Article 5 of Law No. 7020, Respondent observes that Decree No. 2126/98 had granted ENJASA an exclusive license for the operation of games of chance in the Province of Salta. The only exceptions to this exclusivity were licenses granted by BPAS in 1999 to two other operators for Casino de las Nubes and Casino Central, which expired in 2003,[307] and the possibility that non-

[303] ENJASA's letter of 30 August 2005 (Exhibit ARA-193); ENJASA's letter of 10 September 2005 (Exhibit ARA-195); Request for Reconsideration against Resolution No. 46/10 (Exhibit ARA-239); Request for Reconsideration against Resolution No. 104/10 (Exhibit ARA-165); Respondent Post-Hearing Brief, paras. 157-160; Respondent's Rejoinder on the Merits, para. 279.
[304] Respondent Post-Hearing Brief, paras. 161-164.
[305] Respondent's Rejoinder on the Merits, paras. 341-346.
[306] Respondent' Post-Hearing Brief, paras. 25, 188-194.
[307] Resolution No. 411/99 of 1 September 1999 (Exhibit RA-002).

profit organizations, authorized by ENREJA, could operate bingos and raffles.[308] Claimants' allegation that some of the operators of games of chance had been authorized by BPAS before ENJASA acquired its License and were entitled to continue operating thereafter was therefore incorrect. Except for the two licenses explicitly maintained by BPAS for Casino de las Nubes and Casino Central, all licenses granted by BPAS before 1998 were terminated once ENJASA had been granted its exclusive license.[309]

252. Respondent further rebuts Claimants' allegation that ENREJA was fully aware of the existence of third-party operators of slot machines and had accepted their involvement. For instance, any payments of the canon fee for the operation of games of chance that were made by third parties were actually made on ENJASA's behalf and ENREJA was therefore unaware of the true origin of such payments.[310]

b) The Revocation of ENJASA's License Was Justified and Proportionate

253. Respondent stresses that the revocation of ENJASA's license by Resolution No. 240/13 was fully justified. In terms of competence, ENREJA had the disciplinary power to issue the revocation on the basis of Article 13 of Law No. 7020. Article 13, Respondent submits, authorized ENREJA to sanction ENJASA for violations or breaches of Article 5 of Law No. 7020, Resolutions Nos. 26/00 and 90/12, and of the license agreement, which contained the obligation to comply with Law No. 7020.[311] One of the sanctions mentioned expressly in that provision – although the most severe one – is the revocation of a license. Article 13 also requires that the sanction is proportionate to the violation committed. Respondent submits that, in the present instance, the revocation of the License was a just, fair, and proportionate sanction.

254. Respondent argues that Claimants incorrectly allege that Article 13 was superseded in 2001 by the enactment of Law No. 7133, which amended Law No. 7020 and introduced a new provision on sanctions into Law No. 7020, namely Article 41. It is true that Article 41 did not provide for the revocation of a license as a possible sanction, but only provided for fines, disqualification, seizure, and/or closure of gaming locations.[312] Claimants, however, incorrectly submit, Respondent argues, that Article 13 was abolished and that

[308] Resolution No. 3616/99, Annex I, Art. 1.1.1. (Exhibit RA-010).
[309] Respondent's Rejoinder on the Merits, paras. 308-309.
[310] Respondent's Rejoinder on the Merits, paras. 304-307.
[311] Respondent's Rejoinder on the Merits, paras. 288-295.
[312] Respondent's Rejoinder on the Merits, paras. 15-16.

ENREJA thus could only issue sanctions on the basis of Article 41 of Law No. 7020. ENREJA could, therefore, still revoke ENJASA's license on the basis of Article 13.[313]

255. Respondent submits that Law No. 7133 did not replace Article 13 with Article 41. Rather, Law No. 7020 now has two different provisions that allow for the imposition of sanctions: one for violations or breaches of gaming regulations and the license agreement, which are subject to the sanctions laid down in Article 13, and one for administrative infractions which can be sanctioned on the basis of Article 41. For Respondent, the fact that Article 13 of Law No. 7020 was reproduced in its entirety in the Official Bulletin of the Province of Salta when the full text of Law No. 7020, as amended by Law No. 7133, was published, confirms the continued validity of Article 13.[314]

256. Furthermore, Respondent submits that Law No. 7020, including its Article 13, applies as a mandatory regulation of the gaming sector in the Province of Salta. Furthermore, ENJASA's license agreement also confirms that Law No. 7020, including its Article 13, apply in relation to ENJASA. Contrary to Claimants' argument, the license agreement does not exclude the application of Article 13; on the contrary, it confirms the validity of Article 13 and its application to the relationship between ENREJA and ENJASA.[315]

257. As for the proportionality of the revocation of ENJASA's license, in Respondent's view, Resolutions Nos. 380/12, 381/12, and 384/12 amply established ENJASA's manifold breaches of anti-money laundering regulations. Moreover, before 2012, ENJASA had committed many other serious breaches of anti-money laundering regulations. Thus, Respondent submits, these previous breaches could, and arguably had to, be taken into consideration in devising the appropriate sanction.

258. Respondent further submits that anti-money laundering regulations concern the preservation of the social and financial order. A breach of these regulations, in its view, affects the public interest, which ENREJA had to protect. The importance of the regulations, coupled with the consideration that the sanctions previously imposed on ENJASA during the term of the License did not have a deterrent effect on ENJASA, made it impossible not to impose the revocation of the License as a sanction.[316]

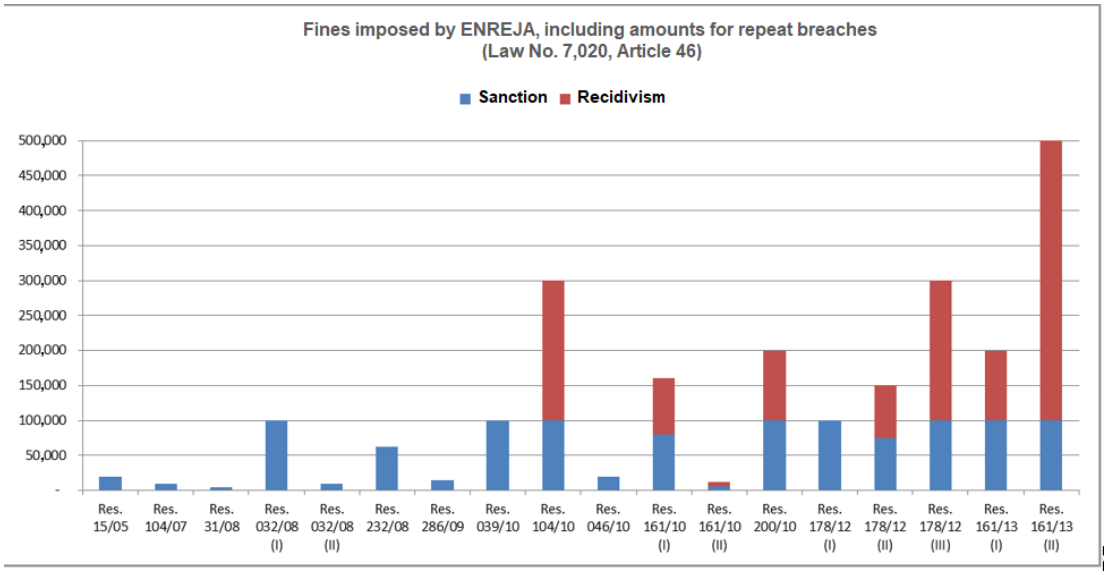
[313] Respondent's Rejoinder on the Merits, paras. 288-295.
[314] Respondent's Rejoinder on the Merits, paras. 28-30, 293; Respondent Post-Hearing Brief, paras. 41-46.
[315] Respondent's Rejoinder on the Merits, paras. 25-27, 290-292; Respondent Post-Hearing Brief, paras. 35-55.
[316] Respondent's Post-Hearing Brief, para. 3.

259. Respondent also submits that, in the past, ENREJA had applied sanctions gradually and progressively from warnings, over fines, to temporarily suspending certain local operations. The following overview indicates this development:

ENREJA's Resolution No. 244/08 (Exhibit RA 45)	Breach of resolution and inaccuracy in the information on poker tournaments	Warning
ENREJA's Resolution No. 015/05 (C-239)	Lack of authorization of betting limit	Fine
ENREJA's Resolution No. 104/07 (C-240)	Irregularities in slot machines	Fine
ENREJA's Resolution No. 031/08 (C-150)	Violation of anti-money laundering regulations	Fine
ENREJA's Resolution No. 032/08 (C-151)	Violation of anti-money laundering regulations	Fine
ENREJA's Resolution No. 232/08 (C-155)	Violation of anti-money laundering regulations	Fine
ENREJA's Resolution No. 286/09 (C-153)	Unauthorized modification of betting chart	Fine
ENREJA's Resolution No. 039/10 (C-164)	Unauthorized implementation of a Jackpot	Fine
ENREJA's Resolution No. 106/10 (C-156)	Violation of anti-money laundering regulations	Fine
ENREJA's Resolution No. 104/10 (C-152)	Violation of anti-money laundering regulations	Fine
ENREJA's Resolution No. 161/10 (C-157)	Violation of anti-money laundering regulations	Fine
ENREJA's Resolution No. 200/10 (C-165)	Unauthorized opening of a casino	Fine
ENREJA's Resolution No. 178/12 (C-166)	*Tómbola* lottery game irregularities	Fine
ENREJA's Resolution No. 161/13 (C-154)	Modification of highest prize at poker tables and unauthorized implementation of a Jackpot	Fine
ENREJA's Resolution No. 128/10 (C-158)	Irregularities in slot machines	Suspension of the License
ENREJA's Resolution No. 129/10 (C-159)	Modification of the approved betting chart	Suspension of the License
ENREJA's Resolution No. 130/10 (C-160)	Modification of the approved betting chart	Suspension of the License

ENREJA's Resolution No. 151/10 (C-161)	Irregularities in slot machines	Suspension of the License
ENREJA's Resolution No. 152/10 (C-162)	Irregularities in slot machines	Suspension of the License
ENREJA's Resolution No. 153/10 (C-163)	Irregularities in slot machines	Suspension of the License
ENREJA's Resolution No. 240/13 (C-031)	Breach of anti-money laundering regulations as a consequence of failure to record lottery prize payments	Revocation of the License

260. Respondent also points out that, since 2010, ENREJA had substantially increased the amount of fines due to ENJASA's recidivism, as required by Article 46 of Law No. 7020.[317] The amount of fines, as submitted by Respondent, developed as follows:



261. The increasing intensity of the sanctions notwithstanding, Respondent submits, ENJASA continued to breach the regulatory framework in place, as the breaches identified in Resolutions Nos. 380/12, 381/12, and 384/12 show. ENREJA had also repeatedly warned ENJASA that it had the power to revoke the License in the event of further breaches or violations of the gaming regulations in place.[318] Under these circumstances, Respondent

[317] Respondent's Post-Hearing Brief, para. 28.
[318] See Respondent's Post-Hearing Brief, para. 23 (referring to Resolution No. 39/10 (9 March 2010) (Exhibit C-164); Resolution No. 104/10 (30 May 2010) (Exhibit C-152); Resolution No. 107/10 (3 May 2010) (Exhibit ARA-231); Resolution No. 128/10 (20 April 2010) (Exhibit C-158; Resolution No. 161/10 (15 June 2010) (Exhibit C-157)).

concludes, the revocation of ENJASA's license to operate games of chance in Salta remained the only possible sanction for ENREJA.

c) Respect of ENJASA's Due Process Rights

262. Respondent also submits that ENJASA's due process rights and its right of defence were at all times respected. Respondent points out that ENREJA had repeatedly warned ENJASA that it had the power to revoke the License in the event of breach or violation of the anti-money laundering regulations.[319] Resolution No. 240/13 also contained a detailed explanation of the reasons and grounds leading to the revocation of the License. Each administrative file referred to in Resolution No. 240/13 was processed separately and maintained its autonomy. Moreover, each of these files, individually considered, warranted the revocation of the License.[320]

263. Respondent further submits that, in all administrative inquiries, ENJASA was informed of the charges on which it was being investigated and the evidence relied upon. Furthermore, ENJASA was granted sufficient time to file a defence and to submit the appropriate evidence. It could also always access the files – which it did – without any restrictions from ENREJA.[321]

264. Finally, Respondent points out, ENREJA considered the arguments raised in ENJASA's answers, but concluded that these answers did not affect the sanction imposed. ENJASA was entitled to challenge ENREJA's decisions with ample room for submitting arguments and evidence.

265. Respondent also points out that ENJASA submitted a recourse for reconsideration of Resolution No. 240/13 on 28 August 2013. ENREJA addressed this Recourse and confirmed the revocation of ENJASA's license through Resolution No. 315/13 on 19 November 2013. In this context, Respondent refers to her expert, Prof. Marcer, who confirmed that ENREJA "analysed and addressed all the arguments stated in the appeal for review, and denied the appeal."[322] ENJASA also filed a complaint with the

[319] Ibid. See also Respondent's Counter-Memorial on the Merits, paras. 457-460; Respondent's Rejoinder on the Merits, paras. 367-368.
[320] Respondent's Counter-Memorial on the Merits, paras. 455-456; Respondent's Rejoinder on the Merits, paras. 365-366.
[321] Respondent's Counter-Memorial on the Merits, paras. 449-456, 461-465; Respondent's Rejoinder on the Merits, paras. 359-364.
[322] Marcer I, para. 60.

Administrative Court of the Province of Salta on 2 February 2014,[323] but failed to move the case forward until its complaint had to be withdrawn as a consequence of the Tribunal's Decision on Jurisdiction in the present proceeding. Consequently, ENJASA abandoned the claim and, with ENREJA's consent, withdrew the appeal.[324]

266. All of the above shows, Respondent submits, that due process and ENJASA's right of defence were at all times respected.

D. Respondent's Analysis of the Law

267. In Respondent's view, the revocation of ENJASA's license, followed by the appointment of new operators and the transfer of ENJASA's operations and employees to new operators, was a lawful exercise of the host State's regulatory powers. It did not, Respondent submits, constitute a breach of either Articles 2(1) or 4 of the BIT.

1. Applicable Law

268. Respondent contends that the law applicable to the dispute pursuant to the first sentence of Article 42(1) of the ICSID Convention is the law agreed by the Parties; such an agreement is contained in Article 8(6) of the BIT,[325] which provides in the translation provided by Respondent:

> The arbitral tribunal shall decide the dispute in accordance with the law of the Contracting Party involved in the dispute including its rules on conflict of laws, the provisions of this Agreement, and the terms of any specific agreement concluded in relation to such an investment, if any, as well as the applicable principles of international law.

269. According to this provision, Respondent submits, the applicable law in the present proceeding is (i) Argentine law; (ii) the BIT itself – which should not be interpreted in

[323] Complaint of 2 February 2014 (Exhibit C-221).
[324] Respondent's Counter-Memorial on the Merits, paras. 466-477; Respondent's Rejoinder on the Merits, paras. 369-378.
[325] Respondent's Counter-Memorial on the Merits, paras. 506-508. Respondent's argument in her Rejoinder on the Merits, paras. 411-412, is different, however. While in the Counter-Memorial, Respondent argues that Argentine law applies pursuant to Article 42(1) of the ICSID Convention as the law "agreed by the parties", in the Rejoinder Respondent suggests that Argentine law forms part of the applicable law as the law applicable "in the absence of such agreement," which is consistent with the law applicable under the BIT. Both arguments lead to the inclusion of Argentine law as part of the applicable law, but the two approaches seem otherwise incompatible.

isolation from the remaining rules of international law;[326] and (iii) the principles of international law on the subject.[327]

270. Contrary to Claimants' argument, Respondent submits that Argentine law is not merely part of the factual matrix of the dispute, but part of the applicable law.[328] Amongst other things, Argentine law will "determine the nature and scope of the investor's rights arising from its investment"[329] and "is part of the law to be applied in order to determine whether or not the Treaty has been complied with."[330] Argentine law would not be relied upon to justify a breach of international law, but has to be applied in accordance with the agreement of the Parties. In any event, in order to rely on Article 27 of the VCLT, Claimants would have to establish "a clear and concrete conflict" between Argentine law and international law, as they are both applicable to the dispute.[331] In sum, Respondent submits, "this Tribunal is required to harmoniously apply Argentine domestic law, the BIT and the relevant principles of international law, so that none of them precludes the application of the others."[332]

271. Respondent further points out that Claimants have accepted the regulatory authority of the Province of Salta over the gaming industry. In Respondent's view, the Tribunal has to consider whether the revocation of ENJASA's license constituted a regular exercise of ENREJA's supervisory powers under Law No. 7020 or whether the revocation constituted an abuse of those powers.

272. Respondent stresses that, as many arbitral tribunals have recognized, investment tribunals must exercise a large degree of deference vis-à-vis the determinations of local authorities. Respondent invokes, inter alia, the award in *Koch Minerals*, which stated that "a tribunal cannot simply put itself in the position of the State and weigh the measure anew, particularly with hindsight."[333] Similarly, the tribunal in *Crystallex* held that "it is not for an investor-state tribunal to second-guess the substantive correctness of the

[326] Respondent's Counter-Memorial on the Merits, para. 514
[327] Respondent's Counter-Memorial on the Merits, para. 510; Respondent's Rejoinder on the Merits, para. 413.
[328] Respondent's Rejoinder on the Merits, paras. 414-415.
[329] Respondent's Counter-Memorial on the Merits, para. 513; Respondent's Rejoinder on the Merits, paras. 415-418, 420.
[330] Respondent's Counter-Memorial on the Merits, para. 517; Respondent's Rejoinder on the Merits, paras. 419-420.
[331] Respondent's Counter-Memorial on the Merits, paras. 511-512; Respondent's Rejoinder on the Merits, para. 419.
[332] Respondent's Counter-Memorial on the Merits, paras. 515, 517; Respondent's Rejoinder on the Merits, para. 420.
[333] *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award (30 October 2017) para. 7.20 (Exhibit ALRA-305).

reasons which an administration were to put forward in its decisions, or to question the importance assigned by the administration to certain policy objectives over others."[334] For the tribunal in *SD Myers v Canada*, a "tribunal does not have an open-ended mandate to second-guess government decision making,"[335] and the tribunal in *Glamis Gold v United States* did not consider it as its role "to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency."[336]

273. For Respondent, it is clear that ENREJA was best positioned to assess the facts and impose a sanction, due both to its technical expertise and its direct knowledge of the situation.[337]

274. Referring to *Laboratoires Servier v Poland*, Respondent also insists that Argentina's international liability should not be presumed.[338] Claimants who allege a violation of the BIT have the burden of proof.[339]

2. Breach of Article 4 of the BIT

275. In respect of Article 4 of the BIT, Respondent submits that the revocation of ENJASA's license was a lawful exercise of the host State's regulatory powers and therefore constituted neither an indirect expropriation of Claimants' investment in Argentina, nor a direct expropriation of a relevant asset of ENJASA that would entitle Claimants to the payment of compensation pursuant to Article 4(3) of the BIT.

a) No Indirect Expropriation under Article 4(1) and (2) of the BIT

276. As for the claim for an indirect expropriation contrary to Article 4(1) and (2) of the BIT, Respondent contends that Claimants have failed to show that the three cumulative requirements for an indirect expropriation have been met in this case, namely that (i) the contested measures interfere with the investor's property rights that qualify as investments; (ii) the interference be substantial; and (iii) the government measures that

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[334] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)11/2, Award (4 April 2016) para. 583 (Exhibit CL-203); Respondent's Post-Hearing Brief, para. 237.
[335] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL/NAFTA, Partial Award (13 November 2000) para. 261 (Exhibit ALRA-64).
[336] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, Award (8 June 2009) para. 779 (Exhibit ALRA-183).
[337] Respondent's Post-Hearing Brief, para. 242.
[338] Respondent's Post-Hearing Brief, para. 244; *Les Laboratoires Servier, S.A.S. Biofarma, S.A.S. Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (14 February 2012) paras 583-584 (Exhibit CL-193).
[339] Respondent's Post-Hearing Brief, paras. 243-244.

constitute the interference do not qualify as regulatory measures that have been adopted under the State's police power.[340]

277. Regarding the first two requirements, Respondent submits that Claimants' arguments to demonstrate substantial interference are "false".[341] According to Respondent, no "forced transfer" of ENJASA's personnel, premises, or title to assets had occurred. Decree No. 3330/13 of 20 November 2013 did not transfer ENJASA's license to other operators, as the License had already been revoked by Resolution No. 240/13 of 13 August 2013. The Government of the Province of Salta only granted, at first, provisional permits for new operators[342] and eventually issued new licenses to them in order to keep the gaming business going.[343] For its part, Decree No. 3330/13 sought to preserve jobs by obliging the permit holders to absorb the employees leaving ENJASA or other operators that also stopped operating games of chance. There was no "forced transfer" of ENJASA's premises or assets. The Temporary Plan, which was approved by Decree No. 3330/13, required the new operators to prove that their facilities were authorized and that they had the devices to operate games of chance. Respondent points out that Claimants' own valuation experts confirmed that there was no "forced transfer" of ENJASA's premises or assets, but that some were sold voluntarily to the new operators and resulted in an economic benefit for ENJASA.[344]

278. According to Respondent, Claimants do not contend that, after the revocation of ENJASA's license, they were prevented from participating in the process to obtain temporary operating permits and eventually licenses; Claimants recognize that they were offered to continue operating Casino Salta, but Claimants did not accept this offer.[345]

279. In addition, after the revocation of the License, ENJASA continued operating the Sheraton Hotel in Salta until it was sold for a real estate value of USD 4.2 million; also, the goodwill of the hotel was sold later on.[346] Respondent contends that the sale of the hotel "proves that there was a purchaser interested in the operation of the hotel;"[347] also

[340] Respondent's Counter-Memorial on the Merits, para. 522-523; Respondent's Rejoinder on the Merits, paras. 430-431.
[341] Respondent's Rejoinder on the Merits, para. 432.
[342] Decree 3330/13 of 20 November 2013, Art. 2 (Exhibit C-033).
[343] Decree No. 1502/14 of 29 May 2014 (Exhibit C-176).
[344] Respondent's Counter-Memorial on the Merits, paras. 539-545; Respondent's Rejoinder on the Merits, paras. 433-437.
[345] Respondent's Rejoinder on the Merits, para. 406.
[346] Respondent's Rejoinder on the Merits, para. 438; Dapena II, para. 14; Official Gazette of the Province of Salta of 5 December 2016, p. 16 (Exhibit ARA-060).
[347] Respondent's Rejoinder on the Merits, para. 438.

the hotel to this day continues operating. Respondent moreover stresses that Claimants have not submitted evidence to substantiate their allegation that the hotel only had limited value for them. The sale of the hotel and of its goodwill refutes this allegation.[348]

280. As for the third requirement for an indirect expropriation, Respondent contends that a distinction must be made between "compensable expropriation" and "non-compensable regulation." In order to distinguish between the two, most tribunals take into account the purpose of the measure taken by the State, and recognize the State's power to restrict private property rights without compensation through regulatory measures that are adopted in good faith, in accordance with due process, and in pursuit of a legitimate purpose.[349] Respondent notes that Claimants admit the existence of the concept of non-compensable regulation, although they incorrectly contend that that concept does not apply to the facts of this case because its requirements are not met.[350]

281. Concerning a State's regulatory powers, Respondent refers to awards that have found that it is not the function of an investment tribunal to second-guess the policies that a State may deem useful or necessary for the public good, and that "the standard of review of a State's conduct to be undertaken by an international tribunal includes a significant measure of deference towards the State making the impugned measure."[351] Respondent submits that the public purpose of ENREJA's measures to ensure compliance with anti-money laundering rules, which were themselves in line with international standards, cannot be denied.[352]

282. Respondent further contends that, far from abusing its powers, ENREJA had warned ENJASA in the past that it could lose its License if it continued breaking the rules.[353] The revocation of ENJASA's license was a measure adopted within ENREJA's powers, it was reasonable and proportionate in view of ENJASA's serious and repeated breaches. It was adopted following a long list of lesser sanctions and warnings.[354] Respondent also

[348] Respondent's Counter-Memorial on the Merits, paras. 524-528; Respondent's Rejoinder on the Merits, paras. 438-440.
[349] Respondent's Counter-Memorial on the Merits, paras. 529-530.
[350] Respondent's Counter-Memorial on the Merits, paras. 531-532.
[351] Respondent's Rejoinder on the Merits, paras. 422-443.
[352] Respondent's Counter-Memorial on the Merits, paras. 534-536; Respondent's Rejoinder on the Merits, para. 444.
[353] Respondent's Counter-Memorial on the Merits, para. 538; Respondent's Rejoinder on the Merits, para. 448.
[354] Respondent's Counter-Memorial on the Merits, para. 533; Respondent's Rejoinder on the Merits, paras. 447, 449.

argues that due process was respected at all times, and ENJASA was granted extensions for consulting records, submitting answers, and offering evidence.[355]

283. Finally, Respondent refers to the principle recognized in international law that no claim can be brought under international law where an agreement has been revoked according to its terms. Respondent contends that this was the case here, considering that ENJASA's license had been revoked in accordance with its express provisions and the applicable regulatory framework.[356]

b) No Direct Expropriation under Article 4(3) of the BIT

284. Respondent also submits that Claimants are not entitled to compensation or damages under Article 4(3) of the BIT. In this context, Respondent contends that Article 4(3) of the BIT does not protect ENJASA's license. Respondent invokes two reasons for this. First, the License does not qualify as a "financial asset" ("*activos financieros*"), which is the term used by the authentic Spanish version of Article 4(3) of the BIT. This term is more restrictive than the term used by the German version of the same provision ("*Vermögenswerte*"), which would translate as "*activos*" in Spanish or "assets" in English. According to Respondent, interpreting Article 4(3) of the BIT by reference to the Spanish version should be preferred over any broader interpretation based on the German version of the BIT because the Spanish version represents "the minimum point of agreement between the Parties to the Treaty"[357] and therefore constitutes the meaning which best reconciles the two texts, as required by Article 33(4) VCLT. Second, Respondent submits, that even if Article 4(3) of the BIT were interpreted to apply to "assets" in general, and not just to "financial assets", its scope of protection would remain limited to the assets of L&E, the company Claimants are immediate shareholders of; it could not extend to the assets of ENJASA in which Claimants are only indirect shareholders.[358]

[355] Respondent's Counter-Memorial on the Merits, para. 538.
[356] Respondent's Counter-Memorial on the Merits, para. 546.
[357] Respondent's Rejoinder on the Merits, para. 427.
[358] Respondent's Rejoinder on the Merits, paras. 424-429.

3. Fair and Equitable Treatment

285. In respect of Article 2(1) of the BIT, Respondent submits that the revocation of ENJASA's license was lawful under domestic law and did not breach any of the rights Claimants could derive from the fair and equitable treatment standard.

a) The Scope of Fair and Equitable Treatment under the BIT

286. Respondent contends that the fair and equitable treatment standard referred to in Article 2(1) of the BIT forms part of customary international law; its content therefore will be determined by its customary law origin.[359] By being included in an investment treaty without further specification, fair and equitable treatment does not become an autonomous standard, but continues to reflect the customary international law minimum standard of treatment. Respondent concludes that Article 2(1) of the BIT, interpreted in accordance with Article 31 of the VCLT, "coincides with that customary rule."[360]

287. To determine the standard to apply in order to find a violation of the customary international law minimum standard of treatment, Respondent refers to the *Neer* case[361] and *Glamis Gold v. United States*.[362] According to Respondent, "[e]ven though that standard reflects the evolution of customary international law, the threshold for finding a violation of the standard still remains high,"[363] and the acts which have been described as amounting to a violation of the standard include "willful neglect of duty," "subjective bad faith," "manifest failure of natural justice in juridical proceedings or a complete lack of transparency and candour in an administrative process," and "gross denial of justice or manifest arbitrariness."[364]

288. Respondent further relies on the commentary to Article 1 of the 1967 Organisation for Economic Co-operation and Development ("**OECD**") Draft Convention on the Protection of Foreign Property and, in the context of NAFTA, on the NAFTA Free Trade Commission's interpretation to the effect that fair and equitable treatment does "not require treatment in addition to or beyond that which is required by the customary

[359] Respondent's Counter-Memorial on the Merits, paras. 551-553.
[360] Respondent's Rejoinder on the Merits, paras. 454-455.
[361] *LFH Neer and Pauline Neer (USA) v United Mexican States*, Decision (15 October 1926) IV UNRIAA 60 *et seq.* (Exhibit ALRA-112), referred to in Respondent's Counter-Memorial on the Merits, para. 557.
[362] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, Award (8 June 2009) para. 616 (Exhibit ALRA-183), referred to in Respondent's Counter-Memorial on the Merits, para. 558.
[363] Respondent's Counter-Memorial on the Merits, paras. 551-558, 564.
[364] Respondent's Counter-Memorial on the Merits, paras. 565-567.

international law minimum standard of treatment of aliens."[365] Respondent contends that this position has been explicitly referred to by several States and endorsed by international courts and tribunals, as well as international jurists.[366] Respondent further submits that the interpretation of the NAFTA Free Trade Commission of the fair and equitable treatment standard contained in Article 1105 of the NAFTA does not only apply to the wording of that provision in the NAFTA, but has to be understood as reflecting "the ordinary meaning of fair and equitable treatment."[367]

289. Given that, according to Respondent, the fair and equitable treatment standard contained in the BIT is equivalent to the customary international minimum standard of treatment, Article 2(1) of the BIT does not establish a "general and absolute guarantee of legal stability," does not constitute an "insurance policy," and does not support Claimants' allegation that "the most important function of the fair and equitable treatment standard [is] to protect the investor's legitimate expectations."[368] To the contrary, such an approach is not contained in the BIT or in any other BIT signed by Argentina.[369]

290. Respondent contends that international law cannot be distorted by, on the one hand, recognizing that fair and equitable treatment is equivalent to the customary international law minimum standard and, on the other hand, "incorporating, through the backdoor, a whole series of new concepts that are completely alien to the international minimum standard, such as the protection of the investor's expectations, the stability of the regulatory framework, etc."[370] It would be, in any event, for Claimants to demonstrate that customary international law recognizes these concepts.[371]

291. Respondent further points out that several arbitral tribunals have confirmed that the threshold for finding a violation of the international minimum standard remains high. In *Genin v Estonia,* for instance, it was decided that "[a]cts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[372]

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[365] Respondent's Counter-Memorial on the Merits, para. 561.
[366] Respondent's Counter-Memorial on the Merits, paras. 559-563.
[367] Respondent's Rejoinder on the Merits, para. 456.
[368] Respondent's Counter-Memorial on the Merits, para. 568.
[369] Respondent's Counter-Memorial on the Merits, paras. 568-569; Respondent's Rejoinder on the Merits, paras. 457-458.
[370] Respondent's Counter-Memorial on the Merits, para. 573.
[371] Respondent's Counter-Memorial on the Merits, para. 573.
[372] Respondent's Counter-Memorial on the Merits, para. 565 (quoting *Alex Genin and others v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) para. 367 (Exhibit ALRA-114)).

292. For Respondent, the fair and equitable treatment standard contained in the BIT is not aimed at providing a general and absolute guarantee of legal stability or an insurance policy that would preclude the revocation of ENJASA's license when the conditions for this License have not been respected.[373]

293. For Respondent, the fair and equitable treatment standard contained in the BIT also does not protect the expectations of investors. The award in *Tecmed v Mexico*, which relied on the expectations of the investor as the source of the obligations incumbent upon the host State, was much criticized, Respondent argues.[374] At the very least, as was elaborated in *Saluka v. Czech Republic*, a balance would need to be struck between the expectations of foreign investors and the legitimate right of the host State to regulate matters in the public interest.[375]

294. Finally, Respondent observes that, as was admitted in *Lauder v. Czech Republic*, fair and equitable treatment "depends heavily on a factual context"[376] and that a breach of the standard cannot be established in the abstract.[377] In addition, in matters of public policy, regulatory authorities must have a "margin of appreciation".[378]

b) Breach of the Fair and Equitable Treatment Standard

295. Respondent contends that Claimants' allegations of breach of the fair and equitable treatment standard are unsupported. In particular, Respondent contends that (i) the revocation of ENJASA's license was not arbitrary; (ii) due process was observed in the proceeding that led to the revocation; (iii) there was no breach of legitimate expectations; and (iv) there was no harassment or coercion.[379]

296. Regarding the allegation that the License was revoked in an arbitrary manner, Respondent submits that the revocation was lawful and reasonable, was decided by ENREJA within its powers as granted by law, following investigations and inquiries

[373] Respondent's Counter-Memorial on the Merits, para. 568.
[374] Respondent's Counter-Memorial on the Merits, paras. 570-571 (referring to *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States* ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) (Exhibit CL-008)).
[375] *Saluka Investments B.V. v. Czech Republic*, Partial Award (17 March 2006) paras. 304-307 (Exhibit ALRA-79); Respondent's Counter-Memorial on the Merits, para. 572.
[376] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award (3 September 2002) para. 292 (Exhibit ALRA-113); see also *Noble Ventures, Inc. v. Romania*, ICSID Case ARB/01/11, Award (12 October 2005) para. 181 (Exhibit ALRA-109).
[377] Respondent's Rejoinder on the Merits, paras. 461-462; Respondent's Counter-Memorial on the Merits, para. 574.
[378] Respondent's Rejoinder on the Merits, para. 460.
[379] Respondent's Counter-Memorial on the Merits, para. 557; Respondent's Rejoinder on the Merits, paras. 452-453, 465.

already in progress in relation to previous breaches or infractions, and was based on three serious breaches, namely the irregular hiring of other gaming operators, the lack of identification of customers of live games and the payment of prizes in cash, and the failure to identify players of the lottery and to register prices. Given the seriousness and repeated nature of the breaches, and having already imposed numerous, progressively increasing sanctions for previous breaches, "the only valid solution," Respondent submits, was the revocation of ENJASA's license.[380]

297. Respondent also submits that the fact that the government subsequently granted a license to the local business partners with whom ENJASA had subcontracted without proper authorization or knowledge by ENREJA was irrelevant for determining whether ENREJA had breached the regulatory framework by revoking ENJASA's license.[381]

298. Regarding the allegation of a lack of due process in the proceedings leading to the revocation, Respondent contends that ENJASA's arguments are contradictory and untrue. According to Respondent, due process and ENJASA's right of defense were observed both during the revocation proceeding as well as in the administrative inquiries filed prior to the revocation of the License. Also, sanctions were applied gradually, reasonably, and proportionately, considering both the seriousness and the frequency of the breaches. In particular, the revocation of the License followed several breaches by ENJASA that were recorded in resolutions and notified to Claimants, and it was based on substantial grounds. ENJASA was notified of the charges against it through Resolutions Nos. 380/12, 381/12, and 384/12. It was given an opportunity to respond and submit evidence, and had deadlines extended for this purpose on many occasions. ENJASA also had access to the relevant files at all times. Despite numerous opportunities, the breaches by ENJASA continued and became increasingly serious and frequent. ENREJA had also warned ENJASA of the potential consequences, including in particular of the possibility that ENJASA might lose its License.[382] ENJASA had therefore been able to exercise its right of defense in all phases of the administrative proceedings that concerned the revocation of its license.[383]

[380] Respondent's Counter-Memorial on the Merits, paras. 577-579; Respondent's Rejoinder on the Merits, paras. 476-485.
[381] Respondent's Counter-Memorial on the Merits, paras. 580-582.
[382] Respondent's Counter-Memorial on the Merits, paras. 583-590; Respondent's Rejoinder on the Merits, paras. 468-475.
[383] Respondent's Post-Hearing Brief, para. 248.

299. As regards Claimants' expectations, Respondent reiterates that these are not protected under the BIT. However, even if the fair and equitable treatment standard in the BIT was to include the protection of legitimate expectations, it would still not cover Claimants' particular expectations, which were not legitimate.[384] Respondent contends that, when Claimants acquired their indirect shareholding in ENJASA, they had been (or should have been) aware of the regulatory framework in place in the Province of Salta and had themselves accepted the different arrangements contained in the License. ENREJA had the authority to impose a range of sanctions, including the revocation of the License, in case of breach of Law No. 7020, of the License Agreement, or of other applicable regulations. ENJASA could not expect that ENREJA would not use its regulatory and sanctioning powers when monitoring whether games of chance operated in full compliance with the law.[385] ENJASA could also not expect to keep the License despite breaches of the legal framework that applied to the License, particularly after having been sanctioned and warned that further breaches could lead to the loss of the License.[386]

300. Concerning Claimants' allegation of harassment by ENREJA through its supervisory and monitoring activities, Respondent contends that ENREJA merely applied the law and the provisions of ENJASA's license, and that Claimants could not have expected otherwise. In particular, the online monitoring system implemented in 2008 improved the supervision of slot machines as well as of transmission systems and thus contributed towards transparency; it could therefore not be considered as harassing conduct.[387]

301. With regard to the reasonableness and proportionality of the revocation of ENJASA's license, Respondent refers to the concept of proportionality as it exists in Argentine law, where "a measure will be proportionate if it pursues a legitimate aim and is appropriate to that end."[388] For Respondent, the prevention of money laundering is a legitimate aim and the revocation of ENJASA's license was appropriate to prevent money laundering practices.[389] The regulatory requirements imposed were also reasonable. For instance, it was reasonable to require registration of payments above ARS 10,000 (an amount three times the minimum monthly wage and more than one average monthly wage in the

[384] Respondent's Rejoinder on the Merits, para. 492.
[385] Respondent's Counter-Memorial on the Merits, paras. 591-597; Respondent's Rejoinder on the Merits, paras. 493-496.
[386] Respondent's Rejoinder on the Merits, para. 491.
[387] Respondent's Counter-Memorial on the Merits, paras. 598-600; Respondent's Rejoinder on the Merits, paras. 486-487.
[388] Respondent's Post-Hearing Brief, para. 252.
[389] Respondent's Post-Hearing Brief, paras. 253 and 257.

private sector). After all, Respondent states, in the bigger slot machine halls, prices above ARS 10,000 were paid on average once or twice a week and in the smaller slot machine halls, on average once a month, while for lottery games, prizes over ARS 10,000 were only won two or three times a week.[390]

302. Respondent further submits that the revocation of ENJASA's license had no hidden purpose that could undermine its legitimacy.[391] Respondent also observes that the revocation did not exclude Claimants from the gaming sector. In fact, after the revocation, Claimants were offered to continue operating games of chance in the Province of Salta, but refused to accept that offer.[392]

303. Respondent further observes that the revocation of the License was proportionate in view of ENJASA's recidivism and reluctance to comply with the regulatory framework in place in spite of sanctions imposed on prior occasions. Besides, no appropriate, but less intrusive sanctions were available to achieve the same purpose. A measure, such as a six-month or one-year suspension of ENJASA's license, would have affected other interests protected by Law No. 7020, which provides that "in order to rank the sanction, [ENREJA] shall take into account … the damage caused to the Provincial State and/or private persons."[393] Suspending ENJASA's license for six months or a year would have left workers in the sector unemployed and would have deprived the Province of Salta of fiscal resources aimed at funding social and educational policies.[394]

304. Respondent finally observes with regard to proportionality, that the Province of Salta took Claimants' interests into consideration and revoked only ENJASA's exclusive license for the operation of games of chance, while offering Claimants to continue operating casinos and leaving the operation of the five-star hotel unaffected.[395]

VI. THE TRIBUNAL'S ANALYSIS OF RESPONDENT'S LIABILITY

305. As becomes clear from the Parties' arguments on the facts of the case and their legal

[390] Transcript, Day 2, p. 188 and Day 4, p. 82; Respondent's Post-Hearing Brief, para. 259. The Tribunal notes, however, that the transcript does not exactly support these numbers. It states that, for slot machines, much depends on the frequency and that sometimes ten prizes above ARS 10,000 may be won on one day. Moreover, the evidence does not specify whether the prizes above ARS 10,000 were won per lottery game or for all lottery games together. Finally, no numbers were given for table games, where probably the highest prizes can be won.
[391] Respondent's Post-Hearing Brief, para. 254.
[392] Respondent's Post-Hearing Brief, paras. 255-256.
[393] Respondent's Post-Hearing Brief, para. 210.
[394] Respondent's Post-Hearing Brief, para. 260.
[395] Respondent's Post-Hearing Brief, para. 261.

assessment, the Tribunal is called to determine whether conduct of the authorities of the Province of Salta, which is attributable under international law to Respondent pursuant to Article 4(1) of the ILC Articles, resulted in a breach of the BIT, specifically its Articles 2(1) and 4. The measures Claimants alleged to breach the BIT consist of the administrative proceedings that resulted in the revocation of ENJASA's exclusive license through Resolution No. 240/13 and its confirmation in Resolution No. 315/13 and the subsequent transfer of ENJASA's operations to third operators. Prior conduct of the authorities in the Province of Salta is not claimed independently to have breached the BIT, but rather is invoked as background in support of Claimants' submission that there was a long-term plan to oust ENJASA of its operation in Salta's gaming sector.

306. Functionally, the Tribunal is therefore put by the Parties into a role akin to that of an administrative court which is asked by an affected private actor to review the legality of actions by the executive branch of government. However, as the Tribunal will specify in a first step, the legal standard to determine the legality of that conduct does not consist of domestic (administrative) law, but of the standards of treatment contained in the BIT. The Tribunal, therefore, is not asked by the Parties to make a binding determination under domestic law of the legality of the conduct of Respondent, respectively the authorities in the Province of Salta, as would be the case for a domestic court seized of the underlying dispute, but is limited to assessing the legality of that conduct under international law. The Tribunal, in other words, has to exercise a form of internationalized judicial review of administrative action.[396]

307. This notwithstanding, in determining the legality of Respondent's conduct under international law, the Tribunal will have to address several questions of domestic law as incidental questions or preliminary matters. Article 8(6) of the BIT clarifies that the Tribunal is empowered to do so. However, rather than reviewing questions of domestic law *de novo*, as would presumably be the proper course for a court in the host State sought of the underlying dispute, and thereby replacing domestic courts in their exercise of domestic judicial review, the Tribunal will determine any such question of domestic law, as is appropriate for an international adjudicatory body in its position, by exercising a

[396] To clarify, the Tribunal is not called on to decide on any claim that ENJASA may have, or have had, vis-à-vis the authorities in the Province of Salta or the Argentine Republic, nor is it called on to decide on any claims between the Parties to the present proceeding that may arise out of the breach of legal obligations other than the BIT. In particular, the Tribunal does not decide on, or even "resurrect", any "contract claims" that may exist or have existed between Claimants and/or ENJASA and the authorities in the Province of Salta, as argued by the Dissent, paras. 3-5, 159.

certain degree of deference. After all, the Tribunal's function in the present proceeding is not to replace domestic courts in exercising domestic judicial review, but to exercise a form of internationalized judicial review. However, exercising deference in the interpretation of domestic law and in the review of domestic legality of the host State's conduct, does not affect the Tribunal's task to assess the legality of that conduct under international law and determine whether it has given rise to breaches of the BIT.[397]

308. The Tribunal will then, in a second step, address the alleged breaches of the BIT. These encompass breach of the rules on expropriation contained in Article 4 of the BIT and of the fair and equitable treatment standard contained in Article 2(1) of the BIT. In interpreting the BIT, the Tribunal applies the rules on treaty interpretation laid down in the VCLT, which is binding upon both the Argentine Republic and the Republic of Austria.[398] These rules – and the interpretive canons flowing from them – are well-known and do not need to be further expounded in the abstract. Specifically for investment treaties, they require that treaty interpretation is not to be guided by presumptions in favor of either investors and their home States or of host States, nor by teleological preferences about investor-State relations that are extrinsic to the treaty commitments made.

309. Furthermore, the Tribunal notes that, in its analysis of the governing law, it is not limited to the arguments or sources invoked by the Parties, but is required, under the maxim *iura novit curia* or, better, *iura novit arbiter*, to apply the law on its own motion. This approach corresponds to the Tribunal's public function as an adjudicatory body that is part of the administration of international justice. It justifies reliance on arguments and authorities on the governing law not submitted by the Parties, provided the latter are given an opportunity to comment on arguments and legal theories that were either not addressed or could not reasonably be anticipated.[399]

A. Applicable Law and Causes of Action

310. The law applicable to the merits of the present proceeding is to be determined pursuant to Article 42(1) of the ICSID Convention. According to this provision, an ICSID tribunal

[397] For the Dissent (i.a. paras. 91, 395), Article 8(6) of the BIT requires the Tribunal to apply Argentine law to the dispute and, under the laws of the Province of Salta, the revocation of the License was a lawful sanction, taken by ENREJA in the regular exercise of its regulatory and supervisory powers. The Tribunal does not deny that ENREJA was entitled to exercise these regulatory powers as a matter of international law, but found that, for the reasons explained in the Award, the revocation of ENJASA's license did not qualify as a regular exercise of ENREJA's regulatory powers.
[398] Exhibit CL-001.
[399] See Decision on Jurisdiction, para. 172 (with further references).

is, in the first place, called to "decide a dispute in accordance with such rules of law as may be agreed by the parties." In the present proceeding, on the basis of Respondent's offer to arbitrate contained in Article 8 of the BIT, which Claimants have accepted, the Parties have agreed on Article 8(6) of the BIT, which provides in English translation as submitted by the Parties (with differences in translation noted), as follows:

> The arbitral tribunal shall decide the dispute in accordance with the laws of the Contracting Party involved in the dispute – including its rules on conflict of laws [Respondent]/private international law rules [Claimants], the provisions of this Agreement, and the terms of any specific agreements concluded in relation to such an investment, if any, as well as the applicable principles of international law.[400]

311. Pursuant to Article 8(6) of the BIT, the Tribunal is therefore empowered and required to apply Argentine law, the BIT itself, as well as other applicable principles of international law in resolving disputes between investors covered by the BIT and the other Contracting State, which are submitted to international arbitration on the basis of Article 8.

312. This does not mean, however, that the combination of domestic law, the BIT, and other principles of international law, which is laid down in Article 8(6) of the BIT applies necessarily to every claim or cause of action submitted by the parties, as part of their dispute, to an arbitral tribunal established under Article 8 of that BIT. Article 8(6) is a choice-of-law clause for the merits of the dispute on the basis of which a tribunal established under Article 8 of the BIT is to determine the law that applies to the causes of action before it. In providing that the applicable law encompasses the host State's domestic law, the provisions of the BIT, any specific agreements concerning the investment, and applicable principles of international law, Article 8(6) has to be seen in the context of the jurisdictional grant under Article 8(1), which allows an investor of one Contracting Party to bring "[a]ny dispute with regard to investments … concerning any subject matter governed by this Agreement" to a treaty-based ICSID tribunal. This provision may be understood as a wide dispute settlement provision that extends jurisdiction to a variety of different causes of actions, including claims for breach of the BIT (i.e., treaty claims), claims for breach of investor-State contracts (i.e., contract claims), or claims for breach of domestic law, provided these claims all regard an investment the claimant investor has made in the host State and the dispute concerns a

[400] Exhibits C-001 and ARA-001.

subject matter governed by the BIT, which would encompass any issue relating to the promotion and protection of investments that comes up in the relations between covered investors and host State. After all, as Article 7 of the BIT clarifies, contracts between covered investors and host State, as well as domestic law governing investor-State relations are covered by the term "subject matter of this Agreement" in the sense of Article 8(1) of the BIT.[401]

313. Each of those types of claims, or causes of action, would be governed by its own applicable law, as determined pursuant to Article 8(6) of the BIT. A claim for breach of an investor-State contract would be governed by the law applicable to that contract (as determined either by the host State's conflict-of-law rules and/or a choice-of-law clause in that contract); a claim for breach of a host State's domestic statute would be governed by domestic law; and a claim for breach of the BIT would be governed by the BIT itself. In addition, Article 8(6) of the BIT ensures that applicable principles of international law would apply independently of any other law that may be applicable (whether domestic law or treaty law) in order to ensure that the host State's obligations under international law are always complied with. Article 8(6) of the BIT, therefore, does not substantially differ from the approach to the determination of applicable law contained in Article 42 of the ICSID Convention, where applicable rules of international law also apply as a corrective.

314. In sum, Article 8(6) of the BIT sets out the permissible range of causes of action that can come before an Article 8 tribunal, but it does not have the effect that any dispute submitted to an Article 8 tribunal, independently of the causes of action upon which the disputing parties rely, is always governed by a combination of domestic and international law. Above all, Article 8(6) does not provide, as seemingly suggested by Respondent,

[401] Article 7 of the BIT (with differences in translation between the Parties noted) provides:

> Article 7
> Other Obligations
>
> (1) If the legislation of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain provisions, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such provisions shall to the extent they are more favourable prevail over this Agreement.
>
> (2) Each Contracting Party shall respect all contractual obligations it may have entered into in respect of [investments in its territory by] [Respondent] investors of the other Contracting Party [concerning investments admitted in its territory] [Claimants].

that Argentine law determines the scope of the investor's substantive rights under the BIT and whether or not Argentina has complied with the BIT. Whether the BIT and international law have been complied with can only be assessed on the basis of an autonomous interpretation and application of the rules and principles that form part of the international legal system. A treaty claim, in other words, remains governed by treaty law. As the ICJ has stated in the *ELSI* case, domestic law and international law, including the BIT, are separate regimes, so that

> [c]ompliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.[402]

315. To the same effect, Article 3 of the ILC Articles provides:

> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

316. That a treaty claim remains governed by treaty law does not mean, however, that domestic law is wholly irrelevant for the determination of compliance with, or liability under, a BIT, including the BIT governing the present dispute. Domestic law will remain relevant in governing a variety of incidental questions, or preliminary matters, including questions for the determination of which a BIT may expressly refer to domestic law (such as the determination of the nationality of an investor or compliance with domestic law under an in-accordance-with-host-State-law clause, as is the case under Article 1(1) and (2) of the BIT),[403] or questions that must be assumed to be governed by domestic law for other reasons, for example because certain elements of a treaty can only be determined

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[402] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989) [1989] ICJ Reports 15, 51, para. 73 (Exhibit ALRA-193); Claimants' Reply on the Merits, para. 455; Claimants' Post-Hearing Brief, para. 235.

[403] The provision in Article 1(1) *in fine* of the BIT, which provides that "[t]he contents and scope of the rights for the different categories of assets shall be determined by the laws and regulations of the Contracting Party in whose territory the investment is made," clarifies that the domestic law of the host State determines the content and scope of the rights that attach to the assets that qualify as protected investments under the BIT. This provision does not, however, mean that the determination of whether host State measures that affect an investor or her investment in respect of rights granted under domestic law qualify as a breach of the substantive protection granted under the BIT becomes subject to domestic law, as suggested by the Dissent, paras. 12, 98, 126-129, 296, 373, 407(1) and (2). Article 1(1) *in fine* of the BIT merely clarifies that no investor can complain that the denial of a benefit to which the investor is not entitled under domestic law – for example the host State's refusal to make payments to an investor under an investor-State contract beyond what that investor is entitled to under the contract – could give rise without more to a claim for breach of the BIT, but it does not mean that any measure of the host State that complies with domestic law would in and of itself comply with the substantive standards of treatment laid down in the BIT.

by recourse to domestic law (such as whether an investor has title to a certain asset or what the treatment afforded under domestic law is for purposes of assessing compliance with a national treatment provision).

317. In the present case, as their prayer for relief indicates, Claimants have brought claims for breach of specific provisions of the BIT, namely of Article 4 (addressing expropriation) and of Article 2(1) (addressing fair and equitable treatment). The law applicable to determining these claims is international law, more specifically the BIT itself, as well as other relevant rules of international law, including customary international law or general principles of international law, to the extent they are not supplanted by the BIT. Claimants have not brought claims before this Tribunal for breach of domestic law or breach of contract. While the assessment of ENREJA's conduct under domestic law, as specified further below, is a relevant factor in the application of the substantive standards of treatment under the BIT, the Tribunal is not called on deciding on a dispute between ENJASA and ENREJA about the legality of the revocation of ENJASA's license under domestic law. This dispute was before the courts in the Province of Salta and has become moot when the Parties withdrew it following the Tribunal's order to do so in its Decision in Jurisdiction.[404]

B. Expropriation

318. The Tribunal will first assess Claimants' claim for breach of the rules on expropriation in Article 4 of the BIT, which provides in English translation, with remaining differences between the Parties indicated, as follows:

> (1) The term "expropriation" includes both nationalization as well as any other measure having an equivalent effect.
>
> (2) The investments of investors of a Contracting Party shall not be expropriated in the territory of the other Contracting Party except for a public purpose, in accordance with due process of law and against compensation. Such compensation shall amount to the value of the investment expropriated immediately before the expropriation or the impending expropriation became public knowledge. Compensation shall be paid without undue delay and shall bear interest until the date of payment, at the customary bank rate of the State

[404] The withdrawal of the proceedings in Argentina's domestic courts concerning the dispute between ENJASA and the authorities in the Province of Salta does not, however, have the effect that the legality of the revocation of ENJASA's license under domestic law would become *res judicata* in the present proceeding and could not be revisited by the Tribunal as an incidental question in order to determine whether that revocation was lawful as a matter of international law, or that the legality of the revocation of the License would have to be qualified as a "legal *event* under Respondent's domestic law" that could not be revisited by the Tribunal, as suggested by the Dissent, paras. 3, 4, 91(iii), 100, 158-159, 206, 214, 233, 385, 390, 394, 407(1).

> in whose territory the investment has been made; shall be effectively realizable and freely transferable. Assessment and payment of compensation shall be adequately provided for no later than at the time of expropriation.
>
> (3) Where a Contracting Party expropriates the financial [Respondent] assets of a company that, in accordance with the provisions of Article 1, paragraph 2 hereof, is deemed to be a company belonging to that Contracting Party, and in which the investor of the other Contracting Party owns [Respondent]/has [Claimants] shares, the provisions set forth in paragraph 2 of this Article shall be applied by the former so as to guarantee the appropriate compensation of the investor.

319. As forwarded by Claimants, the claim for breach of Article 4 of the BIT arises from the revocation of ENJASA' exclusive 30-year license and the subsequent transfer of ENJASA's operations to third operators. As compared to the claim for breach of the fair and equitable treatment standard in Article 2(1) of the BIT, which arises out the same set of measures taken by the authorities in Salta, the claim for breach of Article 4 is the more specific one. Article 4 not only requires an interference with a protected investment that must meet a higher threshold and qualify as an "expropriation," it also gives the host State a right to expropriate a covered investment under specific circumstances, namely if the expropriation serves a public purpose, is implemented in accordance with due process of law, and provides for compensation. For this reason, claims under Article 4 of the BIT have to be addressed before claims for breach of other provisions of the BIT, such as the one on fair and equitable treatment in Article 2(1) of the BIT.

320. In respect of Article 4 of the BIT, Claimants claim that the revocation of ENJASA's license and the subsequent transfer of its operations to third operators gives rise to two (in principle separate) causes of action. In the first place, and as their principal claim under Article 4 of the BIT,[405] Claimants claim that the measures in question destroyed their indirect investment in ENJASA, through their shareholding in L&E, resulting in an indirect expropriation contrary to Article 4(1) and (2) of the BIT. Only as an alternative claim do Claimants allege the measures in question to have resulted in an expropriation of ENJASA's assets contrary to Article 4(3) of the BIT, which would entitle Claimants, they claim, as indirect shareholders in ENJASA to compensation.

321. Respondent, by contrast, claims that neither an indirect expropriation of Claimants' indirect investment in ENJASA that would violate Article 4(1) and (2) of the BIT has

[405] On the claim for breach of Article 4(1) and (2) of the BIT being Claimants' principal claim, see Claimants' Reply on the Merits, para. 644 (Request for Relief); Closing Statement, Transcript, Day 9, p. 64; Claimants' Post-Hearing Brief, paras. 456-459.

occurred, nor that the revocation of ENJASA's license and the subsequent transfer of its operations to new operators has resulted in an expropriation of ENJASA contrary to Article 4(3) of the BIT. Instead, Respondent insists, as its principal argument on the merits, that the revocation of ENJASA's license had occurred in the lawful exercise of ENREJA's regulatory or police powers as provided for under the regulatory framework in place in the Province of Salta. Such exercise of a host State's regulatory and police powers is recognized as lawful under international law and would not, Respondent argues, qualify as an act of expropriation under Article 4 of the BIT. In addition, Respondent submits, the fact that ENJASA could continue operating the Sheraton Hotel in Salta and that Claimants had been offered to continue operating casinos in Salta militated against the existence of an expropriation. Furthermore, Respondent argues that Article 4(3) of the BIT limits the protection of shareholder-investors to claims for compensation arising out of expropriations of "financial assets" of a locally incorporated company, a condition ENJASA's license did not fulfil, thus barring recourse of Claimants as shareholder-investors under Article 4(1) and (2) of the BIT.

322. Against the background of the Parties' arguments, the Tribunal will, in the following, first set out the legal framework to be applied to claims under Article 4 of the BIT. It will start with Claimants' principal claim for indirect expropriation under Article 4(1) and (2) of the BIT, before turning to Claimants' alternative claim for breach of Article 4(3) of the BIT. The key issue that emerges from the legal framework thus expounded is whether the revocation of ENJASA's license amounted to expropriatory conduct in the sense of Article 4(1) or whether it qualified as a regular exercise of the host State's regulatory or police power, that is, as a lawful administration of a sanction by ENREJA under Law No. 7020, which does not qualify as an expropriation and does not require the payment of compensation.

1. Breach of Article 4(1) and (2) of the BIT

a) The Relevant Legal Principles

323. Before assessing whether the facts in the present proceeding resulted in a breach of Article 4(1) and (2) of the BIT, the Tribunal will clarify the relevant legal principles governing the interpretation of this provision of the BIT. In order to do so, the Tribunal will first clarify the qualification of Claimants' claim as a claim for indirect expropriation of their investment (see (1)). The Tribunal will then set out the legal test applicable under

Article 4(1) and (2) of the BIT to determine whether Respondent's conduct qualified as an indirect expropriation and distinguish such conduct from the non-compensable exercise of the host State's regulatory and police powers (see (2)). Finally, the Tribunal will address in more detail what limits the exercise of the host State's police powers has to comply with in case of the enforcement of pre-existing limitations to the rights an investor enjoys under the host State's domestic law (see (3)).

(1) Qualification of Claimants' Claim as a Claim for Indirect Expropriation

324. Article 4(2) of the BIT provides investments of investors in the territory of the other Contracting Party with protection against expropriations that have not been made for a public purpose, in accordance with due process of law, and against compensation.[406] Expropriation, in this context, is defined in Article 4(1) of the BIT as encompassing both nationalization and other measures having an equivalent effect. Article 4 therefore protects not only against direct, but also indirect, *de facto*, or creeping expropriations of covered investments.

325. The notion of "investments", which are protected against expropriation under Article 4 of the BIT, in turn, encompasses not only direct investments of an investor from the other Contracting Party, but also investments that are held through a holding company that was incorporated in the host State, as in the present case. Indeed, the Tribunal has already found in its Decision on Jurisdiction "that both Claimants' direct shareholding in L&E and their indirect shareholding in ENJASA qualify as 'investments' under Article 1(1)(b) the BIT."[407] Claimants as shareholder-investors are therefore protected against

[406] The Dissent (para. 406) posits that the lack of compensation does not in itself render an otherwise lawful expropriation, that is, one implemented for a public purpose and in accordance with due process, unlawful, especially when the issue of compensation is *sub judice*. The Parties' submissions in the present case, however, is not that the revocation of ENJASA's license constitutes an otherwise lawful expropriation that only lacks the payment of compensation. Instead, Claimants claim that the revocation of ENJASA's license constitutes an unlawful expropriation, which entitles them to the payment of damages under the principles on State responsibility. Respondent, in turn, does not argue that the revocation of ENJASA's license qualified as a lawful expropriation either; Respondent's argument is that no expropriation has occurred at all. The issue of compensation for a lawful expropriation, in other words, is not *sub judice* in the present proceeding, nor was it *sub judice* in any of the proceedings that had been pending in the courts of Salta.

[407] Decision on Jurisdiction, para. 182. Since, for purposes of the analysis of whether Respondent's conduct complied with Article 4(1) and (2) of the BIT, the protected investment consists of Claimants' shareholdings in L&E and ENJASA, it is irrelevant that Claimants themselves were not the owners or beneficiaries of ENJASA's license. Similarly, for determining whether Claimants' shareholding was subject to an indirect expropriation, it is irrelevant whether the revocation of the License qualified, or not, as a direct expropriation of ENJASA. The question the Tribunal has to address under Article 4(1) and (2) of the BIT is not whether the License was directly expropriated, and whether the holder of that License, i.e., ENJASA, could claim for breach of Article 4 of the

expropriations of their (direct and indirect) shareholdings in L&E and ENJASA under Article 4(1) and (2) of the BIT.

326. By contrast, the Tribunal has found that ENJASA's assets themselves, including in particular its exclusive operating license, do not qualify under Article 1(1) of the BIT as Claimants' investments.[408] This notwithstanding, Article 4(3) of the BIT provides shareholder-investors in a company that has been established in the host State with a cause of action in case of expropriations of assets/financial assets of the locally incorporated company in which the investor holds shares.

327. In respect of the relationship between claims of shareholder-investors under Article 4(1) and (2) of the BIT, on the one hand, and Article 4(3), on the other hand, the Tribunal reiterates what it has explained in its Decision on Jurisdiction, namely that nothing in the text of Article 4(3) of the BIT supports an argument to the effect that this provision would exclude the protection of shareholder-investors under other standards of protection in instances where assets/financial assets of a locally incorporated company have been expropriated. Rather, as the Tribunal explained:

> 240. … the formulation of Article 4(3) of the BIT suggests that that provision was intended to grant shareholder-investors an additional cause of action when a local company, in which a covered investor holds shares, is expropriated.
>
> 241. This additional cause of action differs from a claim of shareholder-investors under Article 4(2) of the BIT for an (indirect) expropriation of their shareholding. Under Article 4(3) of the BIT, a claimant would only have to show that assets/financial assets of the company were subject to an expropriation, without the need to demonstrate any detrimental effect on the value of the shareholding. By contrast, for a claim under Article 4(2) of the BIT, the shareholder-investor would need to show that the interference of the host State with assets of the company had an effect on the shareholding that was so severe that it qualifies as a "measure having an equivalent effect" on that shareholding.[409]

328. Whereas direct expropriations require the taking and transfer of title to the covered investment from the investor to the host State or a third party, indirect or *de facto* expropriations cover measures that have an equivalent effect to a direct expropriation,

BIT, but whether the revocation of ENJASA's license constituted an indirect expropriation of Claimants' shareholdings in L&E and ENJASA. *Contra* Dissent, paras. 91(vii), 109-111, 125-129.

[408] Decision on Jurisdiction, para. 184.

[409] Decision on Jurisdiction, paras. 240-241.

but leave the title to the investment unaffected.[410]

329. It is this latter category which is the only relevant one in the present proceeding. As the Tribunal equally already has stated in its Decision on Jurisdiction, it is clear that the revocation of ENJASA's license and subsequent events do not constitute a direct expropriation of Claimants' investment, as it is undisputed that Claimants continue to own title to their shares in L&E and ENJASA. The issue is rather whether the revocation of ENJASA's license and the subsequent transfer of its business to new operators constitute an indirect expropriation of Claimants' investment in L&E and/or ENJASA.[411]

(2) Distinction between Indirect Expropriation and Non-Compensable Exercises of the Host State's Regulatory and Police Powers

330. In the past, in determining whether a certain government measure qualified as an indirect expropriation, several tribunals have considered principally, at times even solely, the effects the measure had on the protected investment.[412] What tribunals have required in

[410] For authority on the distinction between direct and indirect expropriation, see e.g. *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) para. 103 (Exhibit CL-011); *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (3 September 2001) para. 200 (Exhibit ALRA-113); *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) paras. 113-114 (Exhibit CL-008); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) para. 187 (Exhibit CL-003); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, Award (8 June 2009) para. 355 (Exhibit ALRA-183); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) para. 191 (Exhibit CL-178); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (27 September 2017) para. 822. For extensive discussion of the case law of investment treaty tribunals on the notions of direct and indirect expropriation, see August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 39-45, 51-69.

[411] See Decision on Jurisdiction, para. 228 (stating that "[i]n the jurisprudence of investment treaty tribunals, it has been held that such indirect expropriations can occur, inter alia, when host State measures, which directly affect assets of the company, substantially and permanently deprive the shareholder-investor of her investment in the shareholding in the company and effectively destroy the value of those shares. In such cases, shareholders can bring claims based on (indirect) expropriation of their shareholding in the host State" and providing further references to the case law invoked by Claimants).

[412] See eg *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000) para. 77 (Exhibit CL-004); *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) para. 7.5.20 (Exhibit CL-032). For a detailed discussion of arbitral case law endorsing the so-called (sole) effects-doctrine, see August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 149-155. The Dissent (i.a. paras. 92-93, 116-117, 120-124, 180-181, 234, 365-366, 375, 384, 387, 449) incorrectly claims that the Tribunal's majority "absurdly" only focuses on the "sole effect" of the revocation, without taking into account the regulatory powers of ENREJA to lawfully revoke the License. However, as the Tribunal explains in the present section, it does not consider the effects of the revocation of the License to be the sole criterion for the existence of an indirect expropriation, but also requires to factor in an assessment of whether this revocation has been brought about as a lawful exercise of ENREJA's regulatory and police powers. If that had been the case, no indirect expropriation would have been occasioned, and no compensation would be due, under Article 4 of the BIT.

application of this approach, as stated for example in *Metalclad v. Mexico*, is that the interference of the host State's measure with the investment "has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit."[413] Other tribunals have used similar formulations that make the existence of an indirect expropriation dependent upon the permanent and substantial deprivation of an investment's capacity to be employed for economic use and benefit.[414]

331. However, looking only at the effect of a measure on the investment in question is too limited. As confirmed by a large number of investment treaty tribunals, not only the impact on the investment of the measures in question has to be examined, but also whether the host State took those measures in the exercise of its police powers or its right to regulate, which are, as numerous tribunals have emphasized, a recognized component of State sovereignty, safeguarded under both customary international law and the law of investment treaties.[415] As stated, for example, by the tribunal in *Saluka v Czech Republic*, "[i]t is now established in international law that States are not liable to pay compensation to a foreign investment when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general

[413] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) para. 103 (Exhibit CL-011).

[414] See e.g. *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1 Award (17 February 2000) para. 78 (Exhibit CL-004); *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000) para. 102 (Exhibit ALRA-69); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL/NAFTA, Partial Award (13 November 2000) para. 283 (Exhibit CL-029); *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 September 2001) para. 200 (Exhibit ALRA-113); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001) paras. 591, 604 (Exhibit CL-021); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002) para. 107 (Exhibit CL-044); *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) para. 115 (Exhibit CL-008); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003) para. 20.32 (Exhibit CL-087); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) para. 262 (Exhibit CL-014); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) para. 188 (Exhibit CL-003); *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award (15 March 2016) para. 6.122 (Exhibit CL-202); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) para. 708 (Exhibit CL-203). For further discussion of arbitral case law to this effect, see also August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 112-155.

[415] See e.g. *Methanex Corporation v United States of America*, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) Part IV, Chapter D, para. 7 (Exhibit ALRA-77); *Saluka Investments B.V. v. Czech Republic,* UNCITRAL, Partial Award (17 March 2006) paras. 255, 262 (Exhibit CL-018); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) paras. 295-301 (Exhibit CL-178). For further detailed discussion of arbitral case law on this point, see August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 85-111.

welfare."[416]

332. The Tribunal agrees that due consideration must be given to the host State's police powers and its right to regulate in circumscribing the concept of indirect expropriation under investment treaties, independently of whether the treaty text makes express reference to such powers. Police powers and the right to regulate are recognized components of a State's sovereignty and firmly grounded in customary international law.[417] Consequently, the State's police powers and its right to regulate are not abrogated merely because a State has entered into treaty commitments that restrict its right to expropriate covered investors and their investment and subject expropriations to certain conditions. Rather, a State's police powers and its right to regulate under customary international law constitute "relevant rules of international law applicable in the relations between the parties" in the sense of Article 31(3)(c) of the VCLT and have to be taken into account in interpreting the provisions in a BIT on expropriation, such as Article 4(1) and (2) of the BIT. This could only be otherwise if it were shown that the contracting parties to the BIT had had a clear intention of dispensing with such a well-recognized principle of customary international law,[418] which is not the case for the BIT applicable to the present proceeding.

333. The State's police and regulatory powers encompass the right of a State to subject property owned by foreigners to regulation in the public interest and to enforce these regulations against the foreign owner without giving rise to a duty to pay compensation. This is true in particular for domestic regulations that already existed when the

[416] *Saluka Investments B.V. v. Czech Republic,* UNCITRAL, Partial Award (17 March 2006) para. 255 (Exhibit CL-018).

[417] The host State's police powers, which allow the taking of measures affecting a foreigner's property rights without compensation, have been recognized as part of customary international law long before modern investment treaty arbitration, inter alia in the practice of pre-World War I claims commissions, by inter-war arbitration tribunals, by the Iran-United States Claims Tribunal, and by commentators. See *Bischoff Case*, German-Venezuelan Commission, Decision (1903) X UNRIAA 420; *J. Parsons (Great Britain) v. United States*, Decision (30 November 1925) VI UNRIAA 165, 166; *Kügele v. Polish State*, Upper Silesian Arbitral Tribunal, Decision (5 February 1932) 6 Annual Digest (1931-1932) 69; *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran*, Award (24 October 1985) 9 Iran-United States CTR 248, 275; *Emanuel Too v. Greater Modesto Insurance Associates and The United States of America*, Award (29 December 1989) 23 Iran-United States CTR 378, 387; Draft Convention on the International Responsibility of States for Injuries to Aliens, Art 10(5) (1961) 55 AJIL 548, 562 (1961 Harvard Draft); American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) vol I, § 712, comment (g). For a review of some of these authorities, see also *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) paras. 290-301.

[418] Cf *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989) [1989] ICJ Reports 15, 42, para. 50 (Exhibit ALRA-193) (stating that "the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so").

investment was made. Such regulation constitutes pre-existing limitations to the rights acquired by a foreign investor. At the same time, it is also clear for the Tribunal that the host State's power to regulate is not unlimited, and regulatory measures and their implementation, including the imposition of sanctions and the forfeiture or revocation of rights granted under domestic law, are not per se carved out as a category from the concept of indirect expropriation. Otherwise, merely by labelling measures as having been taken in the exercise of the State's police and regulatory powers as "sanctions" or as "enforcement of pre-existing limitations" of an investor's rights, such measures easily could be misused and operate as disguised expropriations that would fall through the safety net offered to foreign investors by the rules on expropriation in investment treaties.[419] Authority under customary international law, which only exempts *bona fide*, non-discriminatory measures from any duty of compensation, recognizes such limitations on the host State's police powers and its right to regulate as well.[420] While the host State's proper exercise of its police powers or of its right to regulate is a business risk that has to be borne by an investor and does not lead to international responsibility, the improper exercise of such powers constitutes a political risk that international investment law regulates and sanctions.

334. Consequently, in the Tribunal's view, in distinguishing between compensable indirect expropriation and non-compensable exercises of a host State's police powers or its right to regulate regard has to be given both to the intensity of the interference of the measure with the protected investment and to the reason and purpose for which the host State has taken the measures in question. Under this approach, two elements must be fulfilled for a government measure to qualify as an indirect expropriation.

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[419] See e.g. *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) para. 121 (Exhibit CL-008) (stating that there is "no principle stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole —such as environmental protection—, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever"); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) para. 234 (Exhibit CL-016) (stating that the "Tribunal subscribes to the decisions which have refused to hold that a general regulation issued by a State and interfering with the rights of foreign investors can *never* be considered expropriatory because it should be analysed as an exercise of the State's sovereign power or of its police powers – emphasis in the original); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award (26 June 2000) para. 99 (Exhibit ALRA-69) (stating that excluding host State measures from the concept of indirect expropriation by subsuming them under the State's police powers merely "because the measures … are cast in the form of regulations … goes too far"). The Dissent, paras. 69-73, 91-98, 109-114, 152-154, 176-182, 386-387, by contrast, seems to assume that the imposition of sanctions per se falls under the concept of the host State's police powers and is carved out from scrutiny under the concept of indirect expropriation.

[420] See the references cited *supra* note 417.

335. First, the measure in question must show a certain severity of interference and permanence. To amount to a measure with equivalent effect to an expropriation, it is not sufficient that the measure has occasioned a mere decrease of the value of the investment, or that additional costs have been imposed on the investor. Rather, as required by a long line of arbitral jurisprudence,[421] the measure in question must have affected the investment in a way that the investor has been deprived permanently and substantially of the continued use and economic benefits of his or her investment.

336. Second, as equally recognized by a long line of arbitral jurisprudence,[422] the measure in question must not be covered by the host State's right to exercise its regulatory and police powers, taking into account both the legal framework in place in the host State when the investment was made and the host State's power to regulate and change this legal framework for the protection of public interests. In order to avoid abuse of the host State's regulatory powers, their exercise must be *bona fide* and in line with principles of international investment law, such as good faith, non-discrimination, and the prohibition of arbitrariness,[423] and result in measures whose impact on investments is proportionate to the interest(s) protected.[424] While recognized by modern investment treaty jurisprudence, these limits to the exercise of a host State's police powers also find their basis in customary international law.[425] Alternatively, the exercise of the host State's police and regulatory powers, the use of which would otherwise be legitimate, can qualify as an indirect expropriation if the host State has made assurances or entered special

[421] For references, see *supra* para. 330.
[422] For references, see *supra* paras. 331-333.
[423] See eg *Saluka Investments B.V. v. Czech Republic,* UNCITRAL, Partial Award (17 March 2006) para. 255 (Exhibit CL-018); *Methanex Corporation v United S*tates, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) Part IV, Chapter D, para. 7 (Exhibit ALRA-77). For further discussion of these limits as developed in arbitral jurisprudence, see August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 104-111.
[424] See eg *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) para. 122 (Exhibit CL-008); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) paras. 311-312 (AL RA- 141); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) para. 195 (Exhibit CL-003); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) paras. 241, 243 (Exhibit CL-016); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) para. 522 (Exhibit CL-189); *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award (28 June 2017) paras. 390-391 (Exhibit CL-191). See further August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 168-170.
[425] See the authorities referenced *supra* note 417.

commitments that the host State would refrain from such regulation.[426]

337. Under this framework, measures that do not pass the high threshold of a substantial and permanent deprivation of the investment will not qualify as an expropriation, independently of whether they have been adopted in good faith, are non-discriminatory and proportionate, and respect due process.[427] Furthermore, in the absence of specific commitments or assurances by the host State, both the introduction and administration of new regulatory requirements under its domestic law and the administration of existing regulatory requirements under domestic law will not qualify as an indirect expropriation requiring compensation, provided the regulation in question and its implementation have been made in good faith, are neither arbitrary nor discriminatory, and are otherwise proportionate.

(3) Limitations on the Host State's Exercise of Its Police Powers

338. In the present case, no question arises as to whether changes to the regulatory framework have been made as part of the host State's right to regulate. What is at issue is the implementation of the existing regulatory framework. The task of an investment treaty tribunal in distinguishing between a non-compensable exercise of the host State's police powers and a compensable indirect expropriation in that context, has been circumscribed by the tribunal in *Quiborax v. Bolivia*, in a case dealing with the cancellation of a mining license, as follows:

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

[426] For this limitation on the host State's regulatory and police powers, see eg *Methanex Corporation v United States*, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) Part IV, Chapter D, para. 7 (Exhibit ALRA-77).

[427] Such measures may still violate other standards of treatment in investment treaties, such as fair and equitable treatment or national treatment. Moreover, in certain circumstances, arguments concerning a partial expropriation of an investment may become relevant.

> otherwise), and (iii) whether the revocation was carried out in accordance with due process.[428]

339. As this statement suggests, the question of whether the host State's measures fall under the host State's police powers, and therefore do not qualify as a compensable indirect expropriation, or qualify as an indirect expropriation that is merely disguised as the exercise of the host State's police power, is an issue that depends on the compliance of the measures in question with both the host State's domestic law and standards of international law applicable under the BIT. While agreeing with the basic test circumscribed by the *Quiborax* tribunal to distinguish between the non-compensable exercise of the host State's police powers and the concept of indirect expropriation when the enforcement of pre-existing limitations of an investor's rights under domestic law is concerned, the Tribunal considers that certain concretizations to both prongs of the *Quiborax* test – compliance with domestic law and compliance with international legal standards – are called for.

340. First, in making the determination whether the administration and implementation of an existing regulatory framework constitutes a lawful exercise of the host State's regulatory and supervisory powers, an investment treaty tribunal will regularly be faced with allegations that the regulatory requirements under domestic law were not met. This could be the case, for example, because of alleged mistakes in the factual basis for a decision taken by the host State's authorities or because of errors of those authorities in interpreting domestic law, the violation of procedural rights under domestic law, errors of form, or errors in the exercise of discretion granted to host State authorities. In assessing these matters, the Tribunal is conscious of the fact that it has to leave the host State's authorities room for appreciation and thus exercise an appropriate degree of deference. After all, the Tribunal's mandate in the present proceeding is not to second-guess the host State's determinations under domestic law and review them *de novo*, as if it was the primary decision-maker or a domestic (first-instance, appellate, or supreme) court in the host State.[429]

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[428] *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) para. 207 (Exhibit CL-030).

[429] In this sense, for example, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL/NAFTA, Partial Award (13 November 2000) paras. 261, 263 (Exhibit ALRA-64); *Glamis Gold, Ltd. v. United States*, UNCITRAL/NAFTA, Award (8 June 2009) paras. 779, 805 (Exhibit ALRA-183); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) para. 283 (Exhibit ALRA-303); *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal*

341. In the Tribunal's view, the degree of deference due is a function of both the applicable law and the cause of action before it. If a cause of action for breach of the host State's domestic law is brought, and the investment tribunal has competence to entertain such a claim, it could be appropriate for the tribunal, which in such a case in effect substitutes for a domestic court, to adopt the same degree of deference that the host State's domestic courts would adopt in reviewing the legality of host State action under domestic law. By contrast, if a claim for breach of international law is brought before the investment tribunal, as is the case in the present proceeding, the tribunal will have to adopt the degree of deference that the applicable international law and the tribunal's function as an international adjudicatory body calls for. As the ICJ has stated in the *ELSI* case:

> Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.[430]

342. Against this background, an investment treaty tribunal will regularly not be able to review compliance of the host State with its own domestic law *de novo*, but will have to limit itself to verifying whether the host State's application of the domestic regulatory framework, whether lawful or not under domestic law, resulted in breaches of the international law limitations that fall on the host State under the BIT.

343. Second, the international law limitations on the host State's exercise of its regulatory and police powers when implementing pre-existing limitations to an investor's rights under domestic law, such as in the present proceeding, is not limited to due process violations, which are mentioned expressly by the *Quiborax* tribunal. Instead, international law requires, as explained above (see *supra* para. 338), that the host State's implementation of the existing regulatory framework under its police powers complies, in addition to due process, with the principle of good faith, is neither arbitrary nor discriminatory, and is otherwise proportionate. Focusing on these limitations of the host State's implementation of its regulatory framework to determine whether the host State's police powers have

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Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016) paras. 418, 430 (Exhibit CL-178); *Koch Minerals Sárl and Koch Nitrogen International Sárl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award (30 October 2017) para. 7.20 (Exhibit ALRA-305); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case ARB(AF)/11/2, Award (4 April 2016) para. 583 (Exhibit CL-203). For further discussion on the need for deference in investment treaty arbitration, see generally Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration – Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press 2015).

[430] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989) [1989] ICJ Reports 15, 51, para. 73 (Exhibit ALRA-193).

been exercised in a genuine manner, and therefore do not result in a compensable indirect expropriation, or whether the measures qualify as an indirect expropriation disguised as an exercise of the host State's police powers, operationalize the degree of deference that is due in respect of determinations made by host State authorities in interpreting and applying domestic law and avoid that an investment treaty tribunal would review compliance with domestic law *de novo*.[431]

344. What is not necessary as a requirement for finding a violation of the international law limits of the exercise of the host State's police powers in implementing the existing regulatory framework is the exhaustion of local remedies.[432] The BIT expressly provides for temporal limits to the need for an investor to have recourse before the administrative and judicial jurisdictions of the host State before turning to international arbitration and claim a violation of the BIT. Pursuant to Article 8(3) of the BIT, if no decision on the merits is rendered within eighteen months by the domestic authorities, local remedies no longer need to be pursued. As the Tribunal found in its Decision on Jurisdiction:

> After all, the purpose of such a requirement [i.e., recourse to domestic remedies for a period of 18 months under Art. 8(3)] is to give the courts of the host State an opportunity, for a certain time, to remedy the alleged grievance before an international tribunal assumes jurisdiction, thus coordinating dispute settlement between national and international jurisdiction. … Consequently, if it is clear … that the period the BIT requires domestic recourses to be pursued has passed without the dispute having been settled, the purpose of the domestic-remedies-first requirement, cannot be achieved anymore.[433]

345. Requiring the exhaustion of local remedies as a prerequisite for the finding of a breach of the substantive standards of treatment, in particular a finding that the host State has not complied with the requirements for the legitimate exercise of its police powers, would go against the clear wording of Article 8(3) of the BIT, which indicates that the Contracting Parties to the BIT did not intend to maintain the requirement, which exists as part of the law on diplomatic protection, to exhaust local remedies before having recourse under international law. Consequently, the fact that ENJASA has – on the instructions of the Tribunal and pursuant to Article 8(4) of the BIT – withdrawn its domestic judicial remedies in the Province of Salta, does not preclude the Tribunal from

[431] In this sense also *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, Award (8 June 2009) para. 617 (Exhibit ALRA-183).
[432] *Contra* Dissent, paras. 20-24, 91(iv), 221, 302-306, 380(2), 390-391, 394, 407(7).
[433] Decision on Jurisdiction, paras. 318-319.

assessing whether the revocation of ENJASA's license breached Respondent's obligations under the BIT and international law. Furthermore, the withdrawal of the proceedings in Argentina's domestic courts concerning the dispute between ENJASA and the authorities of the Province of Salta does not have the effect of turning the legality of the License's revocation under domestic law into a matter of *res judicata* that could not be revisited by the Tribunal as a matter of domestic law.[434]

346. Instead, deference to the host State's actions and determinations under domestic law is built into the standards of treatment under the BIT and the international law limitations to the host State's police powers, in particular as far as the standard of arbitrariness under international law is concerned, which the ICJ in the *ELSI* case defined as "not so much something opposed to a rule of law, as something opposed to the rule of law. … It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[435]

347. Similar definitions of arbitrariness can also be found in investment treaty jurisprudence.[436] For example, the tribunal in *Plama v. Bulgaria* equated unreasonableness with arbitrariness and explained that "[u]nreasonable or arbitrary measures ... are those which are not founded in reason or fact but on caprice, prejudice or personal preference."[437] The tribunal in *EDF (Services) Limited v. Romania* elaborated on arbitrariness as involving

> a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
>
> b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
>
> c. a measure taken for reasons that are different from those put forward by the decision maker;

[434] The Tribunal's majority thus disagrees with the Dissent (i.a. paras. 3, 4, 91(iii), 100, 158-159, 206, 214, 233, 385, 390, 394, 407(1)) that upon the withdrawal of the proceedings before the Courts of Salta, ENREJA's decision on the revocation of the License became final under Argentina law and could not be reviewed as the Tribunal is empowered to apply Argentine law pursuant to Article 8(6) of the BIT. See also *supra* note 404.

[435] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989) [1989] ICJ Reports 15, 76, para. 128 (Exhibit ALRA-193).

[436] For further discussion of the case law of investment tribunals on the definition of arbitrariness, see August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 439-441.

[437] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) para. 184 (Exhibit ALRA-36) (referring to *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (3 September 2001) paras. 221, 222, 232 and Christoph H. Schreuer, 'Fair and Equitable Treatment (FET): Interaction with Other Standards' (2007) 4(5) Transnational Dispute Management 8-9).

> d. a measure taken in wilful disregard of due process and proper procedure.[438]

348. As the above definitions show, not every violation of domestic law will *ipso facto* constitute arbitrary conduct under international law. Rather, arbitrariness requires a qualitatively significant breach, an abuse of power, that imposes harm on a foreign investor contrary to the rule of law. Indicators for arbitrariness in this sense can be, for example, a manifest lack of competence of the host State's authority for taking the measure in question, bad faith applications of domestic law, or decisions that appear so manifestly incorrect that they must be deemed to constitute an abuse of power.

349. As far as determining whether manifest errors in the interpretations of domestic law constitute an abuse of power is concerned, the Tribunal considers the statement of the ICJ in the *Diallo* case to offer helpful guidance.[439] In that case, the ICJ stated:

> [I]t is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts. Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.[440]

350. Similarly, in respect of determining whether mistakes made in the factual basis for a decision taken by the host State's authorities or whether the application of domestic law to those facts constitute an abuse of power, the Tribunal considers it appropriate to focus on the manifest character of errors as an indicator for the lack of good faith and arbitrariness.

351. As far as the principle of proportionality is concerned, the Tribunal considers that this principle is a recognized limitation on the exercise of the host State's regulatory and police powers so that host State measures that are disproportionate from the perspective of international law cannot qualify as legitimate exercises of the host State's police powers that fall outside the concept of indirect expropriations. Such a limitation, albeit without necessarily using the word proportionality, has been recognized already under

[438] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) para. 303.
[439] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Judgment (30 November 2010) (Exhibit ALRA-246).
[440] Ibid, para. 70 (internal citation omitted).

customary international law.[441] Proportionality is also laid down as a principle of (public) law in the domestic laws of a large number of countries, and in the practice of their domestic courts, and is used and applied as a principle of international law in the practice of numerous other international courts and tribunals, both within the investment treaty context and beyond, thus confirming that proportionality qualifies as a general principle of law in the sense of Article 38(1)(c) of the ICJ Statute whose purpose it is to reconcile competing interests, such as investment protection, on the one hand, and environmental protection, labor standards, human rights, or any other public interest, including the prevention of money laundering, on the other hand.[442] Proportionality requires that a host State's measures i) pursues a legitimate goal (public purpose); ii) is suitable to achieve that goal; iii) is necessary to achieve that goal in the sense that less intrusive, but equally feasible and effective measures do not exist; and iv) is proportionate *stricto sensu*, that is, that the benefit for the public of the measure in question stands in an adequate and acceptable relationship to the negative impact of the measure on the investment.

b) Application of the Legal Framework to the Facts of the Case

352. Having set out the legal framework on the interpretation and application of Article 4(1) and (2) of the BIT, the Tribunal now addresses how this framework applies to the facts of the case. Two issues are at the core of the analysis: (1) whether the termination of ENJASA's license has reached the threshold of a substantial and permanent deprivation of Claimants' shareholdings in L&E and/or ENJASA; and (2) whether, in the present case, the measures imposed by the host State qualify as a regular exercise of the host State's regulatory and supervisory powers that falls outside the concept of (indirect)

[441] For an early expression of the idea of the proportionality of the exercise of police powers, see *Bischoff Case*, German-Venezuelan Commission, Decision (1903) X UNRIAA 420 (providing that State responsibility would attach to lawful exercises of police powers, if they lasted "for an unreasonable length of time").

[442] For the use of proportionality analysis in domestic legal systems, see in particular Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia JTL 73; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 175-210; Alec Stone Sweet and Jud Matthews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press 2019). For the use in international legal regimes, including international investment law, see Alec Stone Sweet and Giacinto della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2014) 46 NYU JILP 911; Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press 2015); Benedict Kingsbury and Stephan W. Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest: The Principle of Proportionality' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 75–106; Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press 2015); Thomas Cottier and others, 'The Principle of Proportionality in International Law: Foundations and Variations' (2017) 18 JWIT 628; Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar 2018) 54-128.

expropriation.

(1) Permanent and Substantial Deprivation of Claimants' Investment

353. Although Claimants' shareholding in and control over L&E, and indirectly ENJASA, were unaffected by the revocation of ENJASA's license, Claimants were unable to make use of their investment in any meaningful way. ENJASA's exclusive license, which granted a monopoly for operating games of chance in the Province of Salta, was the heart of its entire business operation, the irreplaceable organ that ensured the functioning and survival of the entire body. Without it, ENJASA's operations in the gaming sector became impossible. What remained was an empty shell of assets, employees, and goodwill, a body that was left to decompose economically. The revocation of ENJASA's license, which was confirmed by Resolution No. 315/13, was permanent and was consolidated by the Province allowing new operators to step into ENJASA's shoes. Similarly, as Claimants' Expert Rosen showed in his Second Report, 98.8% of the value of L&E consisted of ENJASA's license.[443] The revocation of ENJASA's license therefore permanently and substantially deprived Claimants of their indirect investment in ENJASA and their direct investment in L&E. Both companies were empty shells after the revocation of ENJASA's license.

354. Respondent questioned whether a permanent and substantial deprivation of Claimants' investment had occurred because Claimants could have applied for new licenses after ENJASA's license was revoked, but did not do so. In addition, Claimants were concretely offered to continue operating casinos in the Province of Salta.[444] For the Tribunal, this aspect does not affect the conclusion that Claimants have been permanently and substantially deprived of their investment in L&E and/or ENJASA, as ENJASA's exclusive license for the remaining 17.5 years could not simply be replaced by new and less favorable licenses that were still to be negotiated and did not have the same scope as ENJASA's operation and were not exclusive. The fact, therefore, that Claimants did not apply for new licenses and refused to accept a possible offer to operate Casino Salta does not affect the Tribunal's conclusion that the revocation of ENJASA's license permanently and substantially deprived Claimants of their investment in L&E and indirectly in ENJASA. If the License was unlawfully revoked, Claimants were not

[443] Rosen II, para. 4.10.
[444] Respondent's Counter-Memorial, paras. 488-489.

obliged to apply for new licenses under less favorable conditions or continue to operate Casino Salta, while relinquishing all the other operations that formed part of ENJASA's exclusivity.

355. Equally irrelevant in this context is the circumstance that the exploitation of certain assets, in particular the five-star hotel, remained under ENJASA's control, and could be monetized after the revocation of the License, first by renting the premises of Casino Salta in the hotel to new operators and later selling the real estate and goodwill of the hotel for USD 4.2 million.[445] These circumstances do not affect the conclusion that ENJASA's exclusive activities in the gaming business had permanently ended with the revocation of the License. Whatever financial revenues ENJASA or Claimants could still draw after the revocation of ENJASA's license from their investments, including the liquidation of individual assets that remained, are matters that concern the calculation of compensation or damages, but do not affect the assessment whether a permanent and substantial deprivation of Claimants' investment has occurred in the first place.

356. The Tribunal consequently decides that the revocation of ENJASA's license constitutes a permanent and substantial deprivation of Claimants' indirect investment in ENJASA and of its direct investment in L&E.

(2) ENREJA's Use of Its Regulatory Powers

357. In the Tribunal's view, it is beyond question that the Province of Salta had the power to regulate within its territory the operation of games of chance, including in particular through imposing duties on operators, whether for the prevention of money laundering or otherwise, as well as it had the power to administer and implement these regulations, including the circumscribed sanctions in question, through regulatory authorities and administrative procedures. All of this is undoubtedly part of the host State's sovereignty and its right to regulate. This is all the more so, considering that the regulation and supervision of gambling operators is demanded by FATF recommendations in order to combat money laundering.[446] Consequently, the administration of such regulations, including the imposition of sanctions, even if resulting in the loss of an operating license,

[445] Although the Parties agreed that the hotel had been a condition to acquire the License and operated at a loss or was – at best – at break even, the Dissent (paras. 132-137) assumes that Claimants were not deprived of the complete value of their investment because they continued to operate the hotel after the revocation of the License.
[446] See 40 FATF Recommendations, Interpretative Note to Recommendations 5, 12 and 16 (20 June 2003) (Exhibit ARA-031) and Interpretative Note to Recommendations 22 and 23 (February 2012) (Exhibit JM-05).

does not quality as (indirect) expropriations under provisions in international investment treaties, such as Article 4 of the BIT, provided it is lawful also under international law, that is, made in good faith, is not arbitrary or disproportionate, and respects due process. If the revocation of the License was, in other words, a lawful sanction, it falls under the host State's police powers and does not constitute an indirect expropriation, whereas the revocation of the License would qualify as an indirect expropriation if it was an unlawful exercise of the host State's police powers.

358. The Tribunal therefore does not question the legitimacy of the regulatory framework set up in the Province of Salta under Law No. 7020, in particular its prohibition to hire operators without ENREJA's authorization and its rules to prevent money laundering. The Tribunal also does not question the sanctions regime established by Law No. 7020, including the possibility provided for in Article 13 of the Law to revoke operating licenses in case of certain serious breaches of the regulatory framework. Similarly, for the Tribunal there is no question that the duties imposed under ENREJA's Resolutions Nos. 26/00 and 90/12 on the modalities of making payments and on keeping records on the identification of recipients of payments and prizes, are legitimate exercises of the host State's police powers.

359. What the Tribunal has to examine, however, is how the regulatory framework in place was applied in the present case, and more specifically, whether ENREJA has properly exercised its regulatory powers under that framework in revoking ENJASA's license. As set out in more detail above, the Tribunal's task is not to review the legality of the revocation of ENJASA's license under domestic law in the same way the host State's administrative courts would. Instead, the Tribunal is limited to reviewing the legality under international law of ENREJA's exercise of its regulatory and supervisory powers, including in particular whether the revocation of ENJASA's license complied with the principle of good faith, the prohibition of arbitrariness, the principle of proportionality, and due process under international law.[447]

[447] As clarified above (see *supra* para. 345), the withdrawal by ENJASA of its recourses for judicial review of the legality of the revocation of its License before the courts of the Province of Salta does not have the effect that Resolutions Nos. 240/13 and 315/13, and the revocation of ENJASA's license they effectuate, become *res judicata* and would have to be accepted as being lawful by the Tribunal.

(a) Plan to Oust ENJASA from Operating in the Gaming Sector

360. One reason why the revocation of ENJASA's license could fail to qualify as a regular exercise of ENREJA's supervisory powers would be if that revocation was, as submitted by Claimants, the end point of a larger plan of ENREJA and the Province of Salta to oust ENJASA from the gaming business in Salta in order to grant licenses to local companies at conditions that were more favorable to the Province than the fee collected from ENJASA. Such a plan and its implementation would constitute an act of bad faith, arbitrariness, and abuse of power that would be unlawful from the perspective of international law.

361. To this end, Claimants allege that already in 2007 the Government of the Province of Salta wanted to "get rid of the Austrians," referring in this respect to the witness statement of Mr. Anselmi, who recalled a suggestion from Governor Urtubey's brother, Mr. Facundo Urtubey, to this effect, and to take over ENJASA and keep Mr. Anselmi as General Manager.[448] Moreover, Claimants allege, the Government of Salta wanted to eliminate the influence of Mr. Garamon, a supporter of the political rival of Governor Urtubey, over ENJASA through his participation in Iberlux. The Province, so Claimants argue, subsequently started to harass ENJASA by renegotiating the license fee, changing regulatory requirements in respect of slot machines, and increasing controls of ENJASA's operations. These allegations, if true, would indeed suggest the conclusion that the revocation of ENJASA's license was not a case of regular exercise of the host State's regulatory powers, but rather a bad faith abuse of those powers.

362. However, the Tribunal does not find that Claimants have submitted conclusive evidence of a long-term strategy as from 2007, when Governor Urtubey took office, to oust ENJASA of its operations in the gaming sector in Salta. Claimants' argument about mounting harassment of ENJASA with the purpose of ousting them from the gaming sector following the December 2007 change in political power in the Province of Salta is of little avail. In this context, the Tribunal does not accept Claimants' allegation that the Acta Acuerdo of May 2008, which changed the fixed license fee into a dynamic fee that depended on ENJASA's profits, constituted harassment of ENJASA. To start with, ENJASA has signed the Acta Acuerdo and therefore voluntarily accepted, without any

[448] WS II Anselmi, para. 47 (Exhibit C-292); Mr. Tucek referred to this message. See Cross Examination Tucek, Transcript, Day 2, p. 207.

sign of duress, that the license fee would henceforth be calculated as a percentage of its net profits.

363. Moreover, the Tribunal accepts Respondent's explanation that the negotiated change in the fee was to be explained against the background of Argentina's 2001/2002 financial and economic crisis and the measures introduced to tackle it, which included amongst others the pesification of US dollar-denominated debt and a significant subsequent devaluation of the Argentine Peso. The Tribunal also accepts that the introduction of the dynamic license fee required a closer monitoring of ENJASA's different operations, which ENREJA implemented through additional technical requirements for slot machines, registration of transactions, and increased surveillance and monitoring of ENJASA's activities. The additional work and investment these changes required on the side of ENJASA cannot be considered as harassment, but were part of the implementation of a reliable system for the calculation of the dynamic license fee.

364. More relevant for sustaining the allegation that ENJASA's license was revoked for purposes unrelated to the regular exercise of ENREJA's regulatory powers appears to be the letter of 23 November 2012 that Video Drome sent to ENREJA, in which Video Drome suggested to take over some of ENJASA's operations under conditions that would be economically more favorable for the Province than the fee arrangement with ENJASA.[449] In this context, the Tribunal notes that the three formal investigations, which led to the revocation of ENJASA's license, started on 11 December 2013, that is, two weeks after Video Drome's letter. The Tribunal further notes that after the revocation of ENJASA's license, Video Drome, which appears to have been politically well-connected, happened to receive licenses for a large part of ENJASA's former gaming operations, including Casino Golden Dreams, as well as another casino and several slot machine halls.[450] Moreover, the Tribunal notes that, whereas ENJASA's license fee consisted of 15-16% of its net profits, the license fee the new operators had to pay happened to be a 20% fee, which is exactly the fee Video Drome had suggested in its letter.

365. The Tribunal further observes that the Government of the Province of Salta appeared eager to endorse ENREJA's Resolution No. 240/13. Less than 40 minutes after its notification on 13 August 2013, Salta's Minister of Economy informed the public in a

[449] Letter of 23 November 2012 (Exhibit C-171).
[450] Resolution No. 334/13 (Exhibit C-036); Resolution No. 339/13 (Exhibit C-041).

press conference of the revocation and declared that ENJASA "disappears from this story" in spite of the possibility for ENJASA to request a suspension and reconsideration of the revocation of the License.[451] A day later, on 14 August 2013, the Governor of the Province of Salta, in a press interview, considered it appropriate to stretch ENREJA's allegations about ENJASA's hiring of operators, stating that ENJASA "has outsourced 100% of its operations."[452] The quick and outspoken comments from the Provincial Government on an administrative decision that was not final and most probably would be subject to administrative and judicial review, could be taken as an indication that Resolution No. 240/13 was not so much a legal, but rather a political decision, which was endorsed by the highest authorities of the Province.

366. The Minister's statements could be understood to suggest that ENJASA's exclusive license was revoked in order to increase the Province's benefits from the operation of gaming operations by asking for license fees from new licensee that would be higher than what ENJASA paid to the Province. At the press conference of 13 August 2013, the Minister stated that: "If we negotiate with each manager, we may reach 20% ... an additional amount between 20 and 25 million per year."[453] The Minister then specified the social projects on which the money could be spent. He also explained that before, in 2007, an increase in the license fee could only be obtained through negotiation "since [UNIREN] was not aware of any breach of the company."[454] He added that, at that time, "we did not have much more since they were complying with a contract."[455] The Minister thus may be seen as confirming that the purpose of the revocation was to improve Salta's finances; where in the past this objective had to be achieved by negotiating amendments to the contractual arrangements with ENJASA, the revocation of its License now allowed for the same without negotiations.

367. The Tribunal further observes that, in 2011 and 2012, ENREJA had only imposed one sanction upon ENJASA,[456] but that on 28 May 2013, a few months before the revocation of ENJASA's license, it imposed in Resolution No. 161/13 the maximum fine of ARS 200,000 for modifying prize limits without authorization in poker games, as well as the maximum fine of ARS 500,000 for organizing an unauthorized jackpot because of an

[451] Press Conference (Exhibit C-169).
[452] Interview of 14 August 2013 (Exhibit C-212).
[453] Press Conference, p. 4 (Exhibit C-169-ENG).
[454] Ibid p. 2.
[455] Ibid.
[456] Resolution No. 178/ 12 (Exhibit C-166).

alleged "recidivism," even though identical infractions had not been committed by ENJASA before.[457] Furthermore, the Tribunal observes that the three investigations that ultimately led to the revocation of ENJASA's exclusive gaming license were all started on 11 December 2012, in what appears to be a coordinated manner.

368. The imposition of the two maximum fines in May 2013 and the earlier coordinated investigations that ultimately lead to the revocation of ENJASA's license may reveal a change in ENREJA's policy towards ENJASA. However, whether this change in policy was motivated by an intention to exclude ENJASA from the gaming sector in Salta and transfer its operations to local companies on terms that were more lucrative for the Province, cannot be established from the evidence submitted by Claimants. In particular, the circumstantial evidence relied on by Claimants, such as the letter by Video Drome, the statements of Salta's Governor and the Minister of Economy, as well as the initiation of coordinated investigations that ultimately led to the revocation of ENJASA's license, with the intervening imposition of maximum fines for recidivism, are insufficient, in the Tribunal's view, to draw an inferences as to the intentions of ENREJA and the Province of Salta in issuing Resolution No. 240/13. The Tribunal will therefore not, on the basis of this circumstantial evidence, speculate what ENREJA's motives for issuing Resolution No. 240/13 may have been.

369. Similarly, the Tribunal considers Claimants' allegation that the revocation of the License was a political plot to harm Mr. Garamon, a supporter of a political rival of Governor Urtubey, as not sufficiently supported by evidence.[458] Likewise, the Tribunal accepts that the quick transition of ENJASA's activities to different operators within one week after Resolution No. 315/13 would be justified if the revocation of ENJASA's license was a lawful exercise of ENREJA's regulatory and supervisory powers. After all, it was necessary to ensure the continuance of games of chance operations in the Province and to protect the employment of hundreds of employees.

370. Instead of speculating about ENREJA's and the Province's motives for revoking ENJASA's license, the Tribunal will focus on the facts and the law and assess on that

[457] Resolution No. 161/13 (Exhibit C-154).

[458] Mr. Tucek, Claimants' witness, stated that in his dealings with ENREJA and the Province, he was told that Mr. Garamon's interests in ENJASA were an obstacle for further negotiations. The Tribunal observes that the allegation that the revocation has been caused by political motives is only based upon Mr. Tucek's testimony, but is not proven otherwise. Moreover, as further developments have shown, the fact that Mr. Garamon was no longer involved after Claimants had purchased all remaining shares in L&E from Iberlux did not lead to a reinstatement of ENJASA's license.

basis whether the revocation of the License as such constituted a regular exercise of ENREJA's regulatory powers that complied with international law requirements, that is, as elaborated above, whether it did not violate good faith, was neither arbitrary nor discriminatory, complied with due process, or was proportionate.

(b) ENREJA's Power to Revoke the License under Article 13

371. One aspect that would result in qualifying the revocation of ENJASA's license as arbitrary conduct contrary to the rule of law would be the lack of a legal basis on which to base that revocation. Claimants indeed argue that Law No. 7020 did not vest ENREJA with the power to revoke ENJASA's license. They submit that Article 13 of Law No. 7020, which provides for this competence, was superseded by the new Article 41, which was incorporated into Law No. 7020 by Law No. 7133 of 9 May 2001. Article 41 provides for specific administrative sanctions, but does not encompass the revocation of a license for operating games of chance. In addition, Claimants submit that the License vested the power of revocation in the Government of the Province of Salta, and not in ENREJA.[459] Respondent by contrast argues that Article 13 of Law No. 7020 was applicable and provided the appropriate basis for ENREJA's revocation of ENJASA's license in Resolution No. 240/13.[460]

372. The Tribunal observes a certain tension in the relationship between Article 13 of Law No. 7020 and the provisions of Articles 40 and 41, which were introduced in 2001. Both Article 13 and Articles 40 and 41 provide for sanctions in case of breaches of Law No. 7020 or of ENREJA's resolutions. Under Article 13, the most severe sanction is revocation of an operating license, whereas the most severe sanction under Article 41 of Law No. 7020 is a closure for a maximum of 30 days of the specific operation or venue where an infraction was committed. In addition, both Articles 13 and 40 of Law No. 7020 make it clear that infractions may also be prosecuted criminally. This overlap makes the Tribunal wonder what the relationship is between Article 13 of Law No. 7020 and the regime under Articles 40 and 41, which was introduced into that Law in 2001.

373. Respondent's expert, Prof. Marcer, argued that Article 13 applied to licensees, while Articles 40 and 41 applied to licensees and other actors.[461] The Tribunal, however, fails

[459] Reply on the Merits, paras. 300-304; see *supra* paras. 176-177. See also García Pullés IV, p. 46 (Exhibit C-300); Transcript, Day 5, p. 18.
[460] See Respondent's Counter-Memorial on the Merits, paras. 377-378; see *supra* paras. 254-256.
[461] Marcer II, paras. 43-44.

to understand this distinction, which would imply that until 2001, illegal operators of games of chance who did not have a license, could not be sanctioned under Law No. 7020. Besides, nothing in Article 13 indicates that its scope is restricted to licensees, and that Article 41 would apply to non-licensees. Similarly, Prof. Marcer's explanation that Articles 40 and 41 would set up a special regime for "administrative" infractions while Article 13 would allow to sanction "punishable" infractions, does not convince the Tribunal either.[462] Pursuant to their wording, both Article 13 and Articles 40 and 41 apply to breaches of Law No.7020 and of ENREJA's resolutions.

374. The Tribunal observes, furthermore, that in the past ENREJA had relied on Articles 40 and 41 when imposing fines for ENJASA's breaches of gaming regulations. For instance, in Resolution No. 161/13, ENREJA explicitly indicated that the sanctions were taken pursuant to Articles 40 *et seq.* of Law No. 7020.[463] By contrast, in Resolution No. 240/13, ENREJA admitted that Article 40 as well as Article 13 conferred it competence to sanction breaches, but relied on Article 13 in order to revoke ENJASA's license, stating that the distinction between the possible penalties the two provisions provided for, was "imperceptible."[464] ENREJA did so, however, without acknowledging that there is a crucial difference between the revocation of an exclusive license, covering extensive operations and various sites, for the remaining duration of the term of the License – here 17.5 years – on the basis of Article 13, and the inability to operate specific sites on the basis of Articles 41 and 43, which cannot exceed the term of one year.

375. The Tribunal observes that Law No. 7133, while incorporating Articles 40 *et seq.* in Law No. 7020, did not expressly abrogate Article 13 of the latter Law. Article 6 of Law No. 7133, which introduced Article 53 into Law No 7020 and which stated that "any other rule contrary to the provisions set forth herein shall be abrogated,"[465] did not apply to Article 13, as this Article is not incompatible with Articles 40 *et seq.* and is part of the very Law that Law No. 7133 amended. Besides, Law No. 7020, as published in the Official Gazette of the Province of Salta after the 2001 amendment, still contains Article 13.[466] The Tribunal therefore holds that there are no convincing legal arguments to limit ENREJA's competence to impose sanctions for the violation of the regulatory framework

[462] Marcer II, para. 102.
[463] Resolution 161/13, p. 4 (Exhibit C-154).
[464] Resolution 240/13, p. 33 (Exhibit C-031).
[465] Law No. 7133, Art 6 (Exhibit ARA-06).
[466] See also Marcer II, paras. 106-108.

established under Law No 7020 to those under Articles 40 *et seq.* and to deny ENREJA the sanctioning powers under Article 13 of Law No. 7020, which include the competence to revoke the License.[467]

376. The Tribunal also has taken note of Claimants' argument that Article 6 of the License only granted the Provincial Executive Branch the power to terminate the License in case of breach.[468] The Tribunal, however, observes that the present case concerns the sanctioning by the regulatory authority, ENREJA, for breaches of the regulations and not the termination of the License for breach of the contractual relationship between Licensee and Licensor.[469] Article 6 of the License can therefore not pre-empt ENREJA's exercise of supervisory and sanctioning powers under Article 13 of Law No. 7020.

(c) ENREJA's Determinations of ENJASA's Breaches of the Regulatory Framework

377. Not only the lack of a legal basis, or the lack of competence of a domestic agency, for imposing a sanction can lead to arbitrariness under international law. Arbitrariness can also consist of an abuse of power. However, an investment treaty tribunal, which is not assuming the function of a domestic administrative court, but is reviewing the international legality of the administrative conduct in question, will not engage in reviewing the application of domestic law *de novo*. In the exercise of due deference, and taking into account that arbitrariness is more than a violation of *a* rule of law, but rather of *the* rule of law,[470] the Tribunal's examination is limited to the issue of whether the decisions in question appear so manifestly incorrect that they must be deemed to constitute an abuse of power and thus constitute arbitrary conduct from the perspective of international law.

378. Based on this standard of review, the Tribunal finds a number of errors ENREJA has committed in the three investigations in Resolutions No. 380/12, 381/12, and 384/12, and which were subsequently used to justify the revocation of ENJASA's license in Resolution No. 240/13, that are so manifest that they must be considered to constitute an abuse of power and arbitrariness under international law. These errors encompass: (i)

[467] For the Dissent (i.e. paras. 140-143, 400-401) Arts. 13 and 41 have a clearly distinct scope of application, but the Dissent joins the Tribunal's majority in the conclusion that ENREJA was not prevented in principle to apply Art. 13 and issue the sanctions mentioned therein.
[468] García Pullés IV, para. 28 (Exhibit C-300); Exhibit 1 to Decree 3616/99 (Exhibit C-048).
[469] See also Mercer II, para. 105.
[470] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989) [1989] ICJ Reports 15, 76, para. 128 (Exhibit ALRA-193).

manifestly incorrect interpretations of several legal rules that form part of the regulatory framework; (ii) manifestly incorrect findings of fact; and/or (iii) combinations of both types of errors in the application of the regulatory framework in Resolution No. 240/13. Taken together, these errors lead the Tribunal to conclude that ENREJA, in revoking ENJASA's operating license, has abused its powers and acted arbitrarily under international law.

(i) Allegations in Resolution No. 380/12

379. In respect of Resolution No. 380/12, in which ENREJA had charged ENJASA with having breached anti-money laundering rules in its lottery operations and by making a payment in respect of a prize won in a slot machine game, the Tribunal is unable to see how ENREJA could plausibly conclude that the rules on anti-money laundering in Resolution No. 26/00 (registration of the payment and of the identity of the winner in the anti-money laundering book) were seriously breached when the payment and registration of a prize of ARS 11,080 were delayed by some six weeks, justifying in combination with other infractions the revocation of ENJASA's license. Similarly, the Tribunal is unable to see how ENREJA could plausibly consider that the same rules on anti-money laundering were seriously breached when a prize of ARS 11,480 won on a slot machine on 14 May 2012, which had not yet been paid out, was only registered in the anti-money laundering book in full on 17 May 2012, after an inspection conducted by ENREJA on 16 May 2012, justifying in combination with other infractions the revocation of the License. In both cases, the Tribunal concludes that ENREJA's finding that ENJASA had breached the regulatory framework on anti-money laundering in respect of these two prizes appears manifestly unsupported in fact and law and must be considered to be arbitrary from the perspective of international law.

380. By contrast, as concerns the other two instances investigated in Resolution No. 380/12, that is (i) ENREJA's charge that ENJASA failed properly to register in the anti-money laundering book the payment of a prize of ARS 12,000 won on 30 January 2012, and (ii) the erroneous registration in the anti-money laundering book of an expired prize of ARS 15,000 won on 2 March 2012, the Tribunal is satisfied that ENREJA has committed no relevant errors in its finding of fact and in the interpretation of the regulatory framework. These two instances were therefore not objectionable from the perspective of international law.

(ii) Allegations in Resolution No. 381/12

381. In respect of Resolution No. 381/12, which concerned alleged breaches of anti-money laundering rules in live games, the Tribunal considers that ENREJA has based its findings on ENJASA's breaches on manifestly incorrect interpretations of said rules. This holds true in respect of both the question of whether payments of prizes above ARS 10,000 had to be made by check prior to 1 May 2012 and the applicable statute of limitations.

382. First, to the Tribunal, it is obvious that an express duty to make payments of prizes above ARS 10,000 by check or international money transfer was only introduced in ENREJA's Resolution No. 90/12, which became effective as of 1 May 2012. Before that date, the Tribunal is unable to see any legal basis in existing anti-money laundering legislation or regulations for requiring ENJASA to make payment of prizes above ARS 10,000 by check. In particular, the Tribunal cannot accept Respondent's allegation that Law No. 7020 and Resolution No. 26/00, which both did not contain such a duty expressly, should nevertheless, following a "comprehensive and harmonious interpretation" be read as requiring the payment of prizes in excess of ARS 10,000 by check because otherwise such payments would be "suspicious transactions" that needed to be denounced under the anti-money laundering regulations in place.

383. As Respondent's expert, Prof. Marcer, himself has admitted, Article 13 is a provision that forms part of criminal administrative law.[471] Consequently, the basic principle in criminal matters, "*nullum crimen sine lege*" should apply. As no legislative text clearly obliged the payment by check of the prizes in question, the payment of such prizes in cash alone cannot constitute a violation of the regulatory framework. This conclusion can also not be changed in light of the fact that ENREJA had imposed, on various occasions, sanctions on ENJASA for not paying prizes exceeding ARS 10,000 by check prior to the entry into force of Resolution No. 90/12,[472] and that ENJASA had not only chosen not

[471] Transcript, Day 5, p.170. See also Marcer II, paras. 29 (stating that "[f]acts must be analyzed in the light of the principles of criminal law"), 43-45, 120-122; Respondent's Rejoinder on the Merits, para. 339; Claimants' Post-Hearing Brief, paras. 311-312.

[472] Cf Dissent, para. 169 (mentioning that Resolution No. 240/13 lists for 2007-2008 at least 52 payments exceeding ARS 10,000, which allegedly did not comply with the requirements for such payments under Law No. 7020 and Resolution No. 26/00). The Tribunal's majority does not agree that imprecise provisions that carry criminal or criminal-law-like sanctions can be retroactively "construed" or "concretized" merely through subsequent administrative practice as the Dissent, para. 197 seems to suggest ENREJA was able to do, when it imposed sanctions on ENJASA for having made payments above ARS 10,000 other than through check or international money transfer in Resolutions Nos. 31/08, 32/08, 232/08, 104/10, 106/10, and 161/10.

to contest those fines, but even accepted – through statements of its legal counsel at the time – that it was required to make payments of prizes above ARS 10,000 by check or international money transfer.[473]

384. Such acceptances – and statements by ENJASA's then legal counsel – may have been made in light of the relative insignificance of the fines involved and may have been motivated by the desire not to cloud or burden the relations with ENREJA. Be that as it may, a subsequent administrative practice, even if accepted by the subjects of the law, cannot, in the Tribunal's view, result in the creation of a primary norm that would impose a legal obligation on ENJASA to the effect that future behaviour that is not forbidden by the letter of the law would turn into a breach of the law that could be enforced through sanctions, including through the revocation of ENJASA's operating license. Consequently, the charge in Resolution No. 381/12 that ENJASA had violated anti-money laundering rules by not paying prizes above ARS 10,000 by check in August and September 2011, lacks any justification in the applicable law and must be considered as arbitrary under international law.

385. Second, it is also obvious to the Tribunal that ENREJA manifestly disregarded the explicit one-year time-bar contained in Article 49 of Law No. 7020, as all alleged infractions investigated under Resolution No. 381/12 had been committed more than one year before the investigation started. In this context, the Tribunal does not follow Respondent's legal expert, Prof. Marcer, who argued that the explicit time bar contained in Law No. 7020 would not apply to breaches of Article 5 of the same law, given that the revocation of ENJASA's license was based on Article 13, not on Article 40 of Law No. 7020. Instead, Prof. Marcer argued that sanctions imposed on the basis of Article 13 of Law No. 7020 were covered by the 5-year statute of limitation under Argentina's federal criminal law.[474]

386. However, there is simply nothing in Articles 5, 13, or 41 of Law No. 7020 that allows such a conclusion. On the contrary, as convincingly explained, in the Tribunal's view, by Claimants' experts, Prof. García Pullés and Prof. Bianchi, under Argentine law, a shorter time bar, or statute of limitations, contained in a provincial statute prevails in respect of breaches of that statute over a longer time bar, or statute of limitations, under

[473] See Letter from ENJASA to ENREJA of 30 August 2005 (Exhibit ARA-193); Letter from ENJASA to ENREJA of 14 April 2010 (Exhibit RA-173); Request for Reconsideration of 20 May 2010, p. 90 (Exhibit ARA-239); Respondent Post-Hearing Brief, paras. 156-160.
[474] Marcer II, paras. 43-44.

federal law.[475] ENREJA could also not rely on ENJASA's recidivism to get around the applicable statute of limitations as there was no relevant prior unlawful disregard of anti-money laundering rules in the conduct of live games, which is the subject-matter Resolution No. 381/12 concerned. Consequently, the charge in Resolution No. 381/12 that ENJASA had violated anti-money laundering rules was also arbitrary from the perspective of international law because ENREJA clearly and manifestly violated the applicable statute of limitations.

387. Finally, in respect of the cash payments made to the two individuals in September 2011 in Casino Salta, the Tribunal observes that, because of the one-year statute of limitation, these payments cannot be the subject matter of an investigation that started in December 2012. However, even if no time-bar excluded the investigation in question, the Tribunal is not able to see which rule would have required ENJASA to make a payment by check in the underlying scenario. It seems that the only basis for an investigation could have been that ENREJA suspected the transactions in question to be part of a money laundering scheme. After all, only a finding of money laundering could have led to sanctions for breach of the regulatory framework in respect of these facts, but ENREJA has not demonstrated in Resolution No. 240/13 in any way that and how this had been the case.

(iii) Allegations in Resolution No. 384/12

388. In respect of Resolution No. 384/12, which charged ENJASA with hiring third operators without ENREJA's authorization in breach of Article 5(1) of Law No. 7020, the Tribunal considers that ENREJA has equally acted arbitrarily from the perspective of international law by basing its findings on either a manifestly incomprehensible interpretation of the concept of "operator" in the sense of Article 5 of Law No. 7020, a manifestly incorrect investigation into the facts, or a combination of both types of errors.

389. In the Tribunal's view, ENREJA in a manifestly arbitrary manner considered Emsenor, Prodec, and DEK, as well as Video Dome to be "operators" of games of chance in the sense of Article 5 of Law No. 7020. While the term "operator" is an indeterminate legal concept, which is not further defined either in Law No. 7020 or any other instrument passed by ENREJA, the type of activities Emsenor, Prodec, and DEK, as well as Video

[475] García Pullés IV, paras. 48-63 (Exhibit C-028); Bianchi IV, paras. 159-171 (Exhibit C-301); Claimants' Reply on the Merits, para. 373.

Drome had engaged in, cannot, in the Tribunal's view, plausibly be considered to qualify as operating games of chance, which, as the experts of both Parties agree, requires responsibility for, control over, and exploitation of games of chance:[476]

- As the factual record laid down in Resolution No. 240/13 indicates, the conclusion that Emsenor was an operator of games of chance was based on a contract with ENJASA in which the rent ENJASA paid to Emsenor for a slot machine hall in Salvador Mazza was calculated as a percentage of the profits ENJASA made from operating slot machines in the hall in question. The conclusion of such a rental agreement, however, does not plausibly turn Emsenor into an operator of games of chance.
- Similarly, as the factual record laid down in Resolution No. 240/13 indicates, Prodec and its predecessor, DEK, had supplied hardware and software to ENJASA for jackpot systems and poker gaming tables for Casino Salta. This activity as well cannot plausibly be considered to turn Prodec and DEK into operators of games of chance.
- Video Drome as well cannot plausibly be qualified as an operator of games of chance just because it provided ENJASA with slot machines for several slot machine halls against a fee that was dependent on the income generated from these slot machines, as Resolution No. 240/13 assumes.

390. The Tribunal further considers that ENREJA in a manifestly arbitrary manner qualified Mr. Navarrete, New Star, and Mr. Colloricchio as unauthorized operators of games of chance. To the Tribunal it is clear, that these operators, and in the case of Mr. Colloricchio his two predecessors from whom he had taken over the slot machine halls, had been authorized to operate games of chance by BPAS, before ENJASA had been granted its exclusive license.[477] While Respondent alleges that these authorisations had been cancelled, both in law and in fact, once ENJASA received its exclusive license, no contemporaneous document proves this allegation. On the contrary, in the Tribunal's view, ENREJA was aware of the continued activities of previously existing operators, including Mr. Navarrete, Mr. Colloricchio, and New Star, and did not protest against

[476] Transcript, Day 5, p. 84 (García Pullés, stating that an operator is not the one "supplying the ship," but the one "steering the ship"); p. 113 (Bianchi, stating "the operator is the one who is responsible for the business, who runs the business"); pp. 130, 197 (Marcer, stating that an operator is a person "who carries out any of the activities of the license holder", whose function is "to exploit", "to operate").
[477] Claimants' Post-Hearing Brief, para. 62, Claimants Memorial on the Merits, paras. 115-120; Claimants' Reply, paras. 84-109.

their continued operation.[478] ENREJA had been informed by ENJASA that the previously existing operators contributed to ENJASA's license fee[479] and it was informed of the roster of slot machines these individuals and entities operated.[480]

391. In this context, it is also telling that Resolution No. 384/12 now qualified the above entities and individuals as "operators" allegedly hired by ENJASA without ENREJA's authorization, while in earlier resolutions ENREJA had fined ENJASA as operator of the very same sites for breaches investigated under Resolution No. 384/12.[481] One would assume that the alleged third operators should also have been sanctioned for operating games of chance without license or authorization of ENREJA, but at the time only ENJASA was sanctioned.[482] This circumstance already puts into question ENREJA's thesis that these companies and persons were actual operators.

392. Independently of the legal status of these three "operators" under domestic law, it cannot be plausibly considered that ENJASA had seriously breached its obligation under Article 5 of Law No. 7020 by hiring these "operators" without ENREJA's authorization. Mr. Navarrete, Mr. Colloricchio, and New Star had been authorized by BPAS and had been operating gaming sites for many years, without ever being disturbed in these operations. Between 1999, when ENJASA became the exclusive license holder, and 2012, that is, for 13 years, these operators frequently had been controlled by ENREJA and their activities had been ratified by ENREJA. After having known and accepted for such a long time these three operators, ENREJA could not in good faith, without any warning and without possibility to amend matters, take the most drastic sanction of revoking ENJASA's license.

393. In sum, of the seven allegedly unauthorized operators that ENJASA had hired, four were

[478] For instance, ENREJA had received a copy of the contracts between ENJASA and Mr. Navarrete, respectively Mr. Colloricchio, and never objected to their continuing gaming operations; Agreement to Conduct Games of Chance of 29 September 2008 (Exhibit ARA-054). See Claimants' Post-Hearing Brief, paras. 188-189.
[479] Exhibits C-361, C-319, and C-363.
[480] Exhibits C-303, C-397, and C-398.
[481] Mr. Collorichio, as per Resolution No. 384/12, allegedly operated the site in Rosario de la Frontera (Respondent's Rejoinder on the Merits, para. 313), Mr. Navarrete the one in Salvador Mazza (Respondent Post-Hearing Brief, para. 94), New Star allegedly operated slot machines in Salvador Guemes, Metán, and Rosario de la Frontera (Respondent's Rejoinder on the Merits, para. 327) and Video Drome slot machines at Casino Golden Dreams, Metán, JV Gonzalez, and Rosario de la Frontera (Respondent's Rejoinder on the Merits, para. 323, referring to Letter Video Drome to ENREJA, 23 November 2012 (Exhibit C-171)), while Prodec and DEK allegedly also operated at Casino Golden Dreams and Casino Salta (Respondent's Rejoinder on the Merits, paras. 324-326).
[482] See e.g. Resolution No. 153/10 (Guemes); Resolution No. 129/10 (Salvador Mazza); Resolution No. 200/10 (Metán); Resolution No. 161/13 (Casino Salta); Resolutions Nos. 232/08, 46/10, 106/10, 104/10, 106/10, and 286/10 (Casino Golden Dreams).

clearly not operating games of chance in the Province of Salta, but only rented the premises, supplied hard- and software, or provided slot machines to ENJASA. The three others had been authorized by BPAS to operate games of chance at one point in time before ENJASA had been granted the License. Since ENREJA, at the very least, had knowledge of this situation and tolerated it, if it had not even asked ENJASA to accept the continuous operation of these and other previously existing operators, as Claimants submit, it is a manifestly arbitrary application of Article 5 of Law No. 7020 to qualify ENJASA as having breached its duty not to hire operators of games of chance without ENREJA's authorization.

394. In sum, in the Tribunal's view, the investigations resulting from Resolution No. 384/12 clearly did not uncover any serious breaches that ENREJA relied upon in Resolution No. 240/13 to revoke ENJASA's license.

(iv) Conclusion on Allegations Underlying Resolution No. 240/13

395. In examining the infractions ENREJA claimed ENJASA had committed in Resolutions Nos. 380/12, 381/12, and 384/12, the Tribunal concludes that ENREJA's findings on these infractions in Resolution No. 240/13 were, to a predominant extent, based on manifestly arbitrary determinations of fact and law. This included in particular ENREJA's interpretation of anti-money laundering rules, disregard for the applicable statute of limitations, the legal qualifications of certain facts, and/or disregard of its own long-time acceptance of certain facts. Taken together, these aspects show that ENREJA's overall findings on ENJASA's breaches of the regulatory framework made in Resolution No. 240/13 were arbitrary and not in accordance with the requirements of the rule of law under international law.

396. ENREJA's findings of breach in Resolution No. 240/13 that the Tribunal does not find fault with are essentially limited to certain issues with the registration of payments of prizes addressed in Resolution No. 380/12, namely the failure to properly register the payment of a prize of ARS 12,000 won on 30 January 2012 and the erroneous registration of an expired prize of ARS 15,000 won on 2 March 2012. These breaches, however, hardly could have justified a sanction as severe as revoking ENJASA's exclusive operating license (even if prior sanctions against ENJASA legitimately could be taken into account as indications of ENJASA's recidivism). The conclusion the Tribunal

therefore draws is that ENREJA's determinations on many of ENJASA's breaches of the regulatory framework, and the consequences ENREJA attached to these determinations, namely the revocation of ENJASA's license, were arbitrary under international law.

(d) Proportionality of Resolution No. 240/13

397. A further aspect militating against qualifying the revocation of ENJASA's license as a proper exercise of ENREJA's regulatory and supervisory powers concerns the lack of proportionality of the sanction imposed. In this context, the Tribunal notes that proportionality is not only a requirement in order for the exercise of a host State's regulatory powers to be carved out from the concept of indirect expropriation under international law (see *supra* paras. 336-337, 351); proportionality is also enshrined in the host State's domestic legal framework, both generally as a principle of administrative law, but also specifically in the regulatory framework governing games of chance in the Province of Salta.

398. Thus, Article 13 of Law No. 7020 explicitly requires that any sanction imposed by ENREJA has to be proportionate to the infractions committed. It states:

> The punishment above shall be applied taking into consideration due proportionality between the penalties and the violation, notwithstanding the criminal liability and misdemeanor liability.

399. Similarly, Article 48 of Law No. 7020 not only requests proportionality with "the gravity of the offense," but also more generally with

> the damage caused upon the legal certainty, the morality and good customs, the consequences suffered by the Provincial Government and/or individuals, the social upheaval caused and the infringer's records of relapses.

400. The Tribunal has noted before that nearly all the alleged infractions, which were the basis for the revocation of ENJASA's license, were based on manifestly ill-conceived and arbitrary interpretations and applications of the regulatory framework in place and can therefore not serve as legitimate grounds for the imposition of sanctions on ENJASA. First, many alleged breaches concerned an obligation that did not exist at the time, namely to pay prizes over ARS 10,000 by check. Second, the allegation that ENJASA had involved seven unauthorized operators was baseless: four of them were not operators, but had rented out premises to ENJASA, had provided slot machines, or had supplied software and hardware; the three others were previously authorized operators, which

were known and accepted by ENREJA. Finally, all alleged infractions, which had been committed more than one year before ENREJA's investigations started on 11 December 2012 were time-barred under Article 49 of Law No. 7020.

401. If one detracts the above alleged breaches of the regulatory framework, what remains for ENREJA as a basis for imposing sanctions are the following minor breaches:

- The failure to properly register one payment of ARS 12,000 for a prize won on 30 January 2012 in the lottery game "*Tómbola*"; and
- The erroneous registration of a prize of ARS 15,000 won on 2 March 2012 in the lottery game "*Tómbola*", which had already expired and was never paid.

402. The Tribunal admits that these breaches could have been a valid ground for sanctions under the regulatory framework. They do not, however, in the Tribunal's view, indicate any systematic disregard by ENJASA of the regulatory framework, including the rules on the prohibition and prevention of money laundering. The Tribunal therefore considers that the revocation of a 30-year exclusive license, that was still to run for 17.5 years, covering many operations in different gaming sectors, constitutes a grossly disproportionate sanction for such minor infractions, which cannot be considered as complying with the international legal requirement of proportionality for a regular exercise of ENREJA's regulatory powers.

403. What is more, even if all allegations concerning ENJASA's breaches of the regulatory framework had been correct, that is, if ENJASA had illegally subcontracted certain of its activities to third operators and breached rules for the prevention of anti-money laundering as alleged by ENREJA, the Tribunal considers a revocation of ENJASA's license under the circumstances of the case to be a sanction that is disproportionate from the perspective of international law. This is so because ENREJA, in a manifestly erroneous manner, has failed to consider whether other equally effective measures had been available to prevent money laundering in the gaming sector short of revoking ENJASA's license and re-allocating its operations to third operators, and has not sufficiently taken into account the legitimate interests of ENJASA to continue exploitation of its exclusive 30-year license for the remaining time in devising the sanctions in Resolution No. 240/13.

404. In this context, the Tribunal notes that ENREJA had, as confirmed by several

witnesses,[483] not even considered the suspension of the License as a means to ensure future compliance of ENJASA with anti-money laundering rules, even though this would have clearly been a milder sanction that could arguably have had the same effect of ensuring compliance of ENJASA with the regulatory framework in place. Not considering whether a milder sanction could have been equally effective to ensure ENJASA's compliance with the regulatory framework is a further indication that ENREJA misused its discretion in sanctioning ENJASA's conduct in an arbitrary fashion. Furthermore, ENREJA's complete disregard of ENJASA's interest in continuing the exploitation, and of the impact of a revocation on the company's future business as well as on its past investments, indicates, in the Tribunal's view, that ENREJA abused its discretion.

405. What also needs to be taken into account in the evaluation of the seriousness of some of the infractions ENJASA allegedly had committed, is that ENJASA's business involved extensive operations and a large number of staff. With 328 employees, ENJASA operated four casinos and 15 slot machine halls with a total of 1,376 slot machines. Its four lottery operations involved the sale of 60,000 lottery tickets per day,[484] employed 44 employees, and relied upon 700 lottery agencies; each week there were 17 draws.[485] With such host of activities, it is inevitable that sometimes someone makes a mistake or that sometimes some rules are not complied with by someone, without such mistakes or non-compliances indicating or resulting in serious and systemically relevant breaches of the regulatory framework by ENJASA. Besides, the risk that someone sometimes does not apply the rules is the reason why ENJASA's activities had to be monitored by ENREJA, which had a full array of sanctions at its disposition to secure future compliance that fell short of revoking ENJASA's license.

406. The Tribunal also observes that urgency did not command the withdrawal of ENJASA's license. ENJASA did not have a bad record at the time the License was revoked: in the two years before the investigations started that led up to the revocation of ENJASA's license ENJASA had only been sanctioned once for negligent conduct in the handling of lottery drawings, which ENREJA admitted was merely imprudent, but not made in bad

[483] See Ms. Cainelli, Transcript, Day 7, pp. 16-17; Mr. S. Sylvester, Transcript, Day 7, pp. 211-213.
[484] WS I Anselmi, para. 41 (Exhibit C-018).
[485] Claimants' Post-Hearing Brief, para. 58.

faith.[486] ENJASA was also not engaged in acute money laundering, so that ENJASA's license had to be urgently revoked in order to prevent further money laundering and immediate harm.

407. The Tribunal finally observes that neither before the formal investigations, nor in the eight months between the start of this investigation in December 2012 and the revocation of the License, has ENREJA ever requested ENJASA to rectify the situation.[487] For the Tribunal, ENREJA's disinterest in rectification is another sign of disproportionality under international law: it indicates that ENJASA's interests to continue operations for more than 17 years was not taken into account in graduating the sanction to be imposed, but that the interest of the Province was given unwavering priority.

408. In fact, compliance with anti-money laundering rules was clearly not a major consideration for ENREJA during the eight months between the initiation of the three investigations in December 2012 and the revocation of ENJASA's license in August 2013. Had the prevention of money laundering been the primary concern for ENREJA, the Tribunal would have expected ENREJA to take a more pro-active and expedited approach to request ENJASA to remedy whatever was wrong, such as the involvement of unauthorized operators whereby ENREJA could have issued a clear warning that, if the conduct in question was not remedied, ENJASA's license would be revoked. None of this happened. ENREJA's investigations were clearly geared towards stopping the operations, rather than aiming at remediation and ensuring future compliance of ENJASA with the regulatory framework in place.

409. Revocation was even more disproportionate as ENREJA had not notified ENJASA concretely that future infringements could result in such revocation when sanctions were imposed in 2011, 2012, and 2013.[488] The only references to revocation, mentioned by Ms. Courel, one of ENREJA's lawyers, dated from 2010 and were unrelated to the issues under investigation in Resolutions Nos. 380/12, 381/12, and 384/12.[489]

410. Respondent has argued that nevertheless revocation was justified because of ENJASA's recidivism, given that ENREJA had already imposed the maximum possible fine in Resolution No. 161/13 (dated 28 May 2013) and that sanctions did not deter ENJASA,

[486] 28 months between Resolution No. 200/10 of 27 July 2010 (Exhibit C-165) and 11 December 2012. See Resolution No. 178/12 of 10 July 2012 (Exhibit C-166).
[487] Claimants' Memorial, para. 328.
[488] See Claimants' Reply on the Merits, para. 256.
[489] See Respondent's Counter-Memorial on the Merits, paras. 371-375; WS Courel, para. 36.

so that there was no other alternative than to revoke ENJASA's license.[490]

411. The Tribunal is aware that Article 48 of Law No. 7020 allowed ENREJA to take into consideration the "infringer's record of relapses" to establish the fine to be imposed and that Resolution No. 240/13 indicated that the penalty was inter alia determined by ENJASA's "background," listing the sanctions imposed since 2005.[491] The Tribunal is also aware that ENREJA has sanctioned ENJASA for some twenty-one breaches of the anti-money laundering regulations, established in sixteen investigations in the years before ENJASA's license was revoked. Moreover, the Tribunal notes that the sanctions imposed by ENREJA in its investigations prior to August 2013 gradually increased because of "recidivism" on the side of ENJASA as a graphic presented by Respondent (see *supra* para. 260) demonstrates.[492]

412. However, the Tribunal finds some inconsistency in ENREJA's recourse to "recidivism" when increasing fines. In Resolutions Nos. 286/09, 39/10, and 46/10, ENREJA made it clear that the provision on "recidivism" would only be applied when the same type of infringement had been committed before. On the other hand, in Resolution No. 161/13 of 28 May 2013, which increased sanctions to the maximum permissible under Law No. 7020 in case of "recidivism", the original fine of ARS 100,000 for modifying prize limits and organizing a jackpot without ENREJA's authorization, was increased fivefold to ARS 500,000 because of prior conduct that relate to infringements that seemed to have nothing to do with the setting of prize limits and the conduct of live games.[493] Resolution No. 240/13, in turn, should not be able to take into account the violations mentioned in Resolution No. 161/13 as an aggravating factor to justify the revocation of ENJASA's license, considering that Resolution No. 161/13 was unrelated to breaches concerning the correct registration and form of payment of prizes or the use of unauthorized third operators by ENJASA without ENREJA's authorization, which is what Resolution No.

[490] Respondent's Post-Hearing Brief, paras. 206-207.
[491] Resolution No. 240/13, pp. 29-31.
[492] In this context, the Tribunal also notes that it is unimpressed by Claimants' argument that these investigations and sanctions were groundless as ENREJA had confirmed in April 2008 that ENJASA had fully complied with its obligations in the Acta Acuerdo. This confirmation only recognized that ENJASA and its controlling shareholder had correctly performed the capital increase and had respected the other terms of the Stock Purchase Agreement of ENJASA's shares; the Acta Acuerdo did not address whether ENJASA had complied with the anti-money laundering regulations and could – of course – not cover compliance after 2008.
[493] Resolution No. 161/13 (Exhibit C-154) justifies this increase inter alia by referring to Resolutions Nos. 128/10 (Exhibit C-158), 129/10 (Exhibit C-159) (both relating to differences between slot machines in operation and those authorized), and 200/10 (Exhibit C-165) (concerning the opening of a gaming location without prior authorization of ENREJA).

240/13 took issue with.

413. The timing of the extraordinary increase for "recidivism" in Resolution No. 161/13 on 28 May 2013 is also striking, coming well after 11 December 2012, when the three investigations that ultimately resulted in the revocation of ENJASA's license had been initiated, and two months before the actual revocation of the License.

414. Furthermore, the Tribunal notes an inconsistency in the testimony of different witnesses as to whether ENJASA's "recidivism" was actually taken into account. Thus, at the hearing, Mr. Sylvester, ENREJA's main legal advisor, who examined the file and recommended the revocation of ENJASA's license, denied that previous infractions were a motivating factor on the side of ENREJA and taken into account,[494] while Ms. Cainelli testified that ENREJA took into account "ENJASA's previous history."[495] Unfortunately, Respondent has not submitted Mr. Sylvester's legal opinion underlying the revocation nor the minutes of the Board meeting where the revocation of ENJASA's license was decided.[496]

415. It is against this background that the Tribunal is not convinced that ENJASA's recidivism, even if it existed in the sense of the applicable domestic law, could have justified, in compliance with the principle of proportionality under international law, a sanction as severe as the revocation of ENJASA's license in the circumstances at hand, that is, without a clearer warning, and without having considered whether a suspension of the License for a certain time could have been an equally effective means to bring ENJASA back on the right track of complying with the regulations against money laundering in place in the Province of Salta, which ENJASA had left according to Resolution No. 240/13.

416. Finally, the Tribunal notes that other gaming jurisdictions, judging from their practices as presented by expert testimony during the proceeding, would not have revoked an operating license in similar circumstances. Claimants observed – and were not contradicted by Respondent – that in other major gaming countries, the alleged infractions – even if true – would not lead to a revocation of an operating license for games of chance.[497] In this context, Claimants' expert, Mr. Bourgeois, testified that he

[494] Transcript, Day 7, p. 190.
[495] Transcript, Day 6, p. 195.
[496] Claimants' Post-Hearing Brief, para. 155.
[497] Claimants' Memorial on the Merits, para. 326.

did not know of any major gaming jurisdiction where the types of infractions ENJASA was charged with, if established, would have resulted in the revocation of an operating license.[498] Moreover, in other Argentine provinces, similar infractions had been sanctioned by much milder penalties and not by the revocation of operating licenses.[499]

417. It is against this background that the Tribunal concludes that even if the allegations underlying Resolutions Nos. 380/12, 381/12, and 384/12 had been true, and their legal evaluation under domestic law accurate, a revocation of ENJASA's license would not have been proportionate under international law and would not have constituted a regular exercise of ENREJA's regulatory powers that would result in carving out the revocation of ENJASA's license as an implementation of pre-existing limitations of the investor's rights from the concept of indirect expropriation.

(e) Respect of Due Process

418. The internationally lawful exercise of regulatory powers not only requires that the measures the host State takes are proportionate and non-arbitrary, but also that due process under international law is respected. As has been held consistently in the jurisprudence of investment treaty tribunals, (international) due process applies not only to judicial proceedings, but also to administrative proceedings that implement the regulatory framework in place in the host State, which is at issue in the present proceeding.[500] Due process in this context requires, inter alia, that the administrative proceedings respect the right to be heard of those affected and that remedies exist for the review of the legality of the measures in question.[501]

419. Claimants claim that due process was violated in connection with the revocation of ENJASA's license because ENJASA was restricted in defending against ENREJA's allegations. Claimants allege that Respondent breached elementary procedural guarantees by ENREJA, namely: (i) not warning ENJASA about the possible consequences of the administrative inquiries; (ii) completely disregarding without any

[498] Bourgeois Expert Report, p. 48 (Exhibit C-027).
[499] Kusa Expert Report, pp. 22-24 (Exhibit C-302).
[500] See eg *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) para. 98; *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL/NAFTA, Arbitral Award (26 January 2006) para. 200. For a discussion of arbitral case law applying due process to administrative proceedings, see August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 398-402.
[501] For a detailed discussion of the content given to international due process in arbitral case law, see August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 420-427.

reasoning the factual justifications brought forward by ENJASA; (iii) failing to respect ENJASA's right to be heard, as ENREJA provided a justification for the sanction imposed by Resolution No. 240/13, without analysing whether the conclusions were legally or factually correct; (iv) depriving ENJASA of a fair opportunity to present its defence, as ENJASA was unable to review the full file relating to the allegations made by ENREJA and was not given adequate time to respond to the administrative inquiries; and (v) revoking the License without adequate reasoning.[502]

420. Respondent by contrast submits that ENREJA followed a strict internal procedure with regard to the investigations underlying Resolution No. 240/13 and that the revocation of ENJASA's license itself complied with ENJASA's due process rights.[503]

421. Certain of the issues that Claimants claim as violations of due process are matters the Tribunal has already dealt with in a different context. Thus, the Tribunal has addressed Claimants' arguments about the lack of a warning by ENREJA about the possible consequences of continued violations of the regulatory framework in the context of its assessment of whether the revocation of ENJASA's license was proportionate (see *supra* paras. 397-417). Beyond that context, the Tribunal is not able to see how international due process would require an administrative agency generally to give warnings to foreign investors about, or provide them with general information on, what the consequences are, or could be, under domestic law of an investor breaching domestic regulations. Arbitral awards that may be read as requiring such a broad duty of assistance of the host State vis-à-vis foreign investors, such as that of the tribunal in *Tecmed v. Mexico*,[504] would overstretch what international law requires of domestic administrative agencies in terms of due process.

422. With respect to the alleged violation of ENJASA's rights of defense flowing from international due process, the Tribunal notes that ENJASA had the formal opportunity to defend itself. Prof. García Pullés, Claimants' legal expert, admitted at the hearing that,

[502] Claimants' Memorial on the Merits, para. 328; Claimants' Reply on the Merits, paras. 293-299; Claimants' Post-Hearing Brief, paras. 394-400.
[503] Respondent's Post-Hearing Brief, paras. 214-215
[504] See *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) para. 154 (Exhibit CL-008) (stating in the context of fair and equitable treatment that the host State is required "in light of the good faith principle established by international law, … to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.").

once ENREJA had issued the formal notices of investigations in December 2012, ENJASA had some time to answer to the charges and submit evidence.[505] Only as the investigations became more concrete with the months, did ENREJA reject, on 18 June 2013, in a reasoned decision, a request for clarification that ENJASA had submitted in respect of Resolution No. 384/12.[506]

423. Shortly thereafter, Resolution No. 240/13 revoked ENJASA's license. ENJASA criticized Resolution No. 240/13 because it allegedly distorted the facts and the law and did not address, one by one, ENJASA's extensive explanations. Claimants object that ENREJA dismissed ENJASA's explanations by merely considering them to be "unclear and contradictory, revealing a disturbing anarchy in the management of the license."[507]

424. ENJASA thereafter was able to submit a detailed request for reconsideration against Resolution No. 240/13, but the decision to revoke ENJASA's license was confirmed by Resolution No. 315/13. For Claimants, Resolution No. 315/13 similarly misrepresented ENJASA's arguments.[508] However, for Respondent's expert, Prof. Marcer, Resolution No. 315/13 amply addressed ENJASA's arguments:

> By means of a lengthy resolution, *i.e.* Resolution 315-13, ENREJA analyzed and addressed all the arguments stated in the appeal for review, and denied the appeal. …
>
> No further analysis should be made in this regard given the abundant evidence found in the administrative files, which should be finally analyzed by the court; however, it may be concluded from the mere confrontation of the court records and the administrative acts on review, namely the resolution revoking the license and the resolution denying the appeal for review, that said resolutions were supported by the evidence on file.[509]

425. ENJASA then appealed ENREJA's resolutions before the First Instance Court of Salta, but, while the case was pending, it withdrew this recourse as instructed by the Decision on Jurisdiction in the present proceeding.[510] The withdrawal notwithstanding, the possibility existed in principle for the judiciary of the Province of Salta to determine the legality of the revocation of ENJASA's license under domestic law. To which extent this possibility for domestic recourse was effective, as required by international due process,

[505] Transcript, Day 5, pp. 36-47; Respondent's Post-Hearing Brief, paras. 217-218.
[506] Request for Access and Clarification, 11 June 2013 (Exhibit C-175); Resolution No. 182/13 (Exhibit C-194).
[507] Resolution No. 240/13 (Exhibit C-031).
[508] Claimants' Post-Hearing Brief, para. 81.
[509] Marcer I, paras. 60 and 70 (emphasis added).
[510] Respondent's Counter-Memorial on the Merits, para. 472.

is a matter that has not been made part of Claimants' claim on the merits before this Tribunal.

426. The Tribunal thus observes that, in these circumstances, it is unable to find a violation of any international due process rights, as claimed by Claimants. ENJASA has been afforded a reasonable opportunity to defend itself and to make submissions in the administrative proceedings conducted by ENREJA. ENREJA has also granted access to its files and gave reasons for why it rejected ENJASA's request for clarification. Finally, ENJASA was afforded access to the domestic courts in the Province of Salta to request a review of the legality of the revocation of the License. International due process has therefore been respected in the administrative proceedings leading up to the revocation of ENJASA's operating license and in access to domestic courts being granted for the review of the legality of ENREJA's measures.

(f) Conclusion

427. Although the Tribunal has not found a breach of due process, its findings on arbitrariness and the lack of proportionality are sufficient to conclude that ENREJA did not properly use its regulatory, supervisory, and police powers when it decided, in Resolution No. 240/13, to revoke ENJASA's exclusive license and when it upheld that revocation in Resolution No. 315/13. The revocation of ENJASA's license, which inappropriately under international law ended what was left of ENJASA's 30-year exclusive gaming license, destroying both ENJASA's business operations and Claimants' investment in ENJASA and L&E, cannot be considered as a regular exercise of ENREJA's regulatory and supervisory powers that would carve out Respondent's conduct from the concept of indirect expropriation under Article 4(1) and (2) of the BIT. Consequently, the revocation and the subsequent transfer of its operation to third operators qualify as an indirect expropriation of Claimants' shareholding in L&E and its indirect shareholding in ENJASA.

428. The Tribunal further finds that this indirect expropriation was unlawful as the revocation of ENJASA's license did not comply with the requirements international law sets for an internationally lawful exercise of the host State's police power. Such a measure does not fulfil the criteria Article 4(2) of the BIT sets up for a lawful expropriation, that is, the existence of a public purpose, the implementation of an expropriation in accordance with due process of law, and the payment of compensation.

429. The Tribunal therefore concludes that Respondent is liable for breach of Article 4(1) and (2) of the BIT.

2. Claim for Breach of Article 4(3) of the BIT

430. Claimants also request the Tribunal to declare that "[t]he Argentine Republic has breached Article 4(3) of the BIT by unlawfully expropriating the license and the gaming operations of Claimants' subsidiary."[511] As explained above (see *supra* paras. 327), Article 4(3) of the BIT allows a shareholder-investor an additional cause of action in case the company in which the investor holds shares is affected by an expropriation.

431. Claimants consider their claim under Article 4(3) of the BIT (concerning a direct or indirect expropriation of ENJASA's assets) to be of an alternative nature to their claim under Article 4(1) and (2) (concerning an indirect expropriation of their shareholdings in L&E and/or ENJASA), as the claim for breach of Article 4(3) would duplicate large parts of the claim for breach of Article 4(1) and (2).[512] Indeed, as an additional cause of action for shareholder-investors, Article 4(3) of the BIT would not give rise to any additional reparation or compensation because the factual matrix on which both claims rely overlap. After all, the compensation Claimants claim under Article 4(3) of the BIT is a consequence of the same measures that the Tribunal has found to have resulted in a breach of Article 4(1) and (2) of the BIT.[513]

432. Accordingly, it is not necessary for the Tribunal to make a formal finding on Claimants' claim under Article 4(3) of the BIT. This claim is consumed by the Tribunal's findings on Respondent's liability under Article 4(1) and (2) of the BIT. Against this background, it is also not necessary for the Tribunal to dwell in detail on the issue, which has divided the Parties, as to whether or not ENJASA's license qualifies as an "asset" or "financial asset" for protection under Article 4(3) of the BIT in light of the different language used by the Spanish and German versions of the BIT.[514]

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[511] Claimants Reply on the Merits, para. 644 (Request for Relief); Claimants' Post-Hearing Brief, para. 584 (Request for Relief).
[512] Claimants' Post-Hearing Brief, paras. 456-459.
[513] As presented by Claimants, the breach of Article 4(1) and (2) of the BIT is the broader cause of action because it covers, Claimants allege, additional heads of damages not covered by Article 4(3) of the BIT, namely costs resulting from the liquidation of ENJASA in the amount of USD 2,753,882. See Claimants' Post-Hearing Brief, para. 459.
[514] It would seem, however, to the Tribunal that the German term "*Vermögenswerte*" and the Spanish term "*activos financieros*" in Article 4(3) of the BIT can both be read as referring to "assets" in the sense of Article 1(1) of the BIT. The additional term "*financieros*" in Article 4(3) would simply seem to indicate that the assets of a locally

C. Fair and Equitable Treatment

433. Claimants also request the Tribunal to declare that Respondent has breached Article 2(1) of the BIT by failing to accord their investment fair and equitable treatment. Article 2(1) of the BIT, in the English translation agreed upon by the Parties, reads:

> Each Contracting Party shall encourage, in its territory and to the possible extent, the investments made by investors of the other Contracting Party, admitting such investments in accordance with its legislation and according at all times fair and equitable treatment.

434. The Parties have extensively argued in their submissions and at the hearing whether Respondent, through the authorities of the Province of Salta, has respected the fair and equitable treatment standard. They have, inter alia, discussed whether the fair and equitable treatment standard enshrined in the BIT is different from the minimum standard of treatment under customary international law, whether the authorities in Salta harassed ENJASA and thereby breached fair and equitable treatment, whether ENREJA had violated due process as required by fair and equitable treatment, and to which extent Claimants were entitled to the protection of legitimate expectations under Article 2(1) of the BIT.

435. The Tribunal notes that initially Claimants had argued that ENJASA was not only not treated fairly and equitably in the process directly leading up to the revocation of the License and in the confirmation of this revocation, but that ENREJA's conduct was permeated by a consistent pattern of bad faith and that ENREJA was visibly searching for pretexts to impose fines also in the administrative proceedings conducted between the year 2008 and May 2013.[515] However, Claimants ultimately limited their claim for breach of fair and equitable treatment to the question of whether the revocation of ENJASA's license, and the administrative proceedings related to it, have been proper under the BIT. In their Post-Hearing Brief, Claimants concluded their analysis of the breach of Article 2(1) of the BIT by stating:

> The revocation of the license falls short of the essential elements of fair and equitable treatment. The Argentine Republic has thus breached Art.

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incorporated company that were subject to expropriation have to have a financial value, without however intending to limit the class of protected assets under Article 4(3) to "financial assets", whatever that term may mean. Both authentic versions of the BIT would therefore have the same meaning and cover ENJASA's license as an asset with financial value, without the need to have recourse to Article 33(4) of the VCLT to resolve a difference in meaning between both treaty texts.

[515] Claimants' Post-Hearing Brief, paras. 430-433.

2(1) of the BIT and is under an obligation to pay damages to Claimants.[516]

436. Claimants have not submitted, however, any additional claims for damages or compensation resulting from breach of Article 2(1) of the BIT other than those arising from the revocation of ENJASA's license.[517] In the Tribunal's view, the claim for compensation under Article 2(1) of the BIT therefore duplicates Claimants' claim for compensation for expropriation under Article 4(1) and (2) of the BIT.

437. The Tribunal, in other words, is therefore not called upon to assess the lawfulness under Article 2(1) of the BIT of any measure taken, or conduct engaged in, by the authorities of the Province of Salta other than those already analyzed above under Article 4(1) and (2) of the BIT. The Tribunal is also not called upon to decide whether the remedies that a breach of Article 2(1) would give rise to differ from those that Claimants are entitled to for breach of Article 4(1) and (2), which the Tribunal has already established.

438. Against this background, the Tribunal considers that it is not necessary to make a formal finding on Claimants' claim for breach of Article 2(1) of the BIT. Although the Tribunal's findings made in the context of its analysis of Article 4(1) and (2) of the BIT that the revocation of ENJASA's license did not constitute a lawful exercise of the host State's regulatory and supervisory powers, but was arbitrary and disproportionate, and constituted an abuse of ENREJA's powers, would translate one-to-one into a breach of the fair and equitable treatment standard contained in Article 2(1) of the BIT, this claim is consumed by the Tribunal's findings on Respondent's liability under Article 4(1) and (2) of the BIT. As a consequence, the Tribunal makes no formal finding as to a breach of Article 2(1) of the BIT.

D. Conclusion on Respondent's Liability

439. In summary, the Tribunal therefore finds that Respondent is internationally responsible for breach of Article 4(1) and (2) of the BIT because the revocation of ENJASA's operating license by ENREJA and the subsequent transfer of ENJASA's business to new operators constituted an unlawful expropriation of Claimants' investment under the BIT.

[516] Claimants' Post-Hearing Brief, para. 454.
[517] The overview of Claimants' claim for damages considers the claim under Article 4(3) to be an alternative claim for the claim under Article 4(1) and 2 of the BIT, but does not mention the relationship to the claim for breach of fair and equitable treatment. See Claimants' Post-Hearing Brief, paras. 456-459. In the discussion on quantum, Claimants state that the claim for breach of fair and equitable treatment would entail the same standard for calculating reparation. See Claimants' Post-Hearing Brief, para. 481.

VII. QUANTUM

A. Standard of Compensation

440. As a consequence of the Tribunal's finding that Respondent has breached its obligations under Article 4(1) and (2) of the BIT by unlawfully subjecting Claimants' investment to an indirect expropriation, Claimants are entitled to full reparation pursuant to the law on State responsibility. As the Permanent Court of International Justice has held in a time-honored statement on the consequences of a State's conduct that breaches international law:

> The essential principle contained in the actual notion of an illegal act … is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[518]

441. This statement of principle reflects the state of customary international law, has been applied in a consistent line of jurisprudence by international courts and tribunals, in the field of foreign investment and beyond,[519] and is enshrined in Article 31(1) of the ILC Articles. This provision stipulates that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." Since restitution of Claimants to the *status quo ante* by reinstating ENJASA's exclusive license for the remaining term until 23 September 2029 is neither requested, nor suggested by the Parties, nor is it materially possible, the only form of reparation in question in the present proceeding is compensation in the sense of Article 36 of the ILC Articles.

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[518] *Case concerning the Factory at Chorzów (Claim for indemnity) (Germany v. Poland)* (13 September 1928) PCIJ Ser. A, No. 17 para. 47 (Exhibit CL-028).

[519] See e.g. *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006) paras. 480-494; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) paras. 326-328 (Exhibit CL-030); *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v. Government of Canada*, UNCITRAL/NAFTA, PCA Case No 2009-04, Award on Damages (10 January 2019) para. 108. For case law of other international courts and tribunals, see e.g. *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment (20 April 2010) [2010] ICJ Reports 14, 103-104, para. 273; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment (30 November 2010) [2010] ICJ Report 639, 691, para. 161; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Compensation)* Judgment (2 February 2018) [2018] ICJ Reports 15, 25-26, paras. 29-31; *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Judgment (14 April 2014) [2014] ITLOS Reports 4, 116-188, paras. 428-433.

Pursuant to paragraph 1 of that provision, Respondent "is under an obligation to compensate for the damage caused"; pursuant to paragraph 2 of the same provision "compensation shall cover any financially assessable damage including loss of profits insofar as it is established." Claimants, in other words, have to be put economically into the position they would, in all probability, have been in but for the revocation of ENJASA's license.

442. Respondent's duty to provide full reparation encompasses both compensation for the value of the expropriated investment, that is, Claimants' direct shareholding in L&E and its indirect shareholding in ENJASA, as well as any consequential damages that were caused as a result of the unlawful expropriation and that Claimants would not have incurred but for Respondent's unlawful conduct. In this context, the Tribunal observes that there must be a proximate causal link between the violation of international law and the injury caused to Claimants. Article 31(1) of the ILC Articles confirms that only "the injury caused by the internationally wrongful act" has to be fully repaired. By contrast, hypothetical, speculative as well as undetermined and remote damage cannot be compensated. Moreover, the burden of proof in respect of causation and the amount of damages lies with Claimants.[520]

443. In the following, the Tribunal will first turn to the valuation of Claimants' investment, that is, their direct shareholding in L&E, and/or their indirect shareholding in ENJASA, and make determinations on a number of contested aspects of valuation between the Parties and their experts (B.). The Tribunal will then turn to Claimants' claim for consequential damages (C.). Finally, questions concerning the payment of interest will be addressed (D.).

B. Valuation of Claimants' Investment

444. Claimants and Respondent, as well as their respective quantum experts, Mr. Howard Rosen and Dr. José P. Dapena, have extensively and in much detail argued the quantum of the compensation due. They agree on certain issues concerning the valuation of

[520] In this respect, the Tribunal agrees with Respondent's position. See Respondent's Counter-Memorial on the Merits, para. 633; Respondent's Rejoinder on the Merits, paras. 509-511. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Compensation)* Judgment (2 February 2018) [2018] ICJ Reports 15, 26, para. 32.

Claimants' investment, namely the use of the discounted cash flow ("**DCF**") method.[521] This method requires the reconstruction of the lost cash flow over the years reduced by a discount rate, reflecting the financial value of expected future cash flows over the years from the valuation date until the end of ENJASA's license.

445. The Tribunal agrees with the Parties that the DCF approach is the most appropriate valuation methodology to establish the losses suffered by Claimants because of the unlawful revocation of ENJASA's license, which otherwise would still have continued to be in force until 23 September 2029.[522] Even though ENJASA remained a going concern for a few months after 13 August 2013, all of its activities finally had to be wound down in November 2013 when ENREJA rejected ENJASA's Request for Reconsideration and the transfer of ENJASA's gaming operations to third operators was implemented. This brought ENJASA's activities in the gaming sector in Salta and its ability to generate cash flows to a halt and directly affected the profitability of Claimants' entire investment, that is, their direct shareholding in L&E, and their indirect shareholding in ENJASA. The capacity of ENJASA to generate future cash flows hinged on the existence of ENJASA's license. Conversely, essentially all of the value of ENJASA, as well as of L&E, was in ENJASA's license.

446. The Tribunal and the Parties also agree that the compensation due for Claimants' shareholding in L&E and/or ENJASA has to be evaluated at the moment immediately

[521] In spite of the Parties' agreement to value the compensation on the basis of lost income and discounted cash flow, the Dissent (i.a. paras. 338-347, 422, 426) considers compensation on the basis of the capital invested and the value of assets more appropriate, inter alia because it considers the assessment of future profits and their discounts to bring them to the level of the Valuation Date as too speculative. The Tribunal's majority, by contrast, follows the Parties' joint approach to value Claimants' investments at the Valuation Date on the basis of the discounted cash flow, discussing and deciding various issues both sides considered relevant for determining the relevant cash flows and the appropriate discount rate. It is against this background that the Tribunal also sees no need to address in any further depth an issue the Dissent raises as a factor that would reduce compensation, which has not been raised by either Party in the context of determining quantum. Contrary to the Dissent, paras. 31-32, 304, 380(6), 439-446, the Tribunal's majority fails to see any indications for Claimants' contribution to injury pursuant to Article 39 of the ILC Articles, either in the form of contributory fault to Respondent's internationally wrongful conduct because ENJASA's prior breaches of the regulatory framework may have contributed to the revocation of its License, or as a violation of a duty to mitigate damages after the revocation has taken place because Claimants did not accept the offer to continue operating Casino Salta and did not participate in the process for applying for new operating licenses. As already stated above (see *supra* para. 354), after ENJASA's license was revoked, Claimants were not obliged to apply for new licenses under less favorable conditions or continue to operate Casino Salta, while relinquishing all other operations that formed part of ENJASA's former exclusivity.

[522] Contrary to the Dissent, para. 427, in the view of the Tribunal's majority, for purposes of determining future cash flows, one has to assume that ENJASA's license continues to exist until its original term in September 2029 and disregard the possibility that the License could be legitimately revoked because of some illegal future conduct of ENJASA. The value of ENJASA and/or L&E at the Valuation Date is based on the assumption of future compliance of ENJASA with the law, so that potential future illegal conduct of ENJASA cannot reduce its value at the Valuation Date.

preceding the issuance of ENREJA's Resolution No. 240/13, which revoked ENJASA's license and put the indirect expropriation of Claimants' investment in motion.[523] For Claimants, the valuation date should be 12 August 2013, which is the day immediately preceding the day Resolution No. 240/13 was issued.[524] For Respondent, the valuation date should be 13 August 2013 itself, but just before Resolution No. 240/13 was issued.[525] In the Tribunal's view, the resulting difference of a few hours is immaterial for purposes of valuation. The Tribunal will therefore adopt 13 August 2013 as the Valuation Date in respect of Claimants' investment, with the understanding that the projection of cash flows is to be carried out on that day prior to the issuance of Resolution No. 240/13.

447. In the context of valuing Claimants' investment, the Parties and their experts disagree, however, on a range of issues. These include: 1) the valuation model to be used to determine the value of Claimants' 60% shareholding in L&E and/or ENJASA; 2) the basis for projecting future cash flows, including the relevance of cash flows generated by Cachi Valle from the Joint Venture with ENJASA relating to Casino Salta, cash flows following the end of the Joint Venture Agreement between ENJASA and Video Drome on 31 December 2013, and cash flows relating to the Sheraton Hotel in Salta; 3) the determination of the applicable discount rate; and 4) the applicable exchange rate. After setting out the respective positions of the Parties, the Tribunal will address these issues in turn.

1. Claimants' Approach

a) Valuation Model

448. Claimants observe that the "value of the investment" is the "fair value", and not the "fair market value." Their expert, Mr. Rosen, distinguishes the "fair market value," i.e., the price in an arms-length transaction at which a hypothetical and willing buyer would buy from a hypothetical and willing seller in an unrestricted market,[526] from the "fair value," which takes into account the respective advantages or disadvantages that the parties will gain from the transaction, including specific synergies, such as those alleged to relate to

[523] This is also reflected in Article 4(2) of the BIT which states that in case of lawful expropriation "compensation shall be the value of the investment expropriated immediately before the expropriation ….". The same date for purposes of valuation must also apply in case of an unlawful expropriation, as in the present case.
[524] Claimants Memorial on the Merits, paras. 456-457; Claimants Reply on the Merits, para. 597.
[525] Respondent's Rejoinder on the Merits, footnote 884.
[526] Rosen II, para. 11.20; Transcript, Day 8, p. 93.

Claimants' debt/equity ratio.[527]

449. Claimants disagree with Dr. Dapena that the valuation of ENJASA's operations is to be based upon the free cash flow to equity holders that was lost from 13 August 2013 until the end of ENJASA's exclusive license on 23 September 2029. They observe that, while a valuation based upon lost dividends as suggested by Dr. Dapena may be appropriate in cases where the continuity of the business is only impaired,[528] or where the shareholders are not fully managing the company,[529] it is not appropriate for valuing a company, whose business is definitely destroyed and whose activities are stopped, as is the case in the present circumstances where the revocation of the License ended ENJASA's gaming operations and lead to ENJASA and L&E being wound up.[530]

450. Moreover, in the present case, Claimants as shareholders in ENJASA and L&E did not only receive dividends, but also a yearly fee as compensation for the use of trademarks and logos and shared know-how.[531] To limit the analysis to dividends lost would therefore not fully compensate Claimants' loss.[532] Consequently, for Claimants, the value of their investment is best established as a percentage of the value of L&E and ENJASA as a whole, corresponding to their respective shareholding at the Valuation Date.[533]

b) Relevant Cash Flow

451. To determine the cash flow related to Claimants' investment in Argentina, that is, their shareholding in L&E, Mr. Rosen determined the entirety of the cash flows that stem from operations that are connected to ENJASA's exclusive license. This License, Mr. Rosen explained, constitutes almost the entire value (98.8%) of L&E.[534]

452. In order to establish the cash flow related to ENJASA, Mr. Rosen offers two valuation scenarios. In his Scenario One, he bases his forecasts, where possible, on actual figures, excluding non-recurring costs and revenues. These include (i) ENJASA's actual results prior to the Valuation Date, and (ii) financial projections that were prepared by

[527] Claimants' Post Hearing Brief, paras. 477, 484.
[528] Claimants' Post Hearing Brief, para. 500.
[529] Claimants' Post Hearing Brief, para. 502.
[530] Claimants' Post Hearing Brief, paras. 494-499. The Sheraton Hotel Salta continued operations a few years after this revocation, but was sold in 2017.
[531] Rosen II, paras. 8.46-8.51.
[532] Rosen, Transcript, Day 8, p. 219.
[533] Claimants' Post Hearing Brief, para. 456.
[534] Rosen II, para. 4.10: Claimants' Post Hearing Brief, para. 471.

ENJASA's management in the normal course of business (i.e., prior to the Valuation Date), with adjustments where necessary.[535] Mr. Rosen observes that his estimates of the actual monthly results of ENJASA for 2013 tied well into ENJASA's audited statements for 2012 and 2013.[536]

453. The forecasts of future cash flows, Mr. Rosen points out, are mainly based upon ENJASA's monthly results in 2013 and not upon projections founded upon contemporaneous management decisions. Moreover, Mr. Rosen observes that forecasts would be distorted if they were only based upon historical data and not take into account management decisions.[537] Mr. Rosen therefore additionally considers management projections, which were prepared in the normal course of business before Claimants or ENJASA had knowledge of the revocation of ENJASA's license; in Mr. Rosen's view, these projections would be inappropriate to ignore.[538] For Claimants, the fact that these forecasts were not audited, does not make them less credible as they are supported by contemporaneous documents, such as historical purchase prices of slot machines and agreements for salary increases.[539]

454. However, in order to respond to criticism of Respondent's expert, Dr. Dapena, concerning the use of actual data from 2013, Mr. Rosen worked out an alternative valuation, that is, his Scenario Two, in which he relied less on projections and was closer to ENJASA's historical data, in particular ENJASA's 2012 audited financial statement. However, Mr. Rosen considers his alternative Scenario Two valuation to be incorrect and maintains that ENJASA's contemporaneous projections must be taken into account.[540]

455. For both scenarios, Mr. Rosen made certain adjustments to the future projected cash flows. A first adjustment concerns the termination of the Joint Venture between ENJASA and Video Drome, which was to take place, Claimants claim, on 31 December 2013.[541] This termination, for Claimants, was certain by the Valuation Date, as ENJASA and

[535] Rosen I, para. 9.22; Rosen II, paras. 2.3, 5.7.
[536] Rosen II, paras. 7.19-7.23.
[537] Rosen II, paras. 5.9, 7.19.
[538] Rosen II, paras. 5.9, 7.12-7.15.
[539] Claimants' Post Hearing Brief, paras. 520-521.
[540] Rosen II, Schedule 2, paras. A2.13-A2.14.
[541] Rosen II, para. 7.8.

Video Drome had already informed ENREJA of it[542] and ENREJA had accepted the termination.[543] As a result of the termination of the Joint Venture, ENJASA would have to acquire slot machines, but was going to keep the total income generated by all slot machines formerly operated by Video Drome under the Joint Venture Agreement. On the basis of the financial information of the Joint Venture, ENJASA's projected cash flow included the expenditures for the acquisition of slot machines as well as the increased cash flow that would result from the termination of the Joint Venture with Video Drome from January 2014 onwards.[544]

456. Mr. Rosen's projected future cash flows of ENJASA also took account of a planned new construction to house ENJASA's headquarters and part of the Casino Golden Dreams.[545] The implementation of these plans would have triggered non-recurring expenditures in a "but for"-analysis, but also account for future savings for rent. Salary increases, agreed for the end of 2013, were also taken into account in Mr. Rosen's projections of future cash flows as they would have had an impact on those future cash flows, a matter that is not reflected in ENJASA's historical financial statements.[546]

457. Furthermore, Mr. Rosen considers that for the valuation of Claimants' investment the cash flows from the Joint Venture between ENJASA and Cachi Valle concerning the operation of Casino Salta had to be included entirely, that is, including the 30% of the cash flows from the joint venture that are allocated to Cachi Valle. The reason for this is, as Mr. Rosen explains, that Cachi Valle was a wholly owned subsidiary of L&E so that Claimants would also be entitled to the share of profits received by Cachi Valle as shareholders in L&E. In order to place Claimants back into the financial position they would be in but for the breaches of the BIT by Respondent, the cash flows that would have been generated through Cachi Valle have to be included in valuing Claimants' investment in L&E.

458. By contrast, Mr. Rosen did not include ENJASA's non-gaming related operations in his projections of Claimants' future cash flows, most importantly cash flows relating to the

[542] Claimants' Post Hearing Brief, para. 513; Note from ENJASA to ENREJA of 23 July 2012 (Exhibit ARA-028); Letter from Video Drome to ENREJA of 23 November 2013 (Exhibit C-171); Hearing Transcript, Day 8, pp. 184-189.
[543] ENREJA's Interlocutory Order of November 2012 (Exhibit ARA-055); Claimants' Post Hearing Brief, para. 513.
[544] Rosen II, para. 7.34; Claimants' Post Hearing Brief, para. 515.
[545] Rosen II, para. 7.8.
[546] Rosen II, para. 7.54.

operation of the Sheraton Hotel in Salta.[547] Mr. Rosen explains that the non-gaming operations had not been impacted by the revocation of ENJASA's license and would therefore not be affected in a "but for"-analysis. Moreover, the Hotel, Claimants argue, has always been a "big loss."[548] Audited financial statements, Claimants point out, show that the hotel did not generate any profit, neither before, nor after the revocation of ENJASA's license.[549]

459. In respect of Dr. Dapena's determination of future cash flows, Claimants disagree with how Respondent has allocated ENJASA's expenses between the hotel and the gaming operations on the basis of its 2014 statements. ENJASA's 2014 financial statements, Claimants point out, contain hindsight information that was not available at the Valuation Date on 13 August 2013. Moreover, ENJASA's actual monthly results for 2013, as well as the notes to its 2012 audited financial statements, already provide a breakdown of ENJASA's expenses between the gaming and hotel operations.[550] In addition, Mr. Rosen observes that, in his valuation of ENJASA, Dr. Dapena erroneously did not include the revenue ENJASA earned from the sale of food, beverages, and other products in its casinos.[551]

460. For Mr. Rosen, Dr. Dapena's pro-ration of ENJASA's forecasted cash flows for the period 2013 to 2029 contains a technical error, resulting in both an understatement and an overstatement of the forecasted cash flows in the relevant period.[552] In Mr. Rosen's view, Dr. Dapena should have carried forward its working capital adjustment beyond 2013, resulting in a mathematical inconsistency that materially understates the valuation of ENJASA.[553] Dr. Dapena should furthermore have maintained internal consistency in his financial model and relied upon the most recent financial statements available. He should thus not have relied on ENJASA's balance sheet of 30 June 2013, but on ENJASA's balance sheet of 31 December 2013.[554]

461. Furthermore, for Mr. Rosen, Dr. Dapena inappropriately assumed that ENJASA would repay all the bank debt that it held prior to the Valuation Date by the end of 2013. The

[547] Rosen II, paras. 6.8-6.13.
[548] Witness Schreiner, Transcript, Day 2, p. 161.
[549] Mr. Rosen's Opening Statement, Slide 80.
[550] Rosen II, paras. 7.22-7.23, 8.7-8.11.
[551] Rosen II, paras. 8.4-8.6.
[552] Rosen II, paras. 8.18-8.22.
[553] Rosen II, paras. 8.19-8.31.
[554] Rosen II, paras. 8.32-8.36.

loan repayment schedule, however, showed that the debt would have only been fully repaid by the middle of 2015 and ENJASA's management had decided prior to the Valuation Date to maintain a certain amount of financial debt.[555]

462. Mr. Rosen further observes that Dr. Dapena erroneously assumed that the annual capital expenditure between 2013 and 2029 would be consistent with the exceptionally high expenditure incurred by ENJASA in 2012. For Mr. Rosen, Dr. Dapena thus materially overstated the amount of ENJASA's capital expenditures.[556] Mr. Rosen also points out that Dr. Dapena incorrectly deducted the Management Know How Fees that ENJASA paid to CAI from ENJASA's net operating profits, because, for Dr. Dapena, a buyer could decide to discontinue the payment of these discretionary management fees after the acquisition of ENJASA. For Mr. Rosen, these fees were, like dividends, a device to transfer funds to CAI and should therefore not be deducted.[557]

c) Discount Rate

463. To establish the discounted cash flow, Mr. Rosen first determines the Risk-Free Rate, i.e., the theoretical rate of return of an investment with zero risk, at 3.39%, which is based on the United States 20-year treasury bond yield at the Valuation Date. Mr. Rosen in turn rejects the risk-free rate used by Dr. Dapena, which is based on the average yield on United States 10-year treasury bonds from the years 1962 to 2013 (see *infra* para. 499) as inappropriate, as this risk rate is outdated to assess ENJASA's expected cost of capital for the years from 2013 to 2029.[558] On the basis of his own risk-free rate, Mr. Rosen then estimates that the Equity Risk Premium, i.e., the excess return that an investment in stock provides over a risk-free investment, would be 5.46%.

464. For the Industry Beta, which reflects the systematic risk that is similar for all businesses in a specific industry, Mr. Rosen retained different Industry Betas for each of ENJASA's gaming operations, namely lotteries, slot machines, and live games. In allocating cash flows, he relies on the breakdown of cash flows to these different business units in ENJASA's financial statements.[559]

465. Mr. Rosen considers this approach to be superior to that adopted by Respondent's expert,

[555] Rosen II, paras. 8.37-8.40; Appendix 2.
[556] Rosen II, paras. 8.41-8.44.
[557] Rosen II, paras. 8.46-8.51.
[558] Rosen II, paras. 9.12-9.19.
[559] Rosen II, para. 7.21.

Dr. Dapena, who did not disaggregate cash flows for the different gaming operations of ENJASA and used one single industry beta for ENJASA as a whole (see *infra* para. 501). For Mr. Rosen, it would be incorrect to consider all activities of ENJASA to form part of one single business unit in the gaming/hotel sector. ENJASA's hotel and gaming business operations were not horizontally integrated and did not operate in the same industry segment. Only a small fraction of ENJASA's gaming operation, namely the operation of Casino Salta, which represented less than 5% of ENJASA's net revenue in 2013, was somewhat integrated with the operation of the Hotel.[560] As a result, Mr. Rosen insists on applying different discount rates for each of ENJASA's gaming segments.

466. Moreover, for Mr. Rosen, Dr. Dapena fails to consider the different levels of risk associated with ENJASA's lottery operations versus its operation of slot machines and live games. Mr. Rosen explains that prospective purchasers commonly view companies that engage in different business areas as a collection of different cash flows with different risks attached. With reference to a paper written by Professor Damodaran, Mr. Rosen submits that it is considered preferable among valuation professionals to value different business segments independently, when possible.[561] For Mr. Rosen, ENJASA's lottery operations had a lower risk level; these operations existed independently of the rest of ENJASA's business and did neither require buildings to be leased or constructed nor the acquisition, maintenance, and replacement of any capital assets, such as slot machines and gaming tables, which were needed in the operation of live games.[562]

467. Moreover, Mr. Rosen initially opted for levered Betas, and for unlevered Betas in his Second Report.[563] If levered, the expected cash flow to the equity holders is considered and discounted at the cost of equity to provide the value of the equity; if unlevered, the expected cash flow to the company is considered and discounted to provide the enterprise value.[564] However, for Mr. Rosen, "the levered and the unlevered approach should in theory be the same as long as the approaches utilize consistent assumptions about the level of financial leverage."[565] Therefore, under both approaches, Mr. Rosen concludes that the relevant industry betas were respectively 1.10, 2.51, and 2.44 for lotteries, slot

[560] Rosen II, paras. 9.20-9.24.
[561] Rosen II, paras. 9.3-9.11.
[562] Rosen II, paras. 9.10-9.11.
[563] Rosen I, Schedule 3; Rosen II, para. 9.45.
[564] Rosen II, paras. 9.40-9.41.
[565] Rosen II, para. 9.44.

machines, and live games.[566]

468. The Adjusted Equity Risk Premium, i.e., the equity risk premium, multiplied by the Industry Betas to reflect how much the stock in specific businesses will outperform risk-free debt instruments, was estimated for ENJASA's operation of lotteries, slot machines, and live-games at 5.98%, 13.73%, and 13.32% respectively.

469. For Mr. Rosen, the Country Risk Premium, i.e., the additional premium to compensate investors for the higher risk associated with investing in a foreign country, compared with investing in their domestic market, was 6% for Argentina in August 2013. In this context, Mr. Rosen also points out that he disagrees with Dr. Dapena's approach to determining the Country Risk Premium (see *infra* para. 505). For Mr. Rosen, the Country Risk Premium should not be based upon the return rate of public bonds, but on commercial profits. Moreover, the Emerging Markets Bond Index Plus ("**EMBI+**") used by Dr. Dapena was too volatile to be a benchmark.[567]

470. Mr. Rosen used a debt/equity ratio of 75.20%/24.80% to calculate the Weighted Average Capital Cost ("**WACC**"). This ratio represented the actual debt/equity ratio of Casinos Austria and should be used because the investment in L&E, and thus indirectly in ENJASA, were made by Casinos Austria.[568] Moreover, the actual debt/equity ratio came close to the optimal capital structure for ENJASA and/or L&E, which involves a debt/equity ratio of 75%/25%.[569] As the cost of debt in his WACC valuation, Mr. Rosen likewise focused on Casinos Austria and used the interest rate for which Casinos Austria could borrow money on the Austrian market, i.e., 4.12% after taxes. He thus obtained a WACC of 8% for the totality of ENJASA's operations.[570]

471. With an assumed USD inflation rate of 2.30%, the discount rates obtained by Mr. Rosen were between 5 and 7%, with an average of 6%.[571]

472. Mr. Rosen's presentation at the hearing included his Slide 14, which reproduced the above data per business unit, but also gave the over-the-board average for ENJASA:

[566] Rosen I, Schedules 3; Rosen II, para. 9.70.
[567] Rosen II, paras. 9.38-9.62.
[568] Rosen II, para. 9.70.
[569] Rosen II, paras. 9.25-9.37.
[570] This is based on the WACC of 7%, 9 %, and 9%, for lotteries, slot machines, and live games operations respectively.
[571] Rosen II, para. 9.68.

		Rosen Report			
		Lotteries Operation Beta	**Slot Machine Operation Beta**	**Live Games Operation Beta**	**Average**
Risk Free Rate[572]	[A]	3.39%	3.39%	3.39%	3.39%
Equity Risk Premium[573]	[B]	5.46%	5.46%	5.46%	5.46%
Industry Beta (Unlevered)		*0.30*	*0.69*	*0.67*	*0.55*
Industry Beta (Relevered)	[C]	1.10	2.51	2.44	2.02
Adjusted Equity Risk Premium	[D] = [B] x [C]	5.98%	13.73%	13.32%	11.01%
Country Premium	[E]	6.00%	6.00%	6.00%	6.00%
***Nominal* Cost of Equity**	**[F] = [A + D + E]**	**15.37%**	**23.12%**	**22.71%**	**20.40%**
Debt					
Pre-tax Cost of Debt		4.70%	4.70%	4.70%	
After-tax Nominal Cost of Debt	[G]	**4.12%**	**4.12%**	**4.12%**	
Weighting					
Debt	[H]	75.20%	75.20%	75.20%	
Equity	[I] = [1 – H]	24.80%	24.80%	24.80%	
WACC – Nominal, rounded	[J] = [G x H] + [F x I]	7.00%	9.00%	9.00%	
Less US Inflation		–2.30%	–2.30%	–2.30%	
Discount Rate		**5.0%**	**7.0%**	**7.0%**	

NOTE: Internal footnotes added to the above Table by the Tribunal.

d) Exchange Rate

473. Given that ENJASA conducted its operations in ARS, a conversion into USD is necessary as of the Valuation Date. For this purpose, Claimants' expert, Mr. Rosen,

[572] 20 Year T-Bill Yield Data as of 12 August 2013 from the US Treasury.
[573] August 2013 ERP data sourced from Damodaran online.

provides two alternative approaches. In his Scenario One, Mr. Rosen makes use of the official ARS-USD exchange rate at the Valuation Date, which is the rate ENJASA used in its financial statements to convert ARS into USD.[574] In his Scenario Two, Mr. Rosen uses an exchange rate that was expected in August 2013 to apply for the next three years, as forecasted by multiple banking institutions at the time.[575]

474. The rates used by Mr. Rosen rely on Claimants' instructions. Claimants justify these rates by pointing to the transfer-of-funds provision in Article 5(3) and (4) of the BIT, which states:

> (3) Transfers referred to in this Article shall be effected at the exchange rate applicable on the date of transfer.
>
> (4) The exchange rates shall be determined in accordance with the framework of the respective bank system of the territory of each Contracting Party.

475. Claimants further point out that Article 5 of the BIT covers the transfer of funds in a non-exhaustive list of situations, which includes the repayment of loans, liquidation, partial sale of the investment, or compensation for lawful expropriation (see Article 5(1) of the BIT). For Claimants, also the payment of damages arising out of a breach of the BIT because of an unlawful expropriation should be covered by Article 5.[576] In Claimants' view, it would be inconsistent with the principle of full compensation to apply an exchange rate that is more favorable for Respondent for the payment of compensation for unlawful expropriation than the rate applicable to the payment of compensation for lawful expropriations.

476. In Claimants' view, the exchange rate referred to in Article 5(4) of the BIT is the official exchange rate applicable on the Valuation Date. The Implied Argentine Peso Rate (*Contado con Liquidación* ("**CCL**")) suggested by Respondent (see *infra* para. 516), by contrast, is applied in the informal market to allow that "companies could import despite the [Argentine] Central Bank's failure to offer exchange alternatives so as not to jeopardize its reserves."[577] Claimants are not impressed by Respondent's argument that investors would expect the use of the CCL rate, which best reflects the market's expectations about the devaluation of the ARS. Even if ENJASA had expected the use of the unofficial CCL rate, Claimants as foreign investors legitimately expected the

[574] Claimants' Post Hearing Brief, para. 535.
[575] Claimants' Post Hearing Brief, para. 534; Rosen, Transcript, Day 8, pp. 95-96.
[576] Claimants' Post Hearing Brief, para. 528.
[577] CEMA I, p. 32, footnote 53.

application of the official exchange rate to be used in the banking system in Argentina.[578]

e) Overall Valuation of Claimants' Investment

477. Applying the above to both the valuation of ENJASA's gaming operations, and taking into account the cash flows from the Joint Venture Agreement between ENJASA and Cachi Valle, Mr. Rosen presents the following valuation of Claimants overall investment in L&E as follows:[579]

Fair Value of Gaming Operations

	Scenario One	***Scenario Two***
Discounted Cash Flows		
Lotteries	*21,949,376*	*17,037,367*
Live Games	*2,363,082*	*1,815,519*
Slots	*53,544,013*	*41,365,542*
	77,856,471	*60,218,428*
99.94% owned by L&E	*77,809,757*	*60,182,297*
Plus: Cachi Discounted Cash Flows	*4,133,771*	*3,265,294*
Total	*81,943,528*	*63,447,591*
60% owned by the Claimants at the Valuation Date	*49,166,117*	*38,068,555*

478. Depending on whether Scenarios One or Two are followed, for Claimants the value of the indirect ownership of ENJASA and Cachi Valle through L&E on the basis of their discounted cash flow was respectively USD 81,943,528 and USD 63,447,591. Taking into account Claimants' 60% shareholding at the Valuation Date, their loss of value would be USD 49,166,117 and USD 38,068,555 respectively.

f) Alternative Valuation: The Market Approach

479. In addition to his evaluation of the value of Claimants' investment in L&E based on a DCF method, Mr. Rosen also provided a market-based analysis in order to support the outcome of his evaluations. Thus, in his Second Report, Mr. Rosen suggested a market-based valuation to test the reasonableness of the outcome of his primary DCF valuation. Among the transactions that occurred four years prior to the Valuation Date, Mr. Rosen

[578] Claimants' Post Hearing Brief, para. 533.
[579] Rosen II, para. 4.7 and Schedules 1 to 17; Rosen Power Point Presentation, Slide 8.

identified a transaction involving a gaming company in Argentina, that he considered to be sufficiently comparable to ENJASA.[580] The transaction concerned the acquisition in June 2010 of all shares of Casino Magic Neuquén S.A. by a group of investors led by Casino Club S.A. for approximately USD 40 million in cash.[581] Casino Magic Neuquén was a business of the same size and in the same sector as ENJASA, in the same country, which equally operated on the basis of a gaming license provided by a local government.[582] Mr. Rosen concludes that this transaction would imply that ENJASA's value would be ARS 243.3 million, respectively USD 43.8 million at the official exchange rate. This amount, Mr. Rosen concludes, is relatively supportive of his DCF valuation of ENJASA and Cachi Valle. It is, however, not determinative of the value of ENJASA at the Valuation Date, which is three years after the Casino Magic transaction.[583]

480. Mr. Rosen also considered the February 2007 transaction whereby CAIH purchased an additional 55% interest in L&E from Iberlux and which predates the Valuation Date by approximately 6.5 years. Mr. Rosen admits that ENJASA's revenue has consistently been increasing (in USD terms) between 2007 and the Valuation Date. However, as the 2007 L&E transaction was at arms' length and concerns specifically ENJASA, Mr. Rosen considers this transaction a valid reference point, whose valuation metrics support his DCF valuation. On the basis of this transaction, ENJASA's enterprise value would be ARS 329.6 million, respectively USD 59.4 million at the official exchange rate.[584]

481. Mr. Rosen, in turn, considers that the references Dr. Dapena makes to two market transactions (see *infra* para. 521) contain errors and flaws.[585] First, for Mr. Rosen, Dr. Dapena's reference to an "Enterprise Value ("**EV**")/Earnings Before Interest, Taxes, Depreciation, and Amortisation ("**EBITDA**") multiple" for Argentina is irrelevant as ENJASA was not an average company in comparison to the Argentine economy as a whole. The multiple did not reflect the relevant elements that made ENJASA special, such as the industry sector it was operating in and its monopoly in the gaming sector in the Province of Salta.[586] Moreover, Dr. Dapena incorrectly deducted ARS 74,246,488 in

[580] Rosen II, paras. 5.25, 11.1-11.49.
[581] Rosen II, paras. 11.29-11.30.
[582] Rosen II, paras. 11.31-11.38.
[583] Rosen II, para. 11.38.
[584] Rosen II, paras. 11.39-11.49.
[585] Rosen II, paras. 11.1-11.27.
[586] Rosen II, paras. 11.6-11.16.

liabilities, while, for Mr. Rosen, only ARS 9.6 million should have been deducted.[587]

482. Second, Mr. Rosen considers the acquisition of the 40% interest in L&E in November 2013, which Dr. Dapena relied on as a comparator to verify the value of ENJASA at the Valuation Date, to be irrelevant as it took place after the revocation of ENJASA's license. The value of L&E (and by extension that of ENJASA) had dropped significantly with the termination of ENJASA's license, since the business was no longer able to conduct its gaming and casino operations which represented its primary source of cash flow.[588]

2. Respondent's Approach

a) Valuation Model

483. Considering that Claimants are only 60% shareholders of L&E and (indirectly) of ENJASA and Cachi Valle, Respondent and their expert, Dr. Dapena, suggest adopting a different model for determining the relevant cash flows. Taking into account that ENJASA was not publicly listed, but had stable business operations and a 13-year record of dividends, which were paid on a regular and audited basis, for Respondent, the most appropriate method to value ENJASA is a Discounted Dividend Model.[589] This model predicts the price of a company's stock on the theory that its price at the Valuation Date is worth the sum of all of its future dividend payments, discounted back to the Valuation Date.[590]

484. Under the Discounted Dividend Model, Respondent's expert, Dr. Dapena, in a first step, estimated ENJASA's income and capital increases as well as its operating expenses, including amortisations, depreciations, reinvestment needs, and income tax for the duration of the License, i.e., until 23 September 2029. In a second step, the projected future dividends are discounted in order to arrive at their value at the Valuation Date on 13 August 2013.

b) Relevant Cash Flow

485. Based upon the historical data for the years 2010-2012,[591] Respondent's expert projects

[587] Rosen II, paras. 11.22-11.27.
[588] Rosen II, paras. 11.17-11.21.
[589] CEMA I, paras. 146-151; Respondent's Post-Hearing Brief, para. 283.
[590] See www.investopedia.com.
[591] CEMA I, para. 170. As investments in 2012 included substantial non-recurring components, Dr. Dapena maintained a level of maintenance capital expenditures in time, i.e., in line with projected amortisation and depreciation. See Dapena II, para. 166.

ENJASA's cash revenues into the future (based upon an historical growth rate of 22.6%) and expenses (based upon an average revenues/expenses ratio of 89.6%).[592] The surplus cash flow thus obtained is the free cash flow to shareholders, paid either as dividends, expected over the years until September 2029, or as ENJASA's estimated residual value in September 2029.[593]

486. Because of the valuation model followed, Dr. Dapena's valuation is not reduced by the pro-rata proceeds from the sale of the hotel building and of Casino Salta. Indeed, the applied "but for"-scenario, based upon dividends and residual value, implies that the hotel and Casino Salta would not have been sold as long as ENJASA's license lasted.

487. Respondent and Dr. Dapena criticize Mr. Rosen's basis for his cash flow projections. They point out that only damages that are certain can be compensated and compensation of hypothetical and undetermined damage is excluded.[594] Respondent argues that Claimants have based their valuation in Scenario One upon unreliable information, have used a number of unreasonable assumptions and parameters, and have applied an incorrect methodology.[595]

488. Respondent does not agree with Mr. Rosen's alternative Scenario Two valuation either, which continues to make assumptions in relation to forecasted capital expenditure ("**CAPEX**"), exchange rates, and discount rates and turned the alternative valuation into another speculative projection.[596] In brief, for Respondent, Mr. Rosen's alternative valuation in Scenario Two shows the same errors as his original valuation.[597] If he had not made these assumptions, his alternative calculation would also be closer to Dr. Dapena's findings.[598]

489. Respondent points out that, for a company with a 13-year history, such as ENJASA,

[592] CEMA I, para. 164.
[593] See Respondent C-033, Excel sheet: Valuation Middle Rate. The residual value at the end of 2029 was estimated to be ARS 33,080,780.
[594] Respondent's Counter-Memorial on the Merits, para. 633; Respondent's Rejoinder on the Merits, paras. 509-511.
[595] Respondent's Counter-Memorial on the Merits, paras. 645-646 and more into detail paras. 647-680.
[596] Respondent's Post-Hearing Brief, para. 280. For instance, the forecasted average CAPEX did exclude the 2012 CAPEX and only relied on the 2009, 2010, and 2011 CAPEX. The exchange rate and discount rates remained the same as in the original valuation.
[597] For Dr. Dapena, Mr. Rosen, for instance, underestimates the expenses associated with the gaming business without support as well as the 8% discount rate while the actual cost of capital to the shareholder was around 22%. The latter shows that Mr. Rosen incorrectly bases his alternative valuation on the same incorrect assumption of a low rate of interest for a substantial share of non-existent debt. See Dapena II, para. 142.
[598] Dapena II, para. 142.

business forecasts have to be based on audited accounting information.[599] Mr. Rosen's model of projected cash flows, by contrast, was only based on internal financial projections that ENJASA's management had prepared for Casinos Austria. These internal projections were neither official nor audited, but mere speculations.[600] Similarly, the unaudited 2013 data that Mr. Rosen used as a starting point for his projections were inappropriate; instead, 2012 must be used as the base year.[601]

490. Respondent also has the greatest objections to the significant leap in the forecasted income flows that Mr. Rosen assumes for 2014. The 2014 numbers, in Respondent's view, are hypothetical and speculative; they have no correlation whatsoever with ENJASA's historical profit/loss as recorded until 2012 and cannot be verified.[602]

491. Dr. Dapena, for instance, observes that Mr. Rosen assumes profits from the termination of the Joint Venture with Video Drome, although the termination at the end of 2013 remains uncertain.[603] In the section entitled "Projections for Upcoming Fiscal Years" in ENJASA's financial report for 2012, which were drafted after Claimants' alleged evidence that termination was certain, its Board of Directors had not mentioned this termination, nor the possibility of alleged additional income.[604]

492. Moreover, Dr. Dapena points out that Mr. Rosen bases his assumption about the profits yielded by the termination of the Joint Venture with Video Drome upon a mere, unaudited spreadsheet, which cannot be checked, instead of upon the audited financial statement of 31 December 2012, as Dr. Dapena did. The Joint Venture's accounting information, on which Mr. Rosen bases himself, was at the time disputed by ENJASA.[605] In addition, from the revenues thus obtained, alleged unproven, non-recurring expenses were incorrectly deducted.[606]

493. Respondent furthermore observes that the increased 2014 projected results went beyond the mere fact that the Joint Venture with Video Drome would have been discontinued

[599] Respondent's Post-Hearing Brief, para. 276.
[600] Dapena II, paras. 40-41, 82.
[601] Dapena II, para. 76.
[602] Respondent's Post-Hearing Brief, para. 284.
[603] Dapena, Comments on the Rosen's revised valuation model and adjustments to CEMA Valuation Model, 20 April 2020, paras. 63-68.
[604] Respondent's Post-Hearing Brief, para. 289.
[605] Respondent's Post-Hearing Brief, paras. 292-296.
[606] Dapena, Comments on the Rosen's revised valuation model and adjustments to CEMA Valuation Model, 20 April 2020, paras. 60-62.

and included other increases.[607] In this context, Dr. Dapena observes that, for instance, because of Mr. Rosen's unrealistic assumptions, the position "other casino revenues" jumps 97% from 2013 to 2014, i.e., from ARS 98 million to ARS 193 million, and ENJASA's EBITDA increased 1.5 times between 2012 and 2014.[608]

494. Respondent further objects to Claimants' disaggregating alleged cash flows by business unit, while no cash flow for the hotel is examined. As no projected cash flow with regard to the operation of the hotel was ever submitted, the allocation of the expenses of the gaming operations, Respondent criticizes, cannot be checked. Dr. Dapena adds that Mr. Rosen's approach may underestimate the operating expenses of games of chance and overestimate the operating expenses of the hotel.[609] The overvaluation of the lost cash flow may result in an overestimation of the alleged damages.[610] Claimants may even be implicitly allocating in their projections a substantial part of the total operating expenses to the hotel, thus undervaluing the results of the hotel and undermining the assumption that the hotel was not-profitable or was not at a break-even point.[611]

495. Dr. Dapena also objects to Mr. Rosen's disaggregation of cash flows by business operation (lotteries, slot machines, live games) because an investor should assess the value of an exclusive license for games of chance as a whole, considering that the different business segments (lotteries, slot machines, live games, hotel) were all part of the same risk, which was covered by ENJASA's exclusive license.[612]

496. For Dr. Dapena, Mr. Rosen's separate analysis of the different gaming activities prevents consistency checks of the various expenses that are allocated to the different gaming units. Furthermore, the disaggregated data have not been audited.[613] Separate data per business unit cannot be obtained from audited sources, such as financial statements, as has been acknowledged by Mr. Rosen.[614] For instance, in Dr. Dapena's view, the expenses related to lotteries in Mr. Rosen's analysis, are clearly underestimated.[615]

497. Mr. Dapena also observes that Mr. Rosen's reference to Professor Damodaran to justify

[607] Transcript, Day 8, pp. 154-156; Dapena, Letter of 30 December 2019, para. 22.
[608] Dapena II, paras. 41 and 59-66; Exhibit C-299_48; Transcript, Day 8, pp. 154-156.
[609] Dapena II, paras. 2, 47-56; Response to Howard Rosen's Memorandum, 28 May 2020, para. 97.
[610] Dapena II, para. 69.
[611] Dapena II, para. 85. Respondent's Post-Hearing Brief, para. 285.
[612] Dapena II, para. 47.
[613] Dapena, Letter of 30 December 2019, para. 22.
[614] Transcript, Day 8, pp. 59-60.
[615] Dapena II, para. 142.

a differentiation between business segments is out of context. When Professor Damodaran states that "a disaggregated valuation should yield a better estimate of value than an aggregated valuation," he refers, Dr. Dapena points out, to multinational companies with multiple businesses, not to various segments of the same business unit in the same geographical location, as is the case with ENJASA.[616] For Dr. Dapena, a differentiation would only be valid if (i) the cash flow associated with business segments derived from different licenses or regions, (ii) the company wanted to sell separately one of the segments (which it could not do), or (iii) the cash flow had a different risk profile (which was not the case here, since they were all associated with ENJASA's gaming operations).[617]

c) Discount Rate

498. As for the discount rate, Dr. Dapena applied a rate of 18.3% and a discount factor that increased from 0.79 in 2014 to 0.06 in 2029.[618] On this basis, Dr. Dapena arrived at a discounted equity-value of ENJASA in August 2013 of ARS 104,244,982. Claimants in turn, would be entitled to 60% or ARS 62,546,989.

499. In this context, Dr. Dapena does not agree with Mr. Rosen's first step to determine the discount rate: the selection of a Risk-Free Rate, i.e., the theoretical rate of return of an investment with zero risk. Mr. Rosen uses a risk-free rate of 3.39%, which is based on the United States 20-year treasury bond yield at the Valuation Date. Dr. Dapena suggests instead a risk-free rate of 6.56%, which is based on the average yield on United States 10-year treasury bonds from the years 1962 to 2013.

500. Dr. Dapena has no comments on the selection of the Equity Risk Premium, i.e., the excess return that an investment in stock provides over a risk-free investment. Both he and Mr. Rosen thus estimated that the Equity Risk Premium would be 5.46%.

501. Dr. Dapena has, however, serious objections to Mr. Rosen's selection of different Industry Betas, which reflect the systemic risk that is similar for all businesses in a specific industry, for ENJASA's operations of lotteries, slot machines, and live games. For Dr. Dapena, it is inappropriate to differentiate the discount rates of business segments

[616] Dapena II, para. 48.
[617] Dapena II, para. 50.
[618] See 'Valuation Model, Tab 'Shareholders Return' Exhibit CEMA-31. Respondent considered 20.3% the appropriate nominal rate of expected return and assumed a 2% deduction to reflect US long-term inflation. See CEMA I, paras. 176-177; Dapena II, para. 168.

that are part of the same corporate and legal vehicle so that no differentiation should be made between different types of games of chance, considering that all segments were (i) covered by the same license, (ii) associated with the same type of risk and geographical area, and (iii) not intended to be commercialized or sold separately. The cash flow generated by one segment serves as collateral for the cash flow generated by the other segments, and they are related from a risk perspective.[619]

502. As Dr. Dapena considered all of ENJASA's activities to be part of the same 'gaming/hotel' business for all of ENJASA's activities, the 'gaming/hotel' Beta of 0.55 should be applied.[620] Dr. Dapena observes that this global approach ties with the audited financial statements, which did not differentiate between the expenses of the different business units or segments.

503. Dr. Dapena furthermore objects to Claimants' use of a relevered Industry Beta, which considers the debt of companies within the specific industry. As Dr. Dapena focuses on equity, he uses the unlevered beta, which does not consider the debts of the companies within the sector, in order to remove the impact of debt and to neutralize the company's capital structure.

504. As Dr. Dapena disagrees with Mr. Rosen on the relevant Industry Beta, he also disagrees with the Adjusted Equity Risk Premium, i.e., the equity risk premium, multiplied by the levered Industry Beta, which in turn reflects how much the stock in a specific business will outperform risk-free debt instruments. In the present case, Dr. Dapena estimated the Adjusted Equity Risk to be 3% on the basis of the unlevered Beta for ENJASA's gaming/hotel operations as a whole.

505. Dr. Dapena also does not accept Mr. Rosen's determination of the Country Risk Premium, i.e., the additional premium to compensate investors for the higher risk that is associated with investing in a foreign country, as compared to investing in their domestic market. Referring to the annual default spreads published by Professor Damodaran, Mr. Rosen estimated the country risk for Argentina at the Valuation Date at only 6%.[621] For Dr. Dapena it should be 10.7%, based on the EMBI+, which indicates the rate of return for US dollar-denominated external debt instruments issued by Argentina.[622]

[619] Dapena II, para. 98.
[620] Exhibit CEMA-33, Tab 'Beta'.
[621] Rosen I, paras. 10.19-10.23.
[622] Respondent's Post-Hearing Brief, para. 308.

506. All in all, however, Dr. Dapena's suggested nominal cost of equity of 20.26% was not much different from Mr. Rosen's average nominal cost of equity of 20.40% (see *supra* para. 472).

507. Dr. Dapena very strongly objects to how Mr. Rosen established the debt/equity ratio to calculate the WACC. Rather than using Claimants' debt/equity ratio (75.20%/24.80%), the actual debt/equity ratio of ENJASA should be used.[623] For Respondent, in order to establish ENJASA's value, Mr. Rosen cannot mix up the debt ratio of Casinos Austria in its country of origin with ENJASA's debt/equity ratio in Argentina. Claimants' increase in L&E's shareholding in 2007 – and thus of their indirect participation in ENJASA – cannot be considered as a loan, which would justify to retain Claimants' debt/equity ratio to establish ENJASA's indebtedness. Whether Casinos Austria had acquired 60% of L&E shares in 2007 with loaned money, Dr. Dapena submits, is irrelevant for ENJASA's cost of capital, as the acquisition of L&E shares is not a loan to ENJASA. The acquired shares did not vest an interest-bearing debt on behalf of L&E, nor ENJASA, but only gave rise to potential dividends.[624] Claimants' level of indebtedness in Austria was therefore not relevant.

508. For Respondent, Claimants can also not apply a fictitious debt/equity ratio of 75%/25% for ENJASA, instead of the actual ratio, based on the argument that the former would be optimal from a financing point of view, or because ENJASA's low debt/equity ratio and its stable cash flow would allow it to increase its financial leverage and to maximize the value of its enterprise and the return to its equity holders. Claimants are not entitled to assume that Casinos Austria's structure should equally apply to ENJASA in Argentina. Besides, ENJASA was not planning to incur debts as it was not intending to make substantial investments.

509. As Dr. Dapena does not accept that Claimants' debt/equity ratio would be used, he does not agree that Mr. Rosen used for the cost of debt in his WACC valuation the interest rate for which Casinos Austria could borrow money on the Austrian market, i.e., 4.12% after taxes. In fact, because of the restricted access to the debt market in Argentina,

[623] Dapena II, paras. 91, 94, 95, 100, 104, and 109. Dr. Dapena initially assumed a debt to equity ratio of 100% equity (i.e., a debt-free situation), considering that ENJASA's financial debt was paid off after the Valuation Date and cash flows were stable and positive. Mr. Rosen objected that it was irrelevant that the debt was repaid after the Valuation Date: what mattered was the situation at the Valuation Date. See Rosen II, paras. 9.25-9.37. For Mr. Rosen, ENJASA's debt/equity ratio, as presented by Dr. Dapena, was 6%/94%. See Exhibit C-026-64, ENJASA Loan Payment Schedule; Rosen Presentation Slide 14.
[624] Respondent's Post-Hearing Brief, para. 303.

ENJASA's cost of debt was 24%.[625] Furthermore, Dr. Dapena points out that Mr. Rosen did not submit evidence that Argentine companies obtained financing in 2013 at the very low rate suggested by Mr. Rosen.[626]

510. As Dr. Dapena disagrees with the debt/equity ratio and the cost of debt that Mr. Rosen uses to arrive at his WACC, he also disagrees with a WACC of 8% for the totality of ENJASA's operations.[627] Instead, for Dr. Dapena, the actual cost of capital for the shareholders was above 20%.[628]

511. On the US inflation rate, Dr. Dapena slightly disagrees with Mr. Rosen. For Dr. Dapena, the rate is 2%, while for Mr. Rosen it is 2.30%.[629]

512. In brief, Respondent does not accept the discount rates of 5-7% submitted by Claimants. In contrast, Dr. Dapena estimated the real cost of ENJASA's equity at 18.3%. Discount rates of 5-7%, Dr. Dapena points out, are below the return of Argentine sovereign bonds at that time and are close to the interest rate of 6% that Mr. Rosen suggests. Underestimating the discount rate increases the value of the alleged damages.[630]

513. Respondent observes that Claimants would arrive at a discount rate of some 20% as Respondent does, if in Mr. Rosen's model ENJASA's actual debt/equity ratio had been followed.[631]

d) Exchange Rate

514. In respect of the applicable exchange rate, Respondent points out that the exchange rates Mr. Rosen suggests for Claimants were not his personal choice, but followed the instructions of counsel for Claimants. For Respondent, these rates are not valid alternatives for converting ARS into USD.

515. The first suggestion, the official bank exchange rate, was, Respondent observes, in practice not used in August 2013 because of the then existing foreign exchange restrictions in Argentina. Respondent can also not accept Mr. Rosen's second alternative

[625] See ENJASA's Financial Statements as of 32 December 2012, Note 22 (CEMA 26); Dapena Response to Howard Rosen's Memorandum, paras. 49-50. The sovereign debt in dollars was approximately 13%. See Respondent's Rejoinder on the Merits, para. 533; Respondent's Post-Hearing Brief, paras. 305-306.
[626] Dapena II, paras. 167-175.
[627] The same holds true for the WACC of 7%, 9%, and 9% for lotteries, slot machines, and live games respectively.
[628] Dapena II, para. 142.
[629] Rosen II, para. 9.68.
[630] Dapena, II, para. 140.
[631] Respondent's Post-Hearing Brief, para. 309.

exchange rate, which was based upon expectations of analysts in August 2013 about the development of the exchange rate for the three years to follow.[632] This alternative rate is only a future, hypothetical exchange rate, not the actual exchange rate in August 2013. The two exchange rates Claimants suggested, Respondent submits, can therefore not be used for a market valuation in August 2013.

516. Instead, Respondent and Dr. Dapena suggest to apply the CCL rate, which is the market exchange rate used for converting cash amounts from ARS into USD in Argentina at the Valuation Date, when exchange controls were in place.[633] The CCL rate was, for instance, the implied exchange rate between stock prices on the Buenos Aires and New York Stock Exchanges.

e) Overall Valuation of Claimants' Investment

517. Applying the CCL rate to the discounted cash flows determined through his Discounted Dividend Model, Dr. Dapena arrives as a total value of the loss L&E suffered in respect of its entire shareholding in ENJASA of USD 11,982,182. For Claimants' 60% shareholding in L&E this translates into a loss of USD 7,189,309.[634]

518. Dr. Dapena also supplements his analysis with a much simpler calculation, which is based upon the average dividends paid out during the 2010-2012 period and projecting said value up to September 2029, again discounted at an annual discount rate of 18%. With this calculation, the value of future dividends amounts to ARS 97.2 million of which Claimants' 60% participation equal ARS 58.3 million; converted to USD at the CCL rate, this would result in USD 11.18 million for L&E as a whole and USD 6.7 million for Claimants 60% shareholding.[635]

f) Alternative Valuation: The Market Approach

519. Respondent observes that Mr. Rosen did not consider a market approach to be decisive – and that Dr. Dapena agreed with him. The specifics of each transaction, the time difference, and the unsteadiness make it difficult to find comparable transactions.[636] At

[632] Rosen, Transcript, Day 8, pp. 95-96.
[633] Transcript, Day 8, pp. 161-162.
[634] Dapena, Comments on the Rosen's revised valuation model and adjustments to CEMA Valuation Model, 20 April 2020, para. 29. For previous submissions, see Dapena II, para. 188; Respondent's Valuation Sheet – CEMA 33.
[635] Dapena, Comments on the Rosen's revised valuation model and adjustments to CEMA Valuation Model, 20 April 2020, paras. 30-32, 101-109.
[636] Respondent's Post-Hearing Brief, para. 342.

most, a market-based valuation can serve as a secondary support of a DCF valuation.

520. In all events, for Dr. Dapena, the 2010 Casino Magic transaction and the 2007 L&E transaction relied upon by Mr. Rosen (see *supra* paras. 479-480) are not comparable to the hypothetical acquisition of ENJASA at the Valuation Date. Both transactions were carried out at times when Argentina's economic conditions were totally different. The average market value of companies was considerably higher in 2007 and in 2010 than in August 2013. The unstable economic context in Argentina makes Mr. Rosen's market approach irrelevant and inconsistent with economic reality.[637]

521. Apart from criticizing Mr. Rosen's market-based analysis as irrelevant for determining the value of Claimants' investment, Respondent points out that Dr. Dapena refers to two market-based elements to support the reasonableness of his own valuation of Claimants' investment, i.e., the 2013 EV/EBITDA multiple and the 15 November 2013 acquisition of Iberlux' 40% interest in L&E by CAI.

522. The EV/EBITDA multiple is an indicator for calculating the value of an enterprise based on a company's EBITDA. For the entire Argentine economy in 2013, to which Dr. Dapena refers, the EV/EBITDA multiple was 3.9. Based on this multiple, ENJASA's overall value would be, based on its EBITDA of ARS 36,925,084, ARS 144,377,078. With ARS 38,846,286 cash added and ARS 74,246,488 liabilities deducted, ENJASA's value for shareholders would therefore be ARS 108,976,876 or, at the CCL rate, USD 12,526,078.[638] Claimants' 60% share would thus be worth ARS 65,386,126 or USD 7,515,646. The proceeds from the sale of the hotel building would need to be added on top.[639]

523. Furthermore, for the purchase of 40% of L&E's shares in September 2013, i.e., one month after the revocation of ENJASA's license, Casinos Austria paid USD 2.82 million and was committed to pay USD 1 million more if the gaming license was reinstated. For Respondent, this transaction would imply that ENJASA's whole stock package was worth USD 9.55 million and that Claimants' 60% shareholding thus had a value of USD 5.73 million.[640]

524. Both of these market-based factors, in the view of Respondent and her expert, Dr.

[637] Dapena II, paras. 178-187.
[638] CEMA I, paras. 188-194.
[639] Dapena II, para. 135.
[640] CEMA I, para. 184.

Dapena, support Dr. Dapena's DCF approach based on his Discounted Dividend Model.

3. The Tribunal's Analysis

525. Assessing the compensation due is not a pure mathematical addition of certainties, but involves human appreciation. The commentary on Article 36 of the ILC Articles confirms that the valuation of a going concern, as is the case here, involves human discretion.[641] This notwithstanding, the valuation of Claimants' investment depends on the different elements that are in controversy among the Parties and their experts.[642] The Tribunal will therefore, in the following, address the points that have divided the Parties, namely the valuation model to be used (a.), the determination of the relevant cash flows (b.), as well as the discount rate (c.), and the exchange rate to be used (d.), and on that basis arrive at a valuation of Claimants' investment, that is, its 60% interest in L&E (e.).

a) Valuation Model

526. The first point in controversy between the Parties' experts concerns the valuation model itself. While Respondent's expert, Dr. Dapena, focused on shareholder value and compared the actual and hypothetical cash flow (dividends and value of non-amortized assets in 2029) to the (ultimate) shareholders, Mr. Rosen, Claimants' expert, focused on the value of ENJASA/L&E, and compared the actual and hypothetical cash flow within those companies.[643]

527. The Tribunal observes that Respondent opted for the Discounted Dividend Model because it considered ENJASA to be a mature business with regular distribution of dividends with "a certain stability in the nominal growth of revenues as well as a certain stability in expense and investment/revenue rations."[644] The Tribunal, however, notes that, although ENJASA's net revenues indeed steadily increased with some 23% per year between 2009 and 2012, which is the base year used by Dr. Dapena for the projection of future dividends, ENJASA's net income followed a more bumpy course. Net profits, for example, increased by approx. 150% between 2011 and 2012, and ENJASA's net worth, which had remained stable between 2009 and 2011, increased by 95% between 2011 and

[641] Comment to Article 36 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, paras. 22 *et seq*.
[642] For two issues not raised by either Party, which the Tribunal's majority considers not to be relevant, unlike the Dissent, see *supra* notes 521 and 522.
[643] Respondent's Post-Hearing Brief, para. 319.
[644] CEMA I, paras. 146, 156.

2012.[645] This throws some doubt on the relevance of the stability of dividends paid to the controlling shareholder in the presence of fluctuating income and on whether the dividends would stay stable as assumed by Dr. Dapena.

528. The Tribunal, moreover, agrees with Claimants that the dividends (indirectly) flowing from ENJASA to Claimants do not offer an appropriate basis for ENJASA's valuation as Claimants, who are in control as majority shareholders of ENJASA via L&E, also had other vehicles, such as license and managements fees, to benefit from their investment in ENJASA. The Tribunal therefore considers that an informed valuation of ENJASA/L&E on the basis of projected cash flows, as Claimants' expert Dr. Rosen proposes, is the more appropriate approach in the present situation. The projected cash flows have to be construed on the basis of historical data and reliable projections, and subsequently be discounted to the Valuation Date.

529. The Tribunal further notes that it fails to see any material differences from a legal perspective in the calculation of compensation due under the principle of full reparation that Dr. Rosen attaches to the difference between "fair value" v. "fair market value" of Claimants' interest in ENJASA/L&E. To the extent that Mr. Rosen suggests that under the idea of "fair value" specific synergies for Claimants from the asset under valuation, notable in respect of their own debt/equity value should be considered, the Tribunal will comment on that specific issue below (see *infra* paras. 550-551). This specific issue, however, has no influence on the approach to be taken for valuing Claimants' investment as such. The Tribunal therefore does not consider that the use of the concept of "fair value" as compared to "fair market value" makes a difference in the approach to adopt for determining the compensation due under the principle of full reparation for internationally wrongful conduct of the respondent State.

b) The Relevant Cash Flow

530. In order to determine the value of Claimants' investment, the Tribunal will establish the relevant cash flow on the date ENJASA's license was revoked, that is, on 13 August 2013, until the original term of the License, that is, 23 September 2029. In this context, a number of issues are controversial among the Parties and their experts. These include: (i) the basis for projecting ENJASA's future cash flows; (ii) the relevance of cash flows

[645] Net revenues increased from ARS 157,853,985 (2009) to ARS 290,970,962 (2012), net profits were ARS 9,578,130 (2009), ARS 11,794,744 (2010), ARS 9,126,930 (2011), and ARS 22,852,681 (2012). See CEMA I, Tables 1 and 2.

stemming from the Joint Venture between ENJASA and Video Drome after 31 December 2013; (iii) the relevance of the cash flows stemming from the hotel; (iv) adjustments concerning the working capital of ENJASA; and (v) the relevance of the cash flows for the benefit of Cachi Valle from the Joint Venture with ENJASA relating to the operation of Casino Salta.

531. The first disagreement between the Parties and their experts concerns the basis for projecting future cash flows of ENJASA. While Respondent's expert, Dr. Dapena, relied on ENJASA's audited financial statements of 2012, Claimants' expert, Mr. Rosen, presented two scenarios. Mr. Rosen's Scenario One relies on actual cash flows from January to August 2013 and management projections from September 2012; his Scenario Two relied more on historical data, in particular ENJASA's 2012 audited financial statement and was thus closer to the cash flow basis used by Dr. Dapena. In his Second Report, Mr. Rosen adjusted certain of his projections, resulting in an overall lower valuation of ENJASA, and reducing the difference between Scenarios One and Two to the issue of which exchange should be applied to convert ARS into USD (see *infra* paras. 554-563).

532. In this context, the Tribunal starts out by noting that projections about future cash flows require a basis in historical data and have to consistently follow the reasonable evolution of historical data for the following years. Any deviation in projected cash flows from a consistent evolution requires justification. Having reviewed the various reports of both experts on the appropriate basis for making projections about ENJASA's future cash flows, the Tribunal accepts the basis on which Claimants' expert, Mr. Rosen, made his projections for ENJASA's future cash flows. In the Tribunals view, it is appropriate to use the actual results for the time from January to August 2013, even though these results had not been audited at the Valuation Date, and complement them with projections for the rest of the year that are based on historical data, including the audited data for 2012, as done by Mr. Rosen.[646]

533. Moreover, when looking at the cash flows used for the year 2013, the difference between both experts is negligible. In the Tribunal's view, it is therefore not material for purposes of valuation, whether projections for 2013 are based only on ENJASA's audited statements for 2012 or whether they are based on actual results for the first seven months

[646] See Dapena, II, paras. 59-66; Rosen II, Section 7.

and on projections for the rest of the year.

534. The real difference between the cash flow analysis of both experts starts in the year 2014. This difference, however, is principally due to whether cash flows relating to income generated by slot machines operated under the Joint Venture with Video Drome can be included fully in the projections for ENJASA's benefit, as done in Mr. Rosen's analysis, or whether such cash flows should be excluded as uncertain, as done in Dr. Dapena's analysis. That this is the relevant difference among the experts when it comes to the relevant cash flows was convincingly explained by Mr. Rosen at the hearing, when pointing out the differences in cash flow projections between his Second Report and the Opinion of Dr. Dapena.[647] This explanation was not seriously challenged by Respondent and her expert, Dr. Dapena.

535. For this reason, the Tribunal is not convinced that the basis for Mr. Rosen's projections for the year 2013 is defective and would lead to inappropriate results. What is more important, in the Tribunal's view, is to address the relevance of specific items for the projections on which the experts disagree.

536. The first such item concerns the relevance of future cash flows stemming from the operation of slot machine halls that ENJASA still conducted at the Valuation Date under a Joint Venture Agreement with Video Drome. In this respect, the Tribunal accepts Claimants' position that these cash flows have to be added starting from 1 January 2014. Although the Joint Venture with Video Drome was not yet terminated in August 2013, the agreement was going to terminate as per its terms by 31 December 2013.[648] Furthermore, ENREJA had already been informed about the termination of the Joint Venture, both by ENJASA,[649] as well as by Video Drome.[650] In addition, ENJASA had already made calculations for investing into the slot machine halls operated by the Joint Venture with Video Drome.[651] All of this indicates, in the Tribunal's view, that it was

[647] See Transcript, Day 8, pp. 215-216.
[648] As per its Clause 4, the Joint Venture Agreement between ENJASA and Video Drome of 19 October 2001 (Exhibit C-092) was originally concluded for 5 years. This term was prolonged until 31 December 2013 by a Modification of the Joint Venture concluded by ENJASA and Video on 7 June 2006 (Exhibit C-093). The Modification Agreement provided that the new term could be prolonged "if both parties so agreed" (ibid, p. 6).
[649] ENJASA had communicated the end of the Joint Venture with Video Drome to ENREJA and its intention to replace the slot machines owned by Video Drome after the end of the Joint Venture in a letter of 23 July 2012. See Exhibit ARA-028.
[650] Video Drome had sent a letter to ENREJA on 23 November 2012 asking ENREJA to suspend the obligation to exchange old slot machines against new ones given that the Joint Venture with ENJASA was ending in 12 months, that is, on 31 December 2013. See Exhibit C-171.
[651] See Rosen I, paras. 9.29-9.32; Rosen II, para. 7.27 (relying on Exhibits C-026-39.1 and C-026-41, p. 2). See also WS I Anselmi, para. 104.

sufficiently certain that ENJASA was going to seize the business opportunity that opened because of the termination of the Joint Venture with Video Drome.

537. Furthermore, given the history of the relationship between ENJASA and Video Drome, which appears to have soured over the years, and which involved Video Drome's refusal to upgrade slot machines to new technical requirements demanded by ENREJA, as well as sharing the dynamic canon fee that ENJASA agreed to in relation to the Province in the Acta Acuerdo,[652] the Tribunal considers that the likelihood of a renewal of that Joint Venture was virtually non-existent. From an economic perspective, a willing buyer at the Valuation Date in August 2013 would have taken the income stemming from the operation of slot machines under the Joint Venture with Video Drome fully into account in calculating the value of ENJASA and the amount of cash flow it could generate in the future.

538. By contrast, it is immaterial, in the Tribunal's view, that the termination of the Joint Venture by 31 December 2013 was not mentioned in ENJASA's 2012 financial forecast, a circumstance Respondent points to. Not only is it unclear to the Tribunal to which extent this circumstance would have had to be included in the financial statements of ENJASA at all, such a failure would, in the Tribunal's view, also be a negligible factor for predicting future cash flows, considering the notifications of the termination of the Joint Venture already sent by ENJASA and Video Drome to ENREJA prior to the Valuation Date, as well as the past relationship between ENJASA and Video Drome. Consequently, the Tribunal agrees with Claimants and their expert, Mr. Rosen, that cash flows for slot machines so far operated under the Joint Venture with Video Drome are appropriately to be included in the projections of future cash flows that ENJASA lost because of the revocation of its License. In the Tribunal's view, these future cash flows are not speculative, but constitute part of the injury caused by Respondent's internationally wrongful act in the sense of Article 31(1) of the ILC Articles.

539. The Parties and their experts have also debated whether disaggregating ENJASA's cash flows into gaming-related and non-gaming related activities and disregarding the latter for purposes of determining ENJASA's value as of the Valuation Date was appropriate. Non-gaming related activities concern mainly the treatment of income from the Sheraton Hotel Salta which was operated by ENJASA. In the view of Claimants and their expert,

[652] See *supra* paras. 143-144 (reference to Claimants' argument on past disputes with Video Drome). See also Claimants' Post-Hearing Brief, paras. 125-127.

Mr. Rosen, the hotel should be excluded as it was not affected by the revocation of ENJASA's license and continued operating thereafter, albeit without generating any profits. By contrast, Respondent and her expert, Dr. Dapena, submit that such a disaggregation of cash flows could result in shifting expenses from gaming to non-gaming activities and thus overstate the positive cash flows resulting from ENJASA's gaming-related activities.

540. In the Tribunal's view, normally the entirety of cash flows should be included to determine the value of a company that was subject to expropriation. In the present case, however, both Parties found a common ground in the assumption that the hotel was operating essentially at break-even and did therefore not affect the cash flow from ENJASA's gaming operations. The Tribunal agrees that there is a risk that disregarding certain business units of a company, in particular when they are intertwined with cash-flow-generating activities connected to one of the casinos operated by ENJASA, as is the case with the hotel, can result in a distortion of cash flows. However, Respondent and her expert, Dr. Dapena, have not submitted, beyond pointing generally to the existence of such a risk, any reliable data that could have suggested that any such distortion had occurred in the approach by Claimants' expert, Mr. Rosen. The Tribunal therefore accepts that the data on which Mr. Rosen projected ENJASA's future cash flows does not need to be adapted to take account of cash flows stemming from the hotel.

541. Furthermore, there is also disagreement among the Parties' experts concerning the treatment of ENJASA's working capital, i.e., its short-term capital required to continue its operations, and its impact on the company's projected future cash flows. Increases in working capital in a given year tie up more revenue in current assets and decrease the available cash flow and vice versa.[653] In Dr. Dapena's approach, the forecasted level of working capital was based upon a stable percentage of average revenues from 2009 until 2012, which he considered the optimal balance, without any further adjustments.[654] For Mr. Rosen, on the contrary, the level of working capital needed to be adjusted continuously after 2013 and decreased proportionally.[655] As Mr. Rosen further convincingly pointed out, Dr. Dapena's analysis failed to reflect the impact of inflation on working capital, leading to an undervaluation of cash flows.[656] The Tribunal therefore

[653] Rosen II, para. 8.23.
[654] See Rosen II, paras. 8.24-8.27; Dapena II, para. 161; CEMA – 32, Excel Tab "Forec Financial Statements".
[655] Rosen II, para. 8.25.
[656] Rosen II, para. 8.28.

agrees with Mr. Rosen's approach to consistently adapt the working capital level in projecting ENJASA's future cash flows.

542. Finally, the Parties do not agree on whether Cachi Valle, the subsidiary of L&E (99%) and ENJASA (1%), which had a 30% share in a joint venture with ENJASA to exploit Casino Salta, has to be included in the valuation. For Respondent, the revocation of the License concerned ENJASA and did not affect Cachi Valle, whose lost profits and expenses, Respondent claims, are unrelated to ENJASA's license. Claimants, on the other hand, include Cachi Valle in their valuation. This concerns both the determination of the basis for calculating the loss of future cash flows and the relevance of post-revocation expenses incurred by Cachi Valle (see *infra* paras. 568, 573).

543. In respect of the relevance of future cash flows of Cachi Valle stemming from the joint venture with ENJASA, the Tribunal is of the view that these cash flows must be included in the valuation of Claimants' investment. As a 30% partner of the joint venture that exploited Casino Salta, Cachi Valle was affected by the revocation of the License and lost the respective cash flows. This cash flow, while essentially irrelevant to the valuation of ENJASA, is relevant, however, for the valuation of L&E, considering that Cachi Valle was essentially a wholly owned subsidiary of L&E. The Tribunal will therefore include, in determining compensation for the financial impact of the revocation of ENJASA's license upon Claimants' investment, the cash flows of Cachi Valle from the joint venture with ENJASA relating to the Casino Salta. Claimants, in turn, are entitled to 60% of the resulting value of Cachi Valle, given that they were 60% shareholders in L&E at the Valuation Date. In the Tribunal's view, the future cash flows concerning Cachi Valle therefore constitute part of the injury caused to Claimants' investment by Respondent's internationally wrongful act in the sense of Article 31(1) of the ILC Articles.

c) Discount Rate

544. A DCF analysis of ENJASA's enterprise value requires the determination of its cost of capital and to discount the estimated future cash flows to bring them to what their value was on the Valuation Date, that is, on 13 August 2013. To determine the discount factor, the Tribunal has to decide certain preliminary issues which are in parts in controversy, and in parts agreed among the Parties and their experts. This involves determinations on: (i) the risk free rate; (ii) the equity risk premium; (iii) the relevant industry beta(s); (iv) the country risk premium; (v) the relevant debt/equity ratio; (vi) the interest rate

applicable to ENJASA's debt; and (vii) the US inflation rate.

545. For the Risk Free Rate, the Tribunal adopts the factor 3.39%, as suggested by Claimants. This rate is based on the US 20-year treasury bond yield in August 2013 and is preferred to the average 6.56% yield for US 10-year bonds from 1962 to 2013, which was suggested by Respondent. Indeed, to calculate a rate for the period of the next 16 years from the Valuation Date, the coming 20 years are more relevant than the past 50 years, especially as interest rates had decreased in recent times.

546. The Tribunal accepts an Equity Risk Premium of 5.46% on which the Parties agreed.

547. With regard to the Industry Betas, the Tribunal adopts the following approach. The Parties did not agree on whether a DCF analysis should consider the Industry Beta for 'gaming/hotel' for all of ENJASA's activities, or apply specific Betas for lotteries, slot machines, and live games. The Tribunal observes that slot machines, lotteries, and live games represent 69% (slot machines), 28% (lotteries), and 3% (live games) of ENJASA's cash flow.[657] The systemic risk of these respective types of gaming operations is different. It thus would be illogical to submit lotteries and slot machines to the Beta for live gaming. The Tribunal accepts the specific Betas for ENJASA's respective areas of operation, which are submitted by Claimants' expert on the basis of the average Betas in similar operations.[658]

548. For the Country Risk Premium at the Valuation Date, the Tribunal observes that Claimants admit that a country risk in valuation analyses is usually based upon the default spread, i.e., the EMBI+, which indicates the spread between Argentine government bonds in USD and US treasury bonds. At the Valuation Date, the EMBI+ for Argentina was 10.7%. However, as an exception, for Claimants, the EMBI+ should not be applicable for countries in a default-like situation, such as Argentina around the Valuation Date. The EMBI+ reflects inter alia the State's financial position and concerns bonds, acquired by the market, while in the present DCF analysis, the cash flow was to be transferred between related commercial entities. Claimants therefore suggest a country risk rate of 6%, based upon the annual default spreads published by Professor Damodaran.[659]

[657] Exhibit C-299 – Summaries.
[658] Exhibit C-299 – Control Sheet, lines 16-19.
[659] Rosen II, paras. 9.48-9.62.

549. In the Tribunal's view, both the EMBI+ as well as the country risk rate based on Professor Damodaran's publication of annual default spreads are appropriate indicators of the country risk from a valuation perspective. The Tribunal considers it more appropriate, however, given the rather tumultuous and overall little predictable developments the Argentine economy had taken during the decades before the Valuation Date, to rely on a more conservative country risk premium than the one based on Professor Damodaran's publication. At the same time, the EMBI+ may not necessarily reflect the view a willing buyer may have taken on the country risk premium at the Valuation Date. The Tribunal therefore considers it appropriate to average the country risk premiums suggested by the Parties' experts and round it to half percent marks, and thus set it at 8.5% for purposes of calculating the discount rate.

550. With regard to the debt/equity ratio of ENJASA, the Tribunal agrees with Claimants and their expert, Mr. Rosen, that ENJASA's debt, which existed at the Valuation Date, must be taken into account for purposes of valuation. The Tribunal is not convinced, however, that it should adopt either the debt/equity ratio of Casinos Austria of 75.20%/24.80% or an optimal debt/equity ratio of 75%/25%, as suggested by Mr. Rosen. The consideration that a much higher debt ratio would be optimal, can be no basis to establish ENJASA's actual cost of capital, which is the relevant consideration for valuation. Neither is the debt/equity ratio of its (indirect) shareholder, Casinos Austria, relevant. The cash flow within ENJASA, its debt/equity ratio and the cash flow to the shareholders are not affected by whether Casinos Austria acquired these shares with own capital or loaned funds.

551. Instead, in the Tribunal's view, the actual debt/equity ratio of ENJASA on the Valuation Date has to be adopted. In this respect, the Parties present two different figures for the actual debt/equity ratio. Thus, Respondent's expert, Dr. Dapena, states that the actual debt/equity ratio of ENJASA for 2012 is 8.53%/91.47%;[660] while Claimants' expert, Mr. Rosen, states the actual debt/equity ratio of ENJASA to be 6%/94%.[661] In light of these differences, the Tribunal will adopt, in favor of Respondent, the lower debt/equity ratio of 6%/94%.

552. In respect of the US inflation rate, which is used to reduce the discount rate, the Tribunal

[660] See Dapena II, paras. 91, 103.
[661] See Rosen, Presentation, Slide 16. Possibly, the difference between the Parties' experts results from the fact that Dr. Dapena bases himself on 2012 numbers for ENJASA, whereas Mr. Rosen uses 2013 numbers as a basis for his cash flow calculations.

retains an inflation rate of 2%, as suggested by Dr. Dapena. The 2.30% inflation rate proposed by Claimants is neither supported by the Forecasted Consumer Price Index nor the Core Consumer Index from the second half of 2013 until 2015, which is published by the Federal Reserve Bank of Philadelphia, nor by the more recent inflation rates.[662]

553. The Tribunal agrees with Claimants that a cash flow analysis also has to be applied to the exploitation of Casino Salta by Cachi Valli, as Mr. Rosen did.[663]

d) Exchange Rate

554. The Parties' compensation calculations start from financial data expressed in ARS. Both Parties, however, agree that the compensation has to be paid in USD and has to be converted from ARS into USD at the currency exchange rate applicable on the Valuation Date on 13 August 2013. The Parties, however, are not in agreement on what the applicable exchange rate is.

555. The Tribunal notes, in this context, that Claimants' expert, Mr. Rosen, admitted at the hearing that most foreign exchange transactions at the Valuation Date adopted the CCL rate and recognized that Dr. Dapena's arguments in support of the use of the CCL rate were not incorrect as a matter of economic expertise.[664] The Parties' disagreement therefore boils down to the question of whether the BIT requires the use of the official exchange rate, as argued by Claimants and as used by their expert, Mr. Rosen, or whether a rate that is in fact used in commercial transactions between market actors, as is the case with the CCL rate used by Respondent's expert, Dr. Dapena, reflects the requirements of Article 5 of the BIT.

556. Article 5(1) of the BIT provides that "[e]ach Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments related to an investment, without undue delay and in freely convertible currency ..." This right applies, inter alia, to "the proceeds from the liquidation or total or partial sale of the investment [and] compensations due under Article 4, paragraph 2, of this Agreement" (Article 5(1)(e) and (f) of the BIT). The provision also applies, in the Tribunal's view, to the transfer of funds a covered investor is to receive in compensation for host State conduct

[662] Rosen II, para. 9.68. In fact, the Forecasted Index for 2013-2015 is closer to 2.10%. See Exhibit C-026-53, p. 12. The inflation index from 2016-2020 is under 2%; see www.USinflationcalculator.com.
[663] See Rosen II, para. 12.6 and C-299, Excel sheet, Schedules 2D and 15.
[664] Transcript, Day 8, p. 222 (Mr. Rosen stated: "I appreciate Dr. Dapena's point of view that the market place at the exact valuation date is a consideration … I don't find fault in what he's done; I've just taken a different point of view.").

that is contrary to the obligations laid down in the BIT. Otherwise, compensations for unlawful conduct, such as unlawful expropriations, would be treated worse in respect of the transfer of funds, from the perspective of affected investors, than compensation for lawful expropriations. Furthermore, the list of transactions in Article 5(1) to which an investor's right to free capital transfer applies is not a closed list, but merely illustrative: it provides that the guarantee of the free transfer of payments applies "particularly but not exclusively" to specifically listed items. Compensation for the host State's unlawful conduct can thus also be subsumed as falling under the right to free capital transfer under Article 5 of the BIT.

557. However, while Article 5(1) of the BIT guarantees that the relevant transfers have to be made "without undue delay and in freely convertible currency," Article 5 does not guarantee a specific exchange rate. In this respect, Article 5(3) of the BIT merely requires that the exchange rate on the day of the transfer shall be relevant. Article 5(4) of the BIT provides that "[t]he exchange rates shall be determined in accordance with the framework of the respective bank system of the territory of each Contracting Party."

558. By referring to the exchange rate being "determined in accordance with the framework of the respective bank system of the territory of each Contracting Party," Article 5(4) of the BIT does not guarantee a right to transfers at an official exchange rate. While it prohibits the use of an exchange rate that is less favorable for the investor than the rate used by banks for commercial transactions, it does not positively authorize an investor to invoke an official exchange rate that is more favorable to the investor than that which banks apply to commercial transactions, for instance because of existing foreign exchange restrictions.

559. In this context, the Tribunal also observes that, if Austria and Argentina had had the intention of requiring that the official exchange rate be applied to convert compensation for unlawful expropriation for purposes of the transfer of payments, they could have stipulated so – as, for instance, Austria did in the bilateral investment treaty with the Czech Republic one year before it concluded the BIT with Argentina.[665] Instead, the Contracting Parties to the Argentina-Austria BIT limited the provision on capital transfer to the rather vague reference to the exchange rate applicable in the banking system of the respective countries.

[665] BIT between Austria and the Czech Republic, signed 15 October 1990, Art. 5.

560. Moreover, it was not argued that the foreign exchange restrictions that applied in Argentina in August 2013, and that may have been responsible for a market-going rate to diverge from the official exchange rate, were themselves in breach of Article 5 of the BIT, with the consequence that the official exchange should be applied in order to absorb the effects of unlawful exchange restrictions. Instead, what the BIT merely requires is that the Tribunal select an exchange rate to convert the compensation due to Claimants from ARS to USD that is "determined in accordance with the framework of the respective bank system of the territory of each Contracting Party."

561. The official exchange rate of 5.55 ARS/1 USD,[666] which Claimants suggests to make use of, was not in fact applied by commercial actors to business transactions or currency conversions at the Valuation Date.[667] Moreover, as Respondent correctly observes, at the official exchange rate of ARS 5.55/1 USD, the USD was not "freely convertible currency," as Article 5(1) of the BIT provides. In brief, the official exchange rate of 5.55 ARS/1 USD is not the rate which is established by the banks for commercial currency conversions between commercial entities.[668] The official exchange rate is therefore not the exchange rate commonly applied within the Argentine banking system for currency conversions at the Valuation Date.

562. On the other hand, an ARS/USD rate of 7.23 on the basis of a three-year forecast by 19 reputable analysts made in August 2013, which is also suggested as an alternative to the official exchange rate by Claimants and their expert, Mr. Rosen, cannot be considered either.[669] Indeed, the relevant rate should not be the average of the forecasted – and therefore uncertain – interest rates of the next three years, but the actual rate as applicable on the Valuation Date of 13 August 2013.

563. For the Tribunal, the exchange rate actually applicable to currency conversions therefore is the CCL rate of ARS 8.7/1 USD suggested by Respondent and her expert, Dr. Dapena. In August 2013, the use of this exchange rate was free, unrestricted, and completely legal.[670] In the Tribunal's view, the CCL rate was the exchange rate commonly applied within the Argentine banking system to "freely" convert ARS into USD in August 2013.

[666] Rosen I, Schedules 2A to 2D.
[667] Respondent's Post-Hearing Brief, para. 315.
[668] Ibid.
[669] Rosen I, para. 9.47.
[670] Dapena, Transcript, Day 8, p. 169.

e) Value of Claimants' Investment at the Valuation Date

564. Based on the determination of the various issues that were contested between the Parties' experts, the Tribunal is now in a position to calculate the value of Claimants' investment, that is, its 60% direct shareholding in L&E. To do so, the Tribunal bases itself on the tool provided by Claimants' expert, Mr. Rosen, as part of his updated Control Sheet.[671]

565. According to that Control Sheet, and using the debt/equity structure that is more favorable to Respondent (6%/94%), an averaged country risk premium of 8.5%, a USD inflation rate of 2%, and the exchange rate proposed by Respondent of ARS 8.71/1 USD, the value of Claimants' 60% interest in L&E on the Valuation Date on 13 August 2013 is calculated as follows:

60% interest in participation in ENJASA	USD	20,510,000
60% interest in participation in Cachi Valle	USD	1,150,000
Total	USD	21,660,000

C. Consequential Damages

566. Claimants do not only claim compensation for the loss of their investment in L&E, they also claim for consequential damages, in particular costs for closing down ENJASA's operations.[672] In Claimants' view, these costs are part of full reparation: had the License not been revoked, they would not have been incurred.[673] Respondent, by contrast, rejects the claim for consequential damages as unfounded. In Respondent's view, the balance of ENJASA's expenses and income after the revocation of the License was positive, so that no compensation for post-revocation expenses was due; any post-revocation expenses of Cachi Valle, in turn, could not be included, as only Claimants' investment in ENJASA should be valued.[674]

1. Claimants' Position

567. Claimants' claim for consequential damages includes the operating costs, overhead expenses, and administrative cost for the period from 13 August to 19 November 2013, i.e., from the revocation of the License by Resolution No. 240/13 until ENJASA's activities came to a definitive halt. Moreover, Claimants' claim the additional costs, such

[671] Rosen II, Schedule for Sensitivity Analysis (Exhibit C-299).
[672] Claimants' Post Hearing Brief, para. 459; Rosen II, paras. 1.4-1.5.
[673] Claimants' Post-Hearing Brief, paras. 542-546.
[674] Respondent's Post-Hearing Brief, paras. 335-339.

as severance costs and restructuring fees, that were caused by the revocation of ENJASA's license and the consequential winding up of Claimants' business in Salta.[675] These costs were partially set off by income earned from the operation of the License between 13 August and 19 November 2013, as well as by cash flows generated from the liquidation of gaming-related assets after 19 November 2013.[676]

568. Mr. Rosen concluded in his Second Report that after the revocation of the License, ENJASA and Cachi Valle incurred USD 2.8 Mio in losses, i.e., expenses above revenues. In his calculations, although for ENJASA revenues would still surpass expenses by USD 235,000, the net costs for Cachi Valle for winding up its operations would have been at USD 2.988.878.[677] The basis for his calculations, Mr. Rosen states, are the audited financial statements for 2013 and 2014 of ENJASA and Cachi Valle.[678]

569. Although Claimants owned only 60% of L&E when ENJASA's license was revoked, they deducted 100% of the relevant post-revocation expenses because, in their opinion, their acquisition of the remaining 40% of L&E in November 2013 was also caused by the revocation of ENJASA's license.[679] Moreover, Mr. Rosen opines that if he were to follow Dr. Dapena's suggestion to only include 60% of the additional costs incurred after November 2013, he would also include only 60% of the additional revenues and not deduct USD 4.6 million net credit received from the transaction with Iberlux. The net impact of doing as Dr. Dapena suggested would, in Mr. Rosen's opinion, increase the amount of consequential damages.[680]

570. Mr. Rosen did, however, not include in his valuation ARS 38 million of cash and short-term investments as these amounts represent, he opines, redundant assets that were not required for ENJASA's gaming operations. ENJASA would have held the same amount in cash and investments in both the "but for" and the actual scenarios.[681]

[675] Exhibit C-299, Excel Sheet, Schedule 4, 4A, 4B, and 4C; Claimants' Post-Hearing Brief, paras. 540-546.
[676] Rosen II, para. 13.1. The setoff with income still earned from the License does not contradict the valuation of lost income from the License for the same period, which is the difference between a "but for"-income from 2013-2019 minus the actual income between 13 August and 19 November 2013. See Rosen II, para. 13.3.
[677] Rosen II, Schedule 4; Report, para. 4.7.
[678] Rosen Hearing Presentation, Slides 44 and 45; Transcript, Day 8, p. 34; Claimants' Post-Hearing Brief, para. 546.
[679] Claimants' Reply on the Merits, para. 402.
[680] Rosen II, paras. 13.1-13.18; Exhibit C-299, Excel Sheet, Schedule 4, notes 7-10.
[681] Rosen II, paras. 13.9-13.10.

2. Respondent's Position

571. Respondent rejects the claims for the compensation of additional post-revocation expenses. In Dr. Dapena's view, it is incompatible to add post-revocation expenses that are based on the assumption that related costs are caused by the revocation of ENJASA's license, while calculating the value of Claimants' investment in L&E and ENJASA on the assumption that the gaming activities would continue.[682]

572. Dr. Dapena further notes that there is no documentary support for the allegation that the expenses after the revocation of ENJASA's license actually were incurred, that they were linked to the revocation and that they were actually paid. Mr. Rosen's estimates, Dr. Dapena points out, are based entirely on statements of ENJASA's management. For instance, Dr. Dapena points out that the "Additional Costs Net of Additional Revenues" have been multiplied by seven between Mr. Rosen's first report (USD 0.4 million) and his second report (USD 2.8 million) without any documentary support.[683]

573. Dr. Dapena also points out that, when ENJASA was liquidated, Claimants actually recovered the net book value of its assets and that ENJASA did not lose any money; on the contrary, ENJASA's post-revocation income was above its costs in the amount of USD 0.23 million.[684] Dr. Dapena thus opines that, as ENJASA sustained no post-revocation loss resulting from its liquidation, no compensation was due. The post-revocation additional revenues offset the post-revocation expenses.[685] Moreover, expenses in the amount of USD 2.99 million claimed as consequential losses were related to Cachi Valle, not to ENJASA. As Respondent considered Cachi Valle not to be affected by the revocation of the License, these expenses should not be taken into account.[686]

574. Furthermore, Respondent does not agree that, because Claimants had obtained 99.94% of L&E's shares in November 2013, they would also be entitled to deduct 99.94% of any post-revocation expenses. In Respondent's opinion, at most 60% of the post-revocation expenses could be taken into account, corresponding to Claimants' ownership share in L&E at the time ENJASA's license was revoked in August 2013.

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[682] Dapena Presentation, Slide 21, Transcript, Day 8, p. 163.
[683] Dapena II, paras. 13 and 142. Compare Rosen I, Figure 1 and Rosen II, Figure 2.
[684] Transcript, Day 8, pp. 165 and 223.
[685] Dapena, Letter of 30 December 2019, para. 22, referring to Exhibit C-299, Report Schedules – Tab 1, Summary, line 27.
[686] Respondent's Post-Hearing Brief, paras. 334, 337-338.

3. The Tribunal's Analysis

575. As the Tribunal has already pointed out (see *supra* para. 442), Claimants' entitlement to full reparation for Respondent's internationally unlawful conduct also encompasses consequential damages that Claimants would not have incurred "but for" Respondent's unlawful conduct. This follows from Article 31 of the ILC Articles, which provides that "any damage … caused by the internationally wrongful act" has to be compensated. This encompasses also consequential damage that occurred after the internationally wrongful act occurred.[687] Against this background, Claimants would be entitled to compensation for any additional costs caused by the revocation of ENJASA's license and incurred by Claimants after 13 August 2013, provided these costs were not included yet in the valuation of Claimants' investment at the Valuation Date. Furthermore, consequential damages would not be limited to costs incurred by, or in relation to, ENJASA, but also by, or in relation to, Cachi Valle, given that this company is a wholly owned subsidiary of L&E and that Claimants' shareholding in L&E was the investment wrongfully expropriated by Respondent.

576. The Tribunal, however, is not convinced that any additional post-revocation costs relating to L&E, ENJASA, or Cachi Valle have been successfully proven by Claimants. What Claimants and their expert, Mr. Rosen, have failed to consider are the financial benefits Claimants potentially received via ENJASA through the sale of the hotel for ARS 20,590,902 and via Cachi Valle for the sale of the premises of Casino Salta for ARS 16,133,635, which both took place in 2017.[688] Both of these transactions are not taken appropriately into account by Mr. Rosen in valuing the post-revocation consequential damages.

577. While it is true that both of these assets – that is, the real estate of Casino Salta and of the hotel – would have survived the end of ENJASA's license and could have been sold in 2029, it is not appropriate to exclude the amounts received from the sales of these assets in 2017 completely. Instead, what Claimants would have needed to show in order to exclude both assets is that the value received in 2017 was smaller or equivalent to the

[687] For support in prior jurisprudence, see eg *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) para. 352 (Exhibit CL-034); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) paras. 792-797 (Exhibit CL-022).
[688] See Exhibit C-299-32, pp. 19 and 53 (ENJASA 2017 Financial Statement); Exhibit C-299-42, p. 21 (Cachi Valle 2017 Financial Statement).

value they would have likely received for a sale of both assets in 2029, taking into account that the 2029 value must be discounted to a 2017 value. In other words, Claimants would only be entitled to disregard the proceeds from the sale of the hotel and of Casino Salta, if it was sufficiently certain that the money they received in 2017 for the sale of both assets would have, when invested at a risk free rate, taking into account the country risk, inflation, etc, resulted in an amount that was lower than, or at the most equivalent to, the likely sales prizes they could have achieved in 2029.

578. Claimants have not shown that, under these assumptions, the sale of the hotel and of Casino Salta in 2017 did not generate any profits because they realized value from both transactions that they may not have realized in 2029, for example, because the real estate value could have declined between 2017 and 2029 and/or the value of the assets depreciated. The Tribunal could well envisage that Claimants were able to realize gains from the 2017 sales of both assets that they would not have been able to realize from sales in 2029. Since the Tribunal is not able to attribute a precise value to these financial gains, given that Claimants have not met their burden of proof in this respect, the Tribunal assumes, in favor of Respondent, that the value of financial gains covered the post-revocation costs claimed by Claimants. Consequently, the Tribunal declines to award any consequential damages to Claimants.

579. Against this background, it is also not necessary for the Tribunal to determine whether Claimants are able, as submitted by Claimants, to claim for 100% of the post-revocation expenses given that they had purchased 40% of shares of L&E from Iberlux in November 2013, or whether their claim would be limited, as submitted by Respondent, to 60% of the expenses in question. In this context, the Tribunal observes that the price itself, which was paid by Claimants to Iberlux in return for obtaining 40% of L&E, was not claimed by Claimants as consequential damage and that, in the event Claimants were entitled to claim 100% of the post-revocation expenses, they also would have to include 100% of any profits they may have made from the sales of the hotel and of Casino Salta in the computation.

D. Interest

1. The Parties' Positions

580. The Parties also differ on questions relating to pre- and post-award interest. While they

agree that interest is due as from the Valuation Date,[689] they have different positions on the applicable interest rate and on whether interest should be simple or compounded.

581. Claimants point out that Article 4(2) of the BIT specifically states that in the event an investment is legally expropriated, "compensation shall be paid without undue delay and shall bear interest until the date of payment, at the customer bank rate of the State in whose territory the investment has been made." However, Claimants maintain that this provision does not apply to cases of unlawful expropriations. For Claimants, the rationale for awarding interest is to put the investor in the position he or she would have been in "but for" the breach of the BIT, by awarding a fair and reasonable amount for lost return opportunities. For Claimants, an interest rate of 6% is reasonable from a legal as well as an economic viewpoint.[690] Many awards, Claimants point out, have applied such a 6% interest rate.[691] For Claimants, an interest rate of 6% also is reasonable and adequate, considering inter alia the amount of inflation in Argentina. They thus instructed their expert, Mr. Rosen, to apply an interest rate of 6%.[692]

582. Addressing a question from the Tribunal at the Hearing, Claimants' expert rejected the US inter-bank prime rate, because that rate is unrelated to investments, but applies to low-risk bank loans; besides, it too is lower than the inflation rate.[693] Whenever investment tribunals have applied the prime rate, they have increased it by a margin of 2 to 4%, Claimants point out.[694]

583. Claimants further observe that the current position of investment tribunals is to award compound interest in connection with breaches of international law. Only compound interest can put the investor in a situation as if the breach had never occurred. Whether compound interest is allowed or not under Argentine law, Claimants argue, is irrelevant for any compensation due under international law, as was confirmed by the Tribunal in

[689] Respondent's Rejoinder on the Merits, paras. 539-564; Respondent's Counter-Memorial on the Merits, paras. 700, 703.
[690] Claimants' Post Hearing Brief, para. 550.
[691] Claimants' Post Hearing Brief, paras. 555-556 (referring inter alia to *S.S. Wimbledon*, PCIJ (17 August 1923) Series A No. 1, p. 32 (Exhibit CL-043); *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case ARB/11/26, Award (29 January 2016) para. 587 (Exhibit CL-255); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) para. 9.2.8 (Exhibit CL-032)).
[692] Rosen I, para. 12.3.
[693] Transcript, Day 8, pp. 44-46.
[694] Claimants' Post Hearing Brief, paras. 564-567.

Quiborax v. Bolivia.[695]

584. Respondent, by contrast, considers the 6% interest rate that Mr. Rosen was instructed to apply by Claimants to be too high in the current market scenario.[696] Also the prime rate is, in Respondent's opinion, too high.[697] Instead, Respondent suggests to apply a short-term, risk-free interest rate, such as the rate of six-month or one–year US treasury bills. The average interest rate from 2014 until 2020 was 1.1% for a one-year treasury bill and 1% for a six-month one.[698]

585. Moreover, for Respondent, the interest should not be compounded. Compound interest should only apply when interest obtained is actively reinvested. Moreover, for interest on compensation to be paid, Argentine rules and regulations provide for a simple interest rate.[699] Simple interest moreover complies with US procedural guidelines.[700]

586. Claimants, in turn, consider the short-term risk free US treasury bond rate inappropriate, as also was decided in *L&E v. Argentina*[701] and *PSEG v. Turkey*.[702] Indeed, Claimants submit they would not have invested the compensation for unlawful expropriation in risk-free bonds if received in 2013, but would have put it in their businesses with a greater return. Besides, the yield on a one-year US treasury bill was in 2013 for instance 0.13% and on a six-month bill 0.09%, while the US inflation rate at the valuation date was 2.3%.[703]

2. The Tribunal's Analysis

587. Article 4(2) of the BIT indicates that compensation as part of a lawful expropriation will "bear interest until the date of payment." Although the BIT does not state that explicitly, also for unlawful expropriation, compensation under the principle of full reparation for

[695] Rosen II, paras. 14.1-14.14; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) paras. 520-524 (Exhibit CL-030). In *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000) para. 97 (Exhibit CL-004), quoted in Respondent's Rejoinder on the Merits, para. 542, compound interest was granted.
[696] Rosen, Transcript, Day 8, p. 103; Respondent's Rejoinder on the Merits, para. 558.
[697] Respondent's Post-Hearing Brief, footnote 539.
[698] CEMA 31, Valuation Model, Tab 'T bills'; Dapena II, para. 201.
[699] Respondent's Counter-Memorial on the Merits, paras. 700-705; Respondent's Rejoinder on the Merits, paras. 540-550.
[700] Dapena II, paras. 197-211.
[701] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007) paras. 55-56, 102-103 (Exhibit AR LA-140).
[702] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007) para. 347 (Exhibit CL-243).
[703] Claimants' Post Hearing Brief, paras. 558-563.

internationally unlawful conduct has to bear interest from the Valuation Date until the date of payment. This is what follows from general international law concerning State responsibility. As Article 38 of the ILC Articles provides:

> Article 38
>
> Interest
>
> 1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
>
> 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

588. In order to ensure full reparation of a private investor for breaches of a treaty protecting his or her investment the computation of compensation requires that from the date the expropriation occurred, i.e., the Valuation Date, until the day the award is rendered, pre-award interests are added to the compensation, while from the date of the Award until the date of actual payment, post-award interests have to be paid in addition. Without the payment of interest, full reparation cannot be achieved as the investor would be deprived of the time-value of the compensation due as of the Valuation Date.[704]

589. In the Tribunal's view, which is shared by the Parties,[705] the same interest rate should be granted for the pre-award as for the post-award period. The Parties disagree, however, on the interest rate to be applied. Claimants suggest 6%; Respondent suggests 1%. The Tribunal considers an interest rate of 6% on the USD too high, considering inter alia the present decade of low inflation in the United States. The four ICSID awards cited by Claimants, which granted 6% on the USD all cover the period of the late 1990s to the early 2000s, when USD interest rates were substantially higher than in later times, especially in the period from 2013 to 2021.[706]

590. On the other hand, for the Tribunal, the 1% interest rate suggested by Respondent, which

[704] Although none of the Parties alleged that the payment of interest would lead to double recovery, the Dissent (paras. 36 and 431) alleges that this is the case. However, future profits are discounted to the Valuation Date, as from which date they bear interest until the date of payment. This excludes double discovery.
[705] Claimants' Post-Hearing Brief, para. 549 (expressly stating that the same rate should apply); Respondent Post-Hearing Briefs, paras. 350-356 (treating interest as one issue without distinguishing pre- and post-award interest).
[706] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB 99/6, Award (12 April 2002) para. 175 (Exhibit CL-044); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) para. 122 (Exhibit CL-011); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. AR(AF)/00/2, Award (29 May 2003) para. 197 (Exhibit CL-08); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB /97/3, Award (20 August 2007) para. 9.2.8 (Exhibit CL-032).

is based upon the interest of one-year risk-free US treasury bonds, is too low in staying below annual US inflation since 2013. Moreover, the Tribunal accepts that Claimants would not have been likely to invest the compensation received in 1% risk-free US government bonds, but in their own business.

591. The Tribunal observes that, in the context of applying the DCF method to valuing Claimants' investment, for Claimants considered 3.39% a reasonable risk-free rate, while for Respondent that rate was 6.59% (see *supra* paras. 463, 499). Taking into account their respective positions and the fact that Claimants could have invested the funds worldwide, the Tribunal considers an annual interest rate of 4% to be fair and equitable and sufficient, but also necessary, in order to ensure full reparation in the sense of Article 38 of the ILC Articles.

592. Claimants have requested that the interest should be compounded annually, while Respondent argued that interests should not be compounded. The BIT does not contain an express provision on compound interests. The Tribunal, however, considers compound interest to be consistent with economic reality and therefore necessary in the sense of Article 38(1) of the ILC Articles in order to ensure full reparation of an investor for breach of a treaty that aims at protecting his or her investment.[707] The Tribunal agrees in this respect with what has been stated in *Gemplus v. Mexico*:

> [I]t is the universal practice of banks and other loan providers in the world market to provide monies at a cost amounting to or equivalent to compound rates of interest and not simple interest. In addition … it is current practice of international tribunals (including ICSID) to award compound and not simple interest. In the Tribunal's opinion, there is now a form of 'jurisprudence *constante*' where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.[708]

[707] The Dissent (paras. 38 and 432) considers that the Tribunal's majority is not entitled to grant compound interests. However, the Tribunal's majority is not convinced that the 1925 award in a State-to-State arbitration in *Affaire des biens britanniques au Maroc espagnol* (1 May 1925) II RIAA 615, 650-651, which dismissed compound interest, is still relevant. Moreover, the 2001 ILC Articles on State Responsibility only considered the exclusion of compound interests to be "the general view" at the time of its adoption. Since then, several investment treaty tribunals have granted compound interest, which better compensates for the time-value of money and better helps prevent delays of payment than simple interests does. Furthermore, for the grant of compound interest the position under the host State's domestic law is irrelevant, despite the reference in Article 8(6) of the BIT to domestic law, as the interest in question here is granted under the international law governing State responsibility as part of consequences of Respondent's breach of the BIT.

[708] *Gemplus, S.A., SLP S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No ARB(AF)/04/3, Award (16 June 2010) para. 16-26.

593. In sum, the Tribunal therefore decides that interest of 4% per annum, compounded annually is due to Claimants on the amount owed by Respondent as compensation for the unlawful expropriation of Claimants' investment in Argentina as from the Valuation Date of 13 August 2013.

VIII. COSTS

A. The Parties' Positions

594. The Parties agreed to submit costs statements accompanied by affidavits signed by counsel. The Parties further agreed that they would provide their costs statements in different currencies and that they would use different breakdowns of their respective costs, according to which (a) Claimants would use the categories "Arbitrators Fees and Administrative Costs, Legal Fees and Expenses, Expert Fees and Expenses, Hearing Costs, Travel Costs and Accommodation Costs"; and (b) Respondent would use the categories "Personnel, Experts, Airplane Tickets, Hotels and Travel Expenses, Translations, Stationery, Shipping, and Payments to ICSID".

595. Claimants contend that they should be reimbursed for all costs and expenses incurred in connection with the arbitration, including internal costs, as well as "appropriate interest thereon".[709] Regarding the jurisdictional phase in particular, Claimants argue that since they "were successful in the jurisdictional phase, they should be awarded all costs incurred in the jurisdictional phase."[710]

596. In their costs statement, Claimants specify the costs incurred in connection with the arbitration, including internal costs, that they claim to amount to the total sums of EUR 3,725,134.37 and USD 1,767,984.65, plus interest,[711] broken down as follows:[712]

i. Arbitrators Fees and Administrative Costs: USD 1,025,000.00

ii. Legal Fees and Expenses: EUR 2,556,246.71 and USD 228,178.50

iii. Expert Fees and Expenses: EUR 991,913.17 and USD 514,806.15

iv. Hearing Costs, Travel Costs and Accommodation Costs: EUR 176,974.49.

[709] Claimants' Post-Hearing Brief, para. 584.
[710] Claimants' Post-Hearing Brief, paras. 581-582.
[711] Claimants' Costs Statement of 30 July 2021, referring in footnote 1 to Claimants' Reply on the Merits, paras. 630-631; and Claimants' Post Hearing Brief, paras. 549-550.
[712] Claimants' Costs Statement of 30 July 2021.

597. Respondent requests that the Tribunal order Claimants to pay for all costs and expenses arising from the arbitration, including internal costs.[713] According to Respondent, the costs claimed by Claimants are disproportionate in two respects: first, as compared to the amount of damages claimed, and second, as compared to the equivalent costs incurred by Respondent. Respondent further considers that Claimants have included costs corresponding to an expert in the amount of EUR 56,700.00 and a law firm in the amount of EUR 4,667,40 that did not appear in the present proceeding or in the written record submitted to the Tribunal. Finally, Respondent contends that certain items included by Claimants under "travel costs" are not reasonable, namely costs incurred for travel for the preparation of Claimants' case.[714]

598. Respondent claims the total sum of USD 1,523,439.48 plus interest,[715] broken down as follows:[716]

i. Personnel: USD 243,362.00

ii. Experts: USD 49,152.27

iii. Airplane Tickets, Hotels, Travel Expenses, Stationery: USD 203,470.06

iv. Translations: USD 17,598.93

v. Shipping: USD 9,856.22

vi. Payments to ICSID: USD 1,000,000.00.

B. The Tribunal's Analysis

599. Article 61(2) of the ICSID Convention addresses the assessment and allocation of the costs of an ICSID arbitration as follows:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

600. This provision, as is widely recognized in ICSID practice, gives the Tribunal discretion

[713] Respondent's Post-Hearing Brief, paras. 357-358.
[714] Respondent's letter of 17 August 2021.
[715] Respondent's letter of 17 August 2021, referring in footnote 8 to Respondent's Counter-Memorial on the Merits, Section VI.F, Respondent's Rejoinder on the Merits, Section VI.E; and Respondent's Post-Hearing Brief, section V.E.
[716] Respondent's Costs Statement of 30 July 2021.

to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties.

601. As both Parties have requested the Tribunal to order the other Party to bear the costs of the proceeding, the Tribunal considers it appropriate to exercise that discretion so as to require Respondent to pay the entire costs of the arbitration, including the lodging fee, the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, as well as those reasonable costs that Claimants have incurred in respect of the proceeding.

602. The main consideration for the Tribunal in exercising its discretion in this way is that Claimants have prevailed in respect of the preliminary objections raised by Respondent, except, primarily, for the objection for lack of a *prima facie* case relating to the claim for breach of the BIT's national treatment provision, which was an issue that did not materially affect the dispute and the time and cost spent by either Party or the Tribunal, as well as on liability and – to a considerable degree – also on quantum. Awarding costs for the arbitration and attorney fees and other expenses also ensures that Claimants receive full reparation for the unlawful expropriation they suffered as a consequence of the revocation of ENJASA's license, as they would not have needed to incur any of the costs necessary for the present proceeding without Respondent's unlawful conduct.

603. The fees and expenses of the Tribunal and ICSID's administrative fees and direct expenses are as follows:

Arbitrators' fees and expenses	
Prof. Dr. Hans van Houtte	USD 314,878.00
Prof. Dr. Stephan W. Schill	USD 376,300.39
Dr. Santiago Torres Bernárdez	USD 526,318.56
ICSID's administrative fees	USD 264,000.00
Direct expenses	USD 454,796.99
Total	USD 1,936,293.94

604. The above costs have been paid out of the advances made by the Parties, with Claimants having contributed USD 1,000,000.00 and Respondent USD 1,000,000.00. Therefore, each Party has contributed USD 968,146.97 to the expended portion of the advances made to ICSID. As a consequence of the Tribunal's decision to allocate costs to Respondent, Claimants are therefore entitled to the payment of USD 968,146.97 by

Respondent.[717] Claimants are also entitled to the payment of the lodging fee (USD 25,000.00) by Respondent. Accordingly, Respondent shall pay to Claimants USD 993,146.97 for the expended portion of Claimants' advances to ICSID and the lodging fee.

605. As for the costs that Claimants have incurred for the present proceeding in respect of legal fees and expenses, expert fees and expenses, and costs for the hearing, travel and accommodation, the Tribunal is aware that these costs represent some 10% of the amount initially claimed and some 25% of the amount ultimately awarded. This notwithstanding, the Tribunal is of the view that these costs are reasonable and therefore appropriately allocated to Respondent.

606. In the Tribunal's view, the costs do not appear excessive, neither in relation to the sum claimed, nor in relation to the costs incurred and claimed by Respondent. As regards the latter aspect, the Tribunal is aware that Claimants could not rely on the administrative structure that Respondent has built up over the course of a large number of investment cases, but had to retain specialized outside counsel to conduct the proceedings. Moreover, the cost-structure of in-house counsel within a State's administration is not comparable to that of outside counsel. The Tribunal also acknowledges that the fees of Claimants' experts and advisors were higher than those of Respondent's experts, but considers these fees not to be unreasonable, but within market level.

607. As for the costs of the expert in the amount of EUR 56,700 and fees for a law firm in the amount of EUR 4,667,50 that have neither appeared before the Tribunal, nor have been mentioned in the record, the Tribunal sees no reason to exclude those as costs incurred by Claimants "in connection with the proceedings" in the sense of Article 61(2) of the ICSID Convention. Article 61(2) of the ICSID Convention is not worded narrowly to cover only costs for legal and expert advice that has been presented in written submissions or in oral hearing to the Tribunal. Article 61(2) of the ICSID Convention instead covers any "expenses incurred by the parties in connection with the proceedings." In the Tribunal's view, this would also cover expenses for expert and legal advice received in the preparation of the claim (or its defense) by law firms and experts other than counsel of record in the present proceeding and experts that have either appeared before the Tribunal or made written submissions. Since Respondent does not challenge

[717] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

that the costs in the amount of EUR 61,367,50 in question have actually been incurred by Claimants, the Tribunal considers that these expenses have been reasonably incurred.

608. Finally, for the Tribunal, not only the travel expenses to attend the hearings may be reimbursed as costs of the proceeding, but also those travel costs incurred to investigate the facts and interview witnesses in preparation of the hearing. These expenses as well are covered by the wording of Article 61(2) of the ICSID Convention as "expenses incurred by the parties in connection with the proceedings."

609. Consequently, the Tribunal awards Claimants the costs incurred in connection with the proceedings, the fees and expenses of the members of the Tribunal, and the charges for the use of the facilities of the Centre in the total sums of EUR 3,725,134.37 and USD 1,736,131.62, broken down as follows:

i. Expended portion of Claimants' advances to ICSID and the lodging fee: USD 993,146.97

ii. Legal fees and expenses: EUR 2,556,246.71 and USD 228,178.50

iii. Expert fees and expenses: EUR 991,913.17 and USD 514,806.15

iv. Hearing costs, travel costs and accommodation costs: EUR 176,974.49.

610. As far as the award of interest on costs is concerned, the Tribunal is of the view that, even though Article 61(2) of the ICSID Convention does not mention the payment of interest on costs, these costs are part of the Award and should be covered by the interest provision of the Award, if so requested by the Party in question. Full reparation of Claimants in the sense of Article 38 of the ILC Articles requires, in the Tribunal's view, that interest is due also on the costs of the proceedings from the date the Award is rendered. Article 61(2) of the ICSID Convention is no bar to an award of interest; this provision only addresses the allocation of costs between the parties, but is silent as to whether allocated costs are to accrue interest as from their allocation or not.[718] As for the interest rate, the Tribunal adopts the same interest rate as that adopted for the amount of

[718] Ordering the payment of interest on costs is also not unusual in ICSID practice. For a few recent examples, see *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria*, ICSID Case No ARB/15/43, Award (13 August 2019) para. 82; *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award (14 August 2020) para. 589; *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (9 October 2018) para. 622. The Dissent (para. 447), by contrast, is of the view that no interests are due on costs because Article 61(2) of the ICSID Convention does not provide so.

damages awarded, that is, 4% per annum compounded annually, with interests running from the date of the Award until full payment thereof.

IX. DECISION

611. For the reasons set forth above, the Tribunal decides, by majority, as follows:

(1) Respondent has breached Article 4(1) and (2) of the Argentina-Austria BIT by subjecting Claimants to an unlawful expropriation.

(2) The Tribunal makes no findings as to the claimed breaches by Respondent of Articles 4(3) and 2(1) of the Argentina-Austria BIT, as any such breaches would be consumed by the finding under (1).

(3) Respondent is liable to pay compensation to Claimants in the amount of USD 21,660,000 plus interest at a rate of 4% per annum compounded annually from 13 August 2013 until full payment thereof.

(4) Respondent shall pay to Claimants for the costs incurred in connection with the proceedings, the fees and expenses of the members of the Tribunal, and the charges for the use of the facilities of the Centre (i) USD 1,736,131.62 and (ii) EUR 3,725,134.37, plus interest at a rate of 4% per annum compounded annually on both (i) and (ii) from the date of the Award until full payment thereof.

(5) The Tribunal rejects all other claims.

612. Arbitrator Dr. Torres Bernárdez appends a Dissenting Opinion to the Tribunal's Award.

[signed]

Prof. Dr. Stephan W. Schill Arbitrator	Dr. Santiago Torres Bernárdez Arbitrator (subject to the attached Dissenting Opinion)
Date: 24 October 2021	Date:

Prof. Dr. Hans van Houtte
President of the Tribunal

Date:

[signed]

Prof. Dr. Stephan W. Schill Arbitrator	Dr. Santiago Torres Bernárdez Arbitrator (subject to the attached Dissenting Opinion)
Date:	Date: 25 October 2021

Prof. Dr. Hans van Houtte
President of the Tribunal

Date:

Prof. Dr. Stephan W. Schill
Arbitrator

Date:

Dr. Santiago Torres Bernárdez
Arbitrator
(subject to the attached Dissenting Opinion)

Date:

[signed]

Prof. Dr. Hans van Houtte
President of the Tribunal

Date: 27 October 2021