

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

In the arbitration proceeding between

**HOCHTIEF AG**

Claimant

and

**ARGENTINE REPUBLIC**

Respondent

(ICSID Case No. ARB/07/31)

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**DECISION ON LIABILITY**

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*Members of the Tribunal*

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

*Secretary of the Tribunal*

Mrs. Mercedes Cordido-Freytes de Kurowski

*Date:* December 29, 2014

**REPRESENTATION OF THE PARTIES**

Representing Hochtief

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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT or the Treaty	Treaty between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments dated 9 April 1991, that came into force on 8 November 1993.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
E [CE] [RE]	Exhibit [Claimant] [Respondent]
LA [CLA] [RLA]	Legal Authority [Claimant] [Respondent]
Mem. [Cl. Mem.] [Resp. Mem. Jur.]	Memorial [Claimant on the merits] [Respondent on jurisdiction]
C-Mem. [Resp. C-Mem.] [Cl. C-Mem. Jur.]	Counter-Memorial [Respondent's on the merits] [Claimant's on jurisdiction]
Rep. [Cl. Rep.] [Resp. Rep. Jur.]	Reply [Claimant's on the merits] [Respondent's on jurisdiction]
Rej. [Resp. Rej.] [Cl. Rej. Jur.]	Rejoinder [Respondent's on the merits] [Claimant's on jurisdiction]
Tr. [J.] [Merits] [page:line]	Transcript of the hearing on jurisdiction/ on the merits

## **I. INTRODUCTION AND PARTIES**

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

## **II. PROCEDURAL HISTORY**

6. On 7 November 2007, ICSID received a request for arbitration dated 5 November 2007 from Hochtief against Argentina (the “Request” or “RFA”).
7. On 18 December 2007, the Acting Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
8. By letter dated 19 February 2008, Claimant elected to submit the arbitration to a Tribunal constituted of three arbitrators, as provided in Article 37(2)(b) of the ICSID Convention.

9. On 23 April 2008, Claimant appointed Judge Charles N. Brower, a national of the United States of America, as arbitrator. On 2 May 2008, Respondent appointed Mr. J. Christopher Thomas, Q.C., a Canadian national, as arbitrator.
10. By letter dated 24 April 2009, the Centre informed the Parties that in accordance with the method agreed by the Parties, Judge Charles N. Brower and Mr. J. Christopher Thomas, Q.C. had agreed on the appointment of Professor Vaughan Lowe, a national of the United Kingdom, as the third arbitrator and President of the Tribunal.
11. On 30 April 2009, the Acting Secretary-General of the Centre, in accordance with Rule 6(1) of the ICSID Arbitration Rules notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Sergio Puig, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
12. On 19 June 2009, the Tribunal held a procedural session with the Parties by telephone conference and, pursuant to the Parties' agreement, on 16 April 2010, the Tribunal held a first session with the Parties at the seat of the Centre in Washington, D.C. The Parties confirmed that the Tribunal had been properly constituted and reached agreements on several procedural matters, inter alia, that the applicable Arbitration Rules would be those in force since 10 April 2006, and that the procedural languages would be English and Spanish.
13. During the First Session, the Parties further agreed that Claimant would file a memorial on the merits on 29 April 2010, and that Respondent would file a memorial on jurisdiction within 120 days from its receipt of Claimant's memorial on the merits. It was also agreed that the Tribunal would promptly instruct the Parties on the timetable for the further submissions. The Minutes were signed by the President of the Tribunal and Mr. Gonzalo Flores on behalf of the ICSID Secretariat, and circulated to the Parties.
14. Claimant's Memorial on the Merits was submitted on 29 April 2010, and Respondent submitted its Memorial on Objections to the Jurisdiction of the Centre and the

Competence of the Tribunal on 30 July 2010. Claimant's Counter-Memorial on Objections to Jurisdiction was submitted on 15 October 2010.

15. On 25 June 2010, Respondent submitted a request for production of documents, followed by Claimant's observations on Respondent's request, on 21 July 2010.
16. On 2 November 2010, after having considered the views of the Parties, the Tribunal decided, to deal with the objections to jurisdiction as a preliminary question, and decided on Respondent's request for production of documents.
17. On 10 November 2010, the Centre informed the Tribunal and the Parties that Ms. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, would replace Mr. Sergio Puig as Secretary of the Tribunal.
18. On 22 December 2010, Respondent filed its Reply on Jurisdiction, and on 10 February 2011, Claimant filed its Rejoinder on Jurisdiction.
19. A hearing on Jurisdiction took place at the World Bank's Conference Centre in Paris on 4-5 March 2011. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For Claimant

Mr. Paul F. Doyle	<i>Kelley Drye &amp; Warren LLP</i>
Mr. Philip D. Robben	<i>Kelley Drye &amp; Warren LLP</i>
Ms. Mellisa E Byroade	<i>Kelley Drye &amp; Warren LLP</i>
Ms. Julia A. Garza Benítez	<i>Kelley Drye &amp; Warren LLP</i>

For Respondent

Ms. Angelina Abbona	<i>Procuradora del Tesoro de la Nación</i>
Mr. Gabriel Bottini	<i>Procuración del Tesoro de la Nación</i>
Ms. Romina de los Ángeles Mercado	<i>Procuración del Tesoro de la Nación</i>
Ms. Verónica Lavista	<i>Procuración del Tesoro de la Nación</i>
Mr Matías Osvaldo Bietti	<i>Procuración del Tesoro de la Nación</i>
Mr. Ariel Martins	<i>Procuración del Tesoro de la Nación</i>
Mr. Julián Santiago Negro	<i>Procuración del Tesoro de la Nación</i>

20. The following persons were examined during the hearing:

On behalf of Claimant

Mr. Martin Lommatzsch  
Mr. Héctor A. Mairal

Witness  
Expert witness

On behalf of Respondent

Mr. Ismael Mata

Expert witness (via video conference  
from Buenos Aires)

21. On 24 October 2011, the Tribunal issued its Decision on Jurisdiction. Attached to the Decision was a dissenting opinion by arbitrator Mr. J. Christopher Thomas, Q.C. The Tribunal, by majority, rejected Respondent's submission that the Centre had no jurisdiction and the Tribunal had no competence over this case; asserted that the Centre had jurisdiction and the Tribunal had competence over this case; and indicated that it would decide upon the question of costs and fees at a later stage, along with the merits of the dispute.
22. On 30 December 2011, Respondent renewed its request of 25 June 2010 for the Tribunal to decide on production of documents, and filed a response to Claimant's observations of 21 July 2010. On 12 January 2012, Claimant submitted a response to Respondent's observations of 30 December 2011. On 18 January 2012, the Tribunal decided on production of documents.
23. On 31 January 2012, Respondent supplemented its renewed request of 30 December 2011 for the Tribunal to decide on production of documents. This was followed by Claimant's observations on 8 February 2011. On 10 February 2011, Respondent further supplemented its request for production of documents, and on 15 February 2012, Claimant submitted its observations on Respondent's request. On 22 February 2012, the Tribunal decided on production of documents.
24. Respondent's Counter-Memorial on the Merits was filed on 7 March 2012, and Claimant submitted its Reply on the Merits on 5 June 2012.

25. On 20 July 2012, Respondent filed a further request for the Tribunal to decide on production of documents. This was followed by Claimant's observations on 27 July 2012, and the Tribunal's decision on 31 July 2012.
26. On 17 August 2012, Respondent submitted a further request for the Tribunal to decide on production of documents. This was followed by Claimant's observations on 21 August 2012, and by a further document production request from Respondent of 27 August 2012. On 30 August 2012, Claimant also submitted a request for the Tribunal to decide on production of documents. On 3 September 2012, Claimant submitted observations on Respondent's further request of 27 August 2012.
27. On 3 September 2012, Respondent submitted its Rejoinder on the Merits.
28. On 4 September 2012, the Tribunal decided on Respondent's requests for production of documents of 17 and 27 August 2012.
29. Also on 4 September 2012, Respondent filed observations on Claimant's document production request of 30 August 2012, and the Tribunal decided on Claimant's request on 7 September 2012.
30. The Tribunal held a two-week hearing on the merits in Paris. The first week was held on 19-23 September 2012 at the International Chamber of Commerce, and the second week was held on 22-26 October 2012 at the World Bank Paris Conference Center.
31. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present during the first week of the hearing were:

For Claimant:

Mr. Paul F. Doyle  
Mr. Philip D. Robben  
Ms. Mellisa E. Byroade  
Ms. Julia A. Garza Benítez  
Ms. Ana Correa  
Ms. Tanya Green  
Ms. Cynthia Inés Graf Caride

*Kelley Drye & Warren LLP  
Kelley Drye & Warren LLP  
Leonhardt, Dietl, Graf & Von Der  
Fecht*

Mr. Hartmut Paulsen  
Mr. Georg von Bronk  
Mr. Christoph Boeninger

*Hochtief Aktiengesellschaft  
Hochtief Aktiengesellschaft  
Hochtief Aktiengesellschaft*

For Respondent:

Ms. Angelina Abbona  
Mr. Gabriel Bottini  
Mr. Javier Pargament

*Procuración del Tesoro de la Nación  
Procuración del Tesoro de la Nación  
Director, Procuración del Tesoro de la Nación*

Mr. Carlos Mihanovich

*Subdirector, Procuración del Tesoro de la Nación*

Mr. Horacio Seillant  
Ms. Verónica Lavista  
Mr. Julián Negro  
Mr. Manuel Domínguez Delucchi  
Mr. Leandro Fernández  
Mr. Luis Rivarola  
Ms. Mariana Lozza  
Ms. Magdalena Gasparini  
Ms. Adriana Cusmano

*Procuración del Tesoro de la Nación  
Procuración del Tesoro de la Nación*

32. The following persons were examined during the first week of the hearing:

On behalf of Claimant:

Mr. Martin Lommatzsch  
Mr. Hartmut Veigele  
Mr. Björn König  
Mr. Héctor A. Mairal

Witness  
Witness  
Witness  
Expert witness

On behalf of Respondent:

Mr. Eduardo Ratti  
Mr. Alfredo Villaggi  
Mr. Sergio Cipolla  
Mr. Roberto Lamdany  
Mr. Andrés Aner

Witness  
Witness  
Witness  
Witness  
Witness

33. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present during the second week of the hearing that took place on 22-27 October 2012, were:

For Claimant:

Mr. Paul Doyle

*Kelley Drye & Warren LLP*

Mr. Philip Robben  
Ms. Melissa Byroade  
Ms. Ana Correa  
Mr. Levi Downing  
Ms. Tanya Green  
Ms. Cynthia Inés Graf Caride

*Kelley Drye & Warren LLP*  
*Leonhardt, Dietl, Graf & Von Der Fecht*

Mr. Hartmut Paulsen  
Mr. Martin Lommatzsch  
Mr. Christoph Boeninger

*Hochtief Aktiengesellschaft*  
*Hochtief Aktiengesellschaft*  
*Hochtief Aktiengesellschaft*

For Respondent:

Ms. Angelina Abbona  
Mr. Horacio Diez

*Procuradora del Tesoro de la Nación*  
*SubProcurador, Procuración del Tesoro de la Nación*

Mr. Gabriel Bottini  
Mr. Javier Pargament  
Mr. Carlos Mihanovich

*Director, Procuración del Tesoro de la Nación*  
*Director, Procuración del Tesoro de la Nación*  
*Subdirector, Procuración del Tesoro de la Nación*

Mr. Horacio Seillant  
Ms. Magdalena Gasparini  
Mr. Luis Rivarola  
Mr. Agustín Tupac Cifré Puig  
Ms. Verónica Lavista  
Ms. Mariana Lozza  
Ms. Alejandra Mackluf  
Mr. Nicolás Grosse  
Ms. Adriana Cusmano  
Mr. Julián Negro  
Mr. Manuel Domínguez Delucchi

*Procuración del Tesoro de la Nación*  
*Procuración del Tesoro de la Nación*

34. The following persons were examined during the second week of the hearing:

On behalf of Claimant:

Dr. Manuel A Abdala  
Mr. Marcelo Schoeters  
Mr. Gustavo de Marco  
Mr. Federico Villar  
Mr. Philip Bates  
Dr. Sergio Berensztein  
Dr. Sebastian Edwards  
Dr. W. Michael Reisman

Expert Witness  
Expert Witness

On behalf of Respondent:

Mr. Martín Bes	Witness
Mr. Ismael Mata	Expert Witness
Mr. Benedict Kingsbury	Expert Witness

Mr. Barry Eichengreen	Expert Witness
Mr. Alberto Müller	Expert Witness
Mr. Guido Sandleris	Expert Witness
Mr. Ernesto Schargrodsky	Expert Witness
Mr. Bernardo Kliksberg	Expert Witness
Mr. Lucas Bertinatto	Expert Witness
Ms. Camila Rodríguez Bedoya	Expert Witness

35. On 12 November 2012, the Tribunal issued a procedural order concerning production of documents and the procedural calendar.
36. On 30 November 2012, Respondent filed a request for the Tribunal to decide on production of documents. This was followed by Claimant’s observations on 14 December 2012. On 7 January 2013, the Tribunal decided on production of documents and issued directions to the Parties concerning additional expert opinions to be submitted by the Parties on certain corporate governance issues under Argentine Law.
37. On 17 January 2013, Claimant submitted a request for the Tribunal to reconsider its decision of 7 January 2013, and on 29 January 2013, Respondent submitted observations on Claimant’s request of 17 January 2013.
38. On 1 February 2013, each Party submitted additional expert opinions in accordance with the Tribunal’s directions of 7 January 2013. On 12 February 2013, Claimant ratified its request of 17 January 2013. On 19 February 2013, the Tribunal decided on production of documents, and ordered Claimant to produce the Puentes del Litoral S.A. (“PdL”) shareholders’ agreement. The Tribunal also decided on the procedural calendar and posed questions to the Parties.
39. On 27 February 2013, Claimant produced the PdL’s Shareholders’ Agreement, which had previously been provided to the Tribunal on 22 February 2013.

40. On 28 February 2013, the Tribunal invited each Party to submit simultaneous comments on the PdL Shareholders' Agreement within 14 days, with replies to be submitted seven days after the comments.
41. On 6 March 2013, Claimant submitted a request for the Tribunal to decide on confidentiality of documents. On 11 March 2013, the Tribunal issued a procedural order concerning confidentiality of documents, and invited each Party to comment upon and propose any amendment to the wording of that order by 18 March 2013.
42. On 14 March 2013, Claimant submitted observations on the relevance of PdL's Shareholders' Agreement, and Respondent filed a request for the Tribunal to order Claimant to provide certain information, noting that it would submit its comments on PdL's Shareholders' Agreement in its Post-Hearing Brief.
43. On 18 March 2013, each Party submitted observations as requested by the Tribunal in its Procedural Order of 11 March 2013.
44. On 21 March 2013, the Parties replied to each other's communications of 14 March 2013.
45. On 28 March 2013, each Party submitted a Post-Hearing Brief.
46. On 11 April 2013, Respondent filed a request for the exclusion of evidence. This was followed by Claimant's observations on 23 April 2013. On 25 April 2013, the Tribunal decided not to grant Respondent's request.
47. On 29 April 2013, the Tribunal informed the Parties that it was ready to issue a confidentiality order, but thought it preferable that the Parties should agree upon one between themselves. The Parties were invited to state their views on this matter.
48. On 6 May 2013, Claimant informed the Tribunal that the Parties had been unable to agree on a proposed order, and submitted its proposed procedural order. On 7 May 2013, the Tribunal invited the Parties to submit any final comments on Claimant's proposed order by 10 May 2013. Also on 7 May 2013, Respondent submitted its proposed procedural order. On 10 May 2013, Claimant submitted its final comments on this matter. No further observations were received from Respondent.

49. On 23 May 2013, the Tribunal issued a Procedural Order concerning confidentiality of documents.
50. The Parties filed their submissions on costs on 30 September 2013.
51. The Members of the Tribunal have deliberated by various means of communication and have taken into consideration the Parties' entire submissions filed during this arbitration proceeding.

### III. FACTUAL BACKGROUND

#### (A) Preliminary Observations

52. The facts summarized hereafter are those considered and debated in the Parties' written pleadings and oral arguments.

#### (B) Argentina's Privatization Program

##### a) Background

53. During the 1980s, Argentina experienced widespread economic instability and a number of economic crises, large foreign debt, and hyperinflation. A number of governmental regulations were in place that restrained or prohibited foreign investments in Argentina.<sup>1</sup>

##### b) The Convertibility Regime and overview of the legal framework

54. Beginning in 1991, the Government of Argentina ("the Government"), enacted a variety of economic reforms to change its policy toward foreign investors, took steps to privatize many of its services, and created laws to encourage foreign investment.<sup>2</sup>
55. Law 23,928, known as the "Convertibility Law", became effective on 1 April 1991, and pegged the Argentine peso to the US dollar by providing that the Argentine peso was convertible by law at a rate of US\$ 1:AR \$ 1, and that the Argentine Central Bank was

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<sup>1</sup> Cl. Mem. ¶¶ 65-66, Cl. Rep. ¶ 36, Claimant's Post-Hearing Brief ("Cl. PHB") ¶ 19.

<sup>2</sup> Cl. Mem. ¶ 67, Cl. PHB ¶ 19.

obliged to sell dollars at that rate of exchange. The Convertibility Law also provided that contracts could be denominated and legally enforced in Argentina in US dollars.<sup>3</sup>

56. According to Claimant, Argentina promoted its reforms to potential foreign investors. It created an Undersecretariat of Investment as part of its Ministry of Economy and Public Works and Services to facilitate the entry of foreign investment, which prepared and distributed a publication in English entitled “Argentina, a Growing Country, A Compendium for Foreign Investors,” dated November 1993. Claimant further asserts that in this Compendium Argentina made several representations, amongst them, that the Convertibility Law, which was described in the Compendium as the “cornerstone of a very strict stabilization plan” had “virtually removed currency risk”,<sup>4</sup> and that, under Argentine law, “[c]ontracts can be denominated and legally enforced in foreign currencies.”<sup>5</sup> According to Hochtief, it relied upon the representations contained therein in making its decision to invest.<sup>6</sup>

57. On 9 April 1991, Argentina and Germany signed the Treaty. It entered into force on 8 November 1993. The Preamble of the Treaty provides that it is intended “to create favourable conditions for investments” and that it recognizes “that the encouragement and contractual protection of such investments are apt to stimulate private business initiative...”<sup>7</sup> Claimant cites the Executive Letter, dated 9 January 1992, through which Argentina sought legislative approval of the Treaty, which stated that “under the said agreements, the States undertake to maintain unchanged during the life thereof some rules on treatment of investments, with which they hope to establish an atmosphere of stability and trust to attract investments”.<sup>8</sup>

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<sup>3</sup> Cl. Mem. ¶ 68, Cl. Rep. ¶ 37, Cl. PHB ¶ 21. Convertibility Law, Art. 7 (Exh. CX-9).

<sup>4</sup> *Argentine Investment Compendium*, at 8-9 (Exh. CX-20).

<sup>5</sup> *Ibid.*, at 8 (emphasis added). See also Argentine Investment Update, at 1 (“Contracts may also be denominated and enforced in foreign exchange.”)(Exh. CX-22).

<sup>6</sup> Cl. Mem. ¶ 75.

<sup>7</sup> Cl. PHB ¶ 22. CLA 179, UNTS German – Argentine BIT.

<sup>8</sup> Cl. Mem. ¶ 90-93. Cl. PHB ¶¶ 22-23. Letter from Guido Di Tella, León C. Arslanián and Domingo F. Cavallo to the Honorable Congress of Argentina, 9 January 1992 (hereinafter the “Executive Letter”), at 2 – 4 (Exh. CX-12).

58. According to Claimant, highly placed Argentine officials, including Presidents, represented to Hochtief and other prospective investors that the Convertibility Law was permanent, and had also highlighted the protections afforded to investors by the German-Argentine BIT.<sup>9</sup>
59. On 21 May 1991, Argentina signed the ICSID Convention. The ICSID Convention entered into force in Argentina on 18 November 1994.<sup>10</sup>
60. In 1993, Argentina enacted a “Foreign Investment Act”.<sup>11</sup> This law permitted foreign investors to repatriate capital and remit earnings abroad at any time, and to invest in Argentina without registration or prior governmental approval, on the same terms as investors domiciled in Argentina. Investors were free to invest in Argentina through merger, acquisition or joint venture.<sup>12</sup>

(C) The Project, the Bidding Process and the Concession Contract

a) The Project and the Bidding Process

61. Bidding for the Project opened on 15 July 1997. The object of the concession was to construct, maintain, and operate a 608-meter long, four lane, cable-stayed bridge, 12 smaller bridges and embankments, and a toll road linking the cities of Rosario, in Santa Fe province, and Victoria, in Entre Ríos province, through a crossing over the Paraná river (the “Project”). This entailed the construction of 59.4 kilometers of roads.<sup>13</sup>

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<sup>9</sup> Cl. Mem. ¶ 78-86. Cl. PHB ¶ 20. Lommatzsch Stmt. ¶¶ 13-20. Saúl Carlos Menem, *Última Oportunidad para la Grandeza*, Actualidad Energética, Edición Latinoamérica, 27 November 1990 (Exh. CX-7).

<sup>10</sup> Cl. Mem. ¶ 103. Cl. PHB ¶ 24.

<sup>11</sup> Cl. Mem. ¶ 73, Cl. PHB ¶ 29. Ministry of Economy, *Argentine Investment Update*, Vol. 1, No. 1, at 8 – 9 (setting forth the Argentine Foreign Investment Act, as codified on 8 September 1993 by Executive Order 1852) (Exh. CX-22).

<sup>12</sup> Cl. Mem. ¶ 73, Cl. PHB ¶ 29. *Argentine Investment Update*, 8 (Exh. CX-22).

<sup>13</sup> Cl. Mem. ¶ 115, Cl. PHB ¶ 35. Lommatzsch Stmt. ¶ 29; National Executive Order No. 650/97 (Exh. CX-28). Resp. C-Mem. ¶ 90.

62. Argentina published the terms of the concession and solicited bids through the *Pliego de Bases y Condiciones del Concurso y sus Circulares* [Bidding Terms and Conditions, and Related Circular Letters] (the “Bidding Terms”).<sup>14</sup>
63. This was a subsidized concession, meaning that a substantial portion of the construction would be funded by State subsidies.<sup>15</sup> The Concession would be awarded to the project requesting the smallest total subsidy.<sup>16</sup>
64. Hochtief formed a Consortium together with Impregilo S.p.A., Techint Compañía Técnica Internacional S.A.C. I., Benito Roggio e Hijos S.A., and Iglys S.A. to bid for the Project (together “the Consortium”).<sup>17</sup>
65. There were several bidding processes. Argentina noted that because there was a technical tie in the second call for bids, the bidders were invited to improve their offers, and that the best bid would be the one requesting the lowest subsidy.<sup>18</sup>
66. The Consortium was the Successful Bidder, as indicated in Resolution MEyOSP No. 1039, dated 13 November 1997.<sup>19</sup>

b) The Concession Contract

67. The Concession Contract was signed on 28 January 1998<sup>20</sup>, and was ratified by Argentina by Decree No. 581/1998 of 14 May 1998.<sup>21</sup>

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<sup>14</sup> Cl. Rep. ¶ 27. Bidding Terms (Exh. CX-31).

<sup>15</sup> Cl. Mem.¶ 116. Resp. C-Mem. ¶ 91

<sup>16</sup> Resp. C-Mem. ¶ 91

<sup>17</sup> Cl. Mem.¶ 119. Resp. C-Mem. ¶ 102.

<sup>18</sup> Resp. C-Mem. ¶ 106.

<sup>19</sup> Cl. Mem.¶ 121. Resp. C-Mem. ¶ 108. Resp. PHB¶ 42. Resolution MEOySP No. 1039, 13 November 1997, Art. 2 (Exh. RA 121).

<sup>20</sup> Resp. C-Mem. ¶ 108.

<sup>21</sup> Cl. Mem.¶ 12. Cl. PHB ¶ 46. Ministry of Economy Resolution No. 581/98, 14 May 1998 (Exh. CX-35). Resp. C-Mem. ¶ 110. Decree No. 581/1998 dated 14 May 1998, section 1 (Exh. RA 124). Concession Contract (Exh. RA 12).

68. As required by Article 5 of the Concession Contract, the Consortium formed Puentes del Litoral S.A. (“PdL” or “the Concessionaire”), a local corporation with the sole purpose of performing under the Concession Contract, incorporated on 1 April 1998.<sup>22</sup>
69. The current members of the Consortium are the sole current shareholders of PdL. Hochtief is the largest shareholder of PdL, holding 26% of its shares. Impregilo is the second largest shareholder, holding 22% of shares in PdL directly and 4% through Iglys S.A., which it wholly controls. It is followed by Benito Roggio e Hijos S.A. (20%), Sideco Americana S.A. (19%), Iecsa S.A. (1%) and Techint Cía Técnica Internacional S.A. (8%). Sideco and Iecsa were not part of the original Consortium.<sup>23</sup>
70. On 17 June 1998, the Consortium members assigned all of their rights and obligations under the Concession Contract to PdL.<sup>24</sup> The legal consequences in the context of this claim of this assignment is a matter of dispute between the Parties.
71. On 14 September 1998, the Concessionaire signed the *Acta de Toma de Posesión*, and took possession of the Project site.<sup>25</sup>
72. The term of the Concession would be 25 years as from Taking of Possession.<sup>26</sup> The Concessionaire was to build, operate and maintain the road and bridges, and the rights and responsibilities would be transferred to Argentina at the end of the Concession.<sup>27</sup>
73. Respondent notes that in order to obtain the promised financing from the Republic of Argentina the Concessionaire had to comply with two duties within 90 days from the

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<sup>22</sup> Cl. Rep. ¶ 28, Respondent’s PHB. ¶ 43. Deed of Incorporation: Puentes del Litoral S.A., 1 April 1998 (Exh. RA 122).

<sup>23</sup> Cl. Mem.¶ 133. Lommatzsch Stmt. ¶ 47.

<sup>24</sup> Cl. Mem.¶ 131, Cl. Rep. ¶ 28, Cl. PHB ¶¶ 42, 51. FLT, § 5.2 (Exh. CX-32). *Acta Cesión*, 17 June 1998 (translation by counsel) (Exh. CX-36); *see also* Lommatzsch Stmt., ¶¶ 45, 46. Resp. C-Mem. ¶ 111; Resp. PHB ¶ 43. Rights and Duties Transfer Deed: —Impregilo S.p.A. and others to —Puentes del Litoral S.A., dated 17 June 1998 (Exh. RA 126). Decision on Jurisdiction ¶ 117.

<sup>25</sup> Cl. Mem. ¶ 145, Lommatzsch Stmt., ¶ 56, Resp. C-Mem. ¶ 113, Resp. PHB ¶ 44. Certificate of 14 September 1998 (Exh. RA 131).

<sup>26</sup> Resp. C-M ¶ 129. Concession Contract, section 4 (the date of taking of possession was 14 September 1998 (Record dated 14 September 1998, Record of Taking of Possession) (Exh. RA 131).

<sup>27</sup> Cl. Mem.¶ 125. Cl. PHB ¶ 47

execution of the Contract by Argentina: (i) the filing of Firm and Irrevocable Financing Agreements (“AFFIs” or “FIFAs”) to evidence the availability to the Concessionaire of the funds required to comply with its duties under the Concession Contract; and (ii) the filing of a stand-by letter of credit issued by a banking institution to secure that the amount indicated in sections 8.2 and 22.1.b of the Concession Contract (i.e., the difference between the projected total construction costs and the subsidy requested from the State, plus 20%) would be immediately transferred to the Government of Argentina on the demand so that the Government might, either directly or through third parties, complete the works.<sup>28</sup>

74. On 30 October 1998, the shareholders of PdL posted a standby letter of credit dated 15 October 1998 (the “Letter of Credit”) in favour of Argentina in the amount of US \$143.1 million (ARS 143,102,193) to guarantee PdL’s performance and financing for the Project. Hochtief’s share amounted to 26% or US \$37 million (ARS 37,206,570).<sup>29</sup>
75. Once construction was completed, the Concessionaire would be entitled to collect toll revenue, which would be the sole source of revenue for the Concessionaire under the Concession<sup>30</sup>. The basic toll rate would be equal to the peso equivalent of US\$ 7.40 for a 2-axle vehicle<sup>31</sup>. For other vehicles, the toll would be calculated as a multiple of this rate.<sup>32</sup> The toll was to be denominated in US dollars and adjusted periodically for inflation pursuant to the US Consumer Price Index.<sup>33</sup> In accordance with Law No. 23,696, which amended Law No. 17,520, the toll amount “was required to comply with two restrictions: (i) not to exceed the average economic value of the service rendered; and (ii) profitability was not to exceed a reasonable relation between the investments actually made by the concessionaire and the net profits obtained through the concession.”<sup>34</sup>

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<sup>28</sup> Resp. C-Mem. ¶ 141.

<sup>29</sup> Cl. Mem. ¶ 144, Cl. Rep. ¶ 50, Cl. PHB ¶ 55, Resp. C-Mem. ¶ 146.

<sup>30</sup> Cl. Mem. ¶ 125, Cl. PHB ¶ 39.

<sup>31</sup> Cl. Rep. ¶ 31.

<sup>32</sup> Cl. Mem. ¶¶ 126-127, Cl. PHB ¶¶ 47-48.

<sup>33</sup> Cl. Mem. ¶ 127, Cl. PHB ¶¶ 47-48.

<sup>34</sup> Resp. C-M ¶ 122.

76. The estimated volume of traffic was not guaranteed by Argentina. In accordance with Decree 650/97, “there will be no guaranteed minimum revenues or traffic volume. The concession will be for all purposes a risk contract, except for the subsidy to be granted to the Concessionaire.”<sup>35</sup>
77. The toll rate was calculated in US dollars, to be collected from users paying in Argentine pesos, and would be adjusted monthly based on the average buyer-seller exchange rate between dollars and pesos of the Banco de la Nación Argentina. Claimant expected that the exchange rate would generally be US \$1 to AR \$1.<sup>36</sup>

c) Capital Contributions and Project Funding

78. Under the terms of the Concession Contract, the funding of the Project was to come from three sources: (a) Argentina was to provide a subsidy (the “Subsidy”), which was the initial source of funding for the construction, to be paid in monthly tranches.<sup>37</sup> According to Respondent, the amount of the Subsidy accounted for more than 60% of the Project;<sup>38</sup> (b) PdL was to provide US\$ 30 million of its own capital (shareholders’ equity); and (c) the balance was to come from funds borrowed by PdL.<sup>39</sup> According to the Claimant, after several revisions, the final funding plan provided for approximately US \$234 million<sup>40</sup> of Subsidy, approximately US \$59 million of equity, and a loan from the Inter-American Development Bank (the “IDB”) in the amount of approximately US \$74 million.<sup>41</sup>
79. The Concession Contract also contemplated that the first funds to finance the Project would be those provided by Argentina through the Subsidy, and that once the Subsidy

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<sup>35</sup> Cl. PHB ¶ 53. Resp. C-M. ¶ 125. Decree No. 855/95 issued by the Argentine Executive, section 3, as amended by Decree No. 650/97 (Exh. RA 97); Villagi Stmt. ¶ 16.

<sup>36</sup> Cl. Mem. ¶ 127, Cl. PHB ¶ 48.

<sup>37</sup> Resp. PHB ¶ 58. Final Technical Document, Sec. 36.2 (Exh. CX-33).

<sup>38</sup> Resp. PHB ¶ 58.

<sup>39</sup> Cl. Mem. ¶¶ 137-138, Cl. PHB ¶¶ 52-54.

<sup>40</sup> Cl. Mem. ¶ 137.

<sup>41</sup> *Ibid.*, ¶ 137. CL. Rep. ¶ 55. Cl. PHB ¶¶ 52, 54.

was depleted, Concessionaire should continue the Project with its own funds (including third-party loans).<sup>42</sup>

80. According to Claimant, Hochtief made capital contributions to PdL, consistent with the requirements of the Concession Contract, of US \$594,930 in May 1998 and US \$1,355,070 in August 1998, for a total of US\$ 1,950,000, or 26% of the US \$ 7.5 million capital that PdL was required to have in place upon the start of the Project.<sup>43</sup> Hochtief made further contributions to PdL of US \$1,638,000 in March 2000 and US \$4,212,000 in July 2000, amounting to a total of US\$ 5,850,000, or 26% of the remaining balance of US \$22,500,000 in capital that PdL was required to raise. The other shareholders made similar equity contributions in proportion to their shareholdings. Also, in addition to the initial contribution of US \$30 million made by the PdL shareholders, in January 2001 PdL's shareholders made an additional equity investment of US \$13.65 million. Hochtief's 26% share of this additional equity was US \$3.549 million.<sup>44</sup>
81. On 31 July 2000, PdL entered into a loan agreement with the Inter-American Development Bank (the "IDB") in the amount of US \$73,751,000 (the "IDB loan").<sup>45</sup> However, disbursements were never made under this agreement. The reasons for that are disputed between the Parties.
82. According to Claimant, during the entire construction phase of the Project, Argentina was in default of its legal and contractual obligation to pay the Subsidy<sup>46</sup> in a timely manner, and those delays impacted the financing of the Project.<sup>47</sup> Claimant asserts that under the Concession Contract, PdL was to access third-party funding for the Project only after the Subsidy was paid, and that a condition precedent to the first disbursement of the IDB

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<sup>42</sup> Cl. Mem. ¶ 138. FTD at ¶ 36.2 (Exh. CX-33).

<sup>43</sup> Cl. Mem. ¶ 135. Lommatzsch Stmt. ¶ 50.

<sup>44</sup> Cl. Mem. ¶¶ 135-136, Cl. Rep. ¶ 34, Cl. PHB ¶ 50.

<sup>45</sup> Cl. Mem. ¶ 142. CL. Rep. ¶ 58. IDB Loan Agreement (Exh. CX-46).

<sup>46</sup> Cl. Mem. ¶¶ 150, Cl. PHB ¶ 59.

<sup>47</sup> Cl. PHB ¶ 59.

loan, scheduled for 1 March 2001, was that Argentina had paid no less than 90% of the Subsidy.<sup>48</sup>

83. Respondent, on the other hand, asserts that because the Concessionaire had failed to show the AFFIs, as an assurance that the Project would be carried out<sup>49</sup>, the Respondent temporarily suspended<sup>50</sup> the payment of the Subsidies until the AFFIs were presented.<sup>51</sup> Respondent further asserts that Argentina resumed payment of the Subsidy in September 2000.<sup>52</sup> The Parties dispute whether or not the IDB loan constitutes an AFFI.
84. According to Claimant, another of the conditions precedent to the disbursement of the IDB loan in March 2001 was the injection into PdL as equity of 40% of any loan disbursement until the total paid-in capital amounted to US\$ 59,039,000.<sup>53</sup> Claimant asserts that because Argentina had failed to pay the Subsidy in a timely manner, PdL's shareholders, including Hochtief, were forced to inject equity into PdL in January 2001, two months before it was scheduled.<sup>54</sup>
85. With regard to the IDB agreement, Respondent notes that it had been negotiated since May 1998 for a higher amount, but that it had been reduced twice because, among other factors, the IDB considered the Project "*extremely risky*" and a capital increase of PdL, that was required, never took place.<sup>55</sup>
86. On 20 October 2000, PdL and Argentina entered into an agreement, titled *Acta Acuerdo*, (the "October 20 Agreement"). This Agreement provided renegotiated deadlines for payment of the Subsidy, with the last payment due on 28 February 2001. According to

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<sup>48</sup> Cl. Mem. ¶¶ 152-153. Cl. Rep. ¶ 59. Cl. PHB ¶ 61.

<sup>49</sup> Resp. PHB ¶ 58. Final Technical Document, Sec. 22.1.b (Exh. CX-33).

<sup>50</sup> Resp. PHB ¶ 59, fn 77. Letter Secretariat of Public Works (SOP) 1020, 1 September 2000 (Exh. RA 149). Letter SOP 723/2000, 4 July 2000, p. 2 (Exh. RA 148).

<sup>51</sup> Resp. C-M ¶ 160. Respondent's PHB ¶ 59.

<sup>52</sup> Resp. C-M ¶ 162. Letter SOP No. 1020/2000 dated 1 September 2000 (Exh. RA 149).

<sup>53</sup> Cl. Mem. ¶ 154.

<sup>54</sup> *Ibid.*, ¶ 154.

<sup>55</sup> Resp. PHB ¶¶ 62-64. Memorandum from PdL to the Secretariat of Public Works, 13 April 1999, p. 1 (Exh. RA 139). Letter from IDB to PdL, 17 October 2001 (Exh. RA 286). Shareholders' Agreement, 11 April 2002 (Exh. RA 502). Letter from PdL to the Chief of the Cabinet of Ministers, 25 July 2001, p. 2 (Exh. RA 162).

the Claimant, compliance with this agreement would have permitted the first disbursement of the IDB loan scheduled for 1 March 2001.<sup>56</sup>

87. By letter of 26 February 2001, PdL asked the IDB for a six-month extension of the deadline<sup>57</sup>. Respondent's witness asserted that the IDB did not deny the extension.<sup>58</sup>
88. By letter of 14 May 2001, PdL notified the IDB that over 90% of the Subsidy had already been paid<sup>59</sup>.
89. On 27 August 2001, shortly before the six-month extension was to expire, PdL made a disbursement request to the IDB.<sup>60</sup>
90. By letter of 28 February 2002, the IDB informed PdL that there were various issues that prevented the disbursement.<sup>61</sup>
91. According to Respondent, the disbursements under the IDB loan were never made because there were many major conditions set forth in the IDB Agreement— which had nothing to do with the Subsidy— that remained unfulfilled until at least February 2002.<sup>62</sup> Respondent further asserts that PdL's impossibility of obtaining financing to complete the Project was prior to the economic emergency declared in January 2002.<sup>63</sup>
92. According to Respondent, the Project was essentially financed with funds provided by Argentina (the Subsidy), noting that the Argentine State also provided financial aid in order to finish the work.<sup>64</sup>

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<sup>56</sup> Cl. Mem. ¶ 156. Cl. Rep. ¶¶ 52-53. Cl. PHB ¶ 62. *Acta Acuerdo*, 20 October 2000, Agreement between PdL and Argentina resolving financial disputes (Exh. CX-137).

<sup>57</sup> Cl. PHB ¶ 63. Letter from PdL to the Inter-American Development Bank, 26 February 2001 (Exh. CX-166); Transcript Vol. 2, 454:3 – 455:10 (translated on the record).

<sup>58</sup> Tr. Hear. Merits, day 11, 2700:21-2701:3(Bes) (Spanish version).

<sup>59</sup> Resp. Rej. ¶ 95. Letter from PdL to the IDB, 14 May 2001 (Exh. RA 279). Resp. PHB. ¶ 68.

<sup>60</sup> Resp. PHB ¶ 67.

<sup>61</sup> Resp. PHB. ¶ 72. Letter from IDB to PdL, 28 February 2002 (Exh. CX-70).

<sup>62</sup> Resp. PHB ¶ 66. Tr. Hear. Merits, day 11, 2734:4-2737:11 (Bes) (Spanish version). Letter from PdL to the IDB, 25 October 2001 (Exh. RA 287).

<sup>63</sup> Resp. C-M ¶ 180. Aner Stmt. ¶ 6.

<sup>64</sup> Resp. PHB. ¶ 8. Resp. C-M ¶¶ 132-136 and 179-191 and Resp. Rej. ¶¶ 53-61, 113-118 and 122-145.

(D) The Argentine Crisis

93. The Respondent argues that since mid-1998, Argentina underwent a recession period and decrease of its domestic product that triggered an economic, financial, institutional, political and social crisis, which reached its peak in December 2001.<sup>65</sup> Respondent asserts that the crisis also had an impact on the provinces of Santa Fe and Entre Ríos.<sup>66</sup> The impact, duration and legal significance of that recession period is a matter of dispute between the Parties.
94. The Tribunal heard evidence from Dr. Bernardo Kliksberg, Professor Barry Eichengreen, Dr. Sebastian Edwards, as well as from the witnesses Ratti, Cipolla, Lamdany and Llorens, on various aspects of these issues. Dr. Kliksberg referred to the origins and social consequences of the crisis, how the crisis evolved, and the possible scenarios that could have unfolded if the measures subject matter of these proceeding had not been taken<sup>67</sup>. Professor Eichengreen expressed that the crisis was the result of a series of external factors that were difficult to predict.<sup>68</sup> Professor Nouriel Roubini, who was not cross-examined during the hearing, had referred in his report to the external shocks affecting the Argentine Republic since 1998, which caused exchange parity to become increasingly difficult to sustain. Dr. Edwards expressed his disagreement with Prof. Eichengreen and Prof. Roubini with respect to the impact of external shocks, and asserted that the analysis that both have provided “is incomplete and thus incorrect.”<sup>69</sup> According to Dr. Edwards, “there [were] a number of ways of dealing with [the crisis], .that did not require pesification”<sup>70</sup>. Dr. Edwards asserts that “Argentina contributed significantly to the crisis by these mistakes of omission [...]”<sup>71</sup>.

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<sup>65</sup> Cl. Mem. ¶¶ 16-73. See in general Tr. Merits, Day 10, 2193:15-2235:3 (English version).

<sup>66</sup> Resp. C-M. ¶¶ 74-85.

<sup>67</sup> Resp. Rej. ¶ 295. Kliksberg Report, 6 March 2012, and Supplementary Report, 3 September 2012.

<sup>68</sup> Tr. Merits, Day 9, 2067:16-2070:09 (English version). In general, Eichengreen Report, 3 September 2012.

<sup>69</sup> Tr. Merits, Day 6, 1280:4-6 (English version).

<sup>70</sup> Tr. Merits, Day 6, 1284:7-8 (Lamdany) (English version).

<sup>71</sup> Tr. Merits, Day 6, 1279:19-20 (English version).

(E) The Law 25,561 and its effects

95. On 6 January 2002, Argentina passed Law 25,561, the Public Emergency and Foreign Exchange System Reform Law (“the Emergency Law” or “Law 25,561”).<sup>72</sup>
96. The Emergency Law abrogated several provisions of the Convertibility Law.<sup>73</sup>
97. Respondent asserts that Argentina had to adopt certain measures in order to attempt to remedy the worst economic, social and institutional crisis in the history of the country.<sup>74</sup>
98. The Emergency Law a) set forth the conversion into Argentine pesos of all obligations expressed in foreign currency that were connected with the financial system; b) abrogated adjustment clauses in US dollars or other foreign currencies and indexation clauses based on price indexes of other countries, as well as any other indexation mechanism provided for in the contracts entered into by the Government under public law; c) with regard to contracts between private persons not related to the financial system, it provided that—all considerations [would] be paid in Argentine pesos at an exchange rate of ONE ARGENTINE PESO (ARS 1) = ONE US DOLLAR (USD 1), as payment for the amount to be ultimately agreed upon by the parties, or such amount as might be determined through court proceedings if the parties failed to reach an agreement. The Emergency Law additionally provided for the renegotiation of both private and public contracts in order to adapt them to the new foreign exchange system.<sup>75</sup>
99. Days later, by Decree No. 214/02, Argentina additionally ordered the conversion into Argentine pesos of—all the obligations to pay a sum of money, whatever their cause or origin—whether arising from court proceedings or otherwise—expressed in US dollars or other foreign currencies, existing when the Emergency Law was enacted and which have not yet been converted into Argentine pesos.<sup>76</sup>

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<sup>72</sup> Cl. Mem. ¶¶ 27, 185. Law 25,561, 6 January 2002 (“Emergency Law”) (Exh. CX-63).

<sup>73</sup> Cl. Mem. ¶¶ 28, 189. Cl. Rep. ¶ 43. Resp. C-Mem. ¶ 25.

<sup>74</sup> Resp. C-Mem. ¶1.

<sup>75</sup> *Ibid.*, ¶ 28. Cl. Mem. ¶¶ 189, 191. Emergency Law, at 3-4 (Exh. CX-63).

<sup>76</sup> Resp. C-Mem. ¶ 29. Decree No. 214/02, 3 February 2002 (Exh. RA 194).

100. As a result, PdL's contractual rights to set the basic toll rate in US dollars for its 25-year Concession and to have the rate adjusted for inflation pursuant to the U.S. Consumer Price Index, were eliminated.<sup>77</sup>
101. According to the Claimant, because of the impact of the Emergency Law on the toll revenues under the Concession Contract, the Project was no longer viable and IDB refused to continue to negotiate the loan. By letter of 28 February 2002, the IDB informed PdL of its decision to cease discussion concerning the loan.<sup>78</sup>
- (F) Suspension of Constructions, Project Delay and Additional Capital Infusions by Hochtief ("inter-company loans") (2002), Argentina Provides Financing (February 2003 Loan)
102. According to Claimant, at the time the Emergency Law was enacted, the Project was approximately 93% complete, but the bridge could not be left incomplete and the work suspended until the structure was complete, because it could collapse. Hochtief and Impregilo had therefore to inject additional funds, into PdL by means of inter-company loans. Hochtief's one-half share of these loans was US\$ 5.4 million in 2002. The bridge span was closed on 5 February 2002.<sup>79</sup>
103. On 18 January 2002, PdL requested that in light of the impact of the Emergency Law on the Project, Argentina provide PdL with an advance on compensation. Since there was no response from Argentina, in early March 2002, PdL's Board decided to suspend construction on the Project.<sup>80</sup>
104. On 22 March 2002, PdL again sought assistance from Argentina in financing the Project because, according to Claimant, the Emergency Law had made the Project unviable and eliminated PdL's ability to obtain third-party financing.<sup>81</sup>

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<sup>77</sup> Cl. Mem. ¶ 192, 202.

<sup>78</sup> Cl. Mem. ¶ 204. Lommatzsch Stmt. ¶ 88, n. 4; 28 February 2002 letter IDB (Exh. CX-70).

<sup>79</sup> Cl. Mem. ¶¶ 205-207.

<sup>80</sup> *Ibid.*, ¶¶ 209-211.

<sup>81</sup> *Ibid.*, ¶ 214. Lommatzsch Stmt. ¶ 100; PdL's 22 March 2002 letter (Exh. CX-72).

105. On 22 October 2002, the Argentine Republic and the Provinces of Santa Fe and Entre Ríos entered into an Agreement as an effort to complete the Project. It was agreed that the Argentine Ministry of Economy was to provide the funds required to such effect.<sup>82</sup>
106. By letter No. 962/2002, dated 26 November 2002, the Secretariat of Public Works pledged to provide PdL with assistance in funding for the completion of the Project, in the form of an advance against future compensation due to PdL because of the pesification of the US dollar toll provided for in the Contract.<sup>83</sup>
107. The text of the Financial Aid Agreement was approved by Decree No. 172 dated 3 February 2003, in the amount of AR \$51,648,352, granted by the Road Infrastructure Fund.<sup>84</sup> Claimant asserts that this was just enough to complete construction and open the Project to traffic.<sup>85</sup> According to Claimant, PdL was advised that if it did not agree to the terms of the “Financial Aid” Loan, Argentina would declare PdL to be in default, cancel the Concession resulting in a drawdown of the Letter of Credit in place.<sup>86</sup>
108. On 21 February 2003, the Argentine Ministry of Economy and PdL signed the “Financial Aid” Loan (the “February 21 Agreement” or “Financial Aid Agreement”). Under Section 3 of the February 21 Agreement, PdL agreed to secure repayment of the amount of the financial aid, by assigning its toll collection rights to the *Fondo Fiduciario de Infraestructura Vial*, from the date of commercial operation until the entire amount has been repaid, including financial expenses, net of the Concession’s operation and maintenance expenses.<sup>87</sup> Respondent notes that the assignment of the toll collection rights was contemplated by section 33 of the Concession Contract.<sup>88</sup> Respondent asserts that the

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<sup>82</sup> Resp. C-M ¶ 182. Agreement executed by and between the Argentine State and the Provinces of Entre Ríos and Santa Fe, 22 October 2002 (Exh. RA 213).

<sup>83</sup> Cl. Mem. ¶ 218. Secretariat of Public Works’ 26 November 2002 letter (Exh. CX-76).

<sup>84</sup> Resp. C-M ¶ 185.

<sup>85</sup> Cl. Mem. ¶ 219. Lommatzsch Stmt. ¶ 109; PdL’s 21 February 2003 letter (Exh. CX-78).

<sup>86</sup> Cl. Mem. ¶ 220. Lommatzsch Stmt. ¶¶ 112-114.

<sup>87</sup> Cl. Mem. ¶ 222. Lommatzsch Stmt. ¶ 115. Resp. C-M. ¶ 186. Financial Aid Agreement, section 3 (Exh. CX-78).

<sup>88</sup> Resp. C-M. ¶ 186. Concession Contract, section 33 (Exh. RA 12).

Argentine Government made a significant effort to finance the completion of the Project, even if the Concessionaire was exclusively responsible for such financial resources.<sup>89</sup>

109. PdL received the initial tranche of funds under the February 21 Agreement on 28 February 2003, and resumed work to complete the Project.<sup>90</sup> The Project was opened to traffic on 23 May 2003.<sup>91</sup>
110. Claimant asserts that Argentina had only paid PdL AR \$39.6 million from the agreed AR \$52 million loan, when Argentina abruptly stopped disbursements under the February 21 Agreement. According to Argentina, it stopped payment because a subcontractor, who had worked on the Project, made a claim against PdL for unpaid work, to which PdL replied that it had been unable to pay the subcontractor because of the loss of the third party funding resulting from Argentina's failure to timely pay the Subsidy.<sup>92</sup>
111. Claimant claims that because Argentina failed to make all required payments under the February 21 Agreement in a timely fashion, Hochtief and Impregilo were forced to make further inter-company loans to PdL to complete the Project, not called for in the Contract. Hochtief's share of the contribution made in 2003 was of US\$ 4,172,565.<sup>93</sup>
112. In early July 2003, PdL received Public Works Resolution 14 dated 30 June 2003, from the Secretariat of Public Works ("Resolution 14"), that changed the terms of the February 21 Agreement. It modified the applicable interest rate; interest was to be compounded on a daily basis; maintenance and operation expenses were pesified and would be deemed equal to the pesified amount of the projected costs in 1997; collections under the loan would be made on a daily basis; amounts that PdL could not pay would be added to the principal amount of the loan on a daily basis. According to Claimant, after one year of

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<sup>89</sup> Resp. C-M. ¶ 190.

<sup>90</sup> Cl. Mem. ¶ 223. Lommatzsch Stmt. ¶ 116

<sup>91</sup> Cl. Mem. ¶ 224

<sup>92</sup> Cl. Mem. ¶ 225. Lommatzsch Stmt. ¶ 119

<sup>93</sup> Cl. Mem. ¶ 226. Lommatzsch Stmt. ¶ 120

daily payments, and daily compounding and capitalization of interest, the principal balance of the loan grew to over AR \$41 million.<sup>94</sup>

113. On 26 August 2003, PdL formally appealed Resolution 14, and requested that operation of Resolution 14 be stayed pending resolution of the appeal. According to Claimant, as of PdL's insolvency proceeding in April 2007, PdL was forced to comply with Resolution 14 since neither the appeal nor the stay were acted upon by the Public Administration.<sup>95</sup>

(G) Further Capital infusions by Hochtief (2004-2005) and Total Loans and Capital Infusions

114. According to Claimant, because of the shortfall resulting from the daily collection of loan interest, and the reduced allowance for maintenance and operating expenses, PdL had not had funds to maintain the Project or pay daily expenses. As a result, Hochtief and Impregilo had to make further inter-company loans throughout 2004 and 2005 to fund part of those expenses.<sup>96</sup>

115. Claimant asserts that the total of Hochtief's equity contributions, inter-company loans and accrued interest on those loans up to 31 December 2009 was US \$117.8 million.<sup>97</sup>

(H) Renegotiations and PdL's Insolvency Proceedings (Concurso Preventivo)

116. Section 9 of the Emergency Law and its related decree ordered the renegotiation of all public works contracts in order to mitigate the detrimental effects of the currency devaluation and mandated that contracts be renegotiated within 120 days of 1 March 2001. The Argentine Congress has subsequently ratified and amended the general stipulations of Law 25,561<sup>98</sup>.

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<sup>94</sup> Cl. Mem. ¶¶ 227-230. Lommatzsch Stmt. ¶¶ 122-124. Resolution 14 of 30 June 2003 (Exh. CX-79).

<sup>95</sup> Cl. Mem. ¶ 231. Lommatzsch Stmt. ¶¶ 125-127.

<sup>96</sup> Cl. Mem. ¶ 232. Cl. Rep. ¶ 71. Lommatzsch Stmt. ¶ 128.

<sup>97</sup> Cl. Mem. ¶ 234. LECG Report, ¶¶ 6, 37, 62, 83; Tables V and IX.

<sup>98</sup> Law 25.561, at § 9 (Exh. CX-63).

117. By Decree No. 311/03 the *Unidad de Renegociación y Análisis de Contratos de Servicios Públicos* (“UNIREN”) was created.<sup>99</sup> UNIREN is the agency charged with coordinating the renegotiation proceedings provided for by Article 9 of the Emergency Law, Law 25,561.
118. On 16 May 2006, UNIREN and PdL subscribed the first Letter of Understanding (*Carta de Entendimiento*) (“the May 2006 CdE” or “First Letter of Understanding”).<sup>100</sup> Claimant notes that Argentina’s approval under the May 2006 CdE was conditioned on a public hearing and other procedures<sup>101</sup>, which Argentina never attempted to hold.<sup>102</sup> Respondent asserts that the public hearing requirement was in compliance with the regulations ordering the renegotiation process<sup>103</sup>. Respondent notes that the May 2006 CdE modified the conditions for reimbursement of the February 21 Financial Aid Agreement,<sup>104</sup> and asserts that the validity of the May 2006 CdE was subject to the payment of PdL’s debt to the subcontractor.<sup>105</sup>
119. A second *Carta de Entendimiento* was sent by UNIREN on 12 February 2007 (“the February 2007 CdE” or “Second Letter of Understanding”)<sup>106</sup>. This revised letter also required, as a precondition to the renegotiations, for PdL to waive the rights against Argentina of two-thirds of its shareholders under international investment law, including the BIT, and for PdL to indemnify Argentina for any such claims brought against Argentina by PdL shareholders. According to Claimant, although the February 2007 CdE was less favorable, and PdL had indicated that it could accept Argentina’s proposal,

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<sup>99</sup> Resp. C-M. ¶ 195. Decree No. 311/03 issued by the Argentine Executive (Exh. RA 222).

<sup>100</sup> Cl. Mem. ¶ 242. May 2006 CdE (Exh. CX-94). Resp. C-M. ¶ 200. Lamdany Stmt. ¶¶ 45-47. Respondent’s PHB ¶ 143. Resp. Rej. ¶ 152.

<sup>101</sup> Resp. Rej ¶ 149.

<sup>102</sup> Cl. Mem. ¶ 242

<sup>103</sup> Resp. Rej. ¶ 149. Section 9.b of Presidential Decree No. 311/2003 provides: —The execution of [integral or partial contract renegotiation] agreements must be preceded by a public hearing which helps users become involved in the decision-making process, in the form of the Unit of Renegotiation and Analysis of Public Service Contracts, to determine the procedures and mechanisms fit to implement such public hearing. (Exh. RA 222).

<sup>104</sup> Resp. C-M. ¶ 202. Letter of Understanding of 16 May 2006, Nos. five and six (Exh. CX-94). Lamdany Stmt. ¶¶ 48-49.

<sup>105</sup> Resp. PHB ¶ 143.

<sup>106</sup> Cl. Mem. ¶ 244. Cl. Rep. ¶ 85. February 2007 CdE (Exh. CX-100). Resp. C-M. ¶ 204.

Argentina nevertheless failed to implement the plan.<sup>107</sup> Respondent confirmed that the February 2007 CdE was executed on 27 February 2007,<sup>108</sup> stating that it was more advantageous to the Concessionaire than the previous one.<sup>109</sup>

120. On 24 April 2007, PdL received notice that one of its subcontractors, the joint venture of Boskalis-Ballast Nedam Baggeren, had initiated bankruptcy proceedings against PdL as a result of an unpaid arbitral award.<sup>110</sup>
121. On 2 May 2007, PdL initiated insolvency proceedings, as previously approved on 26 April 2007 by its board of directors<sup>111</sup>, to avoid the liquidation of PdL and the loss of the Concession.<sup>112</sup> The Court granted PdL's insolvency petition on 22 May 2007, which was ratified by PdL's shareholders on 24 May 2007.<sup>113</sup> Claimant notes that the viability of the insolvency payment scheme would depend on the Government's renegotiation of the Concession Contract.<sup>114</sup>
122. By letter of 10 May 2007, UNIREN notified PdL that the February 2007 CdE was no longer effective, in view of the petition that had been filed by PdL to commence an insolvency proceeding.<sup>115</sup>

(I) Ballast Nedam

123. Ballast Nedam Baggeren B.V. together with Boskalis International B.V. ("Boskalis") formed a joint venture (the "Joint Venture") that entered into a dredging subcontract with

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<sup>107</sup> Cl. Mem. ¶ 244.

<sup>108</sup> Resp. C-M. ¶ 204. Resp. PHB ¶ 144. Letter of Understanding of 27 February 2007 (Exh. CX-100).

<sup>109</sup> Resp. PHB ¶ 144.

<sup>110</sup> Cl. Mem. ¶251. Cl. PHB ¶ 96.

<sup>111</sup> Resp. PHB ¶ 147. Exh. RA 320.

<sup>112</sup> Cl. Mem. ¶ 251. Lommatzsch Stmt. ¶¶ 159-161. Cl. PHB ¶ 96. Concession Contract, section 30.1 (Exh. RA 12).

<sup>113</sup> Cl. Mem. ¶ 251.

<sup>114</sup> Cl. PHB ¶ 97.

<sup>115</sup> Resp. C-M. ¶¶ 205-206. Resp. Rej. ¶ 163. Resp. PHB ¶ 147. Letter from UNIREN No. 262/07 of 10 May 2007 (Exh. RA 232).

PdL dated 18 December 1998<sup>116</sup>. Respondent notes that the Joint Venture was PdL’s main subcontractor in the Project, and that it played a prominent role at critical moments of the Concession Contract<sup>117</sup>.

124. Boskalis and Ballast Nedam Baggerem commenced an ICC arbitration on 15 January 2002 on account of PdL’s inability to pay the Joint Venture for dredging services,<sup>118</sup> and a bankruptcy action against PdL in December 2005 due to the ICC award going unpaid.<sup>119</sup>
125. Hochtief confirmed that it “did at one point hold a non-controlling, minority interest in Ballast Nedam N.V., the parent company of Ballast Nedam Baggerem”. The consequences thereof, if any, in respect of the issue of causation of PdL’s claimed losses is a matter of dispute between the Parties.
126. According to Claimant, it was not involved in the ownership or management of Ballast Nedam Baggerem when the Joint Venture commenced ICC arbitration. Hochtief asserts that in November of 2001, Ballast Nedam Baggerem merged with a subsidiary of Hollandsche Beton Groep N.V. (“HBG”), to form a new company, Ballast HAM Dredging (“BHD”). Claimant further asserts that Ballast Nedam sold its interest in BHD in late 2002<sup>120</sup>, and that Hochtief had no interest in Ballast Nedam after 2004.<sup>121</sup> Claimant concludes that Hochtief’s one-time ownership in Ballast Nedam has no relevance to any claim or defense in this proceeding.<sup>122</sup>

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<sup>116</sup> Cl. PHB. ¶ 303. *Contrato de Locación de Obra*, 18 December 1998 (Contract for Works between Puentes del Litoral and the Joint Venture Boskalis – Ballast Nedam) (Exh. RA 497). *Contrato de Unión Transitoria de Empresas*, 10 June 1998 (Joint Venture Agreement between Boskalis International bv Sucursal Argentina and Ballast Nedam Baggerem bv Sucursal Argentina) (Exh. RA 494).

<sup>117</sup> Resp. PHB ¶ 100.

<sup>118</sup> Cl. PHB ¶¶ 303, 305.

<sup>119</sup> *Ibid.*, ¶ 306.

<sup>120</sup> *Ibid.*, ¶ 305. Ballast Nedam Annual Report, 2002, at 4, 15, 17, 20, 31 – 32 (Exh. RA 495.5); Ballast Nedam Annual Report, 2003, at 43, 66 (Exh. RA 495.6).

<sup>121</sup> Cl. PHB ¶¶ 305-306. HT\_01156, Hochtief Annual Report (2004), at 59. According to Claimant, this sale, and the retirement from the Ballast Nedam board of two individuals appointed by Hochtief, is also reported in Ballast Nedam’s annual report for 2004 (Exh. RA 495.7 at 5, 12).

<sup>122</sup> Cl. PHB ¶ 307.

127. Respondent notes that it only learnt about Hochtief's participation in Ballast Nedam during the examination of a witness on the fifth day of the hearing on the merits, and accuses Claimant of having concealed such relationship, as well as of depriving the Tribunal and Respondent of the possibility of analysing any evidence in relation to Hochtief's participation in the decision-making process of Ballast Nedam.<sup>123</sup>
128. According to Respondent, Claimant failed to meet certain obligations concerning transparency and conflicting interests during the selection processes conducted by the Concessionaire.<sup>124</sup>
129. Respondent notes that PdL contracted the debt with the Joint Venture, at the beginning of the Concession, while Hochtief was still a shareholder of both companies, and that such debt was a fundamental cause for the difficulties experienced by PdL's Concession, that culminated with the Joint Venture's claim before the ICC, and the subsequent bankruptcy petition against PdL.<sup>125</sup>
130. Respondent notes that the IDB was not notified of Hochtief's shareholding in Ballast Nedam either,<sup>126</sup> even though in various letters from PdL to the IDB, reference had been made to "some subcontractors hav[ing] announced their intention to file a petition for bankruptcy against PdL";<sup>127</sup> to the need of the financing resources from the IDB to "stop the filing of lawsuits against it by subcontractors."<sup>128</sup> Respondent further notes that in its letter to the IDB of 15 November 2001, PdL had mentioned owing more than \$60 million to its subcontractors and providers, but had still failed to inform that such debt had been incurred with a related company<sup>129</sup>.
131. According to Respondent, the few documents submitted by Hochtief show that its influence on Ballast Nedam was decisive in the decision-making of that company, from

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<sup>123</sup> Resp. PHB ¶¶ 99, 115.

<sup>124</sup> *Ibid.*, ¶¶ 101-103.

<sup>125</sup> *Ibid.*, ¶¶ 110-112.

<sup>126</sup> *Ibid.*, ¶ 105.

<sup>127</sup> *Ibid.*, ¶ 124. Letter from PdL to the IDB, 4 October 2001, p. 2 (Martín Bes Stmt. Exh. MB 4).

<sup>128</sup> Resp. PHB ¶ 124. Letter from PdL to the IDB, 15 November 2001, p. 1 (Exh. RA 283).

<sup>129</sup> Resp. PHB ¶ 125. Letter from PdL to the IDB, 15 November 2001, p. 2 (Exh. RA 283).

1993 until at least mid-2004, when it held almost 50% of the shares and had nearly 48% of the votes of Ballast Nedam.<sup>130</sup>

132. On 28 January 2003, the Joint Venture sought an order of attachment of PdL's accounts in connection with the claim filed against PdL for unpaid sums.<sup>131</sup> According to Respondent, this precluded the disbursements relating to certificates 5 to 13 provided for in the Financial Aid Agreement.<sup>132</sup>

(J) The Transitory Agreements

133. As part of the renegotiation process, in December 2009, a First Transitory Agreement was reached ("the December 2009 Transitory Agreement"), which was signed by PdL on December 17, 2009<sup>133</sup>. Claimant notes that this agreement could be terminated by either party if it was not implemented within 60 days (i.e. by 15 February 2010), and that, like the May 2006 and February 2007 CdEs, the December 2009 Transitory Agreement required PdL to waive the rights against Argentina of two-thirds of its shareholders, but it did not contain an indemnification requirement. According to Claimant, the December 2009 Transitory Agreement was never implemented.<sup>134</sup>
134. The December 2009 Transitory Agreement contemplated a transitory modification of the rate, as well as several aspects of the contract binding the parties, taking into account the PdL's insolvency proceedings.<sup>135</sup> The execution of the December 2009 Transitory Agreement was approved by PdL's shareholders' and Board of Directors. Respondent asserts that "UNIREN included in the records the letters issued by the company and its shareholders representing more than two thirds (2/3) of the capital stock, as well as

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<sup>130</sup> Resp. PHB ¶ 120. Shareholders' Agreement of Ballast Nedam B.V., p. 6. (Exh. RA 503).

<sup>131</sup> Resp. PHB ¶ 137.

<sup>132</sup> *Ibid.*, ¶¶ 137, 152.

<sup>133</sup> Cl. Rep. ¶ 88. Resp. Rej. ¶ 167.

<sup>134</sup> Cl. Mem. ¶¶ 245-246.

<sup>135</sup> Resp. C-M. ¶ 210.

certified copies of the registry of shareholders' and the minutes of the Board of Directors whereby the said company approved the execution of the Transitory Agreement".<sup>136</sup>

135. Upon approval of PdL's creditors' agreement (30 December 2009), a Second Transitory Agreement was agreed upon and executed by PdL on 14 June 2010<sup>137</sup> ("the June 2010 Transitory Agreement").
136. A public hearing took place in the city of Victoria on 17 June 2011, where a petition to amend the agreement's transitional tariff regime was debated.<sup>138</sup>
137. This amendment resulted in a Third Transitory Agreement, (the "October 2011 Transitory Agreement"), signed by PdL on 13 October 2011.<sup>139</sup> Such agreement was submitted to the *Procuración del Tesoro de la Nación* for an opinion, as required by the applicable regulations.<sup>140</sup>
138. Pursuant to Opinion No. 40 of 29 February 2012, certain adjustments were made to the agreement, and UNIREN presented a Fourth Transitory Agreement to PdL in March 2012, which PdL signed on 6 March 2012. (the "March 2012 Transitory Agreement")<sup>141</sup>.
139. The March 2012 Transitory Agreement was signed by the decision of the majority of PdL's shareholders<sup>142</sup>.
140. In this context, reference has been made to PdL's Shareholders' Agreements of 15 May 1999 ("the 1999 Shareholders' Agreement")<sup>143</sup>, and of 11 April 2002 ("the 2002 Shareholders' Agreement")<sup>144</sup>.

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<sup>136</sup> *Ibid.*, ¶ 211.

<sup>137</sup> Resp. Rej. ¶ 169. Second Transitory Agreement, 14 June 2010 (Exh. CX-150).

<sup>138</sup> Resp. Rej. ¶ 170.

<sup>139</sup> Cl. Rep. ¶ 90. Resp. Rej. ¶ 171. Lommatzsch Supp. Stmt., ¶ 15. Third Transitory Agreement, October 2011 (Exh. CX-156).

<sup>140</sup> Resp. Rej. ¶ 171. Cl. Rep. ¶ 90.

<sup>141</sup> Cl. Rep. ¶ 91. Lommatzsch Supp. Stmt., ¶ 18. Fourth Transitory Agreement, March 2012 (Exh. CX-160). As the March 2012 Transitory Agreement is in Spanish, Claimant submitted an English translation that was added to the record as Exh. CX-160(b).

<sup>142</sup> Resp. PHB ¶¶ 169-171.

141. The relevance of the March 2012 Transitory Agreement and of PdL's Shareholders' Agreements is a matter of dispute between the Parties. The Parties' respective experts, at request of the Tribunal<sup>145</sup>, addressed the corporate governance issue concerning the extent to which Hochtief's rights or interests in PdL could lawfully be removed, compromised, or otherwise materially and adversely affected by a decision of the majority shareholders in PdL and of any remedies available under Argentine law for the protection of the interests of minority shareholders<sup>146</sup>.
142. Claimant contends that the Shareholders' Agreements have no bearing, as a legal or factual matter, on the Tribunal's determination of Hochtief's Treaty claims or the damages that should be awarded to Hochtief.<sup>147</sup> According to Claimant, Hochtief has not waived any claims, and PdL has not compromised, settled or waived any of Hochtief's claims in the March 2012 Transitory Agreement.<sup>148</sup>
143. Respondent claims that by PdL signing the March 2012 Transitory Agreement, PdL accepted, by the majority of its shareholders, the validity of one of the two measures to which this case relates, the Emergency Law.<sup>149</sup>
144. Claimant asserts that Respondent has failed to implement any of the transitory agreements PdL entered into, and that there has been no comprehensive renegotiation of the Concession Contract.<sup>150</sup> Claimant further asserts that the basic toll rate remains frozen at the pesified contract rate (where they stood since the Project opened to traffic on 23 May 2013).<sup>151</sup>

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<sup>143</sup> Shareholders' Agreement, 25 May 1999 (Exh. RA 501).

<sup>144</sup> Shareholders' Agreement, 11 April 2002. (Exh. RA 502).

<sup>145</sup> Tribunal's letter of 7 January 2013.

<sup>146</sup> Nissen Supp. Report, Mata Second Supp. Report, and Mairal Expert Opinion of 1 February 2013.

<sup>147</sup> Claimant's letter of 14 March 2013 ¶ 1.

<sup>148</sup> Cl. PHB ¶¶ 276-279. Claimant's letter of 14 March 2013 ¶ 11.

<sup>149</sup> Resp. PHB ¶¶ 169, 171.

<sup>150</sup> *Ibid.*, ¶ 276.

<sup>151</sup> Cl. Mem. ¶ 247. Cl. Rep. ¶ 92. Lommatzsch Stmt. ¶ 157.

(K) Insurance provided by the German Government

145. Hochtief received an indemnification under the German Government's Federal Guarantees for Direct Investments in Foreign Countries program (Guarantee Policies No. GKE 3947 of 20 September 1999 and No. GKE 4151 of 6 September 2001), against political risks<sup>152</sup>, in the amount of EUR 11,359,773.20 relating to Hochtief's capital contributions to PdL.<sup>153</sup>
146. The grounds for requesting compensation under these guarantees were the same as those of this arbitration: the adoption of regulatory measures implemented by the Argentine Republic in the beginning of 2002 in connection with the Emergency Law,<sup>154</sup> the non-disbursement of the IDB loan,<sup>155</sup> and the financial aid for 2003.<sup>156</sup>
147. The relevance of these payments to this proceeding is a matter of dispute between the Parties.

#### IV. JURISDICTION AND ADMISSIBILITY

148. In its Decision on Jurisdiction dated 24 October 2011, the Tribunal decided by a majority:

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

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

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

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<sup>152</sup> Resp. PHB ¶ 233.

<sup>153</sup> Cl. PHB ¶ 299. *See* Letter from PriceWaterhouse Coopers to Hochtief, 7 December 2007 (agreeing to pay indemnification in the amount of approximately EUR 11.4 million relating to Hochtief's capital contributions to PdL) (Exh. CX-142). Resp. PHB ¶ 233.

<sup>154</sup> Resp. PHB ¶ 233. Hochtief's Request for Compensation of 5 March 2007, pp. 2 and 6 (Exh. RA 358) and Annexes to the Request for Compensation (Exh. RA 473).

<sup>155</sup> Resp. PHB ¶ 233. Hochtief's Request for Compensation of 5 March 2007, p. 2 (Exh. RA 358)

<sup>156</sup> Resp. PHB ¶ 233. Hochtief's Request for Compensation of 5 March 2007, p. 3 (Exh. RA 358)

149. The reasoning of the majority in that Decision distinguished between questions of jurisdiction and questions of admissibility.<sup>157</sup> The Decision settled the question of jurisdiction in the present case, but did not address questions of the admissibility of each element of the claims except in so far as that was necessary in the course of the analysis of the question of jurisdiction. Accordingly, this Decision on Liability begins with an analysis of the challenges that were raised by Respondent to the admissibility of Claimant's case. Those objections fall under five broad headings: (A) matters arising from the separate personality of PdL; (B) temporal limitations upon the claims; (C) Claimant's recovery under political risk insurance; (D) Claimant's claims *qua* creditor; and (E) the 'Ballast Nedam' arguments.

(A) The 'PdL Questions'

150. Respondent raised three arguments that bear upon the admissibility of the claims, and which are rooted in the relationship between Claimant and PdL. They flow from Respondent's contention that this case is based upon Claimant's allegations that Respondent acted unlawfully towards PdL as the holder of the Concession and, in essence, that PdL stood between Claimant and Respondent.

151. Specifically, Respondent argued: (i) that the Tribunal should not admit a claim made by Claimant in respect of rights that belong to PdL;<sup>158</sup> (ii) that the Tribunal should not admit a claim made by Claimant in respect of measures that were consented to by PdL;<sup>159</sup> and (iii) that a ruling in favour of Claimant would, in light of the agreement reached between Respondent and PdL, lead either to double recovery or to recovery by a shareholder (Claimant) at the expense of the company (PdL) and its other creditors and shareholders.<sup>160</sup>

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<sup>157</sup> Decision on Jurisdiction, ¶ 90 ff.

<sup>158</sup> Resp. Rej. ¶¶ 18-24.

<sup>159</sup> Resp. PHB ¶ 1.

<sup>160</sup> *Ibid.*, ¶ 2.

152. Before turning to these three specific arguments, the Tribunal will set out its analysis of the relationship between PdL's rights and Claimant's rights.

a) PdL's Rights and Hochtief's Rights

153. The Tribunal has already decided in the context of its Decision on Jurisdiction that Hochtief is an investor. It is a shareholder in PdL, and it can bring a claim for any breach of the terms of the Treaty that has damaged its shareholding in PdL. That follows from the definition of an 'investment' in Article 1.1 of the Treaty, which includes "shares, stocks in companies and other forms of participation in companies." But in the present case all of the alleged breaches arose from Respondent's conduct in its dealings with PdL, and not from Respondent's conduct in its dealings directly with Claimant or other shareholders in PdL or with their shareholdings. The question is whether that renders Claimant's claim inadmissible.

154. The harm for which Claimant seeks redress is the "losses to Hochtief AG's investments in PdL", to use the words of the title of the LECG First Report, dated 29 April 2010. In other words, the harm to Claimant alleged to have resulted from Respondent's breach of the Treaty is the diminution in the value of Claimant's investments in PdL caused by Respondent's treatment of PdL: it is what is sometimes called 'reflective loss'.<sup>161</sup>

155. PdL has signed what might be characterized as a settlement of its claims against Respondent: the 2012 Transitory Agreement. Respondent argues that the Treaty obligations were owed to PdL, that any harm suffered was suffered by PdL and that, as a shareholder in PdL, Claimant has no right to opt out of the settlement accepted by PdL. On this view, redress has been offered by Respondent and accepted by the injured party, PdL; and Claimant as a minority shareholder in that injured party is bound by that settlement.

156. Were those the only material facts there would be a strong argument for concluding that Claimant has no basis to protect its rights and interests as a minority shareholder in PdL by rejecting the settlement that was reached by a majority of PdL shareholders with

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<sup>161</sup> See the LECG Report, 29 April 2010, ¶ 44 and Executive Summary, ¶ 1.

Respondent and pursuing a separate claim. This is the conclusion that would appear almost axiomatic from the perspective of company law. Anyone who invests as a minority shareholder runs the risk that the decisions properly taken by majority shareholders will be undesirable, or even inimical, to them: that is a consequence of shareholder democracy, and a price of being a minority shareholder.

157. In the present case, however, the analysis does not focus on the question of whether the company – PdL – is a separate legal entity (which it plainly is) and on what rights are held as a matter of Argentine law by the company and what rights are held by Claimant as a shareholder. The analysis starts instead with the question of what rights Claimant has as a matter of treaty law as an investor under the BIT; and that question must be addressed within the particular context of the BIT, and not by proceeding from principles of municipal company law, no matter how widely or how firmly those municipal law principles are established or may otherwise be relevant to issues of corporate governance that may arise in the course of considering a treaty claim. In this context, the Tribunal attaches particular importance to two material facts.
158. First, the initial investment was made by members of a consortium, which bid for the Project as a consortium. The Concession was awarded by Respondent to that consortium: not to PdL or to some other single company, but to the members of the Consortium. The incorporation of PdL was required by the terms of the bid offer in order to implement the terms of the Concession.
159. The Concession Contract<sup>162</sup> was signed by each one of the Consortium members, including Claimant, on 28 January 1998. The Ministry, too, signed on that day, and time then started to run on the obligations under the Concession Contract.<sup>163</sup> The Tribunal considers that the investment was made no later than that date, and that the Claimant's own investment at that time took the form of the obligations under the Concession Contract accepted by Claimant in return for the right to participate in the Consortium Project as agreed with the Respondent.

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<sup>162</sup> Exh. CX-32.

<sup>163</sup> Cf., Villagi's Testimony, Tr. Day 4, p. 725.

160. Claimant's rights as an investor were at that time *its own rights in relation to the Project as a member of the Consortium*, and not its rights *qua* shareholder in PdL; and Respondent's obligations to Claimant under the BIT date from that time. Among Claimant's rights at that time was the right to be treated fairly and equitably.
161. PdL was incorporated on 1 April 1998; and on 17 June 1998 all the rights and duties set out in the Concession Contract were transferred by and from the Consortium to PdL ('the transfer').<sup>164</sup> On 17 June 1998, as a result of the transfer, Claimant's investment changed its legal form; but Claimant nonetheless continued to hold an investment in Argentina.
162. This is not a case where the State has dealt with a single company throughout the relevant time, and a claimant shareholder has subsequently emerged from behind a hitherto-intact corporate veil and announced that it is seeking redress for alleged injuries to the company.
163. Nor is this a case where it can be said that Claimant is trying to obtain the benefits – chiefly, limited liability – of the corporate form while seeking to avoid its disadvantages. The Concession Contract itself ensured that the Consortium members would secure the transfer to PdL of what the Parties to the Concession Contract regarded as adequate financial resources for the Project, so that the incorporation of PdL cannot be regarded as an improper attempt to avoid financial liability.
164. Secondly, the Concession Contract itself (in Article 5.2) stipulated that PdL would assume all obligations and rights of the Consortium members under the Concession Contract. Both Respondent and Claimant entered into the Project knowing that for the purposes of pursuing the Project PdL would be the vehicle and the nominal actor, while behind PdL the commercial interests would remain in the hands of the individual members of the Consortium. The legal form of the investments would change; but the underlying commercial reality would not.

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<sup>164</sup> Exh. CX-36; Exh. RA 126.

165. It is plainly possible in circumstances such as these to transfer to a locally-incorporated corporation all of the substantive contractual rights (here, the rights under the Concession Contract) initially held individually by the investors who collectively own that locally-incorporated corporation. Indeed, that is what was done when PdL was established. Equally, the Tribunal does not doubt that in the context of BIT rights a State and an investor can, by agreement between them, extinguish the right of an investor, as a member of a consortium, to take action in its own name to enforce against the State the rights that it had previously possessed under the BIT.<sup>165</sup> But the question here is different. It is whether the individual investors can transfer to the local corporation their rights under an applicable BIT<sup>166</sup> to protect their substantive rights under the Concession Contract; and if so, whether they did so transfer their rights.
166. It is evident that there can be no simple substitution of PdL for the individual Consortium members. In the present circumstances, for example, the transfer could not confer upon PdL (an Argentine company most of whose shares were owned by investors of other, non-German nationalities) the rights that the Germany-Argentina BIT conferred on German companies, including the Claimant. That effect cannot be brought about within the provisions of the Germany-Argentina BIT. At most, the procedural rights of the Consortium members under the BIT could be extinguished, and supplanted by whatever procedural rights were available to PdL.
167. There is no evidence that Claimant's rights under the BIT were extinguished here. There is no indication in the terms of the invitation to bid, or in the Concession Contract, or in the various unimplemented settlement agreements, that the legal right and capacity of each investor under an applicable BIT to sue to uphold its substantive BIT rights was altogether extinguished by the very fact of the creation of PdL. Section 5.2 of the Concession Contract refers only to the assumption by PdL of "all obligations, liabilities and rights *hereunder* as well as all loans and guarantees applied for and obtained by the

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<sup>165</sup> The rights in question under the BIT are those of the investor, so that there is no question of an attempt by an investor to waive the right of its national State to exercise diplomatic protection on its behalf.

<sup>166</sup> Of all of the Consortium members, Hochtief alone was German. The balance of the Consortium therefore had no rights under the Germany-Argentina BIT.

Successful Bidder in connection herewith” (emphasis added). Rights and obligations *under the Concession Contract* were transferred to PdL: but there is no provision that purports to transfer to PdL Claimant’s rights and obligations under the Germany-Argentina (or any other) BIT or to extinguish such treaty rights.

168. The Tribunal accordingly considers that Claimant retains its standing to bring claims in respect of the treatment of its shareholding in PdL in a situation such as the present, where (i) the investment was clearly made at a date before the establishment of PdL and the Claimant acquired rights under the BIT at that date, and (ii) the bidding terms required the transfer of consortium rights to a company to be established and maintained for the purpose of holding the concession rights so transferred, and (iii) the actual commercial obligations (of financing, of commitment of materials, technology, labour and skills, and of organization of work, etc) remained unchanged by the transfer of rights to PdL, and (iv) there is no evidence that the Claimant had waived or renounced its rights of action against Respondent under the BIT.
169. This is the general reason in principle why the Tribunal does not regard the claims in this case as inadmissible by reason of Respondent’s arguments based upon the separate legal personalities of Claimant and of PdL.
170. Against the background of this explanation of its reasoning, the Tribunal now turns to the three specific arguments noted in paragraph [151] above.

(i) **Claimant’s investment as shareholder in PdL**

171. The Tribunal will first address the argument that the Tribunal should not admit a claim made by Claimant in respect of rights that belong to PdL. As was noted in the Decision on Jurisdiction,<sup>167</sup> Article 1(1)(b) of the BIT is unequivocal in stipulating that an investment includes “Shares, stocks in companies and other forms of participation in

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<sup>167</sup> Decision on Jurisdiction, ¶ 115.

companies.”<sup>168</sup> Further, the Protocol to the BIT specifies that the definition of an investment includes “specifically those capital investments that do not entitle their holders to voting or control rights.”<sup>169</sup> Minority shareholdings are thus clearly included.

172. Claimant owns 26% of the shares in PdL and is plainly entitled to bring a claim in respect of that shareholding,<sup>170</sup> which constitutes an ‘investment’ in Argentina within the meaning of the BIT. The question of the extent of those rights – the question of precisely what rights attach to the shareholding – is distinct; and it is raised also by the second of the arguments distinguished in paragraph [151], above.
173. It is said that under Article 5 of the Concession Contract, Claimant assigned to PdL all of its rights and obligations in respect of the Project, and that Claimant therefore retains no rights for which it can seek protection under the BIT. The Tribunal does not accept that argument.
174. The rights and obligations under the Concession Contract may belong to PdL to the exclusion of the Claimant; but the claim in this case is not made in order to vindicate any of those rights but in order to vindicate rights under the BIT that attach to Claimant’s investment in the shares of PdL. The precise extent of PdL’s own rights and obligations under the Concession Contract will plainly affect the value of Claimant’s investment in the shares of PdL; but, whatever the extent of PdL’s rights under the Concession Contract may be, Claimant as a shareholder in PdL has an interest in the shares of PdL which it is entitled to protect under the BIT.

**(ii) PdL and the March 2012 Transitory Agreement**

175. The second argument is that the Tribunal should not admit a claim made by Claimant in respect of measures that were consented to by PdL. This argument focuses not on the initial assignment of rights by Claimant to PdL but on PdL’s subsequent agreement with

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<sup>168</sup> This is the English translation in the United Nations Treaty Series (‘UNTS’). Vol. 1910, at p. 198. The English translations submitted by the Parties differ in certain details from that in the UNTS, but the Tribunal has examined the authentic German and Spanish texts and is satisfied that there are no material differences.

<sup>169</sup> Protocol, Ad Section 1(c).

<sup>170</sup> Which distinguishes the situation in this case from that in *Barcelona Traction*: see Resp. PHB, ¶ 54.

the Respondent on the settlement of outstanding claims, in the March 2012 Transitory Agreement (*'Acuerdo Transitorio'*).<sup>171</sup>

176. Respondent's argument here is that since PdL held all of the rights that were allegedly violated, PdL was competent, and PdL alone was competent, to agree upon a settlement of any and all claims concerning the violation of those rights, and that PdL did so in the March 2012 Transitory Agreement.<sup>172</sup>
177. For its part, Claimant asserts that the March 2012 Transitory Agreement has not been implemented, and in any event contains no waiver of its Treaty claims.<sup>173</sup>
178. At this point in the analysis we are concerned only with the question whether the argument is applicable as a bar to the admissibility of the claims in this case. We are not concerned at this stage with the question of the implications of PdL's signature of the March 2012 Transitory Agreement for the substantive question of Respondent's liability: that is a merits question, not a preliminary question of admissibility.
179. Whatever those implications might be, PdL's signature of the March 2012 Transitory Agreement cannot operate *in limine* to bar the admissibility of the claim and prevent its consideration by the Tribunal. Claimant contends that PdL was not entitled to settle claims concerning the violation of Claimant's rights, and that it was unfair and inequitable of Respondent to purport to settle those rights of Claimant by means of its agreement with PdL. That contention is put forward by Claimant in respect of its investment in PdL. It is a contention that Claimant is entitled to have considered, and which can be appraised only in the context of a consideration of the merits of the case.

**(iii) 'Double Recovery'; Claimant's profits as construction contractor**

180. Third, Respondent argues that there is a possibility of double recovery.<sup>174</sup> Even assuming that such a possibility exists, however, that is a matter concerning the remedy rather than

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<sup>171</sup> See above, ¶ 155.

<sup>172</sup> Resp. PHB ¶¶ 42-55.

<sup>173</sup> *Ibid.*, ¶ 276 – 279.

<sup>174</sup> Resp. PHB ¶ 2.

the claim. It is not a bar to the admissibility of a claim – unless, perhaps, it arises as an aspect of an argument based upon the principle of *res judicata*, which is not the case here. To the extent that there may be a possibility of double recovery, that is a matter to be taken into account in the context of the need to prove and to quantify loss, and in the drafting of any Order by the Tribunal. The Tribunal accordingly rejects this objection to the admissibility of the claim.

181. Similarly, Respondent submits that the fact that Claimant derived benefits from its involvement in the actual construction of the highway and bridge bears upon the admissibility of its claim.<sup>175</sup> The Tribunal does not consider that submission to have any legal basis. The fact that an investor has earned profits in the capacity of a contractor working on the physical construction of the project in question cannot operate to bar the admissibility of that investor’s claim, although it may bear upon the merits of the claim and / or upon questions of quantum. The Tribunal accordingly rejects this objection to the admissibility of the claim.

(B) The temporal limits of the dispute

182. Over the course of the proceedings, Hochtief supplemented its claims by reference to the continued unfolding of events in Argentina. Respondent asks the Tribunal to limit its consideration to the claims as they stood at 18 December 2007, which is the date of the registration of the Request for Arbitration (the Request for Arbitration itself being dated 5 November 2007).<sup>176</sup>
183. The Tribunal considers it to be axiomatic that the scope of the claims that Respondent is called upon to answer is fixed by the terms of the Request for Arbitration and the Submissions set out in the Memorial. Subject to the possibility of the making of ancillary

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<sup>175</sup> Resp. Rej., ¶¶ 13, 183-186, 194-196; Sandleris and Schargrodsky Valuation Report, ¶¶ 5, 43, 104; Sandleris and Schargrodsky Supplementary Valuation Report, ¶¶ 24, 138-139, 269, where the experts observed that Hochtief had failed to provide access to information pertaining to the revenues it received as a contractor during the construction phase.

<sup>176</sup> Resp. PHB, ¶ 231.

claims arising directly out of the subject-matter of the dispute,<sup>177</sup> those instruments define the case that the Respondent has to answer, and the case in respect of which Preliminary Objections must be made.<sup>178</sup> No ancillary claims have been made in this case; and the difference between the date of the Request for Arbitration and the date of its registration by ICSID is not material. Nor is there any suggestion that the scope of the claims as set out in the Memorial differs from that set out in the Request for Arbitration.

184. As long as the claims remain within the limits thus described, the facts that a tribunal may take into account in order to decide the claims are not confined to those facts that occurred prior to the date of the signature or registration of the Request for Arbitration and / or the Memorial. The *quantum* claimed may clearly need to be updated in the light of later events; and even matters bearing upon liability may be affected by developments up to the date of the hearing – for example, if action by the Respondent amounts to timely reparation for an earlier action that had caused injury to the Claimant.<sup>179</sup> As long as Respondent has been given a proper opportunity to respond to all factual allegations, the consideration of events occurring after the filing of the Request for Arbitration and the Memorial is permissible, and it will be for the Tribunal to determine the relevance of such references for the claims that are properly before it. Respondent had that opportunity to respond in the present case. This appears not to be contested.<sup>180</sup> This objection to the admissibility of the claims is accordingly dismissed.

(C) Claimant's political risk insurance

185. Respondent asserts that on 7 December 2007, the German Government agreed to pay Claimant EUR 11,359 million under a political risk insurance policy that covered the losses encompassed within the claims made in the present case, and that in consequence,

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<sup>177</sup> ICSID Convention Article 46; ICSID Arbitration Rules (2006), Rule 40.

<sup>178</sup> ICSID Convention Articles 36, 41; ICSID Rules (2006), Rule 41.

<sup>179</sup> See, for example, *Swisslion DOO Skopje v Macedonia* (ICSID Case No. ARB/09/16), Award, 6 July 2012, ¶¶ 133-139.

<sup>180</sup> See Resp. PHB, ¶¶ 231- 232.

by virtue of Article 6 of the BIT, Germany is now subrogated to the rights of Hochtief so that Claimant can no longer pursue its claim.<sup>181</sup>

186. The Tribunal does not agree with that analysis. Article 6 is phrased in terms that do not require that the insuring State succeed to and extinguish the rights of the insured investor once payment is made on the insurance policy. Much less does Article 6 itself bring about that legal result. Article 6 merely obliges the respondent State to recognize or admit (*‘reconocerá, ‘erkennt’*) such a transfer of rights if and when the transfer is in fact effected by provision of law or by a legal act. In the present case no such transfer has been shown to have occurred. The Tribunal accordingly dismisses this objection to the admissibility of the claim.

(D) Claimant’s claims as creditor

(i) **Article 22.2 of the Concession Contract**

187. Respondent raises objections to the elements of the claim that arise from Claimant’s position as a creditor of PdL. The first objection concerns Article 22.2 of the Concession Contract.<sup>182</sup> Respondent submits that this provision bars claims against Argentina by lenders to PdL, despite the arbitration clause in the Treaty.<sup>183</sup> In so far as the claims in this case relate to Claimant’s loans to PdL, it is said that the claims are made by Claimant as a creditor of PdL.

188. Article 22.2 provides that:

“Loans entered into by the Successful Bidder and Concessionaire, as the case may be, to finance the construction, maintenance and operation of the Project shall not be secured by Grantor, nor shall the lenders be entitled to any claim against Grantor or the Provinces, all of which shall be indicated in the relevant agreements.”

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<sup>181</sup> *Ibid.*, ¶ 233.

<sup>182</sup> Exh. RA 12.

<sup>183</sup> Resp. Rej. ¶¶ 214, 275; Resp. PHB ¶ 19.

The evident purpose of Article 22.2 of the Concession Contract is to limit the extent of Respondent's liability for loans procured by the Concessionaire. It is a means of ensuring that the State (the Grantor) makes its agreed financial contribution to the Project and that thereafter it faces no further financial exposure: it is for the concessionaire, through what was plainly expected to be a mix of equity and loan financing, to contribute the remaining finance needed for the Project. It may be that Article 22.2 was drafted with third party lenders, rather than inter-company loans, in mind. But the provision does not express any such limitation upon its scope of application, and the majority of the Tribunal sees no basis for reading such a limitation into Article 22.2.<sup>184</sup>

189. Article 22.2 provides that lenders are not entitled to “any claim against the Grantor or the Provinces.” The question is whether “any claim” includes both claims under the law applicable to the loan contract and claims under the BIT. ‘Any claim’ means, on the face of it, *any* claim. The precise legal basis of a claim is not material. The question is whether this is effective to bar BIT claims.
190. It is necessary to decide if an investor can be bound by an agreement with a host State that it will not invoke the protection of the Treaty in relation to a limited and specified range of issues. In the present case, the issues in question are loans by Claimant to PdL, which are legal arrangements to which Respondent is not a party, and whose terms were not agreed by Respondent.
191. The Tribunal considers that there is no legal reason why effect should not be given to an agreement between an investor and a host State either to limit the rights of the investor or to oblige the investor not to pursue any remedies, including its BIT remedies, in certain circumstances. Such an agreement does not purport to alter the terms of the Treaty. Nor does it necessarily purport to bar action in respect of extant responsibilities of the Grantor: it may constitute an agreement by a particular investor to limit the range of matters for which the Grantor carries the risk and responsibility. It may also be regarded

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<sup>184</sup> It is noted that other sections of the Concession Contract, such as Sections 11.1 and 11.3, do expressly provide for the position of third parties.

as an agreement by the investor not to rely upon certain treaty provisions and extant rights in the specified circumstances.

192. The majority of the Tribunal considers that Article 22.2 is such a provision, and that it operates so as to bar “any claim”, including claims under the Treaty, by a signatory to the Concession Contract, such as Claimant, against the Respondent *in so far as the claim is made by the signatory in its capacity as a lender*. Neither the Concession Contract nor the BIT contains any provision that expressly nullifies Article 22.2 or subordinates it to the protections afforded by the Treaty. The Concession Contract is governed by Argentine law,<sup>185</sup> and there is no suggestion that Argentine law imposes any such nullification or subordination upon Article 22.2.
193. In the view of the majority, Article 22.2 takes effect so as to limit the range of matters for which the Grantor carries the risk and responsibility. Under the Concession Contract, the Grantor was to provide a subsidy to the Project and once that subsidy was paid in full, the Grantor bore no further financial exposure. In the case of loans, the parties to the Concession Contract agreed that the Lender and the Successful Bidder and Concessionaire, and not the Grantor, should carry that business risk and responsibility. The Successful Bidder and Concessionaire agreed in the Concession Contract that the Grantor will not carry any liability to any lender for any loans covered by Article 22. In this way, the Concession Contract underlined the basic principle that, having paid the totality of its promised subsidy, Respondent had no further financial exposure: the obligation to arrange finance for the Project lay with the Successful Bidder and Concessionaire, whether by capital contributions, third-party loans, inter-company loans or other arrangements made by the Successful Bidder and Concessionaire.
194. Article 22.2 relates only to claims made by ‘lenders’, which the Tribunal understands to mean claims made by lenders in their capacity as such, relying upon their rights under the relevant loan agreement. The Tribunal accordingly decides, by a majority, that claims made in this arbitration by Claimant in its capacity as a lender to PdL are precluded by

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<sup>185</sup> Concession Contract, Article 35.1; and the Bilateral Investment Treaty, Article 10(5).

the terms of Article 22.2 of the Concession Contract. When valuing Claimant's interests as a shareholder in PdL, however, it will take into account all of the inter-company loans made by Claimant in the same way that all other financial transactions are counted on the balance sheet as corporate assets or liabilities of PdL; but they will not be counted as individual interests of particular lenders.

(ii) **Conformity of the loans with Argentine financial regulations**

195. Respondent argues further that Claimant's loan transactions were not all recorded as required by Argentine financial regulations,<sup>186</sup> and that the loans were accordingly not made in accordance with the laws and regulations of Argentina and are excluded from the scope of the Treaty protection by Article 2(2) of the Treaty.<sup>187</sup>

196. Given the Tribunal's prior finding, strictly speaking it is not necessary to dispose of this objection. However, the Tribunal will make a few comments because the questions raised by the objection are important ones.

197. Article 2(2) reads as follows:

“Investments made by nationals or companies of either Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Party shall enjoy full protection under this Treaty.”<sup>188</sup>

198. Claimant suggested that the loans were not subject to the reporting requirement because PdL was not a financial institution. Respondent did not accept that view; but the Parties did not adduce expert evidence focused on the regulatory requirements, nor did they make detailed submissions on the legal consequences of any failure to make reports required by Argentine regulations. It is also notable that Respondent did not suggest that the loans violated Argentine law in any respect other than a failure to fulfil the reporting requirement that was said to apply to them.

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<sup>186</sup> Respondent maintains that Claimant reported only one foreign-currency loan transaction to the Argentine Central Bank: Resp. PHB ¶ 21; Exh. RA 451.

<sup>187</sup> See Tr., Day 11, pp. 2694 – 2695.

<sup>188</sup> English translation from the version in vol. 1910 of the *United Nations Treaty Series*.

199. The Tribunal notes that in previous cases, tribunals have focused upon compliance with “fundamental principles of the host State’s law”.<sup>189</sup> This Tribunal considers that to be the correct focus when the question is addressed in the context of questions of jurisdiction and admissibility. Investments that are forbidden, or dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption can be caught by a provision such as Article 2(2) of the Argentina-Germany BIT. But not every technical infraction of a State’s regulations associated with an investment will operate so as to deprive that investment of the protection of a Treaty that contains such a provision.
200. Having considered the facts in the present case, and the submissions of the Parties on this point, the Tribunal does not consider that there is a sufficient basis for rejecting the claims concerning the loans on the basis of their non-registration under Argentine regulations. This decision concerning the effect of the alleged breaches of reporting requirements in Argentina’s financial regulations on the question of the admissibility of the claims is, however, taken without prejudice to the possibility that such breaches might, by virtue of Article 2(2) of the Treaty, limit the substantive rights enjoyed by the Claimant.
201. The Tribunal’s decision concerning the admissibility of claims in respect of Claimant’s loans to PdL thus remains based upon the majority decision concerning Article 22.2 of the Concession Contract, as explained above. The Tribunal accordingly concludes, by a majority, that claims made by Claimant in its capacity as a lender to PdL are inadmissible in this arbitration.

(E) The ‘Ballast Nedam’ argument

202. Ballast Nedam, a Netherlands company, was part of a joint venture (with Boskalis International BV, another Netherlands company) which was the main subcontractor of

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<sup>189</sup> The term used in *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award, 6 February 2008, ¶ 104, citing *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26) and *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (ICSID Case No. ARB/03/25).

PdL on the Rosario-Victoria Project. Respondent argues that Claimant attempted to conceal the true nature and extent of its relationship with Ballast Nedam, as part of a plan to recover as much as possible of its investment in Argentina by means that would remain outside the purview of this arbitration and the sight of this Tribunal.

203. In essence, Respondent suggests that Claimant had a financial interest as a shareholder in Ballast Nedam, and that Ballast Nedam colluded in threatening to force PdL into insolvency in order to put pressure on Respondent to provide financial benefits to PdL. Further, there is some suggestion that the plan was that Ballast Nedam, in its ostensible capacity as a third-party creditor of PdL, would recover sums from PdL which would enure to the benefit its shareholders, including Claimant.
204. Respondent argues that these arrangements and plans amount to an improper attempt by Claimant to mislead observers, including the Tribunal, as to the real economic interests in play in this case.<sup>190</sup> It argues that Claimant should, in consequence, be deprived of the protection of the Treaty by having its claim declared inadmissible.
205. The facts underlying these allegations and arguments are complex. They also emerged at a late stage: Respondent asserts that it was only on the fifth day of the merits hearing that it became aware that Claimant held 48% of the shares in Ballast Nedam.<sup>191</sup> The matter was, however, addressed during that hearing and in post-hearing submissions, and the Tribunal is satisfied that it has sufficient information on this matter for the purposes of reaching a decision in this arbitration.
206. The Tribunal considers that the principles governing the admissibility of claims are rooted not only in the notion of a claim that is inherently ripe and properly made, but also in the proper administration of justice. Admissibility is concerned both with the claim itself and with the arbitral process. In a case where an allegation of impropriety, made in the context of a plea of inadmissibility, is based upon facts that are inextricably bound up with the range of facts upon which the substantive claim is based, it will usually not be

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<sup>190</sup> Resp. PHB ¶¶ 99-157.

<sup>191</sup> *Ibid.*, ¶ 99.

practicable to decide upon the question as a preliminary issue. If the tribunal has jurisdiction to hear the case, it should in such circumstances do so.<sup>192</sup>

207. The Tribunal considers this to be the case in these proceedings, and accordingly rejects the argument that the claim be dismissed *in limine* on the ground that it is inadmissible because of the relationship between Claimant and Ballast Nedam.

(F) CONCLUSIONS ON ADMISSIBILITY

208. For the reasons given above, the Tribunal, having already determined (by a majority) that it has jurisdiction over the claims in this case, rejects all except one of the objections to their admissibility. That one exception concerns claims made in this arbitration by Claimant in its capacity as a lender to PdL: these are precluded by the terms of Article 22.2 of the Concession Contract. The Tribunal will identify the precise scope of those ‘creditor claims’ at the points in its analysis where the matter arises and can most clearly be addressed.

**V. MERITS**

209. Claimant invokes several provisions of the Treaty: (A) Fair and Equitable Treatment (‘FET’) under Article 2(1) of the Treaty); (B) Full Protection and Security, under Articles 2(1) and 4(1)); (C) Expropriation (Article 4(2)); (D) the ‘observance of obligations’ or ‘Umbrella Clause’ (Article 7(2)); (E) Arbitrary or Discriminatory Measures (Article 2(3)). In addition, Claimant asserts (F) that Respondent breached binding unilateral declarations in violation of international law. These are considered in turn.
210. It may assist in the reading of the following paragraphs to say at this point that, in broad terms, the majority of the Tribunal has decided that the initial steps taken by Argentina to address the financial crisis by the pesification process do not amount *in themselves* to a violation of the Treaty but that Argentina’s failure to renegotiate the contract with PdL, as provided for in Argentine law, in a timely and final fashion does amount to a breach of

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<sup>192</sup> Cf., the approach of the International Court of Justice to this general issue: *Avena, I.C.J. Reports 2004*, p. 12, ¶¶ 45 – 47.

the FET standard, for which reparation is due. Argentina's actions in respect of the payment of the Subsidy agreed with PdL do not amount to a breach of the FET standard. The terms of the 'Emergency Loan' made by Argentina to PdL, however, are not compatible with the FET standard. The Tribunal does not find that any other independent breaches of the BIT have been established.

(A) FAIR AND EQUITABLE TREATMENT: Article 2(1)

211. The claim based upon the FET principle has four components, each based upon a different aspect of conduct for which Respondent is said by Claimant to be responsible. They are (1) the failure to pay the Subsidy on time; (2) the 'pesification process'; (3) the 'Emergency Loan'; and (4) the failed renegotiation attempts. These are considered in turn.

a) The failure to pay the Subsidy on time

212. A central element of Claimant's case is the argument that Respondent failed to make the Subsidy payments as and when they were due; that this failure violated the fair and equitable treatment ("FET") provision in the Treaty; and that this violation caused Claimant financial loss. The Subsidy was intended to finance the first stages of the Project up to a capped amount, with the balance to be financed by the Concessionaire.<sup>193</sup> According to the Concession Contract, the Subsidy was to be paid out in full, in scheduled monthly instalments, before the duty to finance the continuation and completion of the Project passed across to the Concessionaire.<sup>194</sup>

213. It is not disputed that there were in fact delays in the payment of the scheduled instalments of the Subsidy.

214. Respondent's position is that the acknowledged delays do not constitute a breach of the Treaty because (i) Respondent complied with its contractual obligations by paying

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<sup>193</sup> Resp. Rej., ¶ 14.

<sup>194</sup> Concession Contract, §7.2; Final Technical Document (Exh. CX-33), §36.2.

interest in respect of those delays,<sup>195</sup> and (ii) the obligations were a purely contractual matter and a breach of them could not rise to the level of a breach of the Treaty.<sup>196</sup>

215. It is evident that, in this part of its claim, what Claimant relies on to establish a breach of its rights under the Treaty is the alleged breach by Respondent of an obligation based in contract. Respondent was initially under no obligation other than the obligation under the Concession Contract to make those Subsidy payments. There is no suggestion that PdL was without access to the normal legal procedures for the enforcement of contracts. Moreover, Respondent paid interest on the late instalments in accordance with the Contract.<sup>197</sup>

***Contractual breaches are not ipso facto treaty breaches***

216. The Tribunal does not consider that a contractual breach necessarily amounts to a breach of the Treaty's FET standard. In the particular circumstances of the present case, having regard to the 2000 *Acta Acuerdo* and to the payment by Respondent of interest in respect of delays in the payment of instalments of the Subsidy, the Tribunal does not consider that Respondent's failures to meet the contractual dates for payments of the Subsidy rise to the level of a violation of the FET standard.
217. Claimant argues that the FET standard requires more than the 'minimum standard' of protection prescribed by customary international law, and that it requires 'stability, predictability and consistency' and the protection of an investor's 'legitimate expectations'.<sup>198</sup>
218. In *Waste Management II* the tribunal (there addressing the FET standard in NAFTA Article 1105) said that even the persistent non-payment of contractual debts by a municipality was not to be equated with a violation of Article 1105, provided that it did not amount to "an outright and unjustified repudiation of the transaction and provided

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<sup>195</sup> Resp. C-M. ¶¶ 117, 135; Resp. PHB ¶ 10.

<sup>196</sup> Resp. C-M. ¶¶ 388- 389.

<sup>197</sup> Resp. PHB ¶ 10.

<sup>198</sup> Cl. Rep. ¶¶ 188-206.

that some remedy is open to the creditor to address the problem.”<sup>199</sup> The *Waste Management II* tribunal observed that otherwise the treaty “would become a mechanism of equal resort for debt collections and analogous purposes in respect to all public (including municipal) contracts, which does not seem to be its purpose.”<sup>200</sup>

219. This Tribunal agrees with the approach taken in the *Waste Management II* award. The Tribunal is mindful of the controversy concerning the precise definition and content of the FET standard. The Treaty does not define the FET standard, and the decisions of other tribunals (to which both Parties referred) are not in themselves binding sources of international law.<sup>201</sup> But the Tribunal notes that the threshold for a treaty breach set by *Waste Management II* is representative of the approach taken by investment tribunals to this question, and agrees that this is the proper approach to the interpretation of the FET obligation. The *Waste Management II* approach is particularly apposite in a case where the treaty breach is said to be constituted by a breach of contract. The conduct in this case falls, in the view of the Tribunal, very clearly short of a violation of that threshold.
220. That is sufficient reason for dismissing the claim that the failure to pay the instalments of the Subsidy on time violated Claimant’s Treaty right to Fair and Equitable treatment; and it is not necessary to consider additional arguments leading to the same conclusion.

***The wider consequences of late subsidy payments did not cause the collapse of the Project***

221. It might be argued that although the simple failure to pay Subsidy instalments according to the contractual timetable is not a breach of the FET standard under the BIT, the late payment of the Subsidy caused the failure of the first IDB loan disbursement,<sup>202</sup> and that this had a domino effect that led to the problems encountered by the Project, and that these wider consequences constituted a breach of the FET standard.

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<sup>199</sup> *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, ¶ 115; and cf., *ibid.*, ¶ 98. (*Waste Management II*)

<sup>200</sup> *Ibid.*, ¶ 116.

<sup>201</sup> Resp. C-M. ¶¶ 335-339. Cl. Rep., ¶¶ 196-203. Such decisions are only “subsidiary means for the determination of rules of law.”

<sup>202</sup> See letter from PdL to IDB dated 26 February 2001 (Exh. CX-166).

222. The Tribunal does not understand the evidence in that way. It does not consider that Claimant has shown that it was the delay in paying the Subsidy that caused the IBD to withdraw its support. On the contrary, it considers that the evidence on the record strongly points to the fact that there were “many issues” that prevented the IBD from disbursing the loan in the manner anticipated by the Consortium.
223. Particularly significant, in the view of the Tribunal, were the doubts generated by the results of a traffic study undertaken in 2001 (well prior to the enactment of the Emergency Law) with a view to confirming the financial projections that had been made by PdL to support its application for the loan.<sup>203</sup> A traffic study was deemed to be critically important to disbursing the loan proceeds because it would assist the lending parties in ascertaining the prospects of their being repaid if they were to permit the loan to be disbursed. The IDB thus explicitly made its offer of finance subject to there being “no material adverse change in the financial condition, operations or prospects of the Rosario-Victoria Bridge Project prior to the execution of ... final commitment by the Bank.”<sup>204</sup>
224. The position is well illustrated by the terms of the letter from the IDB to PdL dated 28 February 2002.<sup>205</sup> That letter is sufficiently important to warrant its quotation in full:

“Thank you for your letter dated February 1, 2002, in which you outline your concerns regarding the disbursement of the loan from the Bank and its participating banks. We can assure you that the Bank has employed good faith efforts. We have tried to address in a mutually satisfactory manner among all parties the various issues that have been identified over the course of negotiating the remaining documentation and the satisfaction of the Conditions Precedent for disbursement. Therefore, it is unfortunate that all of our efforts have been perceived by Puentes del Littoral and its Sponsors as simply delay tactics.

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<sup>203</sup> Letter from the IDB to the President of PdL, dated 28 February 2002: Lommatzsch Stmt., Exh. R. Article 5 of the IDB loan agreement with PdL (Exh. CX-46) set out the conditions precedent to disbursement, which included (Section 5.1.(t) ) the delivery to IDB of a traffic study demonstrating that the Debt Service Coverage Ratio following Technical Completion would be not less than 1.5 at any time.

<sup>204</sup> IDB letter to Financial Director, Impregilo S.p.A. and General Manager PdL, dated 4 August 1999 (Exh. RA 143).

<sup>205</sup> Exh. CX-70.

As you are aware, the Loan Agreement executed in July of 2000 contemplated that certain financial projections had to be confirmed at the time of the disbursement by a traffic study. The results of the traffic study called into question the Company's economic and financial viability. The Bank has undertaken considerable effort to restructure the financial plan to address this issue. Moreover, all of the Bank's and the Borrower's hard work to ensure the Borrower's compliance with the Disbursement Conditions have been further complicated by the enactment of the Emergency Law No. 25561 by the Argentine government on January 6, 2002 (the "Emergency Law") as well as other related governmental measures. At a minimum, the Emergency Law has complicated the Borrower's ability to meet a number of Disbursement Conditions.

Following the successful re-negotiation of the Concession Agreement, the Bank and the participating banks will be in a better position to evaluate the Company's economic and financial viability. In this regard, we have just received your proposal of February 27, 2002, are in the process of analysing it and will revert to you shortly.

As we have indicated on numerous occasions, we would welcome reaching a conclusion with the Borrower and the Sponsors regarding the many issues that have prevented the Bank from disbursing to date."<sup>206</sup>[Emphasis added.]

225. The Tribunal draws from this letter the conclusions: (i) that not only the non-payment of the Subsidy but "many issues", including in particular the results of the traffic study, led the IDB not to make the disbursements of the loan as planned, (ii) that the position was at that time recoverable and that the IDB remained willing to make loans to the Project, albeit on renegotiated terms,<sup>207</sup> and (iii) that the one act of Respondent that was particularly identified as further complicating disbursement was not the non-fulfilment of the planned timetable to Subsidy payments but rather the adoption of the Emergency Law and related governmental measures.
226. The Tribunal accordingly considers that the failure to pay the Subsidy on time did not violate the FET standard established by the BIT. The Emergency Law and other measures

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<sup>206</sup> Letter from the IDB to the President of PdL, dated 28 February 2002: Lommatzsch Stmt., Exh. R. A similar impression was given in the evidence of Mr Martin Bes, the only witness with direct knowledge of what transpired within the IDB in relation to PdL: see Tr., Day 11, pp. 2604-2612.

<sup>207</sup> It may also be noted that even in Section 6 of the 'Financial Aid' Loan signed on 21 February 2003, it was still envisaged that the IDB might make a loan to PdL (Exh. CX-78).

adopted during the ‘pesification process’ are considered in the next section of this Decision.

227. The Claimant’s inability to demonstrate that the late payments were in themselves a breach of the FET standard, or that the late payments caused the collapse of the Project, is sufficient reason for dismissing the claim that the failure to pay the instalments of the Subsidy on time violated Claimant’s Treaty right to Fair and Equitable treatment. It is not necessary to consider additional arguments leading to the same conclusion.

***Respondent’s argument based on Claimant’s alleged breach of contract***

228. For the sake of completeness, it should be said that Respondent also asserts, by way of a defence, that PdL acted in bad faith and was itself in breach of its contractual obligations in the performance of the Concession Contract, notably by failing to obtain the Firm and Irrevocable Financing Agreements (variously described as ‘FIFAs’ or ‘AFFIs’) required by Section 22.1.a) of the Concession Contract.<sup>208</sup> Respondent says that Claimant was consequently not entitled to rely upon its rights under the Concession Contract.
229. The Tribunal notes that in Clause 1 of the *Acta Acuerdo* of 20 October 2000, Respondent agreed to deem “the obligation under Section 22.1.a) of the Concession Agreement to have been fully met.”<sup>209</sup> The 2000 *Acta Acuerdo* was a settlement of the dispute between the Parties as to whether or not PdL had provided the necessary FIFAs; and the effect of the settlement is that as between Respondent and Claimant, Claimant cannot be regarded by Respondent as being in breach of Section 22.1.a). In making this finding, the Tribunal rejects the Respondent’s objections to the Tribunal’s relying upon the *Acta Acuerdo*. It was entered into by a senior official of the State and in the circumstances of this case there is no basis for its now being repudiated. The *Acta Acuerdo* did not merely provide that Respondent would take no action in respect of any breach of Section 22.1.a) that might have occurred: it provided that the Parties agreed as of the date of the *Acta Acuerdo* that any such breach had been cured. Respondent cannot, therefore, rely upon

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<sup>208</sup> Resp. Rej. ¶ 65.

<sup>209</sup> Exh. CX-48, Exh. CX-137.

any alleged breach by PdL of Section 22.1.a) as a justification for any of Respondent's own acts that took place after 20 October 2000.

230. That does not necessarily mean that Respondent's actions prior to 20 October 2000 could not be justified by reference to any failure by PdL to comply with Section 22.1.a) of the Concession Contract; but it is not necessary to decide this question because the Tribunal has determined that in any event the late payment of the Subsidy was not a breach of the FET obligation under the BIT.

b) The pesification process

231. The next body of conduct to be considered is the 'pesification process': i.e., the departure of the Argentinian peso from the statutory regime which secured parity with the US dollar. That process rested on the enactment on 6 January 2002 of Law 25,561, the Public Emergency and Foreign Exchange System Reform Law ("the Emergency Law"), and the adoption on 3 February 2002 of Decree No. 214/02. Those measures abrogated the Convertibility Law and converted into Argentine pesos money obligations that had previously been expressed in foreign currency, and abrogated indexing mechanisms tied to foreign currencies or economies. They also provided for the renegotiation of public works contracts in order to mitigate the detrimental effects of this pesification.<sup>210</sup>

232. It may be helpful to outline at the outset of this section of the analysis the broad approach of the Tribunal to the pesification question. The pesification process was part of a major economic and commercial upheaval. There is much that can be said about its causes and much that can be said about its consequences, both generally and in the context of this particular case. But the question to be addressed here is straightforward: as a matter of legal principle, does the Argentinian pesification process amount to a violation of Argentina's BIT obligations?

233. There are three layers of legal analysis involved in that question. Taking the matter for the moment in the context only of FET, the first is the question whether pesification is *prima facie* incompatible with the FET standard in circumstances where it has been

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<sup>210</sup> See below, ¶¶ 241, 248.

represented to investors by the Government that dollar-peso parity would be maintained (or to put it in another way, represented that pesification would not take place). If it is, the second question is whether there is any provision within the Treaty itself that can affect the question whether pesification is in principle a breach of the Treaty. The third question, which arises only if pesification is in principle a breach of the Treaty, is whether the wrongfulness of pesification under the Treaty can be precluded by the plea of necessity under customary international law.

***Was pesification in itself a breach of the BIT?***

234. The first question is whether the pesification was in itself a breach of the FET standard secured by the BIT.
235. Claimant pointed to many statements by the authorities in Argentina, and to reports of such statements, made prior to and after Claimant made its investment, to the effect that parity between the peso and the dollar would be maintained.<sup>211</sup> There can be no serious doubt that all of the Parties to the Contract (including the Government of Argentina) assumed that dollar / peso parity would continue.
236. On the other hand, neither the Bidding Terms<sup>212</sup> nor the Concession Contract stipulated that there could be no departure from dollar / peso parity.<sup>213</sup> Rather, the position of the Concessionaire was protected by provisions that in effect tied the Concessionaire's revenues to US dollars and the US economy. Thus, Section 24 of the Contract stipulated that "In consideration of all its obligations hereunder, Concessionaire shall receive only the toll rates set forth in the following Section, the Subsidy granted by the National Government, and the contributions of the Provinces of Santa Fe and Entre Ríos." Those toll rates were, according to Section 25.2 of the Contract, to be adjusted by "the percentage change in the United States All Items Consumer Price Index (hereafter CPI) officially published by the United States Department of Commerce (Business Statistics

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<sup>211</sup> Cl. Mem. ¶¶ 75- 88.

<sup>212</sup> Exh. CX-31.

<sup>213</sup> Section 3(i) of the Bidding Terms, and Section 2 of the Contract, set out the laws that govern the Agreement, and do not include the Convertibility Law, Law 23,928, which established parity between the dollar and the peso.

Branch).” In this way, the commercial balance of the Contract was secured, with the value of the tolls being tied, in effect, to the value of the US dollar.

237. Further, Section 25.3 of the Contract provided that:

“The Toll Rate to be collected by Concessionaire from users shall be stated in Pesos and be calculated as follows:

a) The toll rate, stated in United States dollars, shall be translated into pesos on a monthly basis with the assistance of the Oversight Agency, using the dollar/peso parity based on the average bid/offered exchange rate quoted by Banco de la Nación Argentina FIVE (5) days prior to the application date. If the peso/dollar parity based on the quote of Banco de la Nación varies upward or downward by more than ONE PERCENT (1%) of the parity used to calculate the Basic Toll Rate in effect, the latter shall be readjusted by the total percentage of such excess commencing on the first day of the following month.”

238. In these circumstances, the majority of the Tribunal considers that what Respondent promised, and what Claimant had the right to expect, was the maintenance of the value, in dollar terms, of the revenues under the Contract. Precisely *how* that value was maintained was, in the view of the majority of the Tribunal, not specified. Claimant did not have a legal right specifically to have that value maintained by means of constant adherence to peso-dollar parity. If parity were abandoned but Claimant was compensated fully and timeously for the fall, in dollar terms, in the value of its revenues, Claimant’s rights and expectations would have been fulfilled, and Claimant could not complain that it had been treated unfairly or inequitably in violation of the BIT.

239. In the view of the majority of the Tribunal, this analysis accords with the facts and the practical realities of the situation. While there was a clear expectation that the commercial balance of the Contract would be maintained by the continuation of peso-dollar parity, no specific promise or undertaking to maintain that parity was explicitly made by Respondent to Claimant. Neither the Bidding Terms nor the Concession Contract, nor any other instrument presented to the Tribunal, contains any specific and absolute undertaking not in any circumstances to pesify the Contract.

240. There can be no doubt of Claimant's intention to secure and to rely upon binding guarantees that the dollar-value of its revenues would be maintained. But equally, there is insufficient factual evidence upon which to base a finding that it would be unfair and inequitable to Claimant to fulfil that obligation to maintain of the dollar value of Claimant's revenues by some mechanism that involved a change in the peso-dollar exchange rate. Indeed, there are indications in Claimant's pleadings that it would have accepted some such change, although not a change involving pesification.<sup>214</sup>
241. The majority of the Tribunal has therefore concluded that while the Claimant had the right to the maintenance of the commercial balance secured by the Contract on the supposition that peso-dollar parity would continue, it had no absolute right to have that commercial balance maintained specifically by the continuation of peso-dollar parity in all circumstances. If parity ceased to exist, Claimant had the right to expect that the resulting disruption of the commercial balance would be corrected fully and timeously, so that it would not be materially disadvantaged. Indeed, that expectation was reflected in the right to apply for renegotiation set out in Section 31.2 of the Contract. But Claimant did not have the right to expect that there would never, in any circumstances, be any departure from parity.<sup>215</sup>
242. The majority has thus concluded that pesification of debts alone did not breach the treaty, and that if appropriate and timely steps had been taken by Respondent to restore Claimant to the position (in terms of the commercial balance of the Contract) that had been secured in the Contract, there would have been no breach of the duty to treat Claimant fairly and equitably.

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<sup>214</sup> Cl. PHB ¶¶ 224- 225.

<sup>215</sup> Section 25.3 of the Contract in fact provides for (minor) variations in the exchange rate: "The toll rate, stated in United States dollars, shall be translated into pesos on a monthly basis with the assistance of the Oversight Agency, using the dollar/peso parity based on the average bid/offered exchange rate quoted by Banco de la Nación Argentina FIVE (5) days prior to the application date. If the peso/dollar parity based on the quote of Banco de la Nación varies upward or downward by more than ONE PERCENT (1%) of the parity used to calculate the Basic Toll Rate in effect, the latter shall be readjusted by the total percentage of such excess commencing on the first day of the following month."

243. The position might have been different if Respondent had made a deliberate choice to abandon peso-dollar parity in circumstances in which parity could have been maintained and Respondent had freedom of choice in determining its exchange-rate policy. But in the view of the Tribunal,<sup>216</sup> that was not the case in Argentina during the period in question. The majority of the Tribunal accepts that although the abandonment of parity was obviously effected by a deliberate act of the Respondent – the enactment of the pesification law – and was in that narrow sense Respondent’s ‘choice’, that act was an acceptance of what foreign exchange markets had already shown to be an economic fact: the unsustainability of parity.<sup>217</sup> The IMF had endorsed the economic policies pursued by Argentina prior to the crisis;<sup>218</sup> and the Emergency Law adopted in January 2002 by the Respondent was regarded by a range of expert commentators<sup>219</sup> as a sound and coherent approach to the unavoidable facts of the extraordinary financial crisis then confronting Argentina.<sup>220</sup>
244. The majority of the Tribunal accordingly does not find that the adoption and pursuit of the policy of pesification was *per se* a breach of the FET standard. The policy was not in itself unfair, and it was not in itself inequitable, to the Claimant.

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<sup>216</sup> And other tribunals: see, e.g., *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010, ¶¶ 160, 163 (Exh. AL RA180).

<sup>217</sup> The Tribunal notes the chart at ¶ 26 of Resp. C-Mem, which shows the peso-dollar exchange rate in the foreign exchange market of the Montevideo, Uruguay, Stock Exchange. That chart shows that the dollar-value of the peso was falling in Uruguay from the first week of December 2001 onwards, several weeks before the enactment of the Emergency Law in Argentina. Cf. Roubini Report, 7 March 2012, ¶ 15: “Effectively, the Argentine government did not ‘choose’ to abandon convertibility and repeal the currency board as there was no effective economic choice or means or option left to maintain such regime. Rather, the economic facts on the ground led to its effective demise and abandonment in December 2001 and its formal legal abandonment in January 2002.”

<sup>218</sup> International Monetary Fund, News Brief 99/24, 26 May 1999, cited in Andrés Velasco, Ricardo Hausmann, Kennedy School of Government, Harvard University - Hard Money’s Soft Underbelly: Understanding the Argentine Crisis, 2002 (Exh. RA 500); Eichengreen Report, 3 September 2012, ¶ 10; Roubini Report, 7 March 2012, ¶ 23.

<sup>219</sup> See Roubini Report, 7 March 2012, especially ¶¶ 31- 49, 53-55, and Eichengreen Report, 3 September 2012, especially ¶¶ 26- 40.

<sup>220</sup> To avoid any possible doubt, it should be emphasized that although these factors are similar to those that would be taken into account in the context of a consideration of the defence of necessity, they are here wholly independent of the necessity defence. The factors do not bear upon the issue raised in the context of necessity: namely, whether in the circumstances the Respondent should be excused for what is on the face of it a breach of its international obligations. Here they bear on the question whether, in order to treat the Claimant with fairness and equity, it was absolutely essential that Respondent maintain parity at all costs. That is a question as to the precise scope of the obligation that was owed by Respondent to Claimant. Was it unfair or inequitable to Claimant for Argentina to depart from parity? In particular, was it unfair to do so in circumstances where Respondent undertook to rebalance the commercial contract in order to address the losses sustained by Claimant as a consequence of pesification?

245. In view of that decision, it is not necessary to consider whether the position in respect of the abandonment of parity is affected by any other provision in the Treaty,<sup>221</sup> or by the plea of necessity in customary international law.
246. That is, however, not an end of the matter. As has been indicated above, while the act of pesification was, in the view of the majority of the Tribunal, not *per se* a violation of the FET standard, it was the direct cause of financial losses to the Claimant. That leads to the question whether the manner in which the pesification process was implemented amounted to a breach of the FET standard.

***Was the manner in which the pesification process was implemented a breach of the BIT?***

247. It has been noted above that the preservation of the US dollar value of Claimant's revenues was undoubtedly a premise upon which the investment was made, and both Parties entered into the Concession Contract; and it was a principle to which the provisions of the Concession Contract<sup>222</sup> were intended to give effect.
248. Respondent recognized from the outset the enormously disruptive effect that pesification would have on public works contracts that had been concluded upon the basis of the premise of constant dollar-peso parity or payment in dollars. Respondent provided, in the Emergency Law itself, for the renegotiation of such contracts.<sup>223</sup> The Tribunal considers that provision to be a wholly appropriate, and necessary, response to the inevitable results of pesification upon dollarized contracts. If those contracts were left unrevised, one party would suffer a radical deterioration in the commercial position that it had secured by means of the express terms of the contract.

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<sup>221</sup> Such as Article XI of the US-Argentina BIT, which provides that the provisions of the BIT do not "preclude the application by either Party of measures necessary for the maintenance of public order ... or the protection of its own essential security interests": < [http://unctad.org/sections/dite/ia/docs/bits/argentina\\_us.pdf](http://unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf) >. The effect of any such provision would have to be considered before the effect of the defence of necessity in customary international law is considered. There is, however, no such provision in the Germany-Argentina BIT.

<sup>222</sup> Notably Sections 6, 13, 24–33 and 31.2 of the Contract.

<sup>223</sup> Emergency Law, Section 9 (Exh. RA 187).

249. The Tribunal considers that the terms of the commitment that Respondent had made to Claimant did not require Respondent to take action during the time of the crisis actually to restore the commercial balance secured by peso-dollar parity. But it did require Respondent to make provision for restoring the commercial balance after the crisis had ended (as, indeed, it did, in the Emergency Law itself); and restoration of the commercial balance required that Claimant be compensated for losses incurred during the crisis, as well as thereafter.
250. As is explained below, in the section dealing with the renegotiation process,<sup>224</sup> the process provided for in the Emergency Law has not in fact led to the rebalancing of the commercial relationship between Claimant and Respondent in this case. Due to Argentina's failure to timeously adjust the contract in a manner satisfactory to PdL, Claimant was accordingly deprived of the protection that the dollarization of PdL's tariffs was designed to secure, and the value of its interest in PdL was thereby reduced, causing it financial loss.
251. The Tribunal thus finds that the manner in which the process for agreeing on the contractual adjustment to offset the effects of pesification was implemented, and specifically Respondent's failure to implement the promised renegotiation process timeously, constitute a breach of the FET standard under the BIT, for which Respondent is liable to make reparation. More precisely, the pesification caused the Claimant to sustain losses; and the breach of the FET in the BIT consists in the failure to implement within a reasonable period of time a renegotiated agreement to replace the security that had been provided by the dollarization provisions in the original Concession Contract and thereby restore the commercial balance of the Concession Contract between Respondent and the members of the Consortium, including Claimant, and to remedy the losses already sustained.

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<sup>224</sup> ¶¶ 268-287, below.

c) The 'Emergency Loan'

252. At the time when the funding for the Project ran out, construction of the bridge span was not complete. Both parties agreed that it could not be left in its incomplete state because of the danger of collapse. At this point in time, funds were needed to complete the Project and without a completed Project, PdL was not yet in a position to collect the toll revenues on which the payment of its share of the financing as well as any profit could be realized.
253. Claimant argued that if an adequate renegotiation had been agreed during the first half of 2002, work on the Project could have been completed on time, and that the failure to secure such a renegotiation obliged it to accept a loan from Respondent to enable it to complete the Project. The Tribunal notes, however, that there is evidence that PdL was in financial difficulties even before pesification occurred. In particular: (i) PdL was informing the Grantor in August 2001, four months *before* pesification, that it was going to have to suspend construction of the bridge at the end of the month<sup>225</sup>; (ii) PdL appeared to be unable to pay its creditors (Boskalis/Ballast Nedam)<sup>226</sup>; (iii) PdL told the IDB in October 2001 that it could be petitioned in bankruptcy by its creditors<sup>227</sup>; and (iv) PdL's smaller shareholders' were apparently unable or unwilling to make further capital contributions in September 2001.<sup>228</sup>
254. PdL requested financial assistance from Respondent; and in February 2003 Respondent offered a loan of AR \$51,648,352 which was sufficient to complete the Project.<sup>229</sup> Claimant's witness, Mr Lommatzsch, testified that PdL was advised that if it did not accept the loan and finish the Project, Respondent would declare PdL to be in default and

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<sup>225</sup> Exh. RA 167.

<sup>226</sup> LECG Exh. 26 (ICC Award, pp. 88-89).

<sup>227</sup> Exh. RA 170.

<sup>228</sup> Document HT\_01540 produced by the Claimant on 22 February 2013 (Agreement of 11 April 2002 between Impregilo S.p.A., IGLYS S.A., Hochtief Aktiengesellschaft, SIDECO Americanas S.A. and IECSA S.A., Benito Roggio y Hijos S.A., Techint Compañía Técnica Internacional S.A., the "Whereas" recitals notes that certain shareholders did not make the contributions requested of them).

<sup>229</sup> Cl. PHB ¶¶ 83-84.

terminate the Concession Contract, which would necessarily have entailed a drawdown by Argentina on a US \$143 million Letter of Credit posted by PdL's shareholders.<sup>230</sup>

255. The Loan Agreement, which secured the loan by the assignment of PdL's toll collection rights, was signed on 21 February 2003.<sup>231</sup> The possibility of the assignment of tolls for the purpose of obtaining finance for the Project was expressly provided for by Section 33 of the Concession Contract.<sup>232</sup>
256. According to Section 2 of the Loan Agreement, the loan was to be repaid "on the terms prevailing in the local market for similar loans, thus subject to the applicable lending interest rate and other terms by way of financial expenses, in accordance with the applicable data to be provided by the Central Bank of Argentina."
257. The evidence of the circumstances and reasoning behind PdL's decision in February 2003 to accept the loan and not to obtain alternative sources of funding, such as additional capital injections or further inter-company loans, does not enable the Tribunal to reach a clear conclusion as to the specific reasons for which PdL accepted the Emergency Loan, rather than to make some other arrangement to obtain additional finance. It appears that at this time alternative loan funding was scarce in Argentina.
258. It was the responsibility of the Consortium and then of PdL to arrange financing for the Project beyond the Subsidy provided by Respondent.<sup>233</sup> PdL was at liberty to obtain finance from other sources on better terms, if it could find them. Claimant says that in fact PdL had no alternative source of funding available from third party banks,<sup>234</sup> and that it was the drastic reduction in toll revenues, resulting from the Pesification Law, Law

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<sup>230</sup> Lommatzsch Stmt., ¶¶ 109 – 116.

<sup>231</sup> Exh. CX-78.

<sup>232</sup> Exh. RA 12.

<sup>233</sup> Concession Contract, Sections 8, 22, 30.3.b).

<sup>234</sup> Cl. PHB ¶ 85.

25,561, that undermined PdL's creditworthiness and was the cause of its inability to obtain finance elsewhere.<sup>235</sup>

259. Claimant asserts that in early July 2003, following a change in the Government of Argentina, it received notice that the terms of that emergency loan had been unilaterally altered by the Secretariat of Public Works through the adoption of Public Works Resolution 14 ('Resolution 14') on 30 June 2003.<sup>236</sup> Claimant says that Resolution 14 had three material effects: (i) it changed the repayment terms from "those prevailing in the local market for similar loans"<sup>237</sup> to a rate (which Claimant says was higher) charged for 30-day unsecured loans; (ii) it provided for the repayment of the loan through the daily collection of toll revenues; and (iii) it pesified the operation and maintenance costs which PdL was entitled to deduct from the toll revenues.<sup>238</sup>
260. Claimant's case is that the terms stipulated in June 2003 by Resolution 14 left PdL in an unsustainable financial position. The daily revenues appropriated to repayment of the loan were inadequate to cover interest payments and PdL's operating expenses; and the interest owing was capitalized, so that the sum owed was constantly increasing.<sup>239</sup> Claimant says that because of PdL's repayments under the loan from Respondent, PdL was unable to maintain the Project or pay daily expenses. In 2004 and 2005 those expenses were largely funded through inter-company loans made by Claimant and Impregilo. Claimant made loans totalling US \$5,481,833 in 2004, and US \$297,000 in 2005.<sup>240</sup>

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<sup>235</sup> *Ibid.*, ¶ 85. Cl. Rep., ¶ 74: "What HOCHTIEF correctly objects to is the unfair and unnecessary pesification of the toll rate, and the extremely protracted renegotiation process that is preventing HOCHTIEF from getting the expected and bargained for return on its investment. Cf., Lommatzsch Stmt., ¶ 134.

<sup>236</sup> Exh. CX-79.

<sup>237</sup> Exh. CX-78, Section 2. That rate was identified in Resolution 14 as "the General Portfolio Lending Rate for Miscellaneous Transactions, a variable rate published each day by the Banco de la Nación Argentina.

<sup>238</sup> Cl. PHB ¶¶ 86-90; Exh. CX-79.

<sup>239</sup> Cf., the evidence of Mr Andrés Aner, Transcript, Day 5, pp. 1018-1030.

<sup>240</sup> Cl. PHB, ¶ 90; LECG First Report, Exh. 034, pp. 28-29.

261. Respondent does not challenge the essential facts concerning the effect of the provisions of Resolution 14.<sup>241</sup> Respondent submitted that Resolution 14 was, however, a measure implementing, rather than unilaterally altering, the terms of the Loan Agreement of 21 February 2003,<sup>242</sup> and that it adopted “a fair market interest rate”.<sup>243</sup>
262. From a comparison of the wording of the Loan Agreement and Resolution 14, it appears to the Tribunal that Resolution 14 purported to give specificity to the vague terms in the 21 February 2003 Loan Agreement regarding interest rates. Resolution 14 identified the repayment terms that were to be treated as corresponding to the “the terms prevailing in the local market for similar loans”, as it was put in Section 2 of the Loan Agreement. Those terms corresponded to the interest rates paid by top-tier companies on 30-day *unsecured* loans.
263. The Tribunal does not consider that the specification under Resolution 14 of an interest rate appropriate for 30-day unsecured loans to the radically different case of a loan secured by the assignment of tolls from a public highway operating under a long-term concession, can reasonably be regarded as an implementation of a contractual provision stipulating the application of “the terms prevailing in the local market for similar loans.” The circumstances of the loans are not ‘similar’. No clear justification was offered for application of the 30-day unsecured loan rate to the 2003 loan to PdL,<sup>244</sup> although it was said that one constraint was the inability of Respondent to engage in a transaction that would, by charging too low an interest rate, in effect increase the Subsidy to the Project provided by the Government beyond that settled when the Consortium’s bid was accepted.<sup>245</sup>
264. The Tribunal is satisfied that the use of rates for unsecured loans as the comparator for the interest rate charged under the Loan Agreement was inappropriate, and that it is likely that, at least at some points, the interest rate charged was excessively high. The Tribunal

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<sup>241</sup> Resp. Rej., ¶¶ 132-147.

<sup>242</sup> Resp. C-Mem. ¶ 409; Resp. Rej., ¶¶ 132-133.

<sup>243</sup> Resp. Rej., ¶ 142.

<sup>244</sup> See the testimony of Mr. Aner, Transcript, Day 5, pp. 1026-1034.

<sup>245</sup> Lommatzsch Stmt. ¶ 110. Cf., Resp. PHB, ¶¶ 10-13, 56-58.

notes, however, that the rate of interest charged was not uniformly high. It dropped from the high of 30% to 18.85% as from 26 September 2003,<sup>246</sup> and stayed around that lower rate until the commencement of insolvency proceedings in May 2007. (During the period 2001-2005, all the inter-company loans made by Claimant and other PdL shareholders were set at the significantly lower rate of 15%.<sup>247</sup>) Furthermore, the evidential record does not provide sufficient data to enable the Tribunal to determine by how much (if at all) the actual rate of interest charged day-by-day under Resolution 14, compared with an appropriate Argentine market rate for secured long-term debts, exceeded the maximum interest rate that would have been fair and equitable.

265. The Tribunal considers that the use of an inappropriate comparator for the determination of interest rates under Resolution 14 was not compatible with Claimant's rights under Article 2 of the Treaty, but the majority of the Tribunal also considers that Claimant has not proved a quantifiable loss under this heading. The majority of the Tribunal accordingly decides not to make an award of damages specifically to compensate Claimant for losses arising from any excessive interest rates charged under the Emergency Loan.
266. Turning to the treatment of PdL's expenses, the Tribunal does not consider that the pesification of operation and maintenance costs which PdL was entitled to deduct from its toll revenues was a step that had been agreed in (or was compatible with) the Loan Agreement of 21 February 2003. The text of the Loan Agreement does not evidence any such agreement. This was a further step taken in Resolution 14 on 30 June 2003, which adversely affected PdL, and hence adversely affected the value of Claimant's investment.
267. It is clear that the pesification of operation and maintenance expenses, much of which required the importation of expensive equipment involving expenditure in US dollars,<sup>248</sup>

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<sup>246</sup> Resp. Rej., ¶ 140. Resp. notes that Hochtief itself already talked of an annual 20% rate in a document it submitted to the German government on 5 March 2007 (Request for Compensation from Hochtief to the German government, 5 March 2007, p. 3 (Exh. RA 358)), and not the 30% rate contended by Claimant in its Reply of 5 June 2012. Cl. Rep., ¶ 69; Resp. Rej., fn 200.

<sup>247</sup> LECG First Report, ¶ 57; and Exh. 034, p. 85

<sup>248</sup> Cl. PHB, fn. 160.

reduced the value of the expenses that PdL was entitled to deduct before making its loan repayments and left it making a loss on the maintenance and operation of the Project. The Tribunal thus finds that the pesification of operation and maintenance expenses was a violation of Article 2 of the BIT, for which reparation is due.

268. The Tribunal accordingly considers that the specific terms imposed by Resolution 14 on 30 June 2003 cannot reasonably be said to have been previously agreed in the February Loan Agreement or to be consistent with it. When those terms are considered in the context of PdL's frozen tariffs, pesified and not adjusted for inflation, they are, in the view of the Tribunal, unfair and inequitable and a violation of Article 2 of the BIT.

d) The renegotiation process

269. The Tribunal has decided that the manner in which the pesification process was implemented, and in particular Respondent's failure to implement the promised renegotiation process timeously, constitute a breach of the FET standard under the BIT for which Respondent is liable to make reparation.<sup>249</sup>

270. It is more accurate to speak of the unacceptable delay in the implementation of the renegotiation process, because even now it remains possible that the process might be implemented in the future. Renegotiation of many public contracts inevitably takes time; and some will be renegotiated before others. The limit of what would be an acceptable delay in the context of an alleged breach of the FET standard is a matter of appreciation. Some delay would not have been incompatible with Fair and Equitable Treatment; but at a certain point, the to-be-expected time that it takes for a complex renegotiation to occur becomes unacceptably unfair and inequitable. Claimant pointed to the recent award in *EDF International SA & Ors v. Argentine Republic*,<sup>250</sup> in which liability for breach of a

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<sup>249</sup> ¶ 251, above.

<sup>250</sup> *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012; CLA 238.

BIT was founded upon delays in renegotiation; but each case turns on its facts<sup>251</sup> and must be appraised separately.

(i) **The unimplemented renegotiations**

271. It was in January 2002 that Law No. 25,561<sup>252</sup> provided, in Article 9, for the renegotiation of public works contracts, a category that included the Concession Contract. Claimant's witness, Mr Lommatzsch, recalled in his first Witness Statement<sup>253</sup>, dated 29 April 2010, that he had been a director of PdL since 1998 and its President from March 2005 to August 2007.<sup>254</sup> He referred to his personal involvement in numerous discussions and other meetings between PdL and the Argentine Government between 2003 and 2009. He testified that PdL had continually tried to engage Respondent in "negotiations aimed at reaching agreement on a renegotiated contract that would compensate PdL for its losses and re-establish the toll rates so that the concession will earn PdL and its shareholders the expected return that Argentina's actions have prevented them from receiving."<sup>255</sup>
272. In May 2006 PdL signed a *Carta de Entendimiento* (the 'May 2006 CdE')<sup>256</sup> which provided for an increased toll rate and adjusted the economics of the Project. Mr Lommatzsch said that it was not a perfect solution, and not sufficient fully to compensate PdL for all of the losses attributable to Law No. 25,561, but that PdL had nonetheless signed it and awaited the approval of the new terms by the Government.<sup>257</sup>
273. The necessary Government approvals for the May 2006 CdE were not obtained and it was not implemented. A second CdE was sent to PdL by Respondent in February 2007

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<sup>251</sup> In *EDF* the renegotiation was the responsibility of a provincial government within Argentina, rather than of the federal Government of the Republic.

<sup>252</sup> Exh. CX-63.

<sup>253</sup> Lommatzsch Stmt., ¶ 137ff.

<sup>254</sup> *Ibid.*, ¶ 1.

<sup>255</sup> *Ibid.*, ¶ 136. See generally Lommatzsch Stmt. ¶¶ 130-158; Supp. Lommatzsch Stmt., ¶¶ 4-22.

<sup>256</sup> Lommatzsch Stmt., Exh. JJ.

<sup>257</sup> *Ibid.*, ¶ 145 – 146.

(the ‘February 2007 CdE’).<sup>258</sup> According to Mr Lommatzsch, its terms were less favourable to PdL than the terms of the May 2006 CdE: nevertheless, in his words, “desperate to finalize a renegotiation, and moderate the financial squeeze it had been put in due to Argentina’s actions, PdL signed the February 2007 CdE on February 27, 2007.”<sup>259</sup> The February 2007 CdE also remained unimplemented.

274. PdL signed another agreement on renegotiation, the ‘December 2009 *Acuerdo Transitorio*’,<sup>260</sup> on 17 December 2009.<sup>261</sup> Claimant Hochtief abstained from participating in the vote by PdL shareholders on the decision to sign this agreement, and indicated that it would not suspend or renounce its ICSID claim (which had been filed at the end of 2007)<sup>262</sup> against Respondent.<sup>263</sup> That agreement, too, remained without Government approval and unimplemented.
275. On 14 June 2010, the ‘June 2010 *Acuerdo Transitorio*’<sup>264</sup> was sent by UNIREN to PdL. It was substantially identical to the December 2009 *Acuerdo Transitorio*. PdL signed it, though again Hochtief abstained from voting.<sup>265</sup> It was not implemented.
276. On 13 October 2010, the ‘October 2011 *Acuerdo Transitorio*’<sup>266</sup> was sent by UNIREN to PdL. It was similar but not identical to the June 2010 *Acuerdo Transitorio*. PdL signed it, but again Hochtief abstained from voting.<sup>267</sup> It was not implemented.
277. A fourth *Acuerdo Transitorio*, the ‘March 2012 *Acuerdo Transitorio*’,<sup>268</sup> was sent to PdL on 6 March 2012. Yet again, PdL approved the agreement; but Claimant abstained.<sup>269</sup>

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<sup>258</sup> *Ibid.*, Exh. MM.

<sup>259</sup> *Ibid.*, ¶ 151.

<sup>260</sup> *Ibid.*, Exh. OO.

<sup>261</sup> *Ibid.*, ¶¶ 154 – 155.

<sup>262</sup> See ¶ 6 above.

<sup>263</sup> Exh. RA 433.

<sup>264</sup> Exh. CX-150.

<sup>265</sup> Mairal Supp. Opinion, Exh. 2; Cl. PHB ¶ 100.

<sup>266</sup> Exh. CX-156.

<sup>267</sup> Mairal Supp. Opinion, Exh. 3; Cl. PHB ¶ 101.

<sup>268</sup> Exh. CX-160.

278. Each *Acuerdo Transitorio* was intended to be an interim agreement, to be replaced within twelve months by a Comprehensive Contract Renegotiation Agreement.<sup>270</sup> No such Comprehensive Agreement has been made.

279. According to Mr Lommatzsch, whose evidence in this respect was not disputed, UNIREN renegotiated 92% of the public works contracts within its jurisdiction by April 2009.<sup>271</sup> It is not to be expected that every eligible contract could be renegotiated at once, or even within a short time of the start of the renegotiation process; and it is obvious that one contract or another must be the last to be renegotiated. The question is whether there is anything in the particular treatment of the PdL that breaches the FET standard. The Tribunal considers that there is.

**(ii) The excessive delay in the renegotiation**

280. The most salient of the particular factors that mark out this case are (i) a need for renegotiation both occasioned by, and recognized and provided for, by Respondent's own pesification legislation, (ii) Respondent's awareness of the precarious position of the Project and of PdL, evident at least from the time of the conclusion of the Loan Agreement on 21 February 2003; (iii) Respondent's awareness of the damages claim in this case, whose registration by ICSID was notified to the Parties on 17 December 2007; and, against this background, (iv) Respondent's repeated failure to implement the agreements on renegotiation that had been signed by PdL in 2006, 2007, 2009, 2010, 2011, and 2012.

281. The renegotiation process was a necessary element – the key element – of the fulfilment of Respondent's obligation under the Treaty to treat PdL in a fair and equitable manner following the 2002 pesification and the complete disruption of the premises upon which the Concession Contract was based.<sup>272</sup> The failure to proceed expeditiously to implement

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<sup>269</sup> Mairal Supp. Opinion, Exh. 4; Cl. PHB ¶ 102.

<sup>270</sup> Article 1.3 in each of the texts.

<sup>271</sup> Lommatzsch Stmt., ¶ 158.

<sup>272</sup> The preamble to Decree 214/02 refers to the “strong interference with the legal relationships, both of public law and of private law” that resulted from the crisis (Exh. CX-68).

the renegotiated terms agreed with PdL, in a situation where the urgency of the rebalancing of the economic relationship after the Respondent's legislative intervention was clear, and in particular when the Claimant's Memorial in this case focused attention upon the compatibility or lack thereof of the continuing delays and abandonments of agreed terms with Respondent's obligations under the Treaty, all combine to persuade the Tribunal that Respondent's failure to secure the implementation of the renegotiated terms was unfair to PdL.

282. Respondent's conduct amounts to more than the disappointment of the hopes and expectations of the Project Consortium. It crosses the line between what is merely sub-optimal administration and bureaucratic delay, and it becomes a failure to remedy the adverse consequences of governmental measures that is so prolonged and so complete as to infringe the investor's rights under the Treaty.
283. It is not easy to identify a precise date by which renegotiation should have been completed, but there are three indications that the renegotiation was not completed within what was a reasonable time in the context of the Argentine laws.
284. First, renegotiation was mandated by the Emergency Law, Law No. 25,561<sup>273</sup> in January 2002. Title IV (and in particular Article 9) of the Emergency Law provided for the renegotiation of public works contracts, and Article 8 of Decree 214/02 provided for adjustments of contracts to be made annually (and in some circumstances, more frequently) so as to "preserve the continuity of the contractual relationship in a way equitable for the parties."<sup>274</sup>
285. Secondly, during the PdL insolvency proceedings, in June 2008, the Argentine Court took the view that UNIREN's refusal to continue the renegotiation of the concession agreement was contrary to the aims of Argentine law, and that more than six years after

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<sup>273</sup> Exh. CX-63.

<sup>274</sup> Exh. CX-68.

the enactment of Emergency Law 25,561 “the grave imbalance in the terms of the [Concession] agreement persists”.<sup>275</sup>

286. Third, the Tribunal notes that it was practicable for the Parties to conclude a negotiated settlement by 2006 or 2007 at the latest. PdL was prepared in 2006 to accept – and, indeed, did accept – a negotiated settlement, and the Claimant was also willing to accept that settlement as a shareholder in PdL. But the 2006 CdE was repudiated by the presentation of the 2007 CdE to PdL by Respondent on 12 February 2007.<sup>276</sup>

287. The Tribunal considers that Respondent’s failure to conclude an agreement on renegotiation was a violation of the FET standard in the BIT. While the Tribunal is satisfied that the violation had occurred by 26 February 2007, when Claimant sent to Respondent its notice regarding the existence of a dispute under the BIT,<sup>277</sup> that is not the date that will be relevant to the calculation of the reparation due in respect of injury caused by the breach. The breach consists in the failure to redress the commercial balance that had been disrupted by the pesification Law, Law 25,561 on 6 January 2002; and the injury for which reparation is due includes losses suffered on and after 6 January 2002.

e) Conclusion on FET

288. The Tribunal has thus concluded that there were violations of the FET standard in Article 2 of the BIT, in respect of which reparation is due, constituted by:

(1) the failure to restore and redress the commercial balance that had been secured by the Concession Contract, after that balance had been disrupted by the pesification Law, Law 25,561, on 6 January 2002; and

(2) the pesification of operation and maintenance expenses in Resolution 14 of 30 June 2003.

(B) FULL PROTECTION AND SECURITY: Articles 2(1) and 4(1)

(C) EXPROPRIATION: Article 4(2)

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<sup>275</sup> Exh. CX-106.

<sup>276</sup> Cl. Rep. ¶ 85; CdE (February 2007) (Exh. CX- 100).

<sup>277</sup> Exh. CX-101.

- (D) THE ‘OBSERVANCE OF OBLIGATIONS’ OR ‘UMBRELLA CLAUSE’: Article 7(2)
- (E) ARBITRARY OR DISCRIMINATORY MEASURES: Article 2(3)
- (F) BREACH OF BINDING UNILATERAL DECLARATIONS

289. Having considered and decided upon Respondent’s liability for breach of the FET standard in Article 2 of the BIT, the Tribunal now turns to the other BIT standards upon which Claimant relied.

290. Not all BIT standards are the same; nor is the FET standard, despite its undoubted breadth, capable of subsuming every other BIT standard. As a matter of fact, however, it may be evident that where the same facts are said to constitute breaches of more than one BIT standard, and where the alleged losses are the same in each case, equally detailed analysis of the application of each of the treaty standards to the facts of the case is redundant.

291. So it is here; and especially because the terms of the protections accorded under Articles 2, 3 and 4 of the BIT appear to overlap. The claims concerning Full Protection and Security [BIT Articles 2(1) and 4(1)],<sup>278</sup> the claims concerning expropriation [BIT Article 4(2)],<sup>279</sup> the claims concerning arbitrary or discriminatory measures,<sup>280</sup> and the claims concerning the ‘observance of obligations’ or ‘umbrella clause’,<sup>281</sup> are all based on essentially the same facts and same arguments as the claims based upon the FET standard. It is not argued that these other standards entail a different approach to causation or to determination of quantum, or to liability for a different range of losses;<sup>282</sup> and the Tribunal considers that these additional grounds for the claims are adequately addressed by its decisions in respect of the FET standard. The same is true of claims

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<sup>278</sup> See Cl. Mem. ¶¶ 426-437.

<sup>279</sup> See *Ibid.*, ¶¶ 454-508.

<sup>280</sup> See *Ibid.*, ¶¶ 438-447, 448-453

<sup>281</sup> See *Ibid.*, ¶¶ 509-527.

<sup>282</sup> See *Ibid.*, ¶¶ 536- 549, 550-551. See also the LECG Report, *Losses to Hochtief AG’s Investments in Puentes del Litoral S.A.*, 29 April 2010, submitted by Claimant.

based upon general international law obligations and the breach of binding unilateral commitments made by Respondent.<sup>283</sup>

(G) THE DURATION OF THE EMERGENCY AND THE OPERATIVE DATE OF THE BREACHES

292. The Tribunal has decided that (1) Respondent's failure to implement timeously the renegotiation process (i.e., by 2006 or 2007, but taking account of prior losses: see paragraph 286 above) and (2) the adoption of Resolution 14 in June 2003, violated the BIT. The next question is whether either breach might be excused or rendered unlawful by the defence of necessity. That would be possible only if the emergency persisted at the relevant time,
293. Fixing a date for the 'end' of an economic crisis is a highly subjective exercise, overwhelmingly influenced by the precise factors or indicia upon which one focuses and the degree of change or stability that one regards as qualifying as a return to a normal, non-crisis situation.
294. The Tribunal found persuasive the expert evidence suggesting that 2003 saw a resumption of growth in the economy<sup>284</sup> and that the worst of the crisis in macro-economic terms was over by mid-2003 (although the Tribunal accepts that the social and other effects on Argentine society identified by Dr Kliksberg persisted well after that time).<sup>285</sup> Other tribunals have found significant dates in this period, such as the date of the election of President Kirchner on 26 April 2003.<sup>286</sup> The selection of such a date does not signify the possibility of making a precise objective determination of a date on which the economic crisis ended: rather, it signifies the exercise by a tribunal of its power to decide a case on the evidence before it, and the need to stipulate a particular date in order to give

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<sup>283</sup> See Cl. Mem. ¶¶ 528- 536.

<sup>284</sup> Eichengreen Report, ¶ 26.

<sup>285</sup> Edwards Report, ¶ 208.

<sup>286</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006, ¶¶ 229-230.

effect to the tribunal's reasoned judgment. No more and no less can be expected than a serious attempt by a tribunal to identify a suitable date on the basis of the evidence provided by the Parties.

295. The evidence presented by the respective experts, for both Parties,<sup>287</sup> in this case indicates that the crisis was over by the mid-2003, the time during which President Kirchner was elected. Bearing in mind the practicalities of financial accounting and calculation, this Tribunal accordingly fixes 1 May 2003 as the date at which the crisis ended.
296. The road and the bridges were opened to toll-paying traffic on 23 May 2003.<sup>288</sup> The Tribunal has found no compelling evidence that the delay in the opening of the Project was caused by conduct that is attributable to Respondent and is in breach of the BIT. PdL's income stream accordingly began to flow on 23 May 2003; and it was that income stream whose dollar value is protected by the FET provision in Article 2 of the BIT. But that flow begins after the end of the crisis, as determined by the Tribunal.
297. To be precise, the actions of Respondent, in breach of its obligations under the BIT, that produced the reduction in value of PdL's income stream were the failure to correct the imbalance caused by the pesification introduced by the Emergency Law, Law No. 25,561 in January 2002, and the imposition of the terms of the Emergency Loan by Resolution 14 on 30 June 2003.
298. The effects of the non-correction of the Emergency Law upon which the Tribunal bases its calculation of reparation due to PdL are in principle all losses sustained after and as a result of the enactment of the Emergency Law on 6 January 2002. In practice, the majority of the Tribunal has found no quantifiable losses of this kind that arose prior to 23 May 2003. It was after the opening of the road and bridges to toll-paying traffic on that date, that the impact of the pesification and the Emergency Loan upon PdL's income stream from tolls began to be felt. The Tribunal accordingly decides by a majority that

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<sup>287</sup> Edwards Report, ¶ 208, and Tr., Day 6, p. 1140. Eichengreen Report, ¶ 26, and Tr. pp. 2122-2123.

<sup>288</sup> Cl. Mem. ¶ 4.

while the renegotiation and ‘rebalancing’ should have occurred by 2006 or 2007,<sup>289</sup> the duty to restore the balance extended back to cover all ‘unbalancing’ losses resulting from the 2002 Emergency Law, and thus covered the losses arising after 23 May 2003.

299. While it is theoretically possible that some type of damage arose prior to 23 May 2003 – for example, the value of the difference between the terms of the Emergency Loan granted by Argentina to PdL and whatever loan or other financing might have been available to PdL had it been able to show the lender that the Contract had been satisfactorily readjusted to offset the effects of pesification – the majority of the Tribunal finds that no such losses have been proven.
300. The adoption of Resolution 14 occurred after 23 May 2003. Its impact similarly postdates both the end of the economic crisis and the opening of the road and bridges to toll-paying traffic.
301. The Tribunal accordingly rejects the submission that either breach can be excused or exculpated by reason of the economic crisis and the doctrine of ‘necessity’ under customary international law. That rejection inevitably follows from the chronology of the facts in this case. The economic crisis had ended by the time that the losses for which reparation is due were sustained.

(H) CLAIMANT’S SHARE OF THE REPARATION

302. The analysis has proceeded thus far by focusing on the reparation due in respect of the breach of the FET standard in the BIT, but without addressing the question of Claimant’s entitlement to a part of that reparation.
303. The Tribunal has found, in summary, that Claimant is entitled as an investor within the meaning of the BIT to sue in respect of breaches of the BIT committed by Respondent in its dealings with PdL, in which Claimant had an investment at the material times. Further, the Tribunal has determined that the adoption of Resolution 14 on 30 June 2003 and

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<sup>289</sup> See above, ¶¶ 286-287.

Respondent's failure to implement the renegotiated agreements timeously violated the BIT.

304. It does not follow that just because Claimant is entitled to sue in its own name, without bringing PdL into the proceedings, it is also entitled to take away all or part of the reparation without bringing PdL into the picture. As a shareholder in PdL, Claimant has obligations as well as rights; and one of those obligations is to accept that the assets of PdL would be properly applied to satisfy the legitimate demands of all PdL's creditors and all PdL's shareholders, according to the priorities laid down by law.
305. In the view of the Tribunal, it cannot be assumed that Claimant has an unencumbered right to a share of the reparation due to PdL that corresponds to the share of the stock in PdL held by Claimant. Other shareholders and creditors of PdL may have claims on sums paid by way of reparation. The question is, whether this is a matter for the Tribunal in this case, or whether any such claims are a matter between Claimant and persons not party to these proceedings.
306. The Tribunal has decided that it is beyond both its responsibilities and its powers to make dispositive orders in this respect. Neither PdL nor any other persons are parties to this arbitration or subject to its jurisdiction. The Tribunal accordingly proceeds on the basis of the approach adopted by other tribunals, and makes an award for reparation of which Claimant will be entitled to a share corresponding to the proportion of its shareholding. But it does so with the proviso that Claimant must disclose this award to the board of PdL, drawing the board's attention specifically to this Section (H).
307. The Tribunal has accordingly decided that Claimant is entitled to 26% of the damages caused to PdL by Respondent, as the share corresponding to its share in the equity of PdL.

308. Claimant asks for full reparation for all of its losses caused by Respondent.<sup>290</sup> It submits that there should be no deduction made in respect of the payment that it received under the political risk insurance that it had arranged with the German Government.<sup>291</sup>
309. The Tribunal decides that the insurance payment, which is understood to amount to EUR 11,359 (US\$ 17.7 million<sup>292</sup>) should not be deducted from the amount due to Claimant. The insurance payment is a benefit which Claimant arranged on its own behalf, and for which it paid. It does not reduce the losses caused by Respondent's actions in breach of the BIT: it is an arrangement that had been made by Claimant with a third party in order to provide a hedge against potential losses. The Tribunal does not consider that any principle of international law requires that such an arrangement, to which Respondent was not a party, should reduce Respondent's liability.<sup>293</sup> It may be that under such insurance policies the protected investors are obliged to hand over to the insurer all or part of any sums recovered as damages: but that is a matter of private contract, into which the Tribunal has no cause to inquire.
310. The Tribunal has already determined that amounts received by Claimant in its capacity as a contractor on the Project do not affect its entitlement to compensation for injury to its investment in the Project.<sup>294</sup>

(I) THE APPROACH TO THE DETERMINATION OF QUANTUM

***The general approach: the reduction in value of Claimant's shareholder interest in PdL***

311. The Tribunal has considered carefully the arguments in the reports of the Parties' respective experts, and their respective approaches to the determination of quantum. In their 2010 report Claimant's experts Messrs Abdala and Spiller of LECG (later Compass/Lexecon) estimated damages as of 31 December 2009, at US\$ 74.6 million,

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<sup>290</sup> Cl. Rep., Section XIV, 'Damages'.

<sup>291</sup> Cl. Rep., ¶ 435 ff.

<sup>292</sup> See the Sandleris and Schargrodsky Valuation Report, ¶ 173.

<sup>293</sup> Cf., *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Cases Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010, ¶ 691 (a decision on third party funding and liability for costs.)

<sup>294</sup> Above, ¶ 181.

using the Discounted Cash Flow ('DCF') approach, and at US\$ 109.0 million using the Net Capital Contribution ('NCC') approach. Those figures were revised in their 2012 report to US\$ 109.4 million and US\$ 157.2 million respectively, as of 31 May 2012. Respondent's experts Messrs Sandleris and Schargrodsky estimated damages as of late December 2010 at sums within a range from negative US\$ 3.83 (i.e., damages owed to the Respondent)<sup>295</sup> to a positive US\$ 1.07 million.

312. The wide gap between the experts' estimates is largely attributable to the different assumptions concerning key issues on which they based their work. For example, Claimant's experts valued damages as at later dates (2010, 2012), and on the basis that sums recovered under the political risk insurance that Claimant had taken out should be disregarded, that but for Respondent's measures tariffs and expenses would have been dollarized and revised, so that Respondent is responsible for losses resulting from pesification, and that Respondent was responsible for the non-payment of the IDB loan and for delays in completing the Project and that Respondent is liable to repay the loans advanced to PdL by Hochtief. Claimant's experts also assume that but for Respondent's actions PdL would have been profitable, and that Claimant would have received dividends and have seen the value of its equity share in PdL increase, and would have had its loans to PdL repaid.
313. On the other hand, Respondent's experts assumed that the date for valuation should have been early 2002, when the pesification measures were enacted; that Claimant's receipts under the political risk insurance should be deducted; that there was no possibility of maintaining dollarized tariffs after 2002, even in a 'but for' scenario; and that Respondent was not responsible for the non-payment of the IDB loan (and Claimant was therefore in breach of its contractual obligation to obtain FIFA) or for delays in completing the Project. Respondent's experts assume that PdL would not have been profitable and that no dividends could have been paid to the shareholders.

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<sup>295</sup> See the explanation in Resp. PHB ¶¶ 77-80.

314. There is little common ground between the experts; and the Tribunal finds that the approach of neither set of experts is entirely satisfactory. Indeed, where there were great differences between the scenarios contemplated by the experts, comparison of their reports was an exercise of regrettably limited utility. The Tribunal does, however, have a clear view on the losses for which compensation is due.
315. In broad terms, the measure of the damage is the amount by which the value of Claimant's 26% shareholding in PdL was reduced by Respondent's conduct in violation of the BIT. It is to be assumed that this amount is equivalent to 26% of the reduction in value of PdL caused by Respondent's breaches of the BIT.
316. The main element in the reduction in the value of PdL is the difference between the sums that PdL actually received from tolls and the sums that it should have received if pesification had not occurred and if the toll rates had been revised annually in line with the US Consumer Price Index, as the Concession Contract provided.
317. Claimant's experts have taken a relatively conservative approach to the determination of toll receipts. They have, of course, the actual figures for receipts up until recent months; and in calculating the toll revenues as they would have been 'but for' the pesification and toll freeze they have assumed that the higher 'dollarized' tolls would have reduced demand, and therefore toll income, because of the elasticity of demand.<sup>296</sup> Respondent's experts challenge, *inter alia*, the elasticity values, and the validity of any assumption that PdL could (even in the absence of Respondent's actions) have maintained dollarized tariff rates after 2002.
318. The Tribunal finds the approach of Claimant's experts to the estimation of the estimation of toll receipts in the 'but for' scenario to be persuasive. In their Second (2012) Report,<sup>297</sup> Claimant's experts revised their estimate of toll receipts in the 'but-for' scenario, in the light of the analysis of elasticities in the study 'Rosario to Victoria Bridge Traffic and Revenues' (1 June 2012), by Mr Philip Bates of Buro Happold. Mr Bates proposed an

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<sup>296</sup> LECG First Report, ¶¶ 138-151.

<sup>297</sup> Compass Lexecon, Second Report, 5 June 2012, Section III.1.6.

‘envelope’ of elasticity values. The initial values used by Messrs Abdala and Spiller lay comfortably within the envelope; but the Tribunal considers that it is appropriate, given the burden that lies upon Claimant to prove its case, to prefer the experts’ calculations based on Mr Bates’ lower bound figures.<sup>298</sup>

319. The other element driving the reduction in value of PdL is the pesification of operation and maintenance expenses imposed by Resolution 14.
320. The Tribunal has given careful consideration to the question of the claims for consequential costs. Claimant claimed for losses flowing from its inability to obtain the IDB loan, and the delay in beginning operations.<sup>299</sup> These include the extra costs incurred as a result of the failure of the IDB loan to materialize, and the allegedly excessive costs of the 2003 Emergency Loan.
321. The factual evidence is, in the view of the Tribunal, not adequate to support the conclusion that Respondent is responsible for the non-materialization of the IDB loan. Nor is the evidence of the market rate for loans to companies in the position of PdL in Argentina in 2003 sufficiently clear to warrant the making of an order for compensation specifically related to the alleged increases in PdL’s costs of borrowing.
322. The pesification of operation and maintenance costs in Resolution 14, in contrast, is a clear departure from the basic principles on which the Concession Contract was concluded, and notional reparation for those losses is to be counted in the ‘but for’ scenario, from which Claimant’s entitlement to reparation will be calculated.
323. Claimant also asserts that it suffered damage to its investment as a result of the fall of PdL towards bankruptcy. The evidence on this point is not clear. Prior to the onset of the financial crisis, the Consortium’s members’ own invoices as contractors were paid,<sup>300</sup> evidently enabling them to recoup their own capital contributions; but PdL’s principal

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<sup>298</sup> *Ibid.*, ¶ 109.

<sup>299</sup> See e.g., the LECG Report, ¶ 2.

<sup>300</sup> In a letter dated 4 December 2002 from the Boskalis International BV-Ballast Nedam Baggeren BV joint venture to the Argentinean Ministry of Economy, it was alleged that PdL gave priority to paying its own shareholder/contractors before paying its principal subcontractor, the joint venture. (Exh. RA 460)

subcontractor, the Boskalis-Ballast Nedam joint venture, was not paid, setting in motion the events that led to the ICC award against PdL rendered on 28 November 2003 and the insolvency proceedings initiated against PdL in April 2007, first by Boskalis-Ballast Nedam on the ground of non-payment of the ICC award and then by PdL's own board. But evidence is lacking to prove that PdL did not receive sufficient monies from Respondent to have been able to pay the invoices received from Boskalis-Ballast Nedam if PdL had chosen to give priority to the payment of those invoices.

324. Given the Project's difficult financial straits in the deteriorating financial conditions of Argentina in the months leading up to the Emergency Law's enactment, the Tribunal finds that there is insufficient evidence to warrant the conclusion that the bankruptcy proceedings against PdL were caused by the pesification process or any other breach of the BIT for which Respondent was responsible; and it declines to order the payment of any reparation in respect of PdL's fall towards bankruptcy. Indeed, the Tribunal's assumption must be that if it requires a revenue stream to be calculated in dollars, in order to avoid any unjust enrichment, it must equally assume that all of PdL's liabilities are similarly to be calculated in dollars. On this basis, and having regard to the normal priority of creditors over shareholders, PdL must be assumed to have been placed in a position to fully repay all of its debts, including to Boskalis-Ballast Nedam, to Argentina (for the Emergency Loan), and to those shareholders such as Hochtief who advanced loans to the company. It follows that the valuation exercise must assume no insolvency and the full repayment of sums owing to creditors without any discount.
325. The Tribunal has accordingly decided that for the purpose of calculating the reparation due to Claimant in this case, the reduction in value is to be Claimant's 26% share of the difference in US dollars between the actual value of PdL at the date of this Decision, and the value that PdL would have had if all other factors had remained as they stand in the 'actual scenario' except that:
- a) Peso-dollar parity had been maintained; and
  - b) The tolls had been revised in accordance with the US Consumer Price Index, as provided in Article 25 of the Concession Contract;

- c) The numbers of each kind of toll payments had been the actual numbers reduced to take into account the impact of the elasticity of demand as estimated in the lower bounds of Mr Bates' report, as indicated by Claimant's experts in paragraph 109 of their Second Report (2012) ; and
- d) The actual operation and maintenance costs and all other financial liabilities incurred by PdL, including all of its debts, had not been pesified or reduced in the insolvency proceedings.

### ***Temporal limitations on recovery***

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

327. The calculation is therefore to be effected by reference to the reduced value of PdL as it stands at the date of the Decision. The Tribunal would reject the claims for the recovery of anticipated losses that may arise after the date of the Award, because the Tribunal has no reason to suppose that Respondent will ignore the implications of this Decision for its continuing obligations towards PdL and Claimant.<sup>301</sup> The approach adopted here does not violate that principle. It is the *present* value of PdL that has been reduced, albeit by taking into account present expectations as to the future treatment of the Project. It is that loss in the present value of PdL that is the basis of the compensation in this Decision.

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<sup>301</sup> See in this respect, *Mobil Investments Canada and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4), Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 473 *et seq*: cf., *Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment*, 13 July 2009, I.C.J Reports 2009, p. 267, ¶ 150.

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

(J) COSTS

329. The Tribunal has considered the submissions of the Parties on the question of costs, and the manner in which the litigation has been pursued.

330. Although the Tribunal has not ordered the payment of reparation under every one of the heads of claim presented by the Claimant, the core of the claim has been upheld and the Tribunal has held that Claimant is entitled to reparation for the losses caused by Respondent's violation of Claimant's rights under the BIT. Those losses include Claimant's reasonable costs in pursuing this claim, payable as at the date of this Decision.

331. The Tribunal considers that the costs, including legal costs and the costs of expert witnesses, are high, but not excessively high given the length and complexity of these proceedings. It starts from the principle that the successful Party should recover its costs, but considers that a substantial part of the Claimant's case was not accepted and that in the circumstances it would not be fair to impose the entire costs upon the Respondent. Accordingly, it reduces the costs claimed (US \$9,233,758) by 25% and decides that the Respondent should reimburse the Claimant in the sum of US \$6,925,318.50.

(K) INTEREST

332. The Tribunal has decided that compound interest is payable on sums due to Claimant from the date on which the payment should have been made to Claimant (e.g., each day on which there was a difference between the actual rate toll revenues and the non-pesified, revised toll revenues).

333. Compound interest is payable on any and all sums due under this Decision from the date of the Decision until the date when the payment of such sums is made.

334. Interest is payable at the rates of short-term US Treasury Bills at the relevant times, compounded quarterly.

(L) THE SUM TO BE PAID

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

## **VI. DECISION OF THE TRIBUNAL ON LIABILITY**

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

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

- f. The political risk insurance payment that Claimant had arranged with the German Government should not be deducted from the amount due to Claimant, as explained in paragraph 309;
- g. Since the Tribunal has not been able, on the basis of the information provided by the Parties, to calculate the actual compensation to be paid, the Parties are to calculate and submit, in accordance with the principles set out in paragraph 325, the information required under paragraph 335, in the manner and within the time limits indicated therein;
- h. As decided in paragraphs 332-334, interest on all sums due to Claimant from the date on which the payment should have been made to Claimant, and on any and all sums due under this Decision from the date of the Decision until the date when the payment of such sums is made is payable at the rates of short-term US Treasury Bills at the relevant times, compounded quarterly.
- i. As to costs, and as explained in paragraphs 329-331, Respondent should reimburse the Claimant in the sum of US\$6,925,318.50.

Done in English and in Spanish, both versions being equally authentic.

[signed]

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Honorable Charles N. Brower  
Arbitrator

[signed]

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

[signed]

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Professor Vaughan Lowe  
President