INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

BA Desarrollos LLC

Claimant

v.

Argentine Republic

Respondent

ICSID Case No. ARB/23/32

ARGENTINE REPUBLIC'S MEMORIAL ON PRELIMINARY OBJECTIONS AND COUNTER-MEMORIAL ON THE MERITS

*** Translation**

25 November 2024

Procuración del Tesoro
República Argentina

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GLOSSARY OF TERMS

§(§)	section(s)
¶(¶)	paragraph(s)
AABE	State Property Management Agency of the Argentine Republic (*Agencia de Administración de Bienes del Estado*)
BA Desarrollos Company Agreement	BA Desarrollos limited liability company agreement
AGP	Administración General de Puertos S.E.
[redacted]	[redacted]
APRA	Agencia de Protección Ambiental de la Ciudad Autónoma de Buenos Aires (*Environmental Protection Agency of the Autonomous City of Buenos Aires*)
Argentina	Argentine Republic
art.	article
Articles on international liability	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, *annexed to* UN General Assembly Resolution No. 56/83, 12 December 2001, UN Doc. A/RES/56/83.
BA Desarrollos	BA Desarrollos LLC
BA Development	BA Development II Gmbh
Energy Charter	Energy Charter Treaty in force since April 16, 1998.
C-	Claimant's exhibit
ILC	International Law Commission
ICSID	International Center for Settlement of Investment Disputes
CL-	Claimant's legal authority
UNCITRAL	United Nations Commission on International Trade Law
CC&C	Civil and Commercial Code of the Argentine Republic
Cogency	Cogency Global Inc.
Comments to the Articles on international liability	Commentaries of the International Law Commission to the Articles on Responsibility of States for Internationally Wrongful Acts, *in Report of the International Law Commission on the work of its fifty-third session*, 2001, chap. IV, ¶ 77, U.N. Doc. A/56/10
Catalinas Norte II	Property located between Eduardo Madero Avenue, San Martín Street, Antártida Argentina Avenue and Cecilia Grierson Boulevard, District 21 - Section 97
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
Urban Agreement	Agreement between the Ministry of Transportation of the Argentine Republic, the State Property Management Agency of the Argentine Republic and the Government of the City of Buenos Aires dated November 30, 2016

DAPSA's Vacancy Agreement	Vacancy Agreement between the State Property Management Agency of the Argentine Republic and Destilería Argentina de Petróleo S.A. dated January 11, 2018.
Tienda León Vacancy Agreement	Vacancy agreement between the State Property Management Agency of the Argentine Republic and Traslados Especiales S.A. dated October 19, 2017
Vacancy Agreements	DAPSA Vacancy Agreement and Tienda León Vacancy Agreement
CP	Participation certificates
PCIJ	Permanent Court of International Justice
CSJN	Supreme Court of Justice of the Argentine Republic (*Corte Suprema de Justicia de la República Argentina*)
VCLT	Vienna Convention on the Law of Treaties in force on January 27, 1980
DAPSA	Destilería Argentina de Petróleo S.A.
[redacted]	[redacted]
Mac Mahon Witness Statement	Witness statement of Juan José Mac Mahon dated November 20, 2024 submitted by Claimant's Memorial together with its Counter-Memorial
Claimant's Memorial	Claimant's Memorial filed by Claimant on March 29, 2024
Respondent	Argentine Republic
Claimant	BA Desarrollos LLC
U.S.	United States of America
Edmond Safra	Edmond Moise Safra
EMS Capital	EMS Capital LP
EMS Continuation	EMS Continuation S.A
EMS Opportunity	EMS Opportunity Ltd
States Parties	Republic of Argentina and United States of America
Fideicomiso BAP	Fideicomiso BAP
Fideicomiso FPIAC	Fideicomiso Financiero Privado Inmobiliario de Administración Catalinas I
GCBA	Government of the Autonomous City of Buenos Aires
LLC	*limited liability company*
LAP	National Law of Administrative Procedures No. 19,549
Ministry of Transportation	Ministry of Transportation of the Argentine Republic (*Ministerio de Transporte de la República Argentina*)
n(n).	footnote(s)
OA	Anti-Corruption Office of the Argentine Republic (*Oficina Anticorrupción de la República Argentina*)

Observations on the Request for Bifurcation	Observations on the Request for Bifurcation filed by Claimant on August 8, 2024.
OPM Inmobiliaria	OPM Inmobiliaria S.A.
p(p).	page(s)
Plot 1	Plot 1 as per M-155-2017 Survey plan, located in the Autonomous City of Buenos Aires, Argentine Republic, Cadastral Nomenclature: District 21 - Section 97 - Block 38 - Parcel 1 (69.757,97 m^2)
Plot 2	Plot located at 1355 San Martín St. in the Autonomous City of Buenos Aires, Argentine Republic, Cadastral Nomenclature: District 21 - Section 97 - Block 38 - Plot 2 (3,954.93 m^2).
Plot 3	Plot located at 1255 Eduardo Madero Avenue, between Cecilia Grierson Boulevard and San Martín Street, in the Autonomous City of Buenos Aires, Argentine Republic, Cadastral Nomenclature: District 21 - Section 97 - Block 38 - Plot 3 (3,188.27 m^2)
Plots or Plots 2 and 3	Plot 2 and Plot 3
Terms and Conditions	Specific Terms and Conditions applicable to the Auctions of the different plots of the Catalinas Norte II Complex.
General Terms and Conditions	Single General Terms and Conditions approved by ONC Disposition No. 63-E/2016.
Promotora Fiduciaria	Promotora Fiduciaria S.A.
[redacted]	[redacted]
Viñoly Project	Project designed by the architect Rafael Viñoly
R-	Argentine Republic's exhibit
RL-	Argentine Republic's legal authority
RBYK Fiduciaria	RBYK Fiduciaria S.A.
Administrative Claim	Administrative claim filed by Fideicomiso BAP on December 30, 2020 requesting the execution of the deeds for Plots 2 and 3.
Arbitration Rules	ICSID Arbitration Rules effective July 1, 2022
Response to Request for Production of Documents	Response to the Request for Production of Documents on Preliminary Objections filed by Claimant on April 18, 2024
SIGEN	National Controller's Office (*Sindicatura General de la Nación*)
Request for Arbitration	Request for Arbitration filed by Claimant on June 23, 2023, registered on August 4, 2023.
Request for Bifurcation	Request for Bifurcation filed by the Argentine Republic on June 28, 2024
Request for Production of Documents	Request for Production of Documents on Preliminary Objections filed by the Argentine Republic on April 8, 2024
Auction No. 3/18	Public Auction for the sale of Plot 3 held on April 26, 2018.
Auction No. 4/18	Public Auction for the sale of Plot 2 held on May 9, 2018.

Auctions	Auction No. 3/18 and Auction No. 4/18
Tienda León	Traslados Especiales S.A.
BIT / Treaty	Treaty between the Argentine Republic and the United States of America on the Reciprocal Promotion and Protection of Investments, signed on November 14, 1992, in force since October 20, 1994.
TTN	National Appraisal Board (*Tribunal de Tasaciones de la Nación*)
USD	United States dollars
TDT	Trust Debt Titles

ARGENTINE REPUBLIC'S MEMORIAL ON PRELIMINARY OBJECTIONS AND COUNTER-MEMORIAL ON THE MERITS

1. The Argentine Republic ("Argentina" or "Respondent") submits this Memorial on Exceptions and Counter-Memorial in the arbitration proceeding *BA Desarrollos LLC v. Argentine Republic* (ICSID Case No. ARB/23/32). The following documents are filed together with this memorial:

- Exhibits (R-054 to R-184);
- Legal authorities (RL-042 to RL-219);
- the legal report of Andrew Verstein dated November 21, 2024 ("Verstein Report"), together with annexes (AV-001 to AV-037), an expert specialized in *Limited Liability Companies* in the United States;
- the witness statement of Juan José Mac Mahon dated November 20, 2024 ("Mac Mahon Statement"), together with annexes (JMM-001 to JMM-043), current General Director of Legal Affairs of the State Property Management Agency of the Argentine Republic ("AABE").

I. INTRODUCTION

2. Not all disputes between a foreign national and a State are amenable to a tribunal of the International Centre for Settlement of Investment Disputes ("ICSID"). This is one such case.

3. The claim before this Tribunal is straightforward in fact and law.

4. It is a U.S. corporation, BA Desarrollos LLC ("BA Desarrollos" or "Claimant"), which was incorporated in the State of Delaware, United States of America ("U.S."), as a *shell company*. Its purpose was to channel funds that would eventually be contributed to Fideicomiso BAP, a financial structure incorporated under Argentine laws to bid at auctions of land located in the Retiro neighborhood of the City of Buenos Aires, Argentina ("Catalinas Norte II"). Fideicomiso BAP participated in two of the auctions and was the successful bidder. Pursuant to this purchase agreement, Fideicomiso BAP paid the price indicated in the auction. However, due to a number of circumstances, the execution of the deeds has been delayed. Claimant also complains of a number of expenses that it alleges are the result of misrepresentations or defaults by Argentina in connection with the purchase contract.

5. In legal terms, the simplicity of these facts has the consequence that this Tribunal lacks jurisdiction because: (i) Argentina has denied Claimant the benefits of the protection of the Treaty between Argentina and the U.S. on the Reciprocal Promotion and Protection of

Investments, signed on November 14, 1992 ("Treaty" or "BIT") (Section IV.A); (ii) Claimant has made an election of remedies in favor of the Argentine courts (Section IV.B); (iii) the main asset to which this dispute relates does not satisfy the requirements to be considered an investment under the ICSID Convention (Section IV.C); and (iv) the dispute is contractual in nature (Section IV.D).

6. Regarding (i), Claimant acknowledges that it is controlled by Cayman Islands and Virgin Islands companies, and ultimately by Mr. Edmond Moise Safra, a Brazilian and Italian national ("Edmond Safra"). It also acknowledges that it has no substantial business activity in the U.S. For the sole purpose of invoking a connection with the U.S., with a series of contrivances with no valid legal basis, Claimant relies on the acts that its *manager,* EMS Capital LP ("EMS Capital"), allegedly did on its behalf. However, the attempt to create a fiction of actual economic nexus between BA Desarrollos and the U.S. fails insofar as there is no evidence to show that the *manager*'s acts are attributable to Claimant, the *manager*'s acts performed in the purported name of BA Desarrollos are not acts in the U.S., and, in any event, do not constitute substantial U.S. business activity.

7. By virtue of this economic reality Argentina exercised the right reserved in Article I(2) of the Treaty allowing it to deny the benefits of the BIT to a company organized under the laws of the other Party, if such company has no substantial business activities in the territory of the other Party.

8. The other three remaining grounds for declining jurisdiction relate to the dispute in this arbitration, which is simply a delay in executing the deed to transfer title of the land awarded to Fideicomiso BAP.

9. Regarding (ii), Argentina does not dispute that Fideicomiso BAP has been awarded two of the Auctions that were held in Catalinas Norte II. Nor is it in dispute that Fideicomiso BAP paid the price at which the two plots were awarded. What is in dispute is the pure and exclusive attribution to Argentina of the delay in the execution of the deeds.

10. It should be noted that on December 30, 2020 Fideicomiso BAP filed the prior administrative claim, the sole purpose of which under Argentine law is to enable judicial action, choosing for the purposes of the Treaty recourse to the Argentine courts. This choice, by virtue of Article VII of the Treaty, which establishes a dispute resolution clause with a *fork in the road* structure, prevents this Tribunal from taking jurisdiction.

11. Regarding (iii), Claimant has also failed to demonstrate that it is the owner of an investment under the terms of the Treaty. The rights derived from the Specific Terms and Conditions applicable to the auctions of the different Catalinas Norte II Plots ("Terms and Conditions"), notwithstanding the fact that they are an asset of Fideicomiso BAP, not of BA Desarrollos, do not satisfy the requirements of the *Salini test*, in particular the elements of risk, duration and regularity of earnings and returns. Failure to satisfy this analysis means falling outside the terms of Article 25(1) of the ICSID Convention.

12. Finally, regarding (iv), the nature of Claimant's claim is clearly contractual: the alleged breach of the terms of the sale and purchase of the land caused by the delay in the execution of the deeds. The contractual nature of the dispute is not undermined simply because the national State is the selling party. There is no exercise of sovereignty involved in the delay in the execution of the deeds in this case.

13. Even if the Tribunal were to disagree with Argentina and decide to assume jurisdiction, the delay Claimant invokes under the BIT is not attributable to Argentina in the terms Claimant puts forward and, to the extent attributable, finds a justified and reasonable basis. While all other successful bidders (domestic and foreign, including companies forming part of the same group to which Claimant belongs) at contemporaneous auctions in respect of comparable plots made progress with the execution of the deeds , Fideicomiso BAP did not. The delay is primarily explained by the constant changes of Fideicomiso BAP’s trustee, which did not meet the necessary conditions for the execution of the deeds to transfer of title of the plots awarded to it, in addition to Fideicomiso BAP's insistence on the approval of a project that exceeded the boundaries of the land awarded to it. In addition to these failures on the part of Claimant, there are ongoing investigations into the manner in which the adjudications were made, investigations which began in July 2019 and prevent the pending proceedings from proceeding until the issues investigated have been clarified.

14. The evidence shows that the delay has not substantially interfered with Claimant's rights, nor is it unreasonable, manifestly arbitrary, discriminatory or non-transparent. On the contrary, the reasons that have delayed the execution of the deeds are justified and reasonable. Fideicomiso BAP has been able at any time to initiate a judicial claim for execution of deeds or to request the termination of the purchase contract in order to be reimbursed for the money paid, or that once the obstacles preventing AABE from proceeding with the deed are removed the deed could be executed (Section V).

15. Finally, Claimant's claim regarding the additional expenses it incurred after the award of the plots for which it is claiming is unfounded. These expenses are based on arguments that: (i) are contrary to the terms of the Terms and Conditions which expressly provided for the possible existence of contingencies and eventualities and included waivers by the purchasers to claim for them; and (ii) exceed the limits of the plots awarded to Fideicomiso BAP. Therefore, any expenses that Fideicomiso BAP incurred outside of what the Terms and Conditions recognized or the boundaries of the awarded plots were solely and exclusively at Claimant's expense.

[redacted]

II.A. [redacted]

16. [redacted]

17. [redacted]

18. [redacted]

19. [redacted]

[redacted]

[redacted]

136. [redacted]

III. APPLICABLE LAW

III.A. The ICSID Convention Article 42 rule

137. The consent of the parties to submit a dispute to arbitration under the ICSID rules entails acceptance of the rules set forth in the ICSID Convention on applicable law. In this regard, Article 42(1) of the ICSID Convention provides:

> The Tribunal shall decide the dispute in accordance with the rules of law agreed upon by the parties. Failing agreement, the Tribunal shall apply the law of the State party to the dispute, including its rules of private international law, and such rules of international law as may be applicable.

138. In the absence of agreement between the parties to the dispute, the rule set forth in the second sentence of Article 42(1) of the ICSID Convention applies. [228] The parties to the present arbitration "have not agreed on the law applicable to the resolution of the dispute, nor has the Treaty".[229] Accordingly, the law governing this dispute is composed of both the provisions of the applicable BIT, the other relevant rules of international law and the rules

[redacted]

[228] *See, e.g., CMS Gas Transmission v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 108 (CL-029); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 128 (CL-007); *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, ¶¶ 82-85 (CL-041).

[229] *CMS Gas Transmission v. Argentine Republic,* ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶108 (CL-029).

of Argentine law.

139. In this regard, the Tribunal in the case of *El Paso vs. Argentina* held that:

> Argentina is correct in pointing out that in the absence of agreement between the parties as to the law applicable to the dispute, the dispute must be governed by Argentine law and international law, in accordance with Article 42(1), second sentence of the ICSID Convention. [...]The Tribunal is of the opinion that both systems - the BIT supplemented by international law and Argentine law - have a role to play. [...]
>
> The application of the treaty as a primary source of law, like the domestic law of the host state, in a case involving a bilateral investment treaty has been endorsed by several ICSID tribunals which have also noted the relationship between the treaty and the law of host state. [...][230]

140. Moreover, under Article VII of the BIT, an "investment dispute", as relevant here, refers to "the alleged breach of any right conferred or established by this Treaty with respect to an investment".[231] Accordingly, Claimant must prove a breach of Argentina's obligation under the BIT invoked. In this regard, the Tribunal in *Saluka v. Czech Republic* explained:

> The [Bilateral Investment] Treaty cannot be interpreted so as to penalise each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State. [232]

141. Therefore, Claimant must establish Argentina's liability on the basis of a breach of one of the standards of the BIT,[233] in accordance with the regime of State responsibility for internationally wrongful acts. [234]

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[230] *El Paso Energy International Company v. Argentine Republic",* ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶¶ 128, 129, 131 (CL-007).

[231] Argentina-US BIT, art. VII.1 (R-017).

[232] *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award, March 17, 2006, ¶ 442 (CL-040).

[233] *See, e.g., El Paso Energy International Company v. Argentine Republic. Argentine Republic",* ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 130 (CL-007); *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ¶ 94 (CL-120); *SGS Societé Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, August 6, 2003, ¶ 168 (RL-014); *Loewen Group. Inc and Raymond L. Lowen v. United States*, ICSID Case No. ARB (AF)/98/3, June 26, 2003, ¶ 134 (RL-045).

[234] *See El Paso Energy International Company v. Argentine Republic",* ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 130 (CL-007); International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, *annexed to* UN General Assembly Resolution No. 56/83, December 12, 2001, UN Doc. A/RES/56/83 (CL-008).

III.B. The role of national law

142. Argentine law is part of the law applicable to this dispute. In the present dispute, Argentine law will make it possible to determine, among other issues, the existence, nature, content and scope of the rights invoked as alleged investment.[235] In in this sense, "the objective of investment treaties is to protect rights in rem acquired in accordance with the municipal law of the host state that constitute an investment according to the definition in the relevant investment treaty".[236] Thus, it has been held:

> It is [...] the municipal law of the host state that determines whether a particular right in rem exists, the scope of that right, and in whom it vests. It is the investment treaty [...] that supplies the classification of an investment and thus prescribes whether the right in rem recognised by the municipal law is subject to the protection afforded by the investment treaty.[237]

143. The rights invoked as an alleged investment — the existence, nature, content and scope of which are determined in accordance with the law of the host State — are part of a legal regime in which the investor voluntarily makes its investment.

144. In conclusion, the law governing this dispute is composed of both the provisions of the Treaty, the other relevant rules of international law and the rules of Argentine law. However, Argentina's liability in this case can only arise from a finding of a breach of an obligation under the BIT, in accordance with the regime of State responsibility for internationally wrongful acts and other applicable rules of international law.

IV. LACK OF JURISDICTION AND ADMISSIBILITY

IV.A. Argentina has denied Claimant the benefits of the Treaty as permitted by Article I(2)

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[235] *See, e.g., El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 135 (CL-007). Argentine Republic",* ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 135 (CL-007); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, February 3, 2006, ¶ 184 (RL-047); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, § 18 (CL-094); *William Nagel v. Czech Republic*, SCC Case 49/2002, Award, September 9, 2003, ¶¶ 300-302 (RL-048); Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, 2007, pp. 182-184 (RL-049).

[236] Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", *The British Year Book of International Law*, 2003, vol. 74, p. 201 (RL-050).

[237] Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", *The British Year Book of International Law*, 2003, vol. 74, p. 198 (RL-050).

of the Treaty.

145. Under Article I(2) of the BIT, the States reserved

> [the right to deny to any company of the other Party the benefits of this Agreement if (a) such company is controlled by nationals of a third country and, in the case of a company of the other Party, if such company has no substantial business activities in the territory of the other Party or (b) is controlled by nationals of a third country with which the denying Party does not have normal economic relations. [238]

146. In exercise of that right, Argentina denied the benefits of the BIT to BA Desarrollos by virtue of its lack of significant business activity in the US.

IV.A.1. The States Parties reserved the right to deny benefits under the Treaty to an investor that does not have significant business activities in the territory of the other State Party

147. In Article I(2) of the Treaty the States Parties reserved the right to exclude from the protection of the BIT investors who are nationals of the other State Party and who do not have substantial business activities in the State of which they are nationals; that is, in those cases where the investors have no real or genuine economic connection with the home State. Determining whether Argentina has exercised this right in accordance with the BIT requires a two-fold analysis.

148. First, the *ratione materiae* analysis. In order to assess whether Argentina has properly exercised its right to deny benefits of the Treaty to BA Desarrollos, it is necessary to determine whether Claimant has substantial business activity in the U.S. territory.[239] In order to do so, it is crucial to establish what it means for an investor to have substantial business activities in a territory.

149. Arbitral tribunals have understood that the term "significant business activities" implies that there must be a genuine connection of the company with its home State and not merely superficial, fleeting or incidental:[240] "[a] genuine connection is necessary to ensure that the

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[238] BIT, art. I(2) (R-017), as amended by Agreement by Exchange of Notes of March 31, 1992 between the Government of the Argentine Republic and the Government of the United States of America Modifying the Treaty on the Promotion and Reciprocal Protection of Investments of November 14, 1991 (R-018).

[239] *Guaracachi and Rurelec v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 367 (RL-4).

[240] *See Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue of November 23, 2020, ¶ 137 (RL-5).

company is one that the home State has an interest to protect, and which the host State would consider it appropriate for the home State to protect".[241]

150. Claimant contends that Argentina is wrong to say that the activities must be "important" since the BIT only requires that the activities be "substantial".[242] While according to the RAE, "substantial" is synonymous with "important" or "essential",[243] the linguistic difference that Claimant seeks to create is unsubstantiated. The reality is that in this case BA Desarrollos has no substantial or important activity in the U.S.

151. When analyzing whether a company has substantial or important activity in the place of its incorporation, the Tribunals have analyzed, in general terms, that the company has a real activity, not limited exclusively to what is necessary to maintain its registration.[244] Among the elements considered by the Tribunals to identify the existence of substantial or important business activity are:

- the hiring of full-time employees at the company's headquarters;[245]
- the rental of offices for the development of corporate activities in the State's territory;[246]
- expenses and procurements that are related to the development of real commercial activities in the territory of the State;[247]

[241] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶ 137 (RL-5).

[242] Observations on the Request for Bifurcation, ¶ 50.

[243] Real Academia Española, definition of "substantial", Diccionario de la Lengua Española, Tricentennial Edition, Update 2023, available at: https://dle.rae.es/sustancial (R-151). *See also* Real Academia Española, synonyms for important, Diccionario de la Lengua Española, Edición del Tricentenario, Actualización 2023, available at https://dle.rae.es/importante?m=form (R-152).

[244] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶ 137 (RL-5).

[245] *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, ¶ 630 (RL-6).

[246] *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, ¶ 630 (RL-6).

[247] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶ 229 (RL-5).

- the payment of taxes related to substantial commercial activities in the territory of the State; [248]
- banking movements linked to significant commercial activities in the territory of the State and[249]
- the existence of government bodies in the territory of the State.[250]

152. Claimant expressly acknowledges that it has no significant business activity in the U.S.[251] This statement is sufficient to conclude that Argentina has the right to deny benefits. Notwithstanding the foregoing, it is necessary to respond to Claimant by stating that the denial of benefits can only operate if Argentina proves that BA Desarrollos was structured for the purpose of treaty shopping, a mechanism that consists of establishing a shell company in a State not related to the investment, with the sole purpose of obtaining the protection of the Treaty. [252]

153. First, such a requirement does not arise from the BIT. Indeed, the Treaty's considerations for exercising the right to deny benefits are clear and explicitly stated: that the "company is controlled by nationals of a third country or by nationals of that Party, and the company has no substantial business activities in the territory of the other Party".[253] This Tribunal has an obligation to honor that agreement between the U.S. and Argentina in light of the fact that "[i]t is undisputed that States have the power to agree on the characteristics of investors to whom to extend treaty protection — and [that] their agreement is clear".[254]

154. Furthermore, Claimant does not invoke any instrument in which Argentina has stated that the purpose of the denial of benefits clauses in the BIT is to avoid treaty shopping and that

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[248] *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, ¶¶ 617, 627 (RL-6).

[249] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, June 1, 2012, ¶ 4.72 (RL-7).

[250] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, June 1, 2012, ¶ 4.72 (RL-7).

[251] *See* Claimant's Memorial, ¶ 124.

[252] Observations on the Request for Bifurcation, ¶¶ 23-24.

[253] BIT, art. I(2) (R-17), as amended by Agreement by Exchange of Notes of March 31, 1992 between the Government of the Argentine Republic and the Government of the United States of America Modifying the Treaty on the Reciprocal Promotion and Protection of Investments of November 14, 1991 (R-18).

[254] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶ 133 (RL-005).

this is the parameter for analyzing the exercise of the right to deny benefits.[255] This is without prejudice to the fact that even if the purpose were to avoid treaty shopping, the two requirements of Article I(2) of the Treaty remain clear.

155. As to the US, Claimant refers to statements made in the opinion filed in *Bridgestone v. Panama*[256] in which, according to BA Desarrollos, the U.S. would have explained that the sole purpose of the denial of benefits clauses is to avoid treaty shopping.[257] However, nowhere in the document cited by BA Desarrollos does such a statement arise. On the contrary, the U.S. merely stated that "shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established".[258] This statement confirms that in a case where a company does not have a real and continuous link with the State of its nationality, the exercise of denial of benefits is legitimate. The U.S. does not include or mention an alleged purpose or intent of the investor to engage in treaty shopping as a consideration when analyzing this issue in either the *Bridgestone v. Panama* submission or in any of the other two submissions the U.S. has made on this point in other arbitration proceedings. [259]

156. On the other hand, Claimant contends that its interpretation is consistent with *Big Sky Energy Corp v. Kazakhstan*.[260] However, Claimant's citation makes no mention of treaty shopping nor does it refer to the denial of benefits clause as seeking to prevent an investor from structuring its investment for the purpose of treaty shopping.[261] On the contrary, in that case

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[255] Observations on the Request for Bifurcation, fn.30.

[256] Observations on the Request for Bifurcation, ¶ 23, citing *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc v. Republic of Panama* (ICSID Case No. ARB/16/34), Supplemental Submission of the United States Pursuant to Article 10.20.2 of the United States-Panama Trade Promotion Agreement, Sept. 25, 2017, (CL-82).

[257] Observations on the Request for Bifurcation, ¶ 23.

[258] *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc v. Republic of Panama* (ICSID Case No. ARB/16/34), Supplemental Submission of the United States Pursuant to Article 10.20.2 of the United States-Panama Trade Promotion Agreement, September 25, 2017, p. 2 (CL-82).

[259] See, *Italba Corporation v. Eastern Republic of Uruguay*, ICSID Case No. ARB/16/9, U.S. Submission, September 11, 2017 (RL-051); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, U.S. Submission, May 20, 2011(RL-052).

[260] Observations on the Request for Bifurcation, ¶ 25.

[261] *Big Sky Energy Corporation v. Republic of Kazakhstan* (ICSID Case No. ARB/17/22) Award, November 24, 2021, ¶ 275 (CL-84).

and under a different treaty, the Tribunal holds that the purpose of the clause is to exclude companies that do not have "meaningful connection to the country whose nationality is invoked".[262] Moreover, the Tribunal in that case, unlike the present case, found that "[t]he presence of certain 'activities' is not at issue here, but whether they cumulatively qualify as 'substantial'".[263] Indeed, the Tribunal found that:

> Claimant [...] was a publicly traded company with several business activities directed at the US. It thus cannot accurately be characterized as merely a "shell company with no geographic location for its nominal, passive, limited and insubstantial activities. [...]
>
> The fact is that a publicly listed company raising tens of millions of US dollars on US markets, including raising equity from US investment companies and funds managed by US companies, whilst engaging US law firms, filing numerous SEC reports and arranging consistent face-to-face meetings in the US with US investors and stockbrokers, can hardly be characterized as a company merely engaging in activities "of form" as opposed to "of substance".
>
> The activities in the US were quite material to Claimant's purpose and went well beyond those displayed by traditional "mailbox" or "shell" companies.[264]

157. Nor is Claimant's reference to *AMTO v. Ukraine* applicable to this case.[265] That case dealt with Article 17 of the Energy Charter Treaty ("Energy Charter"), and it is on the basis of that particular treaty that the Tribunal made its findings:

> As **the purpose of the ECT** is to establish a legal framework 'in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits...' then the potential **exclusion of foreign owned entities from ECT** investment protection under Article 17 is readily comprehensible. 'Long term economic cooperation', 'complementarities' or 'mutual benefits' are unlikely to materialise for the host State with a State that serves as a nationality of **convenience devoid of economic substance for an investment vehicle**, or a State with which it does not enjoy normal diplomatic or economic relations.[266]

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[262] *Big Sky Energy Corporation v. Republic of Kazakhstan* (ICSID Case No. ARB/17/22) Award, November 24, 2021, ¶ 275 (CL-84).

[263] *Big Sky Energy Corporation v. Republic of Kazakhstan* (ICSID Case No. ARB/17/22) Award, November 24, 2021, ¶ 281 (CL-84).

[264] *Big Sky Energy Corporation v. Republic of Kazakhstan* (ICSID Case No. ARB/17/22) Award, November 24, 2021, ¶ 285-287 (CL-84).

[265] Observations on the Request for Bifurcation, ¶ 26 citing Limited Liability Company AMTO v Ukraine (SCC Arbitration No 080/2005) Final Award, March 26, 2008, ¶ 69 (CL-85).

[266] *Limited Liability Company AMTO v Ukraine* (SCC Arbitration No 080/2005) Final Award, March 26, 2008, ¶ 61 (emphasis added) (CL-85).

158. The Tribunal also rejected the denial of benefits invoked by Ukraine on grounds that have nothing to do with *treaty shopping*. Indeed, contrary to what happens in this case, the Tribunal considered that there was abundant evidence of substantial activity:

> AMTO's tax certificate shows payment of taxes during the period from January 1, 2000 until March 31, 2007 of the following types: (i) residents income tax; (ii) social insurance obligatory payments; (iii) internal VAT; and (iv) entrepreneurial activity risk state fee. Claimant states that it employs two staff full-time and the 'social insurance obligatory payments' relate to these staff. No VAT has been paid during the referred period.
>
> AMTO also holds a multi-currency account in the Latvian bank Rietumu Banka. A brief statement of the activity of this account from March 6, 1998 to March 31, 2007 giving the total amount of transactions in each currency has been presented as evidence by Claimant. However, this bank statement provides no evidence of payments in respect of day-to-day business activities, and the Tribunal has not been provided with evidence that any other bank account exists.
>
> Claimant also submitted a statement from AMTO's landlord, certifying that AMTO has been renting an office in Riga from September 1, 2000 to the date of the statement, March 30, 2007.[267]

159. It can be seen from these decisions that in order to determine whether a State may deny benefits of protection under the treaty, there is no requirement to prove that the investor had the purpose of treaty shopping, but rather to abide by the requirements of each treaty. Therefore, arguments that BA Desarrollos did not fabricate its nationality to obtain jurisdiction are irrelevant to the analysis of Article I(2) of the BIT.

160. Second, a *ratione temporis* analysis is required. This requires considering whether Argentina exercised its right at the appropriate time. [268]

161. Claimant submits that Article I(2) of the BIT only has effect if that right is exercised before a dispute arises.[269] This does not arise from the terms of the BIT and is contrary to the *effet utile* of that article.

162. Nothing in the text of the Treaty allows inferring that it was intended to include a time limit for the invocation of the denial of benefits clause. Since the States decided not to include

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[267] *Limited Liability Company AMTO v Ukraine* (SCC Arbitration No. 080/2005) Final Award, March 26, 2008, ¶ 68 (emphasis added) (CL-85).

[268] *Guaracachi and Rurelec v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 367 (RL-4).

[269] Observations on the Request for Bifurcation, ¶¶ 31-34.

this requirement, it is not appropriate under international law for the Tribunal to force an interpretation that the requirement, in the terms set forth by BA Desarrollos, exists:[270] .

> In general, it is not for arbitral tribunals, in interpreting the text of investment treaties, to read into such texts additional requirements (either on States or on investors) that the State Parties have not chosen to impose.[271]
>
> States have a choice whether to incorporate in their treaties express limits on when any denial of benefits must be invoked. While it may be interesting to debate whether they should do so — which would involve balancing a number of considerations — ultimately that is a policy question that is not for tribunals to resolve. Absent any evidence that particular States intended to impose a particular limitation on a right which they granted or reserved in a particular treaty, it is not within a tribunal's remit to impose such an additional limitation. [272]

163. In cases with denial of benefits clauses similar to the one included in the Treaty, the U.S. explains that requiring a State to exercise its right to deny benefits before the claim is filed would place an impossible burden to fulfill by States:

> Neither this Article nor any other provision of the Agreement precludes a Party from invoking the denial of benefits provision at an appropriate time, including as part of a jurisdictional objection (expedited or otherwise) after a claim has been submitted to arbitration, to deny a claimant enterprise benefits under the Agreement.
>
> **Requiring the respondent to invoke the denial of benefits provision before a claim is filed would place an untenable burden on that Party**. It would require the respondent, in effect, to monitor the ever-changing business activities of all enterprises in the territory of the other Party that attempt to make, are making, or have made investments in the territory of the respondent. This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in the other Party. To be effective, such monitoring would in many cases require foreign investors to provide business confidential and other types of non-public information for review. **Requiring the Parties to conduct this kind of continuous oversight in order to be able to invoke the denial of benefits provision under Article 10.12.2 before a claim is submitted to**

[270] Request for Bifurcation ¶¶ 29-30, citing *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Question, November 23, 2020, ¶¶ 127, 137 (RL-5).

[271] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶128 (RL-005).

[272] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶ 129 (RL-005).

> **arbitration would undermine the purpose of the provision**.
>
> Similarly, there is no basis in the plain language of the Agreement to suggest that a respondent is required to invoke Article 10.12.2 between the submission of a claimant's notice of intent and notice of arbitration. Article 10.16.2, for example, requires that a notice of intent include a claimant's "name and address," but Article 10.16.2 does not require a claimant to disclose the extent of Claimant's business activities in the territory of the other Party to the Agreement or the names of any persons or entities that own or control Claimant enterprise.
>
> In sum, for the above reasons, Article 10.12.2 does not impose any requirement with respect to when a respondent may invoke the denial of benefits provision. [273]

164. The U.S. expressed these same considerations in the *Pac Rim v. El Salvador* case regarding the denial of benefits clause in the Dominican Republic-Central America Free Trade Agreement. [274]

165. The cases cited by Claimant to justify the alleged prospective effects of the denial of benefits are based on Article 17(1) of the Energy Charter ,[275] which has a different content and scope than the BIT. Article 17(1) of the Energy Charter, entitled "Non-application of Part III in certain circumstances" refers only to the benefits provided for in the title "Part III- Promotion and Protection of Investments" which contains the standards of treatment, but does not apply to the title "Part V: Dispute Settlement"[276] which contains access to arbitral jurisdiction for disputes between a State party and an investor.

166. Indeed, the Tribunal in the Energy Charter case *Plama v. Bulgaria* distinguishes the content and effects of the provision in that instrument from other treaties: "[u]nlike most modern investment treaties, Article 17(1) does not operate as a denial of all benefits to a covered investor under the treaty but is expressly limited to a denial of the advantages of Part III of

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[273] *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, First U.S. presentation pursuant to Article 10.20.2 of the U.S.-Panama Trade Promotion Agreement, Aug. 28, 2017, ¶¶ 18-21 (RL-053).

[274] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Submission of the U.S. regarding Article 10.12.2 of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), May 20, 2011, ¶¶ 3- 8 (RL-052).

[275] Observations on the Request for Bifurcation, ¶¶ 31-34, 42, citing: *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) Decision on Jurisdiction, February 8, 2005, (CL-86); *ACF Renewable Energy Limited v. Republic of Bulgaria* (ICSID Case No. ARB/18/1) Award, January 5, 2024, (CL-36); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) Award Excerpts, June 22, 2010, (CL-87).

[276] Energy Letter, December 17, 1994 (R-153).

the ECT.[277] Accordingly, while the Tribunal in *Plama v. Bulgaria* found that the effects of the denial are prospective, this was so in the context of the language of the Energy Charter, considered as "a multilateral treaty with Article 17(1) drafted in permissive terms, not surprisingly, in order to accommodate these different state practices". [278]

167. Claimant also argues that the language used by the treaties —"reserves the right to deny benefits"— implies that benefits can only be denied for future disputes,[279] is simply wrong. The reference to the State reserving the right to deny only means that the State retains its right to invoke the denial of benefits and that its invocation will be optional or optional. Nothing in the language used by Article I(2) of the BIT or in the U.S. views on the subject permits any inference to be drawn from the interpretation of the term "reservation" proposed by Claimant.

168. According to the interpretation guidelines of the Vienna Convention on the Law of Treaties ("VCLT"), treaties must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty".[280] In this case, the term "reservation" means "guarda o custodia que se hace de algo" (in Spanish)[281] and "to have or keep a particular power" (in English), *i.e.*, it refers to the retention of the right at the time of the conclusion of the treaty with respect to disputes covered by the treaty and not to the effects of that right once invoked.

169. Moreover, Claimant's position would deprive Article I(2) of the BIT of any useful effect since it would be extremely difficult, if not impossible, for a State to exercise that right when it does not yet have the information necessary to make that determination. Even,

> [I]t would be odd for a State to examine whether the requirements of Article [I(2)] had been fulfilled in relation to an investor with whom it had no dispute whatsoever. In that case, the notification of the denial of benefits

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[277] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) Decision on Jurisdiction, February 8, 2005, ¶ 149 (CL-86).

[278] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) Decision on Jurisdiction, February 8, 2005, ¶ 155 (CL-86).

[279] Observations on the Request for Bifurcation, ¶¶ 32-33, citing *ACF Renewable Energy Limited v. Republic of Bulgaria* (ICSID Case No. ARB/18/1) Award, January 5, 2024, (CL-36); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) Excerpts from the Award, June 22, 2010, (CL-87).

[280] Real Academia Española, definition of "reserve", Diccionario de la Lengua Española, Update 2023 available at: https://dle.rae.es/reserva, (R-154).

[281] Oxford Learner's Dictionaries, definition of "reserve", available at: https://www.oxfordlearnersdictionaries.com/definition/english/reserve_2 (R-155)

> would—per se—be seen as an unfriendly and groundless act, contrary to the promotion of foreign investments. On the other side, the fulfilment of the aforementioned requirements is not static and can change from one day to the next, which means that it is only when a dispute arises that the respondent State will be able to assess whether such requirements are met and decide whether it will deny the benefits of the treaty in respect of that particular dispute. . [282]

170. The fact that the Treaty has not included a temporal requirement limiting the exercise of the right of States to deny benefits at a time prior to the dispute arising "does not mean that the Treaty in that respect operates 'retroactively'" or in contravention of Article 25(1) of the ICSID Convention, as the [c]laimant contends. It simply means that by the terms of the [BIT] itself, investors are placed on notice in advance, from the time the [BIT] entered into force, that they may face a risk of not being able to rely on the [BIT]'s protections if they choose not to organize their activities in accordance with the standards set forth in Article [I(2)]".[283]

171. Claimant cites *ACF v. Bulgaria* to justify that if a State "was familiar with the structure of Claimant from the beginning of the investment onwards and had a particularly good knowledge or the [investment]"[284] then it cannot invoke denial of benefits once the arbitration has been initiated.[285] Claimant's quote does not support its position insofar as, in this case, a discovery stage has been necessary to know the corporate structure, which even today is still not fully known. Notwithstanding the foregoing, even if it were assumed that Argentina knew the corporate structure of BA Desarrollos —which is not the case—, what is not in dispute is that it did not have knowledge of the absence of significant business activity of Claimant in the U.S.

172. Claimant's proposed interpretation of when the right to deny benefits can be exercised confuses the denial of benefits with the withdrawal of consent. This issue was addressed by the Tribunal in *Guarachachi v. Bolivia* in connection with the Bolivia-US BIT. . Clearly, it explains that

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[282] *Guaracachi and Rurelec v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 379(RL-004).

[283] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, November 23, 2020, ¶ 130 (RL-005).

[284] *ACF Renewable Energy Limited v. Republic of Bulgaria* (ICSID Case No. ARB/18/1) Award, January 5, 2024, ¶1471 (CL-36).

[285] Observations on the Request for Bifurcation, ¶ 42, citing *ACF Renewable Energy Limited v. Republic of Bulgaria* (ICSID Case No. ARB/18/1) Award, Jan. 5, 2024, ¶1471 (CL-36).

> [T]he denial of benefits cannot be equated to the withdrawal of prior arbitral consent, which is only permissible prior to the acceptance of the host State's consent by the investor.
>
> Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are fulfilled. All investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by that denial of benefits.[286]
>
> The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is "activated" when the benefits are being claimed.[287]

173. As in that case, BA Desarrollos, like "any US investor who invests in [Argentina] already knows in advance of the possibility of a denial of benefits by [Argentina]—as long as the Article [I.2] requirements are met—and, if it decides to accept the offer of arbitration made by [Argentina] in the BIT, it accepts it at face value".[288]

174. Finally, and considering the lack of a time requirement for denying benefits, it remains to refer to the procedural rules that establish limits for filing preliminary objections:

> [A]s such, any objection to jurisdiction must be raised no later than permissible under the applicable arbitration rules. In cases governed by the ICSID Convention and Arbitration Rules, the applicable deadline for objecting to jurisdiction on any grounds is the date of a respondent's counter-memorial, so that effectively becomes the deadline for any enforceable denial of benefits.[289]

IV.A.2. Claimant has no significant business activity in the U.S. Claimant has no significant U.S. business activity.

175. Claimant accepts that BA Desarrollos is not controlled by any U.S. company.[290] Therefore, the element of control is not in dispute in this arbitration proceeding. [291]

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[286] *Guaracachi and Rurelec v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶¶ 371-372 (RL-004).

[287] *Guaracachi and Rurelec v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 376 (RL-004).

[288] *Guaracachi and Rurelec v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 373 (RL-004).

[289] *Guaracachi and Rurelec v. Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 131 (RL-005).

[290] Observations on the Request for Bifurcation, ¶ 48. *See also*, Letter from BA Desarrollos to Argentina, May 22, 2024, p. 2 (R-14); Response to Argentina's Request for Production of Documents, April 18, 2024, response to DR#14.

[291] Observations on the Request for Bifurcation, ¶ 48. On the basis that this is allegedly an undisputed fact between the Parties, Claimant's Memorial requests the Tribunal to consider in its decision on costs the fact that

176. Notwithstanding this acknowledgement, Argentina clarifies that, to date, it is not certain as to who is/are the natural person(s) that ultimately control Claimant or the identity of all the companies that make up the chain of control of BA Desarrollos.[292] Based on the documents to which Argentina has had access, the certainty is that BA Desarrollos was always controlled by companies based in the Cayman Islands or British Virgin Islands, and that its ultimate controller would be Edmond M. Safra, a Brazilian and Italian national. [293]

177. Indeed, the shareholder registry of [redacted],[294] company that is currently the sole owner of BA Desarrollos,[295] only indicates that [redacted] has [redacted] as a shareholder.[296] Claimant does not identify who owns [redacted] or whether there are other shareholders of [redacted] in addition to such [redacted] In fact, as Argentina indicated, there are inconsistencies in the information submitted by Claimant that preclude confirmation that [redacted] is the sole shareholder

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Argentina insisted on the production of documents evidencing BA Desarrollos' chain of control. On the contrary, it is Claimant's reluctance and repeated failures to comply with the production of documents ordered by the Tribunal that should be considered when awarding costs, attributing all costs caused by the delay of that stage exclusively to Claimant.

[292] Note from the Argentine Republic to the Tribunal, May 30, 2024, DR#14.E. ("Claimant did not produce any document as to Edmond Safra being the ultimate controlling person of the companies that controls BA Desarrollos LLC. In fact, Claimant does not even provide the names of the allegedly intermediary companies between [redacted] and Edmond Safra. Document BA-000279 simply states that BA Desarrollos is controlled by [redacted]., and that [redacted] is controlled by [redacted] in the Cayman Islands, and that Edmond Safra and [redacted] would be the beneficiaries of [redacted]. However, the chart does not indicate who the trustee of trusts actually is and Claimant refuses to produce documents about the [redacted]".). Accordingly, Argentina reserves the right to present such arguments and remedies as may be appropriate.

[293] *See* Claimant's Memorial to the Argentine Republic's Request for Production of Documents, 18 April 2024, response to DR#14 ("BA Desarrollos was owned by [redacted], an entity incorporated in the Cayman Island from October 2017 until [redacted] As of [redacted] BA Desarrollos is owned by [redacted], an entity incorporated in the British Virgin Islands. Neither entity is a US national [...] BA Desarrollos is ultimately owned by Mr. Safra, an Italian and Brazilian national"). *See* BA Desarrollos Corporate Structure Chart, May 9, 2024 (R-003); BA Desarrollos LLC Limited Liability Company Agreement, October 3, 2017, p.1 (C-121); Cayman Islands Registry Certificate certifying the change of name from [redacted] to [redacted], September 17, 2011 (R-019); Amended and Restated Limited Liability Company Agreement of BA Desarrollos LLC, [redacted], p. 6 (C-003); Certificate of Registration of [redacted] in the British Virgin Islands Registry, April 4, 2012 (R-020); Brazilian Passport of Edmond Moise Safra, March 10, 2016 (R-001), and Italian Passport of Edmond Moise Safra, May 2, 2022 (R-002).

[294] [redacted] shareholders' registry book, April 4, 2012 (R-020).

[295] Assignment Agreement between [redacted] and [redacted], [redacted] (R-004); Amended and Restated Limited Liability Company Agreement of BA Desarrollos LLC, [redacted] p. 1 (C-003).

[296] [redacted] shareholders' registry book, April 4, 2012 (R-020).

of [redacted]. [297]

178. In turn, the chart of the corporate structure of BA Desarrollos submitted by Claimant in this arbitration proceeding only indicates that Edmond M. Safra "and [redacted]" are beneficiaries of the [redacted] that would control the investment in BA Desarrollos.[298] Claimant has refused to identify who these other controllers of BA Desarrollos are, or in what percentage, or what nationality they are. [299]

179. Having made these qualifications with respect to the control of BA Desarrollos, and with full reservation of its rights, Argentina next addresses the issue of the lack of significant commercial activity.

180. Claimant contends that BA Desarrollos is a company with U.S. activities.[300] This assertion has no factual support.

181. The very choice of the type of company to make the investment in Argentina shows that was looking for a structure that did not require significant activity in the U.S. BA Desarrollos is an LLC incorporated in Delaware.[301] As expert Verstein points out:

> [T]he majority of Delaware LLCs have no substantial business activity anywhere in the United States. In short, the formation of a Delaware LLC is at best a very weak signal that anything has occurred other than formation itself.
>
> [...] Delaware is internationally famous for how little it requires of anyone seeking to create an entity and maintain its existence. A Delaware LLC can be created online, without the help of a lawyer, for US$110. Delaware registration does not require any business ties in the United States or anywhere else in the world [...].[302]

182. For its part, the evidence submitted by Claimant clarifies the following: "[y]ou can form a Delaware LLC **no matter where your business activities take place**, or where you live in the United States. Most countries allow individuals to use a Delaware LLC as well. (...) Most

[297] As previously indicated by Argentina: "*See*, Argentina's Note to the Tribunal of July 29, 2024.

[298] Chart of BA Desarrollos' corporate structure, May 9, 2024 (R-003).

[299] Chart of BA Desarrollos' corporate structure, May 9, 2024 (R-003).

[300] Observations on the Request for Bifurcation, ¶ 51.

[301] Verstein Expert Report, ¶¶ 8, 87.

[302] Verstein Expert Report, ¶¶ 43, 59.

Delaware LLCs are formed **without any of the LLC members ever visiting Delaware**".[303] In this sense, Delaware law indicates that the registration office "need not be **a place of its business**".[304]

183. When considering elements to determine whether BA Desarrollos has significant business activity in the U.S., the following is observed:

184. *Employees:*[305] BA Desarrollos has no employees dedicated exclusively to its alleged business activity in Delaware. Argentina requested Claimant to produce sufficient documents to identify the employees of BA Desarrollos, their position and dates of entry and payments of salaries or any other amounts by BA Desarrollos LLC in Delaware.[306] In this regard, Claimant acknowledged that BA Desarrollos has no contract employees as it is allegedly BA Desarrollos' manager, EMS Capital, who has employees providing services on behalf of BA Desarrollos.[307] Claimant did not present any evidence about employees who, through EMS Capital, provide services on behalf of BA Desarrollos, nor what tasks they allegedly perform, how often or for what period of time. Nor does Claimant explain how this constitutes a commercial or substantial activity in the U.S. As expert Verstein points out:

> [I]t is absolutely foundational to entity law that the employees and assets of one entity are not the employees and assets of another entity. The employees and assets of a limited partnership are not the employees and assets of a separate LLC. This is true even if the limited partnership has a fiduciary relationship to the LLC. An agent's employees and assets are not the principal's employees and assets. A manager's employees and assets are not the LLC's employees and assets.[308]

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[303] Inc Now, "What is a Delaware LLC?", p.1 (emphasis added) (C-205).

[304] 6 Delaware Code § 18-104. (2022), available at: https://law.justia.com/codes/delaware/2022/title-6/chapter-18/subchapter-i/section-18-104/ (emphasis added) (R-023).

[305] Arbitral tribunals have considered the hiring of full-time employees at the company's headquarters as relevant evidence to consider the existence of substantial business activity of a company in the State of incorporation. *See IC Power Ltd. and Kenon Holdings Ltd. v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, October 3, 2023, ¶ 225 (CL-062); *see also Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, ¶ 630 (RL-006).

[306] Request for Production of Documents from the Argentine Republic, April 8, 2024, DR#8.

[307] Claimant's Memorial to the Argentine Republic's Request for Production of Documents, 18 April 2024, Response to DR#8. *See*, Claimant's Memorial, ¶¶ 50, 52, 124, and n. 91; [redacted]

[308] Verstein Expert Report, ¶ 11.

185. *Offices:*[309] BA Desarrollos does not have or maintain any offices in Delaware. Argentina requested Claimant to produce BA Desarrollos' U.S. office leases.[310] Claimant confirmed that BA Desarrollos does not rent or own any offices in Delaware, and argued that EMS Capital would have offices in New York that are allegedly used to conduct BA Desarrollos' business.[311] Claimant presented no evidence that EMS Capital has offices in New York, nor that they are rented on behalf of BA Desarrollos, nor that they are used exclusively to conduct any business activity of BA Desarrollos in the U.S. Even in the latter case, the maintenance of offices is not sufficient to constitute a significant business activity. [312]

186. *Expenses and Services:*[313] BA Desarrollos has no expenses or contracts that relate to the conduct of actual business activities in the U.S. Argentina requested Claimant to produce invoices for internet services and office utilities and related expenses paid by Claimant for its alleged "head office" in Delaware, as well as sufficient documents to identify BA Desarrollos' annual purchases of goods and services in the U.S., including, among others, accounting and consulting services, legal services, IT services and liability policies.[314]

187. On this point, Claimant produced only five documents that are not linked to any activity of a commercial nature and, for the most part, are not even in the name of BA Desarrollos. On the one hand, Claimant accompanied different contracts in the name of Edmond Safra with the firm [redacted][316]

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[309] Arbitral tribunals have considered office rentals to be relevant evidence in assessing the existence of substantial business activity in a State. *See IC Power Ltd. and Kenon Holdings Ltd. v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, October 3, 2023, ¶ 225 (CL-062); *see also Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, ¶ 630 (RL-006).

[310] Request for Production of Documents from the Argentine Republic, April 8, 2024, DR#7.

[311] Claimant's Memorial to the Argentine Republic's Request for Production of Documents, April 18, 2024, Reply to DR#7. See, Claimant's Memorial, ¶¶ 50, 52, and n. 91; [redacted]

[312] Verstein Expert Report, ¶ 55.

[313] The Tribunal has considered that evidence of expenditures on office utilities and other related expenses is relevant to determine whether a company has substantial activities in a given State. *See Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue of November 23, 2020, ¶ 139 (RL-005).

[314] Request for Production of Documents from the Argentine Republic, April 8, 2024, DR#10-11.

[315] Contract between Edmond Safra and [redacted] engagement, March 11, 2019 (R-050).

[316] Letter from [redacted] to Edmond Safra regarding [redacted] February 23, 2022 (R-051).

[redacted] These documents simply mention BA Desarrollos among the entities included in the contracts entered into by Edmond Safra,[318] without providing further details, and do not refer to the development of any commercial activity of Claimant in the U.S. Rather, they appear to be limited to compliance with tax requirements at the place of registration of the company or its owner or holder. [319]

188. On the other hand, Claimant produced an invoice in the name of EMS Capital for professional fees from [redacted] dated September 12, 2019, with reference to "Catalinas Norte Office Building" in the amount of [redacted].[320] Beyond the fact that the derisory nature of this amount reflects the insignificance of these professional fees, the invoice is not accompanied by any contract that would allow to know the nature and type of activities allegedly carried out by the firm in favor of EMS Capital, nor the term of the professional advice allegedly provided, and therefore, it is also insufficient to prove that BA Desarrollos carries out commercial activities in the U.S.

189. Finally, Claimant produced the compromise agreement between Freshfields Bruckhaus Deringer LLP and BA Desarrollos dated June 26, 2023, signed by Noiana Marigo on behalf of Freshfields Bruckhaus Deringer LLP and Grace Lee on behalf of BA Desarrollos, regarding legal advice in this arbitration proceeding.[321] This is the only document to which BA Desarrollos is a party, however, it does not refer to or evidence any business activity of Claimant in the U.S., as it refers only to the commencement of these arbitration proceedings. In sum, none of these documents demonstrates that BA Desarrollos has contracted any services related to a real commercial activity in the U.S., nor do they relate to business

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[317] Letter from [redacted] to Edmond Safra regarding [redacted] engagement", February 3, 2023 (R-052).

[318] Contract between Edmond Safra and [redacted] engagement, March 11, 2019, p.5 (R-050); Letter from [redacted] to Edmond Safra with reference to [redacted] engagement", February 23, 2022, p.6 (R-051); Letter from [redacted] to Edmond Safra with reference to [redacted] engagement", February 3, 2023, p.6 (R-052).

[319] Contract between Edmond Safra and [redacted] engagement, March 11, 2019 (R-050); Letter from [redacted] to Edmond Safra with reference to [redacted] engagement", February 23, 2022 (R-051); Letter from [redacted] to Edmond Safra with reference to [redacted] engagement", February 3, 2023 (R-052).

[320] Invoice payable to EMS Capital for professional fees, September 12, 2019 (R-053).

[321] Compromise agreement between Freshfields Bruckhaus Deringer LLP and BA Desarrollos, June 26, 2023 (R-024).

matters or the execution of activities related to Fideicomiso BAP.

190. As expert Verstein indicates, no activity carried out by BA Desarrollos constitutes a business activity in the U.S., the company's main object is aimed at establishing commercial operations in Argentina and it has never received income,[322] the expert concludes:

> [BA Desarrollos lacks substantial business activity in the United States. Lacking employees and a location, but possessing a bank account, BA Desarrollos has essentially served as a shell company for wiring money from an offshore investment fund to an Argentinian real estate project. Nearly all of the money wired was to recipients in Argentina, performing services in Argentina. The few payments to U.S. headquartered persons were small in magnitude and were for work directed toward an Argentinian project and largely performed in Argentina.[323]

191. *Taxes:*[324] Argentina requested Claimant to produce official tax certificates of BA Desarrollos evidencing payment of all applicable taxes, *e.g.*, resident income tax, mandatory social security payments (for employed personnel), franchise tax, income taxes, property taxes, property and use taxes.[325] In this regard, documents produced by Claimant attest that BA Desarrollos pays a minimum tax of USD 300 per year in Annual Tax and USD 300 in Franchise Tax.[326] The small amount of taxes paid by Claimant, as well as the small amount of taxes to which it is subject, only confirms that it has no significant business activities in the U.S.

192. *Bank accounts and movements:* Argentina requested Claimant to produce sufficient documents to identify BA Desarrollos' U.S. bank accounts, as well as the account statements for each of those bank accounts.[327] The documents voluntarily produced by Claimant ratify that BA Desarrollos does not carry out any important or substantial business activity in the

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[322] Verstein Expert Report, ¶¶ 71-73.

[323] Verstein Expert Report, ¶ 74

[324] Arbitral tribunals have considered the payment of taxes to be a relevant element in assessing the existence of substantial business activities in the territory of a given State. *See Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, February 4, 2021, ¶ 617, 627 (RL-006).

[325] Request for Production of Documents from the Argentine Republic, April 8, 2024, DR#4.

[326] State of Delaware - BA Desarrollos Entity Data (R-156); BA Desarrollos LLC Annual Tax Payment Invoice, March 28, 2018 (R-025); BA Desarrollos LLC Franchise Tax Payment Invoice, March 25, 2019 (R-026); BA Desarrollos LLC Annual Tax Payment Invoice, February 20, 2020 (R-027); BA Desarrollos LLC Annual Tax Payment Invoice, March 18, 2021 (R-028); BA Desarrollos LLC Franchise Tax Payment Invoice, March 22, 2022 (R-029); BA Desarrollos LLC Franchise Tax Payment Invoice, May 26, 2023 (R-030).

[327] Request for Production of Documents from the Argentine Republic, April 8, 2024, DR#5.

U.S. On the contrary, its bank accounts record receipts of funds from [redacted],[328] which are automatically wired to: (i) Banco Ciudad de Buenos Aires,[329] (ii) to the account of Fideicomiso BAP,[330] (iii) to the bank account of architect Viñoly,[331] or (iv) to the trustees of Fideicomiso BAP.[332] None of these transfers refer to any activity in the U.S. of a commercial nature or of any other nature. What emerges from the bank statements of BA Desarrollos is that it functions as a mere shell company, through which [redacted] (Cayman Islands national) transfers money directly to accounts and persons related to Fideicomiso BAP in Argentina.

193. *Governing bodies of BA Desarrollos:*[333] BA Desarrollos has no governing bodies in Delaware. Argentina requested Claimant to produce the governing minutes of BA Desarrollos,[334] as well as documents and communications sufficient to identify all instances in which Claimant has appointed, given orders or instructed Claimant's directors in connection with its management, operations, budget, finances or any other aspect of Claimant's business.[335] Claimant admits that BA Desarrollos has no governing bodies, as it is allegedly EMS Capital in its capacity as manager that conducts its business of the company.[336] Claimant did not produce any evidence regarding decisions or deliberations

[328] [redacted] Bank statement of BA Desarrollos LLC, September 2018, p. 1 (R-032) .

[329] [redacted], Bank statement of BA Desarrollos LLC, September 2018, p. 3 (R-032).

[330] [redacted], Bank statement of BA Desarrollos LLC, October 2018, p. 1 (R-033).

[331] [redacted], Bank Statement of BA Desarrollos LLC, November 2018, p. 1 (R-037); [redacted], Bank Statement of BA Desarrollos LLC, December 2018, p. 1 (R-038).

[332] [redacted], BA Desarrollos LLC Bank Statement, December 2019 (R-034); [redacted], BA Desarrollos LLC Bank Statement, May 2020, p. 1 (R-039); [redacted], BA Desarrollos LLC Bank Statement, September 2020, p. 1(R-040); [redacted], BA Desarrollos LLC Bank Statement, December 2020, p. 1 (R-041); [redacted], BA Desarrollos LLC Bank Statement, January 2021, p. 1 (R-042).

[333] Arbitral tribunals have considered that for a company to have substantial business activities, "[i]t will usually have a board of directors, board minutes [...]" (*Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections of June 1, 2012, ¶ 4.(RL-007)) and have found the existence of substantial business activity proven, where Claimant's Memorial has presented evidence of the holding of continuous and sustained assembly and board minutes linked to the company's business activity. *See IC Power Ltd. and Kenon Holdings Ltd. v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, October 3, 2023, ¶¶ 228-230 (CL-062).

[334] Request for Production of Documents from the Argentine Republic, April 8, 2024, DR#2.

[335] Request for Production of Documents from the Argentine Republic, April 8, 2024, DR#12.

[336] Claimant's Memorial to the Argentine Republic's Request for Production of Documents, April 18, 2024, Response to DR#12. *See*, Claimant's Memorial n. 91.

actually conducted by EMS Capital in relation to the business of BA Desarrollos nor any evidence that BA Desarrollos conducts material or substantial business activities through its manager. As expert Verstein explains, although Delaware law does not require formalities aimed at the functioning of the governing bodies of an LLC, this is because Delaware allows the incorporation of companies without any commercial activity.[337] Observing the (lack) of commercial activity of BA Desarrollos, Verstein concluded that:

> BA Desarrollos lacks substantial business activity in the United States. Lacking employees and a location, but possessing a bank account, BA Desarrollos has essentially served as a shell company for wiring money from an offshore investment fund to an Argentinian real estate project. Nearly all of the money wired was to recipients in Argentina, performing services in Argentina. The few payments to U.S. headquartered persons were small in magnitude and were for work directed toward an Argentinian project and largely performed in Argentina. The state in which these services were supposedly performed, New York, does not consider them to be business activity, much less "substantial".[338]

194. In sum, Claimant argues that the business activities of BA Desarrollos in the U.S. are carried out by EMS Capital in its capacity as manager of the company,[339] alleging in this regard that "EMS Capital undertakes business activities for BA Desarrollos from its office in New York".[340] In this regard, EMS Capital is not a party to this arbitration proceeding, Claimant does not present evidence of business activities that were actually carried out on behalf of BA Desarrollos and that have been carried out in the U.S. According to the Articles of Incorporation of BA Desarrollos, although the manager is empowered to carry out acts on behalf of BA Desarrollos, the manager is not the final decision maker in the conduct of Claimant, as evidenced by the fact that the manager may be removed at any time "in the Members' sole discretion".[341]

195. As expert Verstein explains in his report, based on basic precepts of corporate law, the activities of EMS Capital cannot be considered as activities of BA Desarrollos.[342] On the basis that "[i]t is unfair to structure a business so as to limit the rights of one entity's

[337] Verstein Expert Report, ¶¶ 59-60.

[338] Verstein Expert Report, ¶ 74.

[339] Claimant's Memorial, ¶ 124.

[340] Observations on the Request for Bifurcation, ¶ 55.

[341] BA Desarrollos LLC Limited Liability Company Agreement, October 3, 2017, § 4.k. (C-121).

[342] *See* Verstein Expert Report, ¶ 100.

counterparties, but then ignore that structure whenever it helps the entity".[343] Together with the strictness with which U.S. justice has treated similar cases in which the distinction between a company and its subsidiary is intended to be ignored, it makes that the acts of one company cannot be attributable to another to grant an advantage, in this case, EMS Capital's access to the benefits of the BIT, no matter how much of a subsidiary or management relationship they may have. As Verstein points out:

> The EMS Group could have had EMS Capital LP bid on the contracts in question. Instead, it chose a structure that minimizes claims against any entity other than the shell, BA Desarrollos. That may have been a prudent or strategic decision when considering other issues, but the EMS Group cannot take the benefits of entity partitioning without its consequences.[344]

196. Notwithstanding the foregoing, it is not possible to determine that the acts of EMS Capital have been performed for BA Desarrollos. In carrying out this analysis, expert Verstein explains that:

> EMS Capital LP is the investment manager for a number of assets owned by the EMS Group rather than just BA Desarrollos. EMS Capital LP's [redacted] claims to have overseen approximately [redacted] projects since June of 2018. At the time that EMS Capital LP managed BA Desarrollos in connection with the project related to Plots 2 and 3, it was also engaged in another project in Buenos Aires, related to Plot 8. For any given EMS Capital LP activity, I must ask whether it is related to BA Desarrollos or one of the other assets or projects, but the record rarely makes this determination possible.
>
> [It is not possible to know how much of EMS Capital's real estate work was devoted to BA Desarrollos alone. It is possible that EMS Capital did rather little for BA Desarrollos. The only example of "administrative, accounting and legal support" provided to BA Desarrollos was a few wire transfers. It is possible that nearly all of EMS Capital's business was devoted to more fully realized business activities of other entities.[345]

197. Expert Verstein points out that this impossibility to determine that the acts of EMS Capital have been performed for BA Desarrollos is due to the choice of the corporate structure:

> The business structure adopted for this project, although characterized by [redacted] as "standard," is one of three viable structures. And it is the one that is characterized by the least credible recordkeeping about the business activities of the various special purpose vehicles (SPVs). One of the reasons I cannot see the evidence of EMS Capital's business activity on

[343] Verstein Expert Report, ¶ 103

[344] Verstein Expert Report, ¶ 106.

[345] Verstein Expert Report, ¶¶ 95, 97.

> behalf of BA Desarrollos LLC is that the EMS Group structured things in a way to minimize production of such evidence.[346]

198. Moreover, as also developed by expert Verstein, it is not possible to prove that the acts of EMS Capital that have been carried out "on behalf" of BA Desarrollos, have occurred in U.S. territory, as he notes that the significant commercial activity took place in Argentina:

> [redacted] describes hiring and directing "a team on the ground" in Argentina. [redacted] characterizes this team as "[t]he first step" in order "to get started on the Project". [redacted] then interviewed several architects in Argentina and hired one. The New York personnel, such as [redacted] seem to have been in Argentina for most of their activity associated with BA Desarrollos. It is in Buenos Aires that the builders, construction managers, brokers, and real estate services firms were met, interviewed and hired. It is in Buenos Aires that lawyers were met and instructed and that letters were written to Argentine officials. It is conceivable that all or most of EMS Capital's work for BA Desarrollos LLC took place in Argentina such that no substantial business activity in the U.S. was associated with BA Desarrollos LLC. [347]

199. In conclusion, Claimant does not prove that BA Desarrollos has substantial activity in the U.S. nor that the acts of its manager, EMS Capital, constitute substantial activity of BA Desarrollos in the U.S. Therefore, Argentina has rightfully exercised its right to deny benefits.

IV.A.3. Argentina denied the benefits of the Treaty in a timely manner

200. Argentina denied the benefits of the Treaty to BA Desarrollos long before this Memorial on Exceptions and Counter-Memorial. Indeed, the first instance in which this situation was reported was at the preliminary hearing, as soon as the Tribunal was constituted.[348]

201. In addition, Argentina stated its position in its Request for Production of Documents for Preliminary Objections, where it emphasized the denial to BA Desarrollos of the benefits provided by the Treaty because it is a company controlled by nationals of a third State and does not have substantial commercial activity in the U.S..[349]

202. As a result of that stage, it was confirmed that there was no real and genuine connection between BA Desarrollos and the U.S. At that point, it was confirmed that the conditions for

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[346] Verstein Expert Report, ¶ 99.

[347] Verstein Expert Report, ¶ 98.

[348] Floor audio of the First Session, minute 00:46:36.

[349] Request for Production of Documents from the Argentine Republic, April 8, 2024, p. ii.

denying benefits were met.

203. Consequently, Argentina has timely exercised its right to deny benefits under the Treaty and raised the corresponding jurisdictional objection.

IV.B. Claimant made a choice under Article VII(2) and (3) of the Treaty.

204. Claimant has already chosen the local road to resolve its claim for the non-execution of the deeds of Plots 2 and 3. Pursuant to Article VII (2) and (3) of the Treaty, this choice of road excludes the Tribunal's jurisdiction over this same claim.

205. Article VII(2)(a) of the Treaty provides that a foreign investor may submit a dispute that cannot be settled amicably to "[t]he courts or administrative tribunals of the Party that is a party to the dispute".[350] In this case, these are the judicial or administrative tribunals of Argentina.

206. Then, Article VII (3) of the Treaty goes on to state that

> (a) **Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b)**, and six months have elapsed from the date on which the dispute arose, the national or company concerned **may choose to consent in writing to the submission of the dispute for settlement by binding arbitration**: (i) to the International Centre for Settlement of Investment Disputes ("the Centre") established by [the ICSID Convention].[351]

207. This text reaffirms the eminently conditional character ("provided that") of Argentina's consent to submit to international arbitration investment disputes that may arise under the Treaty. Indeed, "[a]n election [by the investor] in favor of the international tribunal is, therefore, a condition precedent to the consent of the host contracting state party to the arbitration of investment disputes".[352]

208. Article VII (2) and (3) of the Treaty is a typical *fork-in-the-road* clause that gives the investor the choice between multiple alternative fora to submit its claim. The main characteristic of this clause is that the fora are *mutually exclusive*: once the investor chooses one of the fora,

[350] BIT, art. VII (2) (R-017).

[351] BIT, art. VII (3) (R-017).

[352] Zachary Douglas, *The International Law of investment Claims*, 2009, p. 152 (RL-054).

the decision is final and cannot be undone later.[353]

209. The purpose of a *fork in the road* clause is to avoid the situation where the **same dispute concerning an investment** being submitted for resolution to **different** arbitral and/or state **courts** of the party to the treaty that is also a party to the dispute.[354] Indeed:

> [A *fork in the road* clause] confine[s] the foreign investor to the remedy that he has chosen. To a large extent, this is a compromise that forestalls recourse to a multiplicity of claims being brought in respect of the same dispute before different tribunals or courts. The treaty requires the investor to make an election of the means of redress and thus confine the investor to one form of redress.[355]

210. In short, the *fork in the road* clause provides that the investor must choose between the domestic and the international forum and that, once made, that choice is final.[356] The right to make a one-time choice goes to the heart of the *fork in the road clause*.[357]

IV.B.1. Claimant's Administrative Claim constitutes a submission of the dispute to the "administrative tribunals" within the meaning of Article VII(2)(a) of the Treaty.

211. Claimant's Administrative Claim constitutes a submission of the dispute to the administrative tribunals of Argentina. Accordingly, Claimant's voluntary decision to file the Administrative Claim had the effect of triggering the *fork-in-the-road* clause contained in Article VII(2) and (3) of the BIT and thereby excluding its claim from the jurisdiction of this Tribunal.

212. On December 30, 2020 Claimant filed the Administrative Claim before AABE requesting the execution of the deeds of Plots 2 and 3.[358] Despite Claimant's arguments to the contrary,[359] this filing constituted the election in favor of the domestic forum pursuant to Article VII(2) and (3) of the Treaty. Indeed, an administrative claim filed in the terms of

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[353] Rudolph Dolzer and others, *Principles of International Investment Law*, 2022, pp. 384-385 (RL-008).

[354] *Ronald S. Lauder v. Czech Republic*, UNCITRAL Case, Award, September 3, 2001, ¶ 161 (RL-055).

[355] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 2021, §8.1.11 (RL-056).

[356] Rudolph Dolzer et al., *Principles of International Investment Law*, 2022 p. 384 (*RL-008); see also* Christoph Schreuer and others, *The ICSID Convention: A Commentary*, 2009, p. 365 (RL-009).

[357] *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 181 (RL-012).

[358] Previous administrative complaint before AABE, December 30, 2020 (C-046).

[359] Observations on Argentina's Request for Bifurcation, ¶¶ 81-84.

Article 30 of the Law of Administrative Procedures("LAP") constitutes a submission of the dispute to the "administrative tribunals" set for by Article VII(2)(a) of the BIT.

IV.B.1.a. The filing of an administrative complaint constitutes an election of forum pursuant to Article VII (2) and (3) of the Treaty

213. The prior administrative claim, regulated by Article 30 of the LAP, constitutes "a remedy granted to the individual [...] always aimed at achieving the reestablishment of the legality of the Public Administration when its order has been violated".[360] Thus, a prior administrative claim always entails an allegation that the public body involved has negatively affected the legal order in one way or another.

214. In this sense, an administrative claim is a mechanism so that "the conflicts that arise between the administration and individuals can be resolved, in principle, within the orbit [of the administration], allowing to obtain the recognition of the rights of the latter in a less onerous and conflictive way",[361] is "a means to satisfy claims".[362]

215. The prior administrative claim is a necessary and unavoidable requirement for whoever has decided to initiate a judicial action against the national State. Indeed, Article 30 of the LAP establishes that "[e]xcept in the cases of Articles 23 and 24, the national State may not be sued in court without a prior administrative claim ".[363] It is a procedural prerequisite to file a lawsuit,[364] and only when the administrative claim has been filed before the competent authority,[365] and there are no more procedures or remedies to be filed within the administration —which is commonly known in Argentina as the "exhaustion of the

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[360] Julio Rodolfo Comadira, *Administrative Procedures: Ley Nacional de Procedimientos Administrativos, Anotada y Comentada*, Tomo I, 2003, p. 506 (RL-057).

[361] Julio Rodolfo Comadira, *Administrative Procedures: Ley Nacional de Procedimientos Administrativos, Anotada y Comentada*, Tomo I, 2003, p. 508 (RL-057).

[362] Tomás Hutchinson, *Ley Nacional de Procedimientos Administrativos*, Tomo I, 1985, p. 533 (RL-001); *See* also Héctor Pozo Gowland et al, *Procedimiento Administrativo*, Tomo III, 2012, p. 695 (RL-059).

[363] Law No. 19.549, Article 30 (R-010); *See* also Tomás Hutchinson, *Ley Nacional de Procedimientos Administrativos*, Volume I, 1985, pp. 534-535 (RL-058);

[364] Tomás Hutchinson, *Ley Nacional de Procedimientos Administrativos*, Volume I, 1985, p. 533 (RL-001); Julio Rodolfo Comadira, *Procedimientos Administrativos: Ley Nacional de Procedimientos Administrativos, Anotada y Comentada*, Tomo I, 2003, p. 506 (RL-057).

[365] In particular, as AABE is an autarchic entity, the claim must be filed before the highest authority of the body (cfr. Law No. 19.549, Article 30 (R-010)), which was done by Claimant when filing the Administrative Claim "with the purpose that Mr. President of AABE [...]"; Previous administrative claim before AABE, December 30, 2020, p. 2 (C-46).

administrative way [*agotamiento de la vía*]"[366]— may a party file a lawsuit against the national State.[367] The exhaustion of administrative remedies is the essence of the claim against the State. [368]

216. Although, as the Claimant points out,[369] the prior administrative claim stage may have a conciliatory purpose, this does not detract from the fact that the administrative step is the one that allows "bringing before the courts a contentious situation that has already arisen".[370] Prior administrative act and the subsequent judicial action share, as their ultimate purpose, the resolution of an individual's claim.[371] Especially when the judicial body sees its competence limited to what has been debated in the administrative venue.[372]

217. In its Observations to Argentina's Request for Bifurcation, Claimant misrepresents Argentina by responding to an allegation that was not made —i.*e.*, that the Administrative Claim itself constituted the submission of the dispute to "an administrative tribunal".[373] Argentina has not said that the Administrative Claim was a submission of Claimant's dispute to an administrative tribunal, what Argentina contends is that the Administrative Claim constitutes BA Desarrollos' choice of roads to submit the dispute in the local forum, not before this Tribunal.

218. The Claimant argues that the Administrative Claim filed before AABE does not constitute a choice of roads since the AABE is not an administrative tribunal for purposes of the *fork in the road* clause because it "is not independent, is not part of the judicial branch of government, it does not have adjudicative functions nor does it issue binding adjudicative

[366] Héctor Pozo Gowland and others, *Administrative Procedure*, Volume III, 2012, p. 694 (RL-003).

[367] Julio Rodolfo Comadira, *Administrative Procedures: Ley Nacional de Procedimientos Administrativos, Anotada y Comentada*, Tomo I, 2003, p. 509 (RL-057).

[368] Armando N. Canosa, *Los Recursos Administrativos*, 1996, p. 193 (RL-060).

[369] Observations Argentina's Request for Bifurcation, ¶82.

[370] Héctor Pozo Gowland and others, *Administrative Procedure*, Volume III, 2012, p. 694 (RL-003).

[371]Julio Rodolfo Comadira, *Administrative Procedures: Ley Nacional de Procedimientos Administrativos, Anotada y Comentada*, Tomo I, 2003, p. 508 (RL-002); *see* also Request for Bifurcation, ¶ 61.

[372] The text of Article 30 of the LPA in force at the time of the facts provided in its second paragraph that "[t]he claim shall be based on the same facts and rights that are invoked in the eventual legal action and shall be resolved by the cited authorities" (R-010).

[373] Observations on the Request for Bifurcations, ¶¶ 81-82.

decisions".[374] Claimant's proposed reading of the Treaty would deprive Article VII(2)(a) of the BIT of effect.

219. In the Argentine judicial system there is no administrative tribunal that satisfies the characteristics arbitrarily selected by Claimant for the purpose of interpreting Article VII (2) and (3) of the BIT at its convenience that has subject-matter jurisdiction. Although in other areas of Argentine law there are administrative courts whose exclusive function is to be an adjudicative body,[375] there is no administrative tribunal within the sphere of the National Executive Branch with jurisdiction to analyze the actions of the public administration in general or of AABE in particular. Consequently, the only compatible interpretation of the Treaty with the Argentine judicial system is by reference to the procedure set forth in the LAP, which requires an administrative claim prior to submitting the dispute to the judicial tribunals.

220. The citation to the case *Azurix v. Argentina* does not support Claimant nor is it a relevant precedent since it did not analyze whether a proceeding of the characteristics of the administrative claim constitutes —or not— a choice of forum under the terms of the *fork in the road* clause set forth in Article VII (2) and (3) of the Treaty. On that occasion, the Tribunal limited its analysis, and *obiter dictum* stated that it "does not need to consider this matter extensively",[376] to the adjudicatory nature of the Organismo Regulador Bonaerense de Aguas y Saneamiento. [377] Said agency had been created by Law No. 11,820 of the Province of Buenos Aires as an enforcement authority in the context of the privatization of the sanitary works services that were later concessioned to Claimant, Azurix Corp.[378] The counterparty in the local dispute had not been the national State, but the Province of Buenos Aires, and the Organismo Regulador Bonaerense de Aguas y Saneamiento was a provincial, not a national, regulatory body. Consequently, the prior administrative claim system

[374] Observations on the Request for Bifurcations, ¶ 82.

[375] For example, Law No. 15,265 provided for the creation of the National Tax Court for tax and customs matters in relation to claims by Argentine taxpayers (R-157), while Law No. 27,442 created the Tribunal for the Defense of Competition in relation to economic concentrations (R-158).

[376] *Azurix Corp. v. Argentine Republic (I),* ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003, ¶ 92 (CL-105).

[377] *Azurix Corp. v. Argentine Republic (I),* ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003, ¶ 92 (CL-105).

[378] See Law No. 11,820 of the Province of Buenos Aires (R-159).

regulated by the LAP was not at issue in *Azurix* v. *Argentina*.

IV.B.1.b. The applicable standard for determining whether a claim before local bodies and an arbitration claim share the same fundamental basis

221. When analyzing whether a *fork in the road* clause has been triggered, and therefore an arbitration proceeding is precluded, arbitral tribunals have required that the disputes submitted to the domestic courts and those submitted to arbitration have the same fundamental basis.[379] Indeed, "[o]ne can only consider that the dispute submitted before the national tribunals is the same as the one submitted to arbitration if both of them share the fundamental cause of the claim and seek for the same effects".[380]

222. The fundamental basis test has been characterized as a *pragmatic test* as opposed to the formal rigorism required by the triple identity test.[381] Indeed, it does not focus on an absolute coincidence of the disputes —which by the very nature of investment claims is usually practically impossible to find—, but on a general coincidence between the facts and what was claimed in both cases.[382] Thus, the fundamental basis *test* arises as a way of giving useful effect to *fork-in-the-road* clauses pursuant to Article 31(1) of the VCLT. [383]

223. The fundamental basis test arises from *Pantechniki v. Albania*, where it was held that "[t]he same facts can give rise to different legal claims. The similarity of prayers for relief does not

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[379] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009 (RL-061); *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017 (RL-062); *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014 (RL-020).

[380] *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶ 310 (RL-062).

[381] Michael Petsche, "The Fork in the Road Revisited: An Attempt to Overcome the Clash between the Formalistic and Pragmatic Approaches," Washington University Global Studies Law Review, 18 391 (RL-063).

[382] Thiago Braz Jardim Oliveira, "The Authority of Domestic Courts in Adjudicating International Investment Disputes: Beyond the Distinction between Treaty and Contract Claims," *Journal of International Dispute Settlement*, 4 175, 2013, pp. 182, 191-192,194 (RL-018); Michal Swarabowicz, "Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System," *Journal of International Dispute Settlement*, 8 280, 2017, p. 295 (RL-019).

[383] "[t]he strict application of the triple identity test [...] applied by some investment tribunals removes all legal effects from fork in the road clauses, which contravenes the effet utile principle applicable to the interpretation of treaties" - *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award of January 18, 2017, ¶ 330 (RL-062). *See* also *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014, ¶ 382 (RL-020) and *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (II)*, PCA Case N| 2009-23, Third Interim Award on Jurisdiction and Admissibility, February 27, 2012, ¶ 4.76 (RL-064).

necessarily bespeak an identity of causes of action. What I believe to be necessary is to determine whether claimed entitlements have the same normative source".[384] Indeed, the sole arbitrator stated that it was not sufficient to assume that a treaty-based claim would be inherently different from a contract-based claim, as this would simply be "[a]rgument by labelling - not by analysis".[385] In order to determine whether or not two claims have the same normative basis, the importance of analyzing "whether **the same dispute** has been submitted to both national and international fora" and "**whether the claim truly does have an autonomous existence outside the contract**". [386]

224. The *test* applied in *Pantechniki* was replicated in subsequent arbitral awards, such as in *H&H v. Egypt.*[387] The tribunal noted there that it is usual that local and arbitral proceedings "[a]re often not only based on different causes of action but also involve different parties"[388] so the focus should be on whether both claims share the same normative basis and the same factual components[389] with the ultimate aim of discerning whether the later claim can be considered "severable" from the earlier one. [390] In particular, the Tribunal determined that it could not accept claims that were based on essentially the same facts and the same contract relied upon by the claimant in the local case.[391]

225. Likewise, in *Supervisión y Control v. Costa Rica*, the Tribunal considered that the *fork in the road* clause precluded the submission of the dispute to international arbitration as long

[384] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009, ¶ 62 (RL-061).

[385] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009, ¶ 61 (RL-061).

[386] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009, ¶ 61 (emphasis added) (RL-061).

[387] *H&H Enterprises Investments, Inc. v. Arab Republic of* Egypt, ICSID Case No. ARB/09/15, Award, May 6, 2014, ¶ 367 (RL-020).

[388] *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014, ¶ 367 (RL-20).

[389] *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014, ¶ 381 (RL-20).

[390] *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014, ¶ 378 (RL-20).

[391] *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014, ¶ 382 (RL-20).

as it and the local proceeding "[p]ursue ultimately the same purposes".[392] Indeed:

> [t]he Tribunal considers that the claims [...] coincide. They consist of the compensation for lost profits derived from the conduct or omissions of [the respondent], **which are alleged in the local proceeding as violating national law, while in the arbitration proceedings, the conduct of** [the respondent] **is alleged as contrary to the provisions of Treaty**. In both cases [r]espondent's acts **are essentially qualified as illegal because** [c]**laimant considers that the adjustment of rates was not done as agreed to** in the [c]ontract**.**[393]

IV.B.2. The Administrative Claim and the present arbitration have the same fundamental basis

226. In submitting the Administrative Claim, Claimant requested that "[t]he necessary means be taken to proceed with the execution of the deeds of the Plots in the name of my client in the terms herein requested".[394] In other words, Claimant claimed for the lack of execution of the deeds, which deprived it of acquiring title of Plots 2 and 3 that were awarded to it through the Auctions, invoking for such purposes the rights set for in Article 20 of the Terms and Conditions of the Auctions, as well as certain articles of the Argentine National Constitution.[395]

227. Despite having made its choice of forum in favor of the local forum, on June 23, 2023 Claimant filed the present arbitration, suddenly modifying its legal strategy and not allowing the attempted administrative resort to lead to a resolution of the dispute. Both the domestic

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[392] *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶ 315 (RL-062).

[393] *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶ 318 (emphasis added) (RL-062).

[394] Prior Administrative Claim before the AABE, December 30, 2020 p. 8 (C-046). The Administrative Claim was not the first time Claimant's Memorial had turned to the local courts to settle a dispute related to the Plots. On September 25, 2020, Claimant had filed with the AABE a note requesting the execution of the deeds of Parcels 2 and 3 pursuant to Article 20 of the Plots. See Administrative Request to AABE, September 25, 2020 (C-045). Nor was it the last one. *See* Docket Review Certificate EX-2020-91756001- -APN-DGDYD#JGM (RE-2021-06215469-APN-DGDYD#JGM), January 22, 2021, p. 1 (R-160); Docket Review Certificate EX-2020-91756001- -APN-DGDYD#JGM (RE-2021-22950630-APN-DGDYD#JGM), March 15, 2021, p. 1 (R-161); Docket Review Certificate EX-2020-91756001- -APN-DGDYD#JGM (RE-2021-22950630-APN-DGDYD#JGM), March 15, 2021, p. 1 (R-161). 1 (R-161); Docket Review Certificate EX-2020-91756001- -APN-DGDYDYD#JGM (RE-2023-38946776-APN-DGDYD#JGM), April 11, 2023, p. 1 (R-162); Docket Review Certificate EX-2020-91756001- -APN-DGDYD#JGM (RE-2023-38955988-APN-DGDYD#JGM), April 11, 2023 p. 1 (R-163); Docket Review Certificate: EX-2020-91756001- -APN-DGDYD#JGM (RE-2023-39063207-APN-DGDYD#JGM), April 11, 2023, p. 1 (R-164); Docket Review Certificate and Digital Copy (IF-2023-55450726-APN-DGAJ#AABE), May 4, 2023, p. 1 (R-165).

[395] Previous administrative complaint before the AABE, December 30, 2020, p. 6 (C-046).

claim and the present arbitration have the same fundamental basis, so that the option for the local forum implies a choice of forum under Article VII(2) and (3) of the Treaty.

228. Both the Administrative Claim and the arbitration claim are indistinguishable in that Claimant claims the same conduct arising from the same facts: the failure to execute of the deeds to the Plots on the basis of Article 20 of the Terms and Conditions[396]

[396] Prior Administrative Claim before AABE, December 30, 2020 pp. 1-2 (C-046); Claimant's Memorial, ¶¶ 12,146, 164(a)-164(c).

Administrative Claim	*ICSID Arbitration*
"[m]y client has fully complied with all the requirements set forth in the Specific Terms and Conditions of the AABE Auctions (...) in order to move forward with the execution of the deeds of the Plots. In particular, (...) my client has paid the full sale price of both Plot 2, in the amount of USD 23,025,000 (...), and Plot 3, in the amount of USD 25,050,000".[397] "In relation to the execution of the deeds of the Plots and the prior conditions that must be verified in order to move forward with such task, in **accordance with Article 20 of the Special Terms and Conditions**, "[t]he deed transferring ownership of the Properties shall be executed before the OFFICE OF THE GENERAL NOTARY OF THE GOVERNMENT OF THE NATION, or the notary's office appointed by it within FORTY (40) calendar days (...).) In these terms, (...) the Trust paid the totality of the corresponding price in the terms indicated".[398] "[a]fter more than two years have elapsed since the Trust paid the total price of the Plots, and after having requested AABE to carry out the steps to achieve the execution of the deeds of the Plots, AABE, without any justification whatsoever, has failed to carry out the steps in its duty in order to achieve such purpose. In the current status, AABE's reluctance to move forward with the execution of the deeds of the Plots without any justification whatsoever, implies the display of an irregular behavior on the part of AABE which results in the total disregard of the millions of dollars paid by the Trust within the framework of the AABE Auctions, in a clear and serious violation of the rights of my client in accordance with the applicable legal framework" .[399] "This claim is based on the rights to which this party is entitled by virtue of the applicable regulatory framework and, in particular, on the rights provided in Article 20 of the Terms and Conditions of the Auctions AABE, as well as in Articles 14, 16, 17, 19 and 28 of the National Constitution."[400]	"After paying US$49.08 million to Argentina, Fideicomiso BAP held the **right, pursuant to the Terms and Conditions for the Auction, to receive title to the Plots**."[401] "**Terms and Conditions of Public Auction No. 03/2018 (Plot 3),** 31 January 2018, C-11, **Art 20; Terms and Conditions of Public Auction No. 04/2018 (Plot 2),** 31 January 2018, C-12**, Art 20.** *See also* para 57 above."[402] "Argentina has indirectly expropriated BA Desarrollos' participation in Fideicomiso BAP because, without the title to the Plots, for which it paid, Fideicomiso BAP is completely empty and worthless, and so is BA Desarrollos' participation in it. Fideicomiso BAP cannot construct the planned buildings on the Plots and commercialize the Catalinas Norte II Project, which was its sole purpose. Thus, while BA Desarrollos continues to hold its ownership interest in Fideicomiso BAP (including its debt and equity participation and in its capacity as settlor, beneficiary and residuary beneficiary), none of it has any use, value or economic benefit for BA Desarrollos anymore."[403] "**Terms and Conditions of Public Auction No. 03/2018 (Plot 3)**, 31 January 2018, C-11, **Art 20; Terms and Conditions of Public Auction No. 04/2018 (Plot 2),** 31 January 2018, C-12, **Art 20**".[404]

229. As can be seen, the truth is that in this case, as in *H&H v. Egypt*, Claimant claims on both

[397] Previous administrative complaint before the AABE, December 30, 2020, p. 2 (C-046).

[398] Previous administrative complaint before the AABE, December 30, 2020, p. 5 (C-046).

[399] Previous administrative complaint before the AABE, December 30, 2020, p. 5 (C-046).

[401] Claimant's Memorial, ¶ 145.

[402] Claimant's Memorial, n. 321.

[403] Claimant's Memorial, ¶ 147.

[404] Claimant's Memorial, n. 332.

tracks for the same alleged breach by the State of rights arising from a contract (in this case, the Terms and Conditions).[405]

IV.B.3. In any event, the triple identity *test* is satisfied in the present case

230. If the Tribunal chooses to analyze the present objection in light of the requirements of the triple identity *test* to determine whether there is identity between the domestic claim and the arbitration claim, these requirements are also met.[406]

231. Under the triple identity *test*, there must be three coincidences between the dispute submitted in the local venue and the arbitration to understand that the arbitral venue is precluded: (1) identity of parties, (2) identity of object, and (3) the same cause of action.[407]

232. As a preliminary point, it is noted that both recognized authors and arbitral tribunals have concluded that this *test* should not be interpreted so narrowly as to frustrate the ultimate effect of the *fork in the road* clause.[408] Otherwise, it would be very easy for an investor to claim that two disputes are different, making sure to distinguish the two claims sufficiently

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[404] Claimant's Memorial, n. 332.

[405] *H&H Enterprises Investments, Inc.* v. Arab Republic of Egypt, ICSID Case No. ARB/09/15, Award, May 6, 2014, ¶¶ 371, 376-377 (RL-020).

[406] In its Observations on the Request for Bifurcations, Claimant appears to propose a departure from the two standards traditionally used for the purposes of the *fork in the road* clause analysis, stating that it requires (a) the identity of the claimants, (b) the identity of the investment disputes, understanding this concept as identity of causes of action; and (c) that the dispute has been submitted to the judicial or administrative tribunals of the State involved (Observations to Argentina's Request for Bifurcation, ¶¶ 56, 64). Notwithstanding Respondent's contention that in the present case the fundamental basis test, and in the alternative the triple identity test, must be analyzed, the truth is that Claimant's requirements are satisfied. Indeed, and as will be seen in the present case, there is identity of parties *(Infra* ¶¶ 234-237) , identity of investment dispute (*Infra* ¶ 238) and the dispute has been submitted to the Argentine Republic's judicial or administrative tribunals (*Supra* § IV.B.1).

[407] *See Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Excerpts from the Award, November 24, 2021, ¶ 404 (RL-065); *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, March 8, 2021, ¶¶ 390, 416, 419 (RL-066); *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria*, UNCITRAL Arbitration, Final Award, March 26, 2021, ¶ 83 (RL-067).

[408] As McLachlan noted, "[a]n effective interpretation must be given to such clauses [...] It is a basic principle of treaty interpretation that treaties should be interpreted, so far as possible, to give an effective meaning to their provisions", being wary of interpretations of the clause that "[w]ould give no effective scope of operation to the fork in the road clause" Campbell Mclachlan et al, *International Investment Arbtitration - Substantive Principles*, pp. 104,106 (RL-049). *See also*: *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶ 330 (RL-062). *See* also *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014, ¶ 382 (RL-020) and *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (II)*, PCA Case N| 2009-23, Third Interim Award on Jurisdiction and Admissibility, February 27, 2012, ¶ 4.76 (RL-064); Michael Petsche, "The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches", *Washington University Global Studies Law Review*, 18(2),2019, pp. 423,427 (RL-063).

so as not to trigger the *fork in the road* clause. Indeed, to enable only the strict application of the standard would result in that "[t]he fork-in-the-road may almost never apply[409]

233. In the present case, the three identities required by the triple identity *test* are satisfied.

234. First, for purposes of the identity of parties' analysis, different arbitral tribunals have embraced the notion that an absolutely strict identity of parties is not necessary, even in cases where Claimants in each of the proceedings were different companies.[410] The issue is, ultimately, whether Claimant "[h]olds the decision-making power"[411] within the contractual scheme, to the extent that the investment vehicles "[c]an be truly deemed as intermediary". [412]

235. The identity of parties is evident. As appears from the factual narrative, BA Desarrollos incorporated Fideicomiso BAP in Argentina for the purposes of its alleged investment, occupying the roles of trustor, beneficiary and trustee.[413] The identity between BA Desarrollos and Fideicomiso BAP is such that Claimant mentions that Argentina "awarded the Plots to BA Desarrollos through Auctions that it itself organized"[414] , just to mention an

[409] Sofia Cozac, "New trends in international arbitration in relation with the 'Fork-in-the-road' Principle", *Romanian Arbitration Journal*, 10(3), 2016, p. 50 (RL-068); In the same vein, *see* Thiago Braz Jardim Olivera, "The Authority of Domestic Courts in Adjudicating International Investment Disputes: Beyond the Distinction between Treaty and Contract Claims", Journal of International Dispute Settlement, vol. 4, No. 1, 2013,p.194. ("[...] an investment dispute between the same parties and in relation to the same object, once submitted to domestic courts, cannot be deemed to escape the operation of such a provision simply through a distinction based on the nature of the legal claims".) (RL-018).

[410] *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SCC Case No. 062/2012, Final Award, January 2016, ¶¶ 406-408 (RL-069); *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC No. 2017/060, Final Award, March 8, 2021, ¶¶ 424-426 (RL-066); *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶328-329 (RL-062).

[411] *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, CC Case No. 062/2012, Final Award of January 2016, ¶ 408 (RL-069);. S Case No. 062/2012, Final Award, January 21, 2016, ¶ 408 (RL-069); *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SSC Case No. 2017/060, Final Award, March 8, 2021, ¶424 (RL-066).

[412] *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SSC Case No. 062/2012, Final Award, January 2016, ¶ 408 (RL-069); *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, March 8, 2021, ¶¶424-425 (RL-066), *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. Czech Republic*, PCA Case No. 2016-12, Interim Award on Jurisdiction, April 25, 2018, ¶637 (RL-070).

[413] Claimant's Memorial, ¶53.

[414] Claimant's Memorial, ¶173(a).

example. [415]

236. It should be noted that, under Argentine law, trusts do not have a legal personality of their own, but are a type of contract.[416] As Claimant narrates, it "[c]ontrolled the trust"[417] , and Fideicomiso BAP was to follow its instructions, could be liquidated as soon as Claimant wished, and Claimant would receive the benefits produced by the trust.[418] Indeed, its trustee was to require prior written authorization from BA Desarrollos "**before taking any action other than merely procedural or administrative actions in** the ordinary course of business".[419]

237. As far as the respondent is concerned, the Administrative Claim was brought against the president of AABE, who was the person before whom the claim should have been brought under the terms of the LAP, as the representative of the national State in this dispute.[420] In the present arbitration, Claimant's claims for the breach of the Treaty against Argentina.

238. Second, identity of object is also verified in the case: the object of both claims is relief for the lack of execution of the deeds to Plots 2 and 3. Whether the relief sought in one or the other forum is one of the three possible types of relief (satisfaction, restitution or compensation)[421] does not affect the subject matter of the claim. Claimant is always claiming the *value* of the Plots and the expenses allegedly incurred.[422] Whether through the actual required execution of the deeds to the land without the alleged interferences (Administrative

[415] See, e.g., Claimant's Memorial, ¶63 ("BA Desarrollos then directed Fideicomiso BAP to bid [...]"); Observations on the Request for Bifurcation, ¶¶ 26 ("BA Desarrollos directed Fideicomiso BAP to make an offer"),43.(a) ("BA Desarrollos instructed Fideicomiso BAP to bid for the Plots").

[416] Kiper, C. M., Lisoprawski, S. V.; "Liability of the trustee for damages to third parties in the Civil and Commercial Code", *La Ley*, p. 1. The CC&C regulates the trust agreement in its articles 1666 to 1707, without mentioning that it gives rise to the creation of a new legal entity.

[417] Claimant's Memorial, ¶ 53.

[418] Claimant's Memorial, ¶¶ 53-54.

[419] Trust Agreement (Fideicomiso BAP) between BA Desarrollos LCC and [redacted] dated December 12, 2019 (emphasis added) (C-023).

[420] Law No. 19.549, art. 30 (R-010).

[421] Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts, *annexed* to UN General Assembly Resolution No. 56/83, 12 December 2001, UN Doc. A/RES/56/83, Art. 34 (CL-008).

[422] Claimant's Memorial, § V.A.2.

Claim)[423] or through compensation for the value of what was paid (Arbitration) ,[424]the object is essentially the same in one forum and the other. In fact, the Claimant argues that "[t]he compensation owed by Argentina is *equivalent* to all of the Catalinas Norte II Project costs, fees and expenses, plus interest".[425] That is, it is equivalent to the value of the project, which is equivalent to the relief in the Administrative Claim.

239. Finally, the identity of cause of action is also credited. Indeed, the Administrative Claim "is based on the rights it has [...] under the applicable regulatory framework and, in particular, on the rights set forth in Article 20 of the Special Terms and Conditions".[426] In the present arbitration, Claimant again anchors its claim on Article 20 of the Terms and Conditions. According to the Claimant, "Fideicomiso BAP held the right, according to the Terms and Conditions for the Auction, to receive title to the Plots",[427] and refers to Article 20 of the Plots.[428]

240. Claimant appears to argue, in its Observations to Argentina's Request for Bifurcation,[429] that the arbitral and local claims have different causes of action merely because the Administrative Claim did not expressly allege a breach of the BIT.[430] Claimant's effort to recategorize its Administrative Claim in the form of a BIT claim, as noted by the tribunal in *Pantechniki v. Albania*, cannot succeed, as this would be "[a]rgument by labelling — not by analysis."[431] Such a formalistic analysis is not proper to the jurisdictional examination that this Tribunal is called upon to make.

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[423] Administrative claim, December 30, 2022, p. 2-3 (C-046).

[424] Request for Arbitration, ¶46.(b); Claimant's Memorial § V.A.2.

[425] Claimant's Memorial, §V.A.2 (emphasis omitted and italics added).

[426] Administrative Claim before the AABE, December 30, 2020. p. 6 (C-46).

[427] Claimant's Memorial, ¶145; *See* Claimant's Memorial, ¶¶ 57, 85, 126(b), 147, 164(a) ,183, 363, nn. 111, 194, 290,321, 332, 363, 440.

[428] Claimant's Memorial, n. 321.

[429] Observations to Argentina's Request for Bifurcation, ¶¶ 79-80.

[430] The Claimant cites *Pan American Energy v. Argentina* in support of its position regarding identity of causes of action. However, such reference is not correct since in that case the dispute in the local venue was between two private companies and referred to a question of exclusivity of jurisdiction. *Pan American Energy LLC and BP Argentina Exploration Company v. Republic of Argentina*, ICSID Case No. ARB/03/13, ¶157 (CL-104). This scenario is not the one in the present case, where all of Claimant's claims to Argentina arise under the contractual framework referring to the Plots and is based on it.

[431] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009, ¶ 61 (RL-061).

IV.C. The dispute does not arise directly from an investment

241. Claimant alleges as its investment its interest in Fideicomiso BAP and the interests and rights in the Fideicomiso BAP.[432] Specifically the "rights to receive title to the Plots and to develop the Project in Catalinas Norte II".[433] However, such rights do not satisfy the criteria of the *Salini test* necessary to consider that the activity constituted an investment under the ICSID Convention.

IV.C.1. Interpretation of the term "investment" under the BIT and ICSID Convention

242. The vast majority of tribunals constituted under the ICSID Convention have ruled that assets invoked as investments in ICSID arbitration must meet both the requirements of the BIT and the ICSID Convention,[434] cumulatively.[435]

243. The term investment under Article 25(1) of the ICSID Convention has been understood as a limit to the expansive language of bilateral investment treaties. In terms of the Tribunal in *Hassan Awdi v. Romania*, "the principal legal framework to determine the existence of an "investment" must lie in the will of the Parties as set forth in the definition of an "investment" under the BIT **as long as such will is compatible with Article 25 of the ICSID Convention**".[436]

244. Claimant argues that the drafters of the ICSID Convention omitted to include a definition of the term investment, leaving that task to the consent instruments, in this case the Argentina-

[432] Claimant's Memorial, ¶ 126; Observations on Request for Bifurcation, ¶ 93.

[433] Observations on the Request for Bifurcation, ¶ 93.

[434] *See Peteris Pildegovics and SIA North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11, Award, December 22, 2023, ¶ 227 (RL-072); *See also: Westwater Resources, Inc. v. Republic of Turkey*, ICSID Case No. ARB/18/46, Award, March 3, 2023, ¶ 126 (RL-073); *United Agencies Limited SA v. Republic of Algeria*, ICSID Case No. ARB/20/1, Award, July 25, 2022, ¶ 236 (RL-074).

[435] *See Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007, ¶ 55 (RL-075); *See also: Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, September 11, 2009, ¶ 66 (RL-076); *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, ¶ 65 and 74 (RL-077); *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, ¶ 108 (RL-078); *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Award, December 8, 2022, ¶ 231 (RL-079); *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, April 8, 2015, ¶ 369 (RL-080).

[436] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, March 2, 2015, ¶ 197 (emphasis added) (RL-081).

US BIT.[437] However, the *travaux préparatoires* of the ICSID Convention indicate that the term investment has a restricted scope.[438] The scope of the term "investment" under the Convention has been delineated by the application of the *Salini test* by the tribunals. According to this *test*, the alleged investment must meet certain cumulative requirements to be considered as such: "certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State's development".[439] This *test* has been a recurrent tool used by the tribunals to determine that certain contractual operations cannot be subsumed under the term "investment" under Article 25(1) of the ICSID Convention:[440] .

> [W]hether or not a transaction constitutes an investment cannot be determined by consideration of whether that transaction meets the requirements of duration, commitment of capital, expectation of profit and assumption of risk, independently of its true nature. Some ordinary sale of goods contracts can meet the criteria of duration (*e.g.*, a run-of-the-mill long-term purchase contract), commitment of capital (*e.g.*, pre-payments or advance payments for goods), expectation of profit (an attribute of any commercial transaction), and the assumption risk (*e.g.*, the risk of the other party breaching the contract). Therefore, the fact that a transaction may meet those criteria does not automatically make it an investment transaction, *i.e.*, an investment under the BIT.[441]

245. On these premises, recently, the Tribunal in *Alois v. Tajikistan* determined that the sale and purchase for which Claimant claimed did not constitute an investment by holding that:

> [T]o the extent that Claimant committed capital, it was for the purpose of purchasing goods; to the extent that he expected profits, it was largely based on the price discount for the goods that he obtained in exchange for the pre-payment; and to the extent that he assumed risk, it was the risk that the goods would not be delivered and that he would not be reimbursed for

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[437] *See* Observations on the Request for Bifurcation, ¶ 94.

[438] Christoph Schreuer and others, *The ICSID Convention: A Commentary*, 2009, pp. 106-107 (RL-017).

[439] *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, August 6, 2004, ¶ 53 (RL-021).

[440] *See Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007, ¶ 146 (RL-075); *See also: Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Award, December 08, 2022, ¶ 292 (RL-079); *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, November 26, 2009, ¶ 241 (RL-022); *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, August 6, 2004, ¶ 58; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, December 1, 2010, ¶ 56 (RL-024); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, ¶ 155 (RL-025).

[441] *Alois Schönberger v. Republic of Tajikistan*, ICSID Case No. ARB(AF)/19/1, Award, December 8, 2023, ¶ 213 (RL-082).

that non-delivery as provided in the Contracts and the Guarantees. [442]

246. Similarly, the Tribunal in the *Ambiente Ufficio* case quoted by Claimant held that "there are good reasons to leave a single commercial transaction [...] outside the concept of investment and thus outside the subject-matter jurisdiction of the Centre".[443]

IV.C.2. Real estate transactions do not constitute an investment under the terms of the ICSID Convention.

247. In the present case, the claim invoked by Claimant concerns the rights to receive title to the Plots and to develop the Viñoly Project in Catalinas Norte II.[444] It arises directly from two land purchase and sale transactions that lack at least three of the elements of the *Salini test*, namely, risk, duration and regularity of profits and returns. In this connection, the rights to receive title to the Plots must be analyzed.

IV.C.2.a. The risk assumed by BA Desarrollos is of a commercial nature.

248. Every commercial transaction involves a degree of risk — including those that do not constitute an investment under the terms of the ICSID Convention. Therefore, in cases such as the present one, in which the claims arise out of contracts, these risks are not decisive factors in distinguishing an investment in terms of the ICSID Convention from a commercial transaction. [445]

249. An investment under the terms of the ICSID Convention must contain a risk involving "a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations";[446] "an operational risk and not a commercial risk or a sovereign risk. A commercial risk covers, inter alia, the risk that one of

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[442] *Alois Schönberger v. Republic of Tajikistan*, ICSID Case No. ARB(AF)/19/1, Award, December 8, 2023, ¶ 217 (RL-082).

[443] *Ambiente Ufficio S.p.A. et al. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, February 8, 2013, ¶ 470 (CL-113).

[444] Observations on the Request for Bifurcation, ¶ 93.

[445] *See Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, November 26, 2009, ¶ 229 (RL-022); *See also Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, April 8, 2015, ¶369 (RL-080).

[446] *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, November 26, 2009, ¶ 230 (RL-022).

the parties might default on its obligation, which risk exists in any economic relationship".[447]

250. Contrary to Claimant's assessments,[448] BA Desarrollos did not assume any sovereign risk but only a purely commercial one, namely the breach of the agreement. This case bears a similarity to *Romak v. Uzbekistan,* where the Tribunal explained that in the case of a contract for the purchase and sale of wheat supplies it only contained a purely commercial risk which was not sufficient to consider it an investment, understanding that:

> [a]ll economic activity entails a certain degree of risk. As such, **all contracts** -including contracts that do not constitute an investment- **carry the risk of non-performance.** However, **this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally.** It is therefore **not an element** that is useful for the purpose of **distinguishing between an investment and a commercial transaction**.[449]

251. In relation to the rights to receive title to the Plots, the only risk assumed by the Fideicomiso BAP, not BA Desarrollos, was the non-delivery of the properties by AABE, so the failure to execute of the deeds does not constitute a sovereign risk but a typically commercial risk.

IV.C.2.b. The purchase and sale of real estate occurs in a single act of delivery of the price and of the property.

252. The sale and purchase of real estate is a contract under which the buyer pays a price and the seller delivers the real estate. This transaction, in essence, has no duration.

253. The preparatory operations, such as the incorporation of its vehicle —Fideicomiso BAP—,[450] the preparation of reports, plans and renderings[451] and the adhesion and transfers according to the Auctions,[452] were merely preparatory and cannot be considered as part of the sale and purchase of the real estate. This is so since they were carried out prior to the payment, which is the only moment where the analysis as to whether or not there is an

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[447] *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, April 8, 2015, ¶ 369 (RL-080).

[448] *See* Observations on the Request for Bifurcation, ¶¶ 96, 97.

[449] *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, November 26, 2009, ¶ 229 (RL-022).

[450] *See* Trust Agreement (Fideicomiso BAP) between BA Desarrollos LLC and RBYK Fiduciaria S.A., October 11, 2017 (C-023).

[451] *See* Claimant's Memorial ¶¶ 67, 100, 110.

[452] List of qualified participants for public auction No. 03/2018 (Plot 3), April 26, 2018 (C-027); List of qualified participants for public auction No. 04/2018 (Plot 2), May 9, 2018 (C-029).

investment should be made.[453]

254. Claimant asserts that "the investment BA Desarrollos made in Argentina relates to the development of a long-term commercial real estate project in Catalinas Norte II Area, as part of an urban generation program developed by the then President of Argentina and the Buenos Aires City Government".[454] However, this statement omits to acknowledge that the relationship between the Fideicomiso BAP and Argentina was limited to the purchase and sale of real estate that was not perfected. The same claim of Claimants arises from contractual issues related to Plots 2 and 3,[455] whose Terms and Conditions establish that once the payment of the balance of the price was made, the delivery of the Deed of Transfer of Ownership would proceed, thus configuring a typical purchase and sale whose perfection depends on a single act.[456] As already explained, this did not occur due to issues attributable to Claimant[457] and, as witness Mac Mahon refers in his testimony, Fideicomiso BAP did not file the corresponding demand for the execution of the Deeds. [458]

255. In any event, this Tribunal "is not to second-guess what possible future investments the [c]laimants might have made. Rather, the [t]ribunal is to determine whether or not at the time of the termination of the [p]roject an investment had occurred [...] [a]s detailed above, no such investment occurred".[459] Notwithstanding the foregoing, the valuation method presented by BA Desarrollos confirms that there was no future certainty of the projects. Claimant claims under a sunk cost scheme,[460] *i.e.,* a method based on asset values that is more appropriate for cases where a concrete investment has not yet been made.

IV.C.2.c. There was no regularity of earnings and returns

256. In the absence of duration, there was no regularity of profit and return, since the project was

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[453] *Christian Doutrememepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction of August 23, 2019, ¶143 (RL-083).

[454] Observations on the Request for Bifurcation, ¶ 95.

[455] *See* Claimant's Memorial, ¶¶ 11, 13; [redacted].

[456] *See* Terms and Conditions for Public Auction No. 03/2018 (Plot 3), January 31, 2018, pp. 12-13 (C-011); Terms and Conditions for Public Auction No. 04/2018 (Plot 2), January 31, 2018, pp. 12-13 (C-012).

[457] *Supra*, §§ II.A.1.a, II.

[458] Mac Mahon Witness Statement , ¶ 24

[459] *Christian Doutrememepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction of August 23, 2019, ¶152 (emphasis added) (RL-083).

[460] Claimant's Memorial, ¶¶ 197-198.

never started.

IV.D. Claimant's claim is purely contractual.

257. The claim brought by BA Desarrollos is contractual in nature. The mere assertion of an alleged breach of the BIT does not transform a claim that is fundamentally contractual into a Treaty dispute. Where the case is nothing more than a claim for contractual provisions disguised as a Treaty case, investment tribunals lack jurisdiction.

258. The present dispute revolves around a specific fact: the lack of execution of the deeds to transfer title of Plots 2 and 3 to be performed in accordance with the Terms and Conditions, among other allegedly implicated clauses. This constitutes a contractual claim, even if Claimant disguises it as a claim under the Treaty. Claimant pretends to ignore the ICJ's ruling in *Oil Platforms*, where it was established that the tribunals "must ascertain whether the violations of the [BIT] pleaded [...] do or do not fall within the provisions of the [BIT] and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction".[461]

259. Claimant's claim does not demonstrate autonomy outside the Terms and Conditions;[462] Claimant confirms that its claim "entails the (straightforward) assessment of Argentina's violation of the Terms and Conditions,".[463] Specifically, the claims relate to: (i) the obligation of transferring the title contained in Articles 20 of the Terms and Conditions;[464] (ii) its Articles 21 on the state of the Plots;[465] and (iii) its Annex I, which contains the Vacancy Agreements[466] and the survey plans related to the conflict over the railroad tracks and the control tower.[467] The contractual content of the claim is further evidenced by looking

[461] *Oil Platforms (Iran v. U.S.)*, ICJ, Judgment on Preliminary Objection of December 12, 1996, ¶16 (RL-084); *see also SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, ¶ 26 (RL-025).

[462] *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 64 ("[T]here comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty. The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract") (RL-061).

[463] Observations on the Request for Bifurcation, ¶ 107.

[464] Auction Terms and Conditions for Public Auction No. 03/2018 (Plot 3), January 31, 2018 (C-011); Auction Terms and Conditions for Public Auction No. 04/2018 (Plot 2), January 31, 2018, (C-012).

[465] Claimant's Memorial ¶ 82.

[466] Claimant's Memorial ¶ 82.

[467] Claimant's Memorial ¶ 56.

at multiple passages in Claimant in which BA Desarrollos raises the violation of the Terms and Conditions.[468] It also results from the analysis of the notice of dispute which summarizes the essence of this dispute, which limits its analysis to the purchase of the Plots, the clauses that Fideicomiso BAP would have complied with and the ones that AABE would have breached. [469]

260. Claimant argues that BA Desarrollos cannot bring a contractual claim since it was Fideicomiso BAP that was the successful bidder of the Plots.[470] However, this is irrelevant because, although Fideicomiso BAP is the one assuming the obligations of the Terms and Conditions, it is BA Desarrollos who is claiming for not transferring the title of the Plots in this arbitration. The choice of forum that could bind Fideicomiso BAP and Argentina is also irrelevant. The existence of a contract between Fideicomiso BAP and Argentina, even with a choice of forum clause, does not preclude the findings of the tribunals in *Joy Mining v. Egypt* and *SGS v. Pakistan*. They show that claims where there is no involvement of sovereign acts affecting a Claimant should be dismissed, as they do not engage international law.[471]

261. BA Desarrollos' claim does not meet the threshold required to establish a breach of the BIT standards.[472] To reach that level, "it must be the result of behaviour going beyond that which

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[468] *See* Claimant's Memorial, ¶¶ 12, 85, 95, 99, 104, 106, 108, 109, 114, 116, 146, 152, 154, 167, 173, 191 and 197.

[469] BA Desarrollos Notice of Dispute, May 12, 2022, pp. 4-7 (C-047); *See also* Follow-up Letter, April 3, 2023 (C-048).

[470] Observations on the Request for Bifurcation, ¶ 105.

[471] *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, August 6, 2004 (RL-021); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004 (RL-025); Claimant argues that *RMS v. Grenada* is not applicable because it referred to the abuse of process objection. However, the tribunal in that case found it inappropriate to raise contractual claims in an ICSID investment arbitration, the same as Argentina demonstrates in this case, albeit under a different objection; *See* Objections to Request for Bifurcation n. 202; *See Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, December 10, 2010, ¶ 7.3. (RL-026).

[472] *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, Dec. 22, 2003, ¶ 48 (RL-085); *see also Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), ICJ, Judgment of 20 July 1989, ¶ 73 (CL-047); ILC Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, Commentary art. 4, ¶ 6 ("Naturalmente, el incumplimiento de un contrato por un Estado no entraña de por sí un quebrantamiento del derecho internacional. Se requiere algo más para que el derecho internacional se aplique, como por ejemplo la denegación de justicia por los tribunales del Estado en una acción entablada por la otra parte contratante ") (emphasis added), *in Report of the International Law Commission on the Work of its Fifty-third Session*, 2001, ch. IV, ¶ 77, U.N. Doc. A/56/10 (RL-086).

an ordinary contracting party could adopt [and that] [o]nly the State in the exercise of its sovereign authority [...] and not as a contracting party, may breach the obligations assumed under the [Treaty]".[473]

262. Claimant asserts that "[t]he dispute relates to sovereign acts of Argentina and includes the use of sovereign power based on political motives, in which the new Fernández/Kirchner government sought to investigate and undo the projects developed by the Macri administration".[474] However, that argument fails with Claimant very narrative that the Terms and Conditions would have been breached prior to the change of government from President Macri to President Fernandez, when the investigations that led to the criminal case also occurred prior to the change of government.

263. Claimant also points out that the choice of forum clause between Fideicomiso BAP and Argentina does not apply to BA Desarrollos.[475] However, as the claim that BA Desarrollos brings before this Tribunal is a claim of a contractual nature for the alleged breach of the terms of the Terms and Conditions, it is appropriate to bring it before the Argentine courts, not for BA Desarrollos to drag Argentina into an investment arbitration.

264. Despite the fact that BA Desarrollos goes to the extreme as to submit an international dispute and, having initiated local proceedings, it has "not filed a judicial claim for execution of deeds —an action to which AABE has been subject on other occasions—, which seeks to have a judge order the execution of the deed or, as the case may be, to have the judge execute the deed in substitution of the defaulting party".[476]

265. In conclusion, the contractual nature of Claimant's claim justifies this Tribunal to declare that it lacks jurisdiction to hear the dispute concerning the alleged breach of the Terms and Conditions. Addressing the claims for alleged breaches of the Treaty will comingle the contractual nature of the dispute.

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[473] *Impregilo S.p.A. v. Islamic Republic of Pakistan (II)*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of Jan. 17, 2003, ¶ 260 (CL-121); *See also Kornikom EOOD v. Republic of Serbia*, ICSID Case No. ARB/19/12, Award, Sept. 20, 2023, ¶ 520 (RL-087); *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Dissenting Opinion of Professor Zachary Douglas of October 17, 2022, n. 30 ("Several tribunals have found that [...] investment protection obligations more generally, only relate to sovereign acts") (emphasis added) (RL-088) (RL-088).

[474] Observations on the Request for Bifurcation, ¶ 108.

[475] Observations on the Request for Bifurcation, ¶ 109.

[476] Mac Mahon Witness Statement, ¶ 24.

V. STANDARDS OF PROTECTION OF THE BIT

266. In the alternative, should the Tribunal find that it has jurisdiction to hear this dispute, Argentina will demonstrate that there has been no expropriation of BA Desarrollos' interest in Fideicomiso BAP or of the rights derived from the Terms and Conditions, nor has there been any violation of the alleged legitimate expectations invoked by Claimant.... Furthermore, the delay in the execution of the Deeds, which is the measure for which BA Desarrollos is claiming in this arbitration, insofar as it is attributable to Argentina, is motivated and justified on grounds that are far from being arbitrary. Consequently, the claim that Argentina has breached the Treaty is without legal and factual basis.

V.A. Argentina did not expropriate BA Desarrollos' alleged investment

V.A.1. The scope of the protection against expropriation under the BIT

267. Claimant alleges to have been expropriated under the terms of Article IV of the BIT,[477] according to which "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-) except [...]".[478] This article contemplates both direct and indirect expropriation.

268. Direct expropriation refers to the formal and compulsory transfer of title to an asset in favor of the State receiving the investment, as well as other cases of open, deliberate and recognized appropriations.[479] Indirect expropriation occurs when a measure or set of measures has an effect equivalent to that of direct expropriation without formal transfer of title or a plain appropriation.[480] In this sense, article IV of the BIT refers to indirect expropriation as "measures tantamount to expropriation". This phrase indicates that in order for an indirect expropriation to take place, the challenged measure or measures must produce

[477] Claimant's Memorial, § IV.

[478] BIT, art. IV (R-017).

[479] *See, e.g., S.D. Myers, Inc. v. Canada*, UNCITRAL/NAFTA Arbitration, Partial Award, November 13, 2000, ¶ 280 (RL-089); *Generation Ukranie, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, ¶ 20.21 (CL-094); Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours de l'Académie de Droit International*, 1997, vol. 269, p. 382 (RL-090); 2012 U.S. Model BIT, Annex B (expropriation), item 3 (R-166).

[480] Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours de l'Académie de Droit International*, 1997, vol. 269, p. 382 (RL-090); *Starrett Housing Corporation v. Islamic Republic of Iran*, Iran-U.S. Cl. Trib. Rep., 1983, vol. 4, p. 154 (RL-092); 2012 U.S. Model BIT, annex B, item 4 (R-166).

an effect *equivalent* to that of a direct expropriation in terms of the effects on the property in question.[481]

269. As a preliminary matter, it should be noted that it is inappropriate to claim both a direct expropriation and, at the same time, an indirect expropriation. The Tribunal in the *Enron* case explained that*:*

> the inappropriateness of claiming simultaneously a direct and an indirect expropriation, as Claimants have done [...]. In fact, if a given measure qualifies as a form of direct expropriation it cannot at the same time qualify as an indirect expropriation, as their nature and extent are different. The converse is also true.[482]

270. With this caveat, there was no direct or indirect expropriation in this case. Contrary to Claimants' assertion,[483] there was no formal transfer or action taken that would constitute an indirect expropriation of BA Desarrollos' rights.

271. In order to analyze Claimant's allegation, the following cumulative requirements for an indirect expropriation, identified in international doctrine and jurisprudence, must be taken into account:[484] (a) that the challenged measures interfere with the investor's property rights,[485] (b) that the interference with the investor's property rights is substantial,[486] and (c) that the government measures interfering with the investor's rights do not constitute

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[481] *See Pope & Talbot, Inc. v. Canada*, NAFTA Arbitration, Partial Award, June 26, 2000, ¶ 96 (RL-091); *See also S.D. Myers, Inc. v. Canada*, UNCITRAL/NAFTA Arbitration, Partial Award, November 13, 2000, ¶¶ 285-286 (RL-089).

[482] *Enron Corporation and Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶ 250 (RL-108).

[483] Claimant's Memorial, ¶ 147.

[484] Catherine Yannaca-Small, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Directorate for Financial and Enterprise Affairs, Working Paper on International Investment No. 2004/4, 2004, p. 10 (RL-102).

[485] *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, July 17, 2006, ¶ 176 (c) (RL-100); *Wena Hotels Ltd v. Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶ 99 (CL-018); 2012 U.S. Model BIT, Annex B, points 1 and 2. (R-166).

[486] Catherine Yannaca-Small, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Directorate for Financial and Enterprise Affairs, Working Paper on International Investment No. 2004/4, 2004, pp. 10-14 (RL-102); *see also MetaLAPr S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, June 6, 2008, ¶ 173 (RL-096); *S.D. Myers, Inc. v. Canada*, UNCITRAL/NAFTA Arbitration, Partial Award, November 13, 2000, ¶ 282 (RL-089); *Pope & Talbot, Inc. v. Canada*, NAFTA Arbitration, Partial Award, June 26, 2000, ¶ 102(RL-091); *Starrett Housing Corporation v. Islamic Republic of Iran*, Iran-U.S. Cl. Trib. Rep., 1983, vol 4, p. 154 (RL-092); Enrique Fernandez Masiá, "Indirect Expropriation and Foreign Investment Arbitration", *International Arbitration Review*, July 2007, p. 47 (RL-093).

regulatory measures falling within the police power of the State.

272. Regarding (a) (that the challenged measures interfere with the investor's property rights), Claimant attempts to circumscribe this standard based on *Vivendi II v. Argentina*,[487] by stating that what characterizes indirect expropriation is the deprivation of the use and enjoyment and economic benefit of the investment.[488] However, the argumentative foundations on which Claimant in the cited case relied have their origin in *Tecmed v. Mexico,* which was criticized by the annulment committee of *MTD v. Chile* for having determined that an expropriation had occurred on the basis of the investor's expectations, rather than its property rights:

> [T]he *TECMED* Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.[489]

273. In the same vein, Judge Crawford observed that: "[T]he decision of the ad hoc Committee's in *MTD v. Chile* takes the preferable approach regarding the application of the legitimate expectations principle in the investment treaty context. [...] [T]he expectations of the investor cannot act as a substitute for the relevant contractual and treaty arrangements".[490]

274. Therefore, Claimant must demonstrate a substantial governmental interference with its property rights and not merely an impairment of its mere expectations.

275. With respect to (b) (that the interference with the investor's property rights be substantial), it has been held that an interference with the investor's property rights is not substantial if the investor retains control. Such a test was employed by the tribunal in *Pope & Talbot v.*

[487] Claimant's Memorial, ¶ 140-142.

[488] Claimant's Memorial, ¶ 140-142

[489] *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile*, (ICSID Case No. ARB/01/7), Decision on Annulment, March 21, 2007, ¶ 67 (RL-094).

[490] James Crawford, *Treaty and Contract in Investment Arbitration*, 2008, p. 373 (RL-095).

Canada[491] and then by many other tribunals.[492] In this regard, Claimant must demonstrate substantial interference with its interest in the Fideicomiso BAP or the right to the execution of the deeds derived from the Terms and Conditions.

276. Regarding the last and third requirement (that the governmental measures that interfere with the investor's rights do not constitute regulatory measures within the police power of the State), it is necessary that there is no "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment".[493]

277. Claimant argues that the purpose of the measure is irrelevant when analyzing whether there is an indirect expropriation.[494] However, numerous tribunals have held that *bona fide*, non-discriminatory legislative or regulatory acts adopted for the purpose of protecting general welfare objectives do not constitute an expropriation and, therefore, do not require compensation.[495] This principle has also been addressed in international doctrine[496] and has

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[491] *Pope & Talbot, Inc. v. Canada*, NAFTA Arbitration, Partial Award, June 26, 2000, ¶ 100 (RL-091).

[492] *See, e.g., MetaLAPr S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, June 6, 2008, ¶ 174 (RL-096); *BG Group Plc. v. Argentine Republic*, UNCITRAL Arbitration, Award, December 24, 2007, ¶ 271 (CL-004); *LG&E Energy Corp., LG&E Capital Corp, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶ 188 (CL-041); *Methanex Corporation v. United States of America*, UNCITRAL/NAFTA Arbitration, Award, August 3, 2005, § IV.D, ¶ 16 (RL-097); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 262-265 (CL-029); *Marvin Roy Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶¶ 142, 152 (RL-098).

[493] *Methanex Corporation v. United States of America*, UNCITRAL/NAFTA Arbitration, Final Award on Jurisdiction and Merits, August 3, 2005, § IV.D, ¶ 7 (RL-097).

[494] Claimant's Memorial, ¶ 144.

[495] *See, e.g., EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, ¶¶ 292, 299, 308 (CL-046); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, ¶ 276 (RL-099); *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶¶ 195-196 (CL-041); *Fireman's Fund Insuance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, July 17, 2006, ¶ 176(j) (RL-100); *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award, March 17, 2006, ¶¶ 255, 253-265, 275 (CL-040); *Methanex Corporation v. United States of America*, UNCITRAL/NAFTA Arbitration, Award, August 3, 2005, § IV.D, ¶ 7 (RL-097).

[496] *See, e.g.*, Benedict Kingsbury and Stephan W. Schill, "Public Law Concepts to Balance Investor's Rights and State Actions*",* in *International Investment Law and Comparative Public Law*, 2010, pp. 89-96 (RL-101); Catherine Yannaca-Small, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Directorate for Financial and Enterprise Affairs, Working Paper on International Investment No. 2004/4, 2004, pp. 16-19 (RL-102); Ian Brownlie, *Principles of Public International Law*, 2003, p. 509 (RL-109);

been included as a clarification in various international instruments.[497]

278. In arbitral case law, to distinguish between a "compensable expropriation" and a "non-compensable regulation", most tribunals consider the purpose of the State's measure, and adopt the police power doctrine, which recognizes that a State has the power to restrict private property without compensation in pursuit of a legitimate purpose.[498]

279. In this sense, the tribunal in *Bank Melli v. Bahrain* determined that if a measure in compliance with the police power of a State is *bona fide*, non-discriminatory, proportional and respecting due process, it cannot qualify as expropriation,[499] and also highlighted that "[t]o hold otherwise would imply that States could be held liable to pay compensation for enforcing their existing laws and regulations against the investor's wrongdoings".[500] For its part, the tribunal *Naturgy vs. Colombia* determined that police powers protect the regulatory autonomy of States when they are not exercised in an arbitrary or discriminatory manner.[501]

280. In summary, if the measure responds to the police powers of the State, following due process, in a non-discriminatory and proportional manner, it does not constitute an expropriation, otherwise States should pay compensation for applying their domestic laws and regulations.

[redacted]

281. [redacted]

[497] *See, e.g.*, U.S. Model BIT. of 2012, annex B, item 4(b) (R-166); Interpretative Agreement to the Convention between the Republic of Argentina and the Republic of Panama for the Promotion and Reciprocal Protection of Investments, September 15, 2004 (R-167); Free Trade Agreement between the Government of the Republic of Costa Rica, the Government of the Dominican Republic, the Government of the Republic of El Salvador, the Government of the Republic of Guatemala, the Government of the Republic of Honduras, the Government of the Republic of Nicaragua and the Government of the United States of America, August 5, 2004, annex 10-C, item 4(b) (R-168); Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, art. 1 (R-169).

[498] Benedict Kingsbury and Stephan W. Schill, "Public Law Concepts to Balance Investor's Rights and State Actions*",* in *International Investment Law and Comparative Public Law*, 2010, pp. 90-91 (RL-101).

[499] *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, November 9, 2021, ¶¶ 631, 637 (RL-110).

[500] *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, November 9, 2021, ¶ 631 (RL-110).

[501] *Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia*, ICSID Case No. UNCT/18/1, Award, March 12, 2021, ¶ 527 (RL-111).

[redacted]

[redacted]

306. [redacted]

307. [redacted]

308. [redacted]

309. [redacted].

V.B. Argentina provided BA Desarrollos with fair and equitable treatment in accordance

[redacted]

with the BIT.

310. Claimant argues that Argentina has breached and continues to breach the fair and equitable treatment standard under the BIT. To this end, it posits a broad interpretation of the standard, extending its content to encompass protection of BA Desarrollos' alleged legitimate expectations, protection against arbitrary conduct and respect for principles of international law.

311. The Argentine Republic will demonstrate that Claimant's claims are without merit and that Argentina in no way breached its obligations under the fair and equitable treatment standard ("FET").

V.B.1. The scope of the protection of fair and equitable treatment under the Treaty

V.B.1.a. Article II(2)(a) of the Treaty embodies the minimum standard of treatment under customary international law.

312. Article II(2)(a) of the BIT establishes that: "[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law".[549]

313. The fair and equitable treatment enshrined in the BIT —interpreted in good faith, according to the ordinary meaning of its terms in their context and in accordance with its object and purpose—[550] amounts to the minimum standard of customary international law.[551]

314. Its origin in international custom allows to delimit its content: to provide a minimum standard of international law to measure the treatment of foreign investors by a State.[552] The

[549] Treaty, art. II(2)(a) (R-017).

[550] VCLT, May 23, 1969, art. 31 (R-176).

[551] *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 120 (RL-113); Tudor, Ioana, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment,* 2008, p. 9 (RL-114).

[552] *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador, ICSID Case No. ARB/03/6, Award, July 2007, ¶ 369. Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 369 (the Tribunal held that "fair and equitable treatment conventionally obliges States Parties to the BIT to respect the standards of treatment required by international law" and that "[t]he international law referred to by Article II of the BIT refers to customary international law") (RL-012); *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL/NAFTA Arbitration, Arbitral Award, January 26, 2006, ¶ 193 (RL-115); *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶¶ 90-91 (RL-044); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, ¶¶ 124-128 (RL-045); *ADF Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶¶ 175-178, 183 (RL-116); *United Parcel Service*

purpose of the FET is to ensure that the treatment of an investment cannot fall below the treatment considered appropriate under generally accepted principles of customary international law. [553]

315. The content of this standard was formulated in the emblematic *Neer* case,[554] in which the U.S.-Mexico Claims Commission expressed the concept as follows:

> [i]t is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an **outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.**[555]

316. The *Neer* test was taken into account by the tribunal in *International Thunderbird Gaming Corporation v. Mexico* which, while noting that the content of the minimum standard under Article 1105 of the North American Free Trade Agreement should reflect the evolution of customary international law, recognized that a violation of the minimum standard of treatment under the Treaty is constituted by acts that "[s]oped in relation to the context of the facts at issue, represent **a** repugnant **denial of justice or manifest arbitrariness, falling below internationally acceptable standards**".[556]

317. The tribunal in *Glamis Gold v. United States* recognized the relevance *of Neer* for the purpose of determining the scope of the FET.[557] Similarly, the tribunal in *Waste Management II v. United States* compiled the decisions that had been rendered so far on the content of this standard and reached the following conclusion:

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of America, Inc. v. Canada, UNCITRAL/NFTA Arbitration, Award on Jurisdiction of November 22, 2002, ¶ 97 (RL-117).

[553] Commentary of the Department of Foreign Affairs and International Trade Canada to the 2003 Model BIT, art. 5 (RL-118).

[554] *See* Ian Brownlie, *Principles of Public International Law*, 2003, p. 503 (RL-109); *see also* Pamela B. Gann, "The US Bilateral Investment Treaty Program", *Stanford Journal of International Law*, 1985, vol. 21, pp. 389-390 (RL-119).

[555] *Neer case*, October 15, 1926, UNRIAA, vol. IV, pp. 61-62 (emphasis added) (RL-120).

[556] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL/NAFTA Arbitration, Award, January 26, 2006, ¶ 194 (emphasis added) (RL-115).

[557] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, UNCITRAL/NAFTA Arbitration, Award, June 8, 2009, ¶ 616 (RL-121).

> [t]he minimum standard of fair and equitable treatment is breached by conduct attributable to the State and is prejudicial to Claimant if such conduct is **arbitrary, grossly unfair, unjust or idiosyncratic, and discriminatory if Claimant is subjected to racial or regional bias or if it involves an absence of due process** leading to a result that offends judicial discretion, as could occur with a manifest failure of natural justice in judicial proceedings or a total lack of transparency and fairness in an administrative process.[558]

318. In this sense, the *ELSI* case, cited by BA Desarrollos,[559] sets a high standard of arbitrariness by stating that "[i]t is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety".[560] For conduct to be considered of such magnitude to qualify as arbitrary "any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action",[561] otherwise, it cannot be characterized as arbitrary.

319. Claimant intends to include within the FET standard of the BIT aspects that have not been expressly included by Argentina and the U.S. in the Treaty: the protection of legitimate expectations, that the State's actions be consistent, predictable and transparent and the protection against unjust enrichment. [562]

320. However, the elements that Claimant seeks to include in the term FET are not inserted in the letter of the Treaty. [563]

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[558] *Waste Management, Inc. v. United Mexican States (II),* ICSID Case No. ARB(AF)/00/03, Award, April 30, 2004, ¶ 98 (emphasis added) (RL-044).

[559] Claimant's Memorial, ¶¶ 182

[560] *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), ICJ, Judgment of July 20, 1989, ¶ 128 (CL-047).

[561] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶ 371 (RL-135).

[562] Claimant's Memorial, ¶¶ 170-172, 174-175, 188-189.

[563] *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 133 (RL-098); *Cargill Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 294 (RL-122). *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua,* ICSID Case No. ARB/17/44, Award, March 1, 2023, ¶¶ 424-426 (RL-123); *Mason Capital L.P. and Mason Management LLC v. Republic of Korea,* PCA Case No. 2018-55, U.S. Submission, February 1, 2021, ¶ 22 (RL-124); *Bay View Group LLC and The Spalena Company, LLC. v. Republic of Rwanda,* ICSID Case No. ARB/18/21, U.S. Submission, February 19, 2021, ¶ 49 (RL-125); *Angel Samuel Seda et al. v. Republic of Colombia,* ICSID Case No. ARB/19/6, U.S. Submission, February 26, 2021, ¶ 42 (RL-126); *Omega Engineering LLC and Oscar Rivera v. Republic of Panama,* ICSID Case No. ICSID Case No. ARB/16/42, Submission of the United States of February 3, 2020, ¶ 26 (RL-127); *Freeport McMoran Inc in its own right and for Sociedad Minera Cerro Verde S.A.A. v. Republic of Peru,* ICSID Case No. ARB/20/8, United States' February 24, 2023 Submission, ¶ 30 (RL-128); *Finley Resources Inc, MWS Management Inc and Prize*

321. Notwithstanding this, the precepts of consistency and predictability are not self-sufficient since they are linked to the notion of manifest arbitrariness insofar as they do not imply a guarantee not to modify decisions or acts when there are sufficient grounds to do so or in accordance with domestic law, or a guarantee of the intangibility of the normative framework.[564] With specific regard to the issue of transparency, the U.S. has explicitly stated that this notion "has not crystallized as a component of 'fair and equitable treatment' under customary international law giving rise to an independent host-State obligation".[565]

322. The FET's equivalence to the minimum standard of international law has been endorsed by the other signatory of the Treaty under discussion,[566] as well as by decisions of multiple

Permanent Holdings LLC v. United Mexican States, ICSID Case No. ARB/21/25, United States' August 31, 2023 Submission, ¶ 56 (RL-129).

[564] *Alejandro Diego Diaz Gaspar v. Costa Rica*, ICSID Case No. ARB/19/13, Award, June 29, 2022, ¶ 375 (RL-142).

[565] *Freeport McMoran Inc in its own right and Sociedad Minera Cerro Verde S.A.A. v. Republic of Peru*, ICSID Case No. ARB/20/8, Submission of the United States of February 24, 2023, ¶ 30 (RL-128).

[566] *See*, inter alia, *Riverside Coffee, LLC v. Republic of Nicaragua*, ICSID Case No. ARB/21/16, U.S. Submission, March 15, 2024, ¶¶ 3-20 (RL-131); *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, U.S. Submission, February 3, 2020 ¶¶ 11-19 (RL-127); *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, U.S. Submission, Feb. 1, 2021, ¶¶ 9-24 (RL-124); *Koch Industries Inc. and Kock Supply & Trading LP v. Canada*, ICSID Case No. ARB/20/52, U.S. Submission, Oct. 28, 2022, ¶¶ 10-27 (RL-132); *Italba Corporation v. Oriental Republic of Urugay (I)*, ICSID Case No. ARB/16/9, U.S. Submission, September 11, 2017, ¶¶ 17-30 (RL-051); *Freeport McMoran Inc in its own right and for Sociedad Minera Cerro Verde S.A.A.A. v. Republic of Peru*, ICSID Case No. ARB/20/8, U.S. Submission, February 24, 2023, ¶¶ 13-20 (RL-128); *Angel Samuel Seda et al. v. Republic of Colombia*, ICSID Case No. ARB/19/6, Submission of the United States of February 26, 2021, ¶¶ 31-46 (RL-126); *Finley Resources Inc, MWS Management Inc and Prize Permanent Holdings LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Submission of the United States of August 31, 2023, ¶¶ 34-58 (RL-129); *Bay View Group LLC and The Spalena Company, LLC. v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Submission of the United States of February 19, 2021, ¶¶ 36-52 (RL-125).

international tribunals[567] and by international jurists. [568]

323. It should be noted that the fair and equitable treatment standard does not provide a general and absolute guarantee of legal stability.[569] Bilateral investment treaties are not designed to offer guarantees of profitability to foreign investors,[570] nor do they constitute "insurance policies against damages flowing from the assumption of business risks.[571]

324. Finally, in the application of the FET standard, the realities of the State in which it is

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[567] *See, e.g., M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador, ICSID Case No. ARB/03/6, Award, July 2007, ¶ 369. Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 369 (the Tribunal held that "[f]air and equitable treatment conventionally obliges States Parties to the BIT to respect the standards of treatment required by international law" and that "[t]he international law referred to by Article II of the BIT refers to customary international law") (RL-012); *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL/NFTA Arbitration, Award, January 26, 2006, ¶ 193 (RL-115): *Waste Management, Inc. c. United Mexican States (II)*, ICSID Case ARB(AF)/00/3, Award, April 30, 2004, ¶¶ 90-91 (CL-026); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, ¶¶ 124-128 (RL-045); *ADF Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶¶ 175-178, 183 (RL-116); *United Plots Service of America, Inc. v. Canada*, UNCITRAL/NAFTA Arbitration, Award on Jurisdiction of November 22, 2002, ¶ 97 (RL-117); *Mondev International LTD v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 120 (RL-113); *Alex Genin, Eastern Credit Limited, Inc, and A,S, Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶ 367 (RL-135); *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, ¶ 92 (RL-136); *American Manufacturing & Trading, Inc. (AMT) v. Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997, ¶¶ 6.06, 6.10 (RL-137); *United Mexican States v. Metalclad Corporation*, Judgment of the Supreme Court of British Columbia of May 2, 2001 ¶ 62 (RL-138).

[568] *See, e.g.*, Campbell McLachlan et al, *International Investment Arbitration: Substantive Principles*, 2007, p. 260 (RL-049); Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Paper on International Investment Law No. 2004/3, 2004, pp. 8-9 ("Fair and equitable has been identified [...] as one of the elements of the minimum standard of treatment of foreigners and of their property, required by international law. This view has been supported by a number of scholars".) (RL-139); Andrea Menaker, "Standard of Treatment: National Treatment, Most Favoured Nation Treatment & Minimum Standard of Treatment", *APEC Workshop on Bilateral and Regional Investment Rules and Agreements*, 2002, pp. 109-116 (RL-140); United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties*, 1988, U.N. Doc. ST/CTC/65, ¶¶ 113, 115 (RL-141).

[569] *Alejandro Diego Diaz Gaspar v. Costa Rica*, ICSID Case No. ARB/19/13, Award, June 29, 2022, ¶ 375 RL-142).

[570] *See, e.g., Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, Sept. 11, 2007, ¶¶ 308, 333 (RL-143); *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL/ NAFTA Arbitration, Award, Nov. 15, 2004, ¶ 85 (RL-144); *Marvin Roy Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 112 (RL-098); *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, ¶ 83 (RL-136); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, ¶ 217 (CL-046); *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of October 3, 2006, ¶ 197 (CL-041).

[571] *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Award, December 19, 2016, ¶ 21 (RL-145).

invested, the circumstances in which the measures are taken[572] and the power of States to regulate to protect the public interest must be considered.[573] This is because it is not possible to determine whether the FET standard has been violated in the abstract.[574]

V.B.1.b. The FET standard does not address legitimate investor expectations in the sense proposed by BA Desarrollos.

325. Despite the clear language of the BIT, Claimant unsuccessfully attempts to add terms to the Treaty, arguing that the Treaty protects its legitimate expectations.[575] This concept is not part of the BIT.

326. As Professor Nikken explained, bilateral investment treaties do not support the claim to give FET treatment a meaning that is not present in the terms of the treaty according to its normal meaning.[576] Indeed, the fact that treaties have as their object the protection of investments does not authorize to abandon the letter of the treaties or to rewrite them. Thus:

> [t]he *object and purpose* of BITs is not useful, in my opinion, to give the fair and equitable treatment meaning that is not present in the *terms of the treaty* in accordance with its *ordinary meaning.* Moreover, the international law on investment, as a whole has a purpose of protection which, therefore, invites an interpretation favorable to the protected object,

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[572] *See, e.g.*, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability of December 27, 2010, ¶ 162 (CL-033); *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of January 14, 2010, ¶ 285 (CL-023); *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, ¶ 304 (CL-040); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 181 (RL-146); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 219 ("Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its economic life in the public interest") (CL-046); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, ¶ 333 (RL-143).

[573] *See, e.g.*, OECD Draft Convention on the Protection of Foreign Property of October 12, 1967, art. 3, Comment 1(a) (RL-147); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, ¶ 525 (CL-069); *Grand River Enterprises et al. v. United States of America*, UNCITRAL Arbitration, Award, January 12, 2011, ¶ 144-145 (RL-148); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, Dec. 27, 2010, ¶ 115 (CL-033); *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award, Mar. 17, 2006, ¶ 304 (CL-040); *S.D. Myers, Inc. v. Canada*, UNCITRAL/ NAFTA Arbitration, Partial Award, November 13, 2000, ¶ 263 (RL-089); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, ¶ 219 (CL-046).

[574] *See* Giorgio Sacerdoti, "Biateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours de l'Académie de Droit International*, vol. 269, 1997, p. 341 (RL-090).

[575] Claimant's Memorial, ¶¶ 160-163, 168.

[576] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, Separate Opinion of Arbitrator Pedro Nikken, ¶ 21 (RL-130).

> but this does not allow to abandon the wording of the treaties or to redraft them. In my opinion, within the reasoning of the Decision, as with other cases that have followed a similar argumentation, there is an important link missing, because it does not explain why the object and purpose of the BITs can authorize the introduction therein of the concept of *legitimate expectations of investors*, which does not appear in any way, shape or form in the *terms of the treaty* according to its ordinary meaning.[577]

327. Claimant relies on different awards to argue that the investor's expectations are part of the content of the fair and equitable treatment standard.[578] However, the *Tecmed v. Mexico* award invoked by Claimant has been severely questioned. Thus, the annulment committee in *MTD v. Chile* criticized the wording of that award, precisely because the tribunal in *Tecmed v. Mexico* had relied on the investor's expectations as the source of the obligations of the host State of the investment.[579] The *MTD v. Chile* committee stated:

> Las obligaciones del Estado receptor hacia los inversores extranjeros derivan de los términos del tratado de inversión aplicable y no de un conjunto de expectativas que los inversores pueden tener o que reclaman tener. Aquel tribunal que pretenda generar a partir de dichas expectativas un conjunto de derechos diferentes a los contenidos en el TBI o exigibles en virtud del mismo bien puede exceder sus facultades, y si la diferencia fuera sustancial, podría excederlas de modo manifiesto.[580]

328. Argentina's interpretation is in line with the presentation made by the U.S. in March 2024 in *Riverside Coffee v. Nicaragua,* in which it clarified the scope of the minimum standard of treatment and rejected that it protects the investor's alleged expectations:

> The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State

[577] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, Separate Opinion of Arbitrator Pedro Nikken, ¶ 21 (CL-055).

[578] Claimant's Memorial, ¶ 168.

[579] *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, ¶¶ 66-67 (RL-094).

[580] *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, ¶ 67 (RL-094).

under the minimum standard of treatment. [581]

329. In the absence of express promises or specific commitments, expectations that investors may have or intend to have cannot give rise to obligations of States vis-à-vis investors. In this regard, the tribunal in *Hochtief v. Argentina* noted that:

> Si bien existía una clara expectativa de que se mantuviera el equilibrio comercial del Contrato por medio de la continuación de la paridad peso/dólar, la Demandada no efectuó expresamente ninguna promesa o compromiso específicos de mantener dicha paridad. Ni el Pliego ni el Contrato de concesión, ni ningún otro instrumento presentado al Tribunal contienen ningún compromiso específico y absoluto de no pesificar el Contrato bajo ninguna circunstancia.[582]

330. However, in the eventual case of considering legitimate expectations as part of the FET, the following requirements must be considered.

331. First, there must be specific commitments made by the State to the investor. In this sense, tribunals such as the one in *Philip Morris v. Uruguay* have pointed out that legitimate expectations depend on the existence of "[c]ompromisos y declaraciones de naturaleza específica del Estado receptor, expresadas para inducir a los inversores a realizar inversiones". [583]

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[581] *Riverside Coffee, LLC v. Republic of Nicaragua,* ICSID Case No. ARB/21/16, U.S. Submission, March 15, 2024, ¶ 17 (RL-131); *See,* inter alia, *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, U.S. Submission, February 3, 2020 ¶ 24 (RL-127); *Mason Capital L.P. and Mason Management LLC v. Republic of Korea,* PCA Case No. 2018-55, U.S. Submission, Feb. 1, 2021, ¶ 18 (RL-124); *Koch Industries Inc. and Kock Supply & Trading LP v. Canada,* ICSID Case No. ARB/20/52, U.S. Submission, Oct. 28, 2022, ¶ 50 (RL-132); *Italba Corporation v. Oriental Republic of Uruguay,* ICSID Case No. ARB/16/9, United States' September 11, 2017 Submission, ¶ 24 (RL-051); *Freeport McMoran Inc in its own right and for Sociedad Minera Cerro Verde S.A.A. v. Republic of Peru,* ICSID Case No. ARB/20/8, United States' February 24, 2023 Submission, ¶ 28 (RL-128); *Angel Samuel Seda et al. v. Republic of Colombia,* ICSID Case No. ARB/19/6, Submission of the United States of February 26, 2021, ¶ 40 (RL-126); *Finley Resources Inc, MWS Management Inc and Prize Permanent Holdings LLC v. United Mexican States,* ICSID Case No. ARB/21/25, Submission of the United States of August 31, 2023, ¶ 54 (RL-129); *Bay View Group LLC and The Spalena Company, LLC. v. Republic of Rwanda,* ICSID Case No. ARB/18/21, Submission of the United States of February 19, 2021, ¶ 50 (RL-125).

[582] *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability of December 29, 2014, ¶ 239 (RL-133).

[583] *Philip Morris Brand Sàrl (Swiza), Philip Morris Products S.A. (Swiza) and Abal Hermanos S.A. (Uruguay) v. Eastern Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, ¶¶ 424, 426 (RL-149); *See EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, Oct. 8, 2009, ¶ 217 (CL-046); *Charanne and Construction Investments v. Spain*, ECC Case No. V 062/2012, Final Award, Jan. 21, 2016, ¶¶ 490, 499 (RL-069); *Orazul International España Holdings S.L. v. The Argentine Republic*, ICSID Case No. ARB/19/25, Award, December 14, 2023, ¶ 623 (RL-151).

332. Arbitration practice has established that general rules,[584] vague or general comments or representations,[585] or the mere existence of an agreement or contract between parties[586] do not constitute specific commitments that generate an obligation on the part of the State.

333. The tribunal's decision in *Total v. Argentina* cited by Claimant,[587] as well as in *EDF v. Romania*, reinforce this line:

> The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. **Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable**.[588]

334. Therefore, in the absence of express promises or specific commitments, the expectations that investors may have or intend to have, do not generate obligations on the part of the States.

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[584] *Philip Morris Brand Sàrl (Swiza), Philip Morris Products S.A. (Swiza) and Abal Hermanos S.A. (Uruguay) v. Eastern Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, ¶ 426 (RL-149); *WCV and Channel Crossings v. Czech Republic*, PCA Case 2016-12, Award, July 26, 2023, ¶ 342 (RL-071); *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura v. Republic of Peru,* ICSID Case No. ARB/10/2, Award, May 21, 2013, ¶ 597 (RL-155); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, December 27, 2016, ¶ 367 (RL-156); *GPF GP S.á.r.l. v. Poland,* SCC Case No. 2014/168, Final Award, April 29, 2020, ¶ 549 (RL-157).

[585] *White Industries Australia Limited v. Republic of India,* UNCITRAL Case, Award, November 30, 2010, ¶ 10.3.17 (RL-158). *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Award, September 5, 2008 ("considering moreover that political statements have the least legal value, [...] notoriously so") ¶ 261 (RL-099). *See AES Solar et al. (PV Investors) v. Kingdom of Spain,* PCA Case No. 2012.14, Award, February 28, 2020, ¶ 579 (RL-159).

[586] *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, September 11, 2007 ("[n]ot every hope amounts to an expectation under international law [...] contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law".) ¶344 (RL-143); *See Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana,* ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 335 (RL-154); *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award, March 17, 2006, ¶ 442 (CL-040).

[587] Claimant's Memorial, n. 358; *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability of December 27, 2006, ¶ 121 (CL-033).

[588] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, ¶ 217 (emphasis added) (CL-046); *See Ulysseas, Inc v. Republic of Ecuador*, UNCITRAL Arbitration, Award, June 12, 2012, ¶ 249 (RL-150).

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335. Second, the investor's presumed expectations must be analyzed at the time the investor made the decision to make the investment.[590]

336. Finally, the legitimacy of the expectations must be analyzed objectively, demonstrating that they are reasonable and not mere subjective desires of an investor. As the tribunal explained in *Charanne v. Spain*:

> La comprobación de que ha existido vulneración de las expectativas del inversor debe fundarse en un estándar o análisis objetivo, no siendo suficiente la mera creencia subjetiva que pudo haber tenido el inversor al momento de realizar su inversión. Asimismo, la aplicación de este principio depende de que la expectativa haya sido razonable en el caso concreto, siendo relevante al respecto las representaciones eventualmente realizadas por el Estado receptor para inducir la inversión.[591]

[redacted]

337. [redacted]

[redacted]

338. [redacted]

[589] *Orazul International España Holdings S.L. v. The Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023, ¶ 623 (RL-151); *Philip Morris Brand Sàrl (Swiza), Philip Morris Products S.A. (Swiza) and Abal Hermanos S.A. (Uruguay) v. Eastern Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 426 (RL-149).

[590] *Orazul International España Holdings S.L v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, December 14, 2023, ¶ 629 (RL-151); *AES Solar (PV Investors) v. Kingdom of Spain*, PCA Case No. 2012-14, Award, February 28, 2020, ¶ 575 (RL-159); *Bayindir Insaat Turizm Ticaret ve Sayani A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 190 (RL-152).

[591] *Charanne and Construction Investments v. Spain*, CCS Case No. V 062/2012, Final Award, January 21, 2016, ¶ 495 (RL-069). *See also: Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, March 17, 2006, ¶¶ 304-305 (CL-040).

VII. REQUEST FOR RELIEF

439. By virtue of the foregoing, the Argentine Republic requests the Tribunal to:

(a) uphold the exceptions and defenses raised by the Argentine Republic;

(b) reject each and every one of Claimant's claims; and

(c) order Claimant to pay all costs and expenses arising out of these arbitration proceedings.

Submitted on November 25, 2024.

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