INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

THE AES CORPORATION
(USA)

Claimant

and

THE ARGENTINE REPUBLIC

Respondent

ICSID CASE NO. ARB/02/17

AWARD

Members of the Tribunal
Prof. Ricardo Ramírez Hernández, President
Mr. Stephen L. Drymer, Arbitrator
Prof. Domingo Bello Janeiro, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Date of dispatch to the parties: **May 30, 2025**

REPRESENTATION OF THE PARTIES

***Representing AES Corporation*:**	***Representing the Argentine Republic:***
James Hosking Anibal Sabater Caline Mouawad Matilde Flores May Khoury Silvia Marroquin Chaffetz Lindsey LLP 1700 Broadway, 33rd Floor New York, NY 10019 United States of America and Ignacio Minorini Lima Maria Laura Rozan* Bruchou & Funes de Rioja Ing. Enrique Butty 275, 12th Floor C1001 CABA, Argentina and Nigel Blackaby KC Juan Pomés** Ezequiel Vetulli** Joseph Spadafore Virginie Lassez Freshfields Bruckhaus Deringer US LLP 700 13th Street, NW, 10th floor Washington, DC 20005-3960 United States of America and Mr. Marc Michael Chief Counsel, Global Dispute Resolution AES Corporation 4300 Wilson Boulevard, 11th Floor Arlington, Virginia 22203 United States of America *Until June 2024 **Until April 2024	Santiago María Castro Videla Procurador del Tesoro de la Nación Juan Ignacio Stampalija Subprocurador del Tesoro de la Nación Julio Pablo Comadira Subprocurador del Tesoro de la Nación Mariana Mabel Lozza Directora Nacional de Asuntos y Controversias Internacionales María Alejandra Etchegorry Subdirectora Nacional de Asuntos y Controversias Internacionales Procuración del Tesoro de la Nación Posadas 1641 – CP1112 Buenos Aires República Argentina and Eduardo Silva Romero José Manuel Garcia Represa Javier Echeverri Ruxandra Esanu Wordstone Dispute Resolution AARPI 80 Rue Jouffroy d'Abbans 75017 Paris, France

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

ADEERA	Argentine Association of Electricity Distributors (in Spanish, *Asociación de Distribuidores de Energía Eléctrica de la República Argentina*)
AES Argentina	AES Argentina Generación S.A.
AES Auth	Claimant's Legal Authority
AES Ex	Claimant's Exhibit
Paraná	AES Paraná S.A
AGEERA	Argentine Association of Electricity Generators (in Spanish, *Asociación de Generadores de Energía Eléctrica de la República Argentina*)
AGUEERA	Argentine Association of Large Electricity Users (in Spanish, *Asociación de Grandes Usuarios de Energía Eléctrica de la República Argentina*)
AL RA	Respondent's Legal Authority
ATEERA	Argentine Association of Electricity Transmission Companies (in Spanish, *Asociación de Transportistas de Energía Eléctrica de la República Argentina*)
Belgrano	Manuel Belgrano Thermal Power Plant (in Spanish, *Central Térmica Manuel Belgrano*)
BIT	Bilateral Investment Treaty
CAMMESA	Administrator of the wholesale electricity market in charge of the national dispatch of electricity (in Spanish, *Compañía Administradora del Mercado Mayorista Eléctrico S.A*)
Central Dique	Central Dique S.A
Claimant or AES	The AES Corporation
Claimant's PHB	Claimant's Post-Hearing Brief, 23 June 2023
Claimant's Reply Memorial	Claimant's Reply Memorial, 25 March 2021
Claimant's Updated Memorial	Claimant's Updated Memorial, 23 April 2020
CTSN or San Nicolás	Central Térmica San Nicolás
DNDC	National Dispatch of Electricity (in Spanish, *Despacho Nacional de Cargas*)
ECT	Energy Charter Treaty
EDELAP	Empresa Distribuidora La Plata S.A

EDEN	Empresa Distribuidora de Energía Norte S.A.
EDES	Empresa Distribuidora de Energía Sur S.A
Electricity Law	Law No. 24.065, 16 January 1991
Emergency Law	Law 25.561, 7 January 2002.
ENARGAS	*Ente Nacional Regulador del Gas*
Energía Plus	Electricity Regime created through Resolution SE 1281/2006, 5 September 2006
ENRE	Argentine Electricity Regulator (in Spanish, *Ente Nacional Regulador de la Electricidad*)
FET	Fair and Equitable Treatment
FONINVEMEM	Fund for Investments Required to Increase the Electric Power Supply in the Wholesale Electricity Market (in Spanish, *Fondo para Inversiones Necesarias que Permitan Incrementar la Oferta de Energía Eléctrica en el Mercado Eléctrico Mayorista*)
FONINVEMEM I	First FONINVEMEM Program created though Resolution SE 712/2004, 15 July 2004
FONINVEMEM II	Second FONINVEMEM Program created through Resolution SE 564/2007, 1 June 2007
FPS	Full Protection and Security
GBA	*Gran Buenos Aires* Region
GDP	Gross Domestic Product
GOA	Government of Argentina
Guillermo Brown Plant	Guillermo Brown Thermal Power Plant, (in Spanish, *Central Térmica Guillermo Brown*)
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966
ILC	International Law Commission
IMF	International Monetary Fund
LVFVD	Withheld receivables ("Sales with Undefined Settlement Date")
MEM	Wholesale Electricity Market (in Spanish, *Mercado Eléctrico Mayorista*)
MST	Minimum Standard of Treatment

PPAs	Power Purchase Agreements
PSEG	PSEG Global Inc
RA	Respondent's Exhibit
Respondent	The Argentine Republic or Argentina
Respondent's PHB	Argentina Republic's Post-Hearing Brief, 23 June 2023
Respondent's Rejoinder Memorial	Argentine Republic's Rejoinder, 29 July 2021
Respondent's Updated Counter-Memorial	Argentine Republic's Updated Counter-Memorial, 22 October 2020
SADI	Argentine Electricity Grid (in Spanish *Sistema Argentino de Interconexión*)
San Martín	José de San Martín Thermal Power Plant (in Spanish, *Central Térmica José de San Martín*)
SE or SEE	Secretariat of Energy
Suspension Agreement	Suspension Agreement, 20 December 2005
The 2005 Definitive Agreement	Annex 1 to Resolution SE 1193/2005, 7 October 2005
The Generators Agreement, the 2008-2011 Agreement or FONINVEMEM III	2008-2011 Agreement for Management and Operation of Projects, Increase in Thermal Generation Availability and Adjustment of the Remuneration for Generation, 25 November 2010
The Procedures	Resolution SEE No. 61/1992, 29 April 1992. Procedures for the Scheduling of the Operation, the Dispatch of Electricity and the Calculation of Prices (in Spanish, *Procedimientos para la Programación de la Operación, el Despacho de Cargas y el Cálculo de Precios*)
Treaty or US-Argentina BIT	The Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of 14 November 1991, which entered into force on 20 October 1994
VCP	Variable Cost of Production

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID") on the basis of the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of 14 November 1991, which entered into force on 20 October 1994 ("the Treaty" or "the US-Argentina BIT").

2. The Claimant is AES Corporation ("AES" or "the Claimant"), founded in 1981, incorporated in Delaware and headquartered in Arlington, Virginia in the United States.

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

4. The Claimant and the Respondent are collectively referred to as "the parties". The parties' representatives and their addresses are listed above on page (i).

5. The dispute relates to a series of measures taken by the Respondent in the electricity sector in Argentina, beginning in 2002, and which in the Claimant's view breached a series of obligations under the US-Argentina BIT.

II. PROCEDURAL BACKGROUND

6. On November 5, 2002, ICSID received a Request for Arbitration against the Argentine Republic from the AES Corporation.

7. On December 19, 2002, the Secretary-General of ICSID registered the Request for Arbitration, pursuant to Article 36(3) of the ICSID Convention. On the same date, the Secretary-General notified the parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

8. Pursuant to the parties' agreement, the Tribunal in this case would comprise one arbitrator appointed by the Claimant, one arbitrator appointed by the Respondent, and a third, presiding, arbitrator, to be appointed by the Secretary-General of ICSID.

9. On February 18, 2003, the Claimant appointed Professor Karl-Heinz Böckstiegel, a German national, as an arbitrator. On April 3, 2003, the Argentine Republic appointed Professor Domingo Bello Janeiro, a national of the Kingdom of Spain, as an arbitrator. Both arbitrators accepted their respective appointments in due time.

10. With the agreement of both parties, the Secretary-General of ICSID appointed Professor Pierre-Marie Dupuy, a French national, as the President of the Arbitral Tribunal. On June 3, 2003, the Acting Secretary-General notified the parties that all three arbitrators had accepted their appointments, and that the Tribunal was therefore deemed to have been constituted on that date. On the same date the parties were informed that Mr. Gonzalo Flores, at the time Senior Counsel in the ICSID Secretariat, would serve as Secretary of the Arbitral Tribunal.

11. The first session of the Tribunal with the parties was held on July 8, 2003, at the seat of the Centre in Washington, D.C. During the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections in this respect. During the session it was also confirmed that the arbitration rules applicable to the proceedings would be ICSID Arbitration Rules in force since September 26, 1984.

12. During the first session the parties agreed on a number of procedural matters. The Tribunal, after consultation with the parties, fixed a schedule for the written phase of the proceedings.

13. In accordance with the fixed procedural calendar, the Claimant filed a Memorial on the Merits, with accompanying documentation, on October 7, 2003. On December 31, 2003, Argentina filed a Memorial with objections to jurisdiction.

14. On January 12, 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with ICSID Arbitration Rule 41(3) and invited the parties to file their views on a schedule for their presentations on jurisdiction.

15. Both parties submitted their views on January 16, 2004. The Claimant requested the Tribunal to join the questions of jurisdiction raised by Argentina to the merits of the

dispute. Argentina, upon invitation of the Tribunal, filed a response to the Claimant's request on January 27, 2004.

16. On February 18, 2004, the Tribunal confirmed the suspension of the proceedings on the merits and fixed a timetable for the filing of the parties' submissions on the question of jurisdiction.

17. In accordance with the timetable fixed by the Tribunal, the Claimant filed its Counter-Memorial on Jurisdiction on February 20, 2004. Argentina filed its Reply on Jurisdiction on March 26, 2004, and the Claimant filed its Rejoinder on Jurisdiction on April 26, 2004.

18. A hearing on jurisdiction was held on October 23 and 24, 2004 in the World Bank's facilities in Paris, France. Messrs. David M. Lindsay, James H. Hosking and Stephen Kantor and Ms. Andrea Goldbarg, then from the law firm of Clifford Chance US LLP and Mr. Mark Sandy, from the AES Corporation, attended the hearing on behalf of the Claimant. Ms. Luz Moglia, Ms. María Soledad Vallejos Meana and Mr. Ignacio Torterola, from the Procuración del Tesoro de la Nación Argentina, attended the hearing on behalf of the Respondent.

19. During the hearing Messrs. Lindsay and Hosking and Ms. Goldbarg addressed the Tribunal on behalf of the AES Corporation. Mr. Torterola, Ms. Moglia and Ms. Vallejos Meana addressed the Tribunal on behalf of the Argentine Republic. The Tribunal posed questions to the parties, as provided in Rule 32(3) of the Arbitration Rules.

20. On April 26, 2005, the Tribunal issued its decision on jurisdiction, rejecting the Respondent's objections. On the same date, the Tribunal issued a procedural order for the continuance of the proceeding on the merits.

21. In accordance with the calendar established by the Tribunal, Argentina filed a counter-memorial on the merits on September 8, 2005.

22. From January 23, 2006, through December 11, 2018, the proceeding remained suspended pursuant to the parties' agreement.

23. On January 27, 2019, the President of the Tribunal, Professor Pierre-Marie Dupuy resigned from the Tribunal. On January 28, 2019, Professor Karl-Heinz Böckstiegel resigned from the Tribunal. The proceedings remained suspended pursuant to Rule 10(2) of the ICSID Arbitration Rules (2003).

24. On June 19, 2019, the parties informed ICSID that they had reached an agreement on the method to reconstitute the Tribunal.

25. In accordance with the agreed method for reconstitution of the Tribunal, the Claimant appointed on July 5, 2019, Mr. Stephen L. Drymer, a Canadian national, as an arbitrator, filling the vacancy left following Professor Böckstiegel's resignation. On July 7, 2019, Mr. Drymer accepted his appointment as arbitrator.

26. In accordance with the agreed method for reconstitution of the Tribunal, from July through December 2019, the parties considered a number of candidates proposed by the co-arbitrators first, and then by ICSID, to serve as the third, presiding, arbitrator. The parties failed to agree on any of the proposed candidates.

27. On December 2, 2019, after consulting with the parties, the Chair of the Administrative Council appointed Prof. Ricardo Ramírez Hernández, a Mexican national, as the third arbitrator and president of the tribunal, in accordance with the agreed method for reconstitution of the Tribunal.

28. On December 12, 2019, the Tribunal was reconstituted with Prof. Ricardo Ramírez Hernández (Mexican), as President, and M. Stephen L. Drymer (Canadian), and Prof. Domingo Bello Janeiro (Spanish), as co-arbitrators. On that same date, the proceeding was resumed in accordance with ICSID Arbitration Rule 12.

29. On February 19, 2020, the Tribunal issued Procedural Order No. 2 concerning procedural matters, including a new procedural calendar.

30. In accordance with the new procedural calendar, the Claimant filed on April 24, 2020, an updated Memorial on the Merits. The Argentine Republic filed an updated Counter-memorial on the Merits on October 22, 2020. Claimant would then file a reply on the merits on March 26, 2021, and the Respondent a rejoinder on the merits on July 30, 2021.

31. On June 29, 2021the Respondent filed a request for production of documents. The Claimant filed observations to the Respondent's request on July 2, 2021. The Tribunal issued its decision on Respondent's request for production of documents on July 5, 2021.

32. On August 19, 2021, the Respondent requested a postponement of the hearing on the merits – scheduled for November of that same year – invoking circumstances arising from the COVID-19 pandemic. On August 27, 2021, counsel for the Claimant opposed Argentina's request.

33. On September 2, 2021, the Tribunal, after considering the parties' positions, issued its decision, confirming that the hearing on the merits would be held, as scheduled, from November 8 through 19, 2021.

34. On October 18, 2021, the Tribunal held a pre-hearing organizational meeting with the parties by video conference.

35. On October 21, 2021, the Tribunal issued Procedural Order No. 3 concerning the organization of the forthcoming hearing on the merits.

36. On November 3, 2021, the Argentine Republic filed a proposal for disqualification of arbitrators Ricardo Ramírez Hernández, Stephen L. Drymer, and Domingo Bello Janeiro. The proceeding was suspended in accordance with ICSID Arbitration Rule 9(6).

37. On November 17, 2021, in accordance with the scheduled fixed by the ICSID Secretariat, the Claimant filed observations on the disqualification proposal. On November 19, 2021, each member of the Tribunal furnished explanations regarding the disqualification proposal, in accordance with ICSID Arbitration Rule 9(3). On November 29, 202, each party filed further observations on the proposal for disqualification.

38. On April 6, 2022, the Chair of the ICSID Administrative Council, in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9, issued its decision rejecting the proposal for the disqualification of the tribunal. The proceeding was resumed on that same date pursuant to ICSID Arbitration Rule 9(6).

39. On January 23, 2023, the Tribunal issued an amended Procedural Order No. 3, concerning the organization of the forthcoming hearing on the merits.

40. From February 6 through 16, 2023, the Tribunal held a hearing on the merits at the seat of the Centre in Washington, D.C. The following individuals attended the hearing on behalf of the Claimant: James Hosking, Aníbal Sabater, Caline Mouawad, Matilde Flores, May Khoury and Silvia Marroquín from the law form of Chaffetz Lindsey, LLP in New York, NY; Nigel Blackaby, Juan Pedro Pomes, Ezequiel Vetulli, Virginie Lassez and Joseph Spadafore from the law form of Freshfields Bruckhaus Deringer, LLP in Washington, D.C.; and Ignacio Minorini Lima and Maria Laura Rozan from Bruchou & Funes De Rioja, in Buenos Aires, Argentina.

41. The following individuals attended the hearing on behalf of the Argentine Republic: Carlos Alberto Zannini (Procurador del Tesoro de la Nación), Sebastián Soler, Mariana Lozza, María Alejandra Etchegorry, Soledad Romero Caporale, Carolina Carla Catanzano, María Rosario Tejada, Cristian De Fazio, Pedro Grijalba Marsans, Julián Rivainera, Josefina del Rosario Lago, Matías Acacio, Emiliano Leanza, Ana Miño Foncuberta, all from Argentina's Procuración del Tesoro de la Nación, and José Manuel García Represa, Eduardo Silva Romero, Javier Echeverri, Ruxandra Esanu, Ana Cuartero de Vidiella, Paulina Rodríguez de León and Anna Avilés-Alfaro, from the law firm of Dechert LLP.

42. During the hearing, the parties posed questions to the witnesses and experts called for examination and answered questions from the Tribunal.

43. On June 23, 2023, the parties filed post-hearing briefs.

44. On May 2, 2024, the parties filed submission on costs.

45. On May 12, 2025, the Tribunal declared the proceedings closed, in accordance with ICSID Arbitration Rule 38.

III. FACTUAL AND LEGAL BACKGROUND OF THE DISPUTE

46. As is fairly well known, the modern history of the electricity sector in Argentina has been examined by several international investment tribunals. In the summary below the Tribunal presents a general overview of the facts surrounding the present dispute and, when appropriate, refers to descriptions and findings expressed by those tribunals which in its view are pertinent. The Tribunal also adopts as its own a number of factual descriptions and findings which in its view are uncontested by the Parties.

1. Situation of the Electricity Market in Argentina Prior to Reforms

47. In the 1980s, the Argentine economy was facing several problems that led to reforms and privatizations. Hyper-inflation was severe, the currency suffered frequent exchange rate swings, and the federal government was burdened by high levels of foreign indebtedness and a large fiscal deficit, which in turn, led to under-investment and a decline in the quality of goods and services as well as public infrastructure.[1]

48. Public sector entities were also facing difficulties and operating deficits, which grew by 1990. The electricity market was characterized by the existence of vertically-integrated State-owned companies, however, electricity infrastructure was outdated and deteriorated.[2] To address the situation, the new administration of Carlos Menem adopted and implemented a series of macroeconomic reforms as well as reforms on

[1] Claimant's Updated Memorial, ¶¶ 56, 57. "Prior to 1990, most of Argentina's essential economic activities were State-run. The infrastructures were unsatisfactory […] and the public debt was high, particularly regarding the production of energy, *i.e.* electricity and hydrocarbons. This led the GOA to introduce, in 1989, a bill which was to become the State Reform Law, announcing a privatisation programme encompassing incentives as well as monetary and structural measures to promote foreign investment and to stabilise the country's economy". "The oil and gas sector, too, was essentially in the hands of the State". *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶¶ 51, 53.

[2] Claimant's Updated Memorial, ¶¶ 58-60. "Before the privatization process undertaken in the 1990s, the electricity sector had been operated mostly by state-owned companies for a period of approximately 30 years". Respondent's Updated Counter-Memorial, ¶ 28. "Public enterprises controlled the production, transmission and distribution of energy. In addition, some provinces ran their own energy companies. The system was flawed by insufficient funding, rife with inefficiency and was in deficit. In 1988/1989, rolling black-outs were organised owing to limited power-generating capacity." *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 52.

specific sectors, such as gas and electricity.[3] Argentina also entered into bilateral investment treaties with several States.[4]

49. On 14 November 1991, the U.S. and Argentina signed a Treaty for the reciprocal encouragement and protection of investments, which entered into force on 20 October 1994.

50. Along with the Convertibility Law, which pegged the Argentine peso to the US dollar at a fixed rate of 1:1,[5] other laws made changes in the public sector to allow for the eventual privatization of public assets, including for the unbundling of assets in the electricity sector.[6] The Electricity Law was enacted in 1992 and has remained continuously in force since.

2. Reform to the Legal Framework

51. Law No. 23,696 (the "State Reform Law") established the basic framework for the privatization of public assets. As to the electricity sector, Decree 634/91 divided vertically integrated state-owned companies into separate business units for subsequent privatization.[7]

52. Decree No. 1853/93 mainly reformed the legislation on foreign investment. The Decree encouraged foreign investment by removing the requirement for several governmental authorizations, and by providing for same tax treatment and guarantees of minimum standard of treatment.[8] After the privatization, the electricity sector was

[3] Claimant's Updated Memorial, ¶¶ 64, 65.

[4] Claimant's Updated Memorial, ¶ 69. List of Bilateral Treaties on Investment Matters published by Argentine Ministry of Foreign Affairs, **AES Auth. 207**.

[5] "[…] Law No. 23,928, the 'Convertibility Law,' complemented by Decree No. 529/1991, pegged the peso to the dollar at a fixed rate of 1:1, and no increase in the domestic monetary supply would henceforth be permitted without a corresponding increase in the Central Bank's foreign currency holdings. As a consequence, inflation abated and the economy grew during the period from 1991 to 1997". *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 54.

[6] Claimant's Updated Memorial, ¶¶ 66, 67, 75-81.

[7] Respondent's Updated Counter-Memorial, ¶ 32.

[8] Claimant's Updated Memorial, ¶ 68. "Decree [1853/1993] encouraged foreign investment by removing various restrictions, notably the three-year waiting period for the repatriation of foreign capital, allowing for such repatriation at any time; and by opening domestic credit facilities to both foreign and national businesses

divided into generation, transmission and distribution. The activities were defined, and limitations were also provided.[9]

A. The Electricity Law

53. Article 2 of the Electricity Law establishes as objectives for the "national policy on the supply, transportation and distribution of electricity": to adequately protect the rights of users; to promote the competitiveness in the electricity production and demand markets; to encourage investments in order to ensure supply in the long-term; to promote the operation, reliability, equality, free access, non-discrimination and widespread use of services and installation of electricity transportation and distribution; the regulation of electricity transportation and distribution activities, ensuring that the rates applied to the services are fair and reasonable; to encourage the supply, transportation, distribution and efficient use of electricity, establishing appropriate tariff methodologies; as well as to encourage private investments in production, transportation and distribution, ensuring the competitiveness of markets wherever possible.[10]

54. Under the Electricity Law, while electricity transmission and distribution are considered as a "public service", power generation is regarded of "general interest."[11]

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on an equal footing." *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 56.

[9] Respondent's Updated Counter-Memorial, ¶¶ 36, 37. *See also* "the GOA allowed foreign investors a dominant role in the production, transmission and distribution of electric energy. They could acquire facilities and equity interests and also proceed to direct investments. Investments had to be made within the legal framework provided by Law No. 24,065 (the 'Electricity Law'), by Regulatory Decree No. 1398/1992 and related regulations, and by Resolution No. 61/1992." *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 59.

[10] Electricity Law, Art. 2, **AES Ex. 084**. (Unofficial translation). "The objectives of the Electricity Law were the promotion of private investments in the production, transmission and distribution of electrical power, the setting of appropriate rates in order to further such activities, the efficient use of electricity, and the stimulation of competition". *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 60.

[11] Respondent's Updated Counter-Memorial, ¶¶ 36, 40 and Electricity Law, **AES Ex. 084**, Art. 1: "The transportation and distribution of electricity is characterized as a public service. The generation activity, in any of its modalities, destined totally or partially to supply energy to a public service will be considered of general interest […]." (Unofficial translation). *See also Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 242.

i. Governmental and Regulatory Entities

55. The main agencies contemplated in the electricity legal framework are: i) the Secretariat of Energy, which is in charge of issuing the rules for dispatch; ii) *Compañía Administradora del Mercado Mayorista Eléctrico S.A.* ("CAMMESA"), a specific body who administers the Wholesale Electricity Market ("MEM") and handled the scheduling and physical dispatch by generators; and iii) the Ente Nacional Regulador de la Electricidad ("ENRE"), an independent governmental body with regulatory and jurisdictional power over the electricity industry.[12]

a. Secretariat of Energy

56. The Secretariat of Energy is tasked with the development and implementation of an energy policy designed to preserve safety conditions in the Argentine Electricity Grid (*Sistema Argentino de Interconexión*, "SADI") and, in particular, the electricity supply.[13]

57. The Secretariat of Energy has supplemented the legal framework established in the Electricity Law with specific regulations for the MEM, in particular, for the economic dispatch (transactions of energy and capacity) and price formation through Resolution No. 61/1992 ("The Procedures"). The Procedures were approved in 1992 and have been modified several times since.[14]

b. CAMMESA

58. Article 35 of the Electricity Law ordered the creation of a body in charge of the national dispatch of electricity (*Despacho Nacional de Cargas* or "DNDC,"). To that

[12] Electricity Law, Arts. 35, 36, 54-56; Claimant's Updated Memorial, ¶¶ 94, 96-100; Respondent's Updated Counter-Memorial, ¶¶ 48, 53-58. *See also El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 63.

[13] Respondent's Updated Counter-Memorial, ¶ 46.

[14] Claimant's Updated Memorial, ¶¶ 106; Respondent's Updated Counter-Memorial, ¶¶ 78, 79. *See also Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 252.

end, CAMMESA was created through Decree No. 1192/92 as a non-profit corporation controlled by the Argentine Government.[15]

59. CAMMESA is a "partially state-owned company, as both associations of the public sector and associations that represent renowned MEM participants hold interests in it. Its shareholders are the Argentine Association of Electricity Generators (*Asociación de Generadores de Energía Eléctrica de la República Argentina*, "AGEERA"), Argentine Association of Large Electricity Users (*Asociación de Grandes Usuarios de Energía Eléctrica de la República Argentina*, "AGUEERA"), Argentine Association of Electricity Distributors (*Asociación de Distribuidores de Energía Eléctrica de la República Argentina*, "ADEERA"), Argentine Association of Electricity Transmission Companies (*Asociación de Transportistas de Energía Eléctrica de la República Argentina*, "ATEERA") and the Secretariat of Energy."[16]

60. MEM participants (including AES) hold interests in CAMMESA through the abovementioned associations (which hold 20% of total shares each). The Secretariat of Energy is the President of the company's Board of Directors[17] and any board decision is subject to its favorable vote.[18]

61. CAMMESA administers the scheduling and physical dispatch of electricity into the SADI[19] and is also in charge of collecting payment by distributors and large users as well as to pay generators for the electricity sold in the spot market.[20]

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[15] Art. 35, Electricity Law, **AES Ex. 084**; Decree No. 1192/1992, July 21, 1992, **AES Ex. 089**, Art. 3 ; Claimant's Updated Memorial, ¶ 96-98 ; Respondent's Updated Counter-Memorial, ¶ 53.

[16] Respondent's Updated Counter-Memorial, ¶ 54.

[17] Respondent's Updated Counter-Memorial, ¶ 54.

[18] *Estatuto de Compañía Administradora del Mercado Mayorista Eléctrico Sociedad Anónima* (CAMMESA's By-Laws), Arts. 9 and 10, **AES Ex. 387**.

[19] CAMMESA's By-Laws, **AES Ex. 387.**

[20] Claimant's Updated Memorial, ¶ 98; Respondent's Updated Counter-Memorial, ¶ 56. *See also Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 264.

c. ENRE

62. The Electricity Law also provided for the creation of an autonomous body, the ENRE, in charge of fulfilling the objectives set out in Article 2 of the Electricity Law.[21] These objectives are: "a) [t]o adequately protect the rights of users; b) [t]o promote competition in the electricity production and demand markets, and to foster investments for the purpose of guaranteeing the supply in the long term; c) [t]o promote the operation, reliability, equality, free access, non-discrimination and widespread use of services and installation of electricity transportation and distribution; d) [t]o Regulate electricity transportation and distribution activities, ensuring that the rates applied to services are fair and reasonable; e) [t]o encourage supply, transportation, distribution and efficient use of electricity by setting appropriate rate methodologies; f) [t]o encourage private investments in production, transportation and distribution, thus ensuring market competitiveness where possible".[22] The ENRE was created to regulate and supervise the provision of electricity service.[23]

63. The ENRE is a "self-governed entity and has regulatory powers (it adopts general rules and regulations), control powers (it ensures compliance with the regulatory framework and concession contracts), disciplinary powers (it imposes penalties under the regulatory framework) and jurisdictional powers (it settles disputes between users and concessionaires and among MEM participants.)"[24]

[21] Electricity Law, Art. 54, **AES Ex. 084**.

[22] Electricity Law, Art. 2, **AES Ex. 084**.

[23] Decree No. 277/2020, **AES Ex. 380**, 1st recital.

[24] Respondent's Updated Counter-Memorial, ¶ 58; Claimant's Updated Memorial, ¶ 101; Electricity Law, **AES Ex. 084**, Arts. 56, 72. Law No. 27,541 authorized the Executive to intervene the administration of the ENRE. Through Decree No. 277/2020, the Executive ordered its intervention until December 31, 2020, and suspended the members of the board of directors on March 16, 2020. See Decree No. 277/2020, **AES Ex. 380**, Art. 1.

ii. The Electricity Market: Generation and Dispatch

a. Participants

64. The Electricity Law identifies as participants in the electricity market: a) generators or producers; b) transportation companies; c) distributors; and d) large users.[25] "Generators" or in other words "producers" are, according to Article 5, those owners "of an electric power plant acquired or installed under the terms of this law, or concessionaires of exploitation services in accordance with article 14 of law 15,336, [who] place their production totally or partially in the transportation and/or distribution system subject to national jurisdiction."[26] Articles 7, 9 and 10 define in turn "transportation company", "distributors" and "large users."[27]

b. The MEM: Term and Spot Markets

65. The MEM comprises two markets: i) the term market, in which generators can freely negotiate contracts with large users or distributors; and ii) the spot market, in which a merit order (based on the efficiency) is determined for each day and hour and where generators are called in ascending order of their declared variable costs to dispatch electricity until demand is met.[28]

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[25] Electricity Law, Art. 4, **AES Ex. 084**. *See also Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 241.

[26] (Unofficial translation). Electricity Law, **AES Ex. 084**, Art. 5.

[27] Art. 7: "A transportation company is considered to be someone who, being the holder of a concession for the transportation of electric power granted under the regime of this law, is responsible for the transmission and transformation linked to it, from the point of delivery of said energy by the generator, to the point of reception by the distributor or large user, as the case may be." Art. 9: "A distributor is considered to be someone who, within their concession area, is responsible for supplying end users who do not have the ability to contract their supply independently." Art. 10: "A large user is considered to be someone who contracts, independently and for their own consumption, their supply of electric power with the generator and/or distributor. The regulations will establish the capacity and energy modules and other technical parameters that characterize it." (Unofficial translation).

[28] Electricity Law, **AES Ex. 084**, Art. 35 subparagraphs a) and b); Claimant's Updated Memorial, ¶¶ 111, 113, 114 and 117; Resolution SEE 61/1992 (*Procedimientos*), Art. 9(a). *See also El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 61 and *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 244.

66. Regarding the term market, and in accordance with the Electricity Law, generators "may enter into supply contracts directly with distributors and large users. These contracts will be freely negotiated between the parties."[29] Generators, large users and distributors may thus participate in the "term market" through those contracts;[30] usually power purchase agreements or "PPAs". "As of 2000, the term market represented 45% of the electricity purchased in the market."[31] With respect to the spot market, generators may also sell the power they produce in the "spot electricity market" based on the rules of dispatch issued by the Secretariat of Energy.[32]

67. Articles 35 and 36 of the Electricity Law are the provisions which establish fundamental rules for the dispatch of energy. In particular, Article 35 determines that the DNDC (*i.e.* CAMMESA) will be in charge of the technical dispatch of the SADI. CAMMESA, as dispatch operator, will conform with rules that: i) guarantee the transparency and fairness of decisions; ii) allow the execution of contracts negotiated freely between the relevant parties: generators, large users, and distributors (the "term market"); and iii) dispatches the required demand, based on the acknowledgment of energy and capacity prices (spot market and capacity payments).[33]

c. Uniform Rate and Economic Cost of the System

68. Article 36 establishes that CAMMESA will apply the "economic dispatch rules". Such rules will provide that generators "receive for the power sold a uniform rate for all in each delivery location determined by the DNDC, based on the economic cost

[29] Electricity Law, Art. 6, **AES Ex. 084**. (Unofficial translation).

[30] Electricity Law, Art. 35 subparagraph a), **AES Ex. 084**.

[31] Abdala-Spiller Report ¶ 71. "Before 2002, contracts were usually for one year […]". See also Resolution SEE 61/1992 (*Procedimientos*), Art. 9(a) and Annex I, Section 4, **AES Ex. 086**.

[32] Electricity Law, **AES Ex. 084**, Arts. 35 subparagraph b) and 36; Claimant's Updated Memorial, ¶¶ 113, 114; Resolution SEE 61/1992, (*Procedimientos*), Art. 9(b) and Annex I, Section 3, **AES Ex. 086**. *See also Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 245.

[33] Electricity Law, **AES Ex. 084**, Art. 35 and Claimant's Updated Memorial, ¶ 103.

of the system". In order to determine such rate, the cost that the unsupplied energy represents for the community must be taken into account.[34]

69. The economic cost of the system, on which the uniform tariff mandated by Article 36 of the Electricity Law must be based, is "given by the true cost of producing electricity, including the cost that the system must sustain to prevent blackouts." Pursuant to this, the Procedures provided for two payments to generators: i) the spot price; and ii) the capacity payments.[35]

d. Spot Price

70. The spot price is the hourly price set by CAMMESA based on the last dispatched generator at a given time. All generators that are dispatched in that hour receive the same uniform spot price, adjusted to each generator's particular node, based on their distance from the central node in the system.[36]

71. Within the spot market mechanism, "[e]very power generator has to inform CAMMESA of its variable cost of production twice a year to allow CAMMESA to make these price determinations. […] Each generator was required to calculate its variable cost in accordance with the formulas provided for by Resolution 61/1992,

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[34] "Also, [the rules] will determine that the […] (distributors) pay a uniform rate, stabilized every ninety (90) days, measured at the reception points, which will include what the generators receive for the concepts indicated in the preceding paragraph, and the transportation costs between supply and reception." (Unofficial translation). Electricity Law, **AES Ex. 084**, Art. 36.

[35] Electricity Law, **AES Ex. 084**, Art. 36; Claimant's Updated Memorial, ¶¶ 104, 107; Abdala-Spiller Report, ¶¶ 50, 51.

[36] Electricity Law, **AES Ex. 084**, Arts. 35 subparagraph b) and 36; Claimant's Updated Memorial, ¶¶ 113, 114. "[…] [O]n an hourly basis set by the economic cost of production, represented by the Short Term Marginal Cost measured in the System Load Center." (Unofficial translation) Resolution SEE 61/1992, (*Procedimientos*), Art. 9(b), **AES Ex. 086**. *See* "CAMMESA calls for dispatch of all the power generators that have declared costs lower than those of the marginal unit (that is the unit that sets the spot price). The marginal unit is the unit next-in-line to the last plant dispatched in order to satisfy the hourly demand of electricity. More specifically, CAMMESA prepares an ascending order (the so-called merit order) calling for dispatch first from the generators that have declared the lowest costs. The spot price, which is hourly-determined, is equivalent to the variable costs declared by the marginal unit, that is, the least expensive generator excluded by CAMMESA from the merit order. All of the generators dispatched receive the same spot price from CAMMESA but do not obtain the same margin. Their individual margin depends on their efficiency." *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 260 and also *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 64.

depending on the type of fuel used for production of electricity and the type of generation unit."[37] The variable cost is a function of both the cost of fuel burned by each plant (*e.g.,* natural gas, diesel-oil, fuel-oil, coal, etc.) as well as the efficiency of the plant.[38] In relation to this, "a large portion of thermal plants in Argentina are and have been natural gas based. As a result, the price of natural gas has been the main input in the calculation of the variable cost of production of most thermal power plants".[39]

72. As administrator of the MEM, CAMMESA determines the financial transactions of the market by accounting for the credits and debits of each transaction and making the relevant settlements to the participants.[40] In other words, it would collect the payments made by distributors and large users and pay the spot-price revenues to the generators.[41] According to the Procedures, generators would be paid within 41 days.[42]

e. Capacity Payments and Risk of Failure Price

73. Articles 35 b) and 36 of the Electricity Law provide for a capacity price. In this sense, and pursuant to the Procedures, capacity payments are a remuneration paid to generators in exchange for their maintaining enough reserves to avoid the extreme costs of outages and thus, a way to account for the cost of unsupplied energy.[43]

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[37] *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶¶ 254, 255. *See also* Resolution SEE 61/1992, (*Procedimientos*), **AES Ex. 086**, Annex 13.

[38] Claimant's Updated Memorial, ¶ 113.

[39] Claimant's Updated Memorial, ¶ 116. *See also* "It is undisputed between the Parties that the price of natural gas is the key element determining electricity prices in Argentina. Most of the time, the marginal unit (that is the unit that sets the spot price), used to be a thermal plant burning gas except in cases of peak demand. In cases of peak demand, more costly generators such as liquid fuel units are also utilized to meet the increased demand." *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 261.

[40] Respondent's Updated Counter-Memorial, ¶ 56.

[41] *See also Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 264.

[42] Resolution SEE 61/1992 (*Procedimientos*), Annex I, Sections 5.4 and 5.6, **AES Ex. 086**; Abdala-Spiller Report, ¶ 37(e).

[43] Claimant's Updated Memorial, ¶ 107; Abdala-Spiller Report, ¶ 51; Resolution SEE 61/1992 (*Procedimientos*), Annex I, Section 2.4.2. *See also* "Capacity payments are revenues paid by CAMMESA to

f. Stabilization Fund

74. This fund, managed by CAMMESA, was established by the Procedures, "[t]o finance and cover any difference between the spot prices and the seasonal tariff".[44] Section 5.7 of the Procedures provide:

> "The difference arising from the amounts to be paid by debtors, considering that one part of them, the Distributors, pay such amounts based on a system of seasonal prices, and the amounts to be received by creditors, resulting from spot price transactions, shall be absorbed by a stabilization system based on the existence of a provisional deposit fund called STABILIZATION FUND. In this fund, the amounts produced in the months in which there is a positive balance obtained from the application of the seasonal price system with respect to the Spot Market shall be deposited. In turn, this fund shall provide the necessary financial resources to complete the credit amount of the sellers in those months with opposite results. This Stabilization Fund shall not be used to compensate default payments. In case the financial resources which are available in the Stabilization Fund are not enough to raise the complete credit amount in a given month, the OED [*i.e.*, CAMMESA] shall require the necessary financial assistance to the SEE. To these ends, the SEE shall provide for the grant of a repayable automatic loan and without interest using resources of the Unified Fund […]."[45]

3. The Claimant's Investment

75. AES's investments in the Argentine energy sector that are the subject of the present arbitration include a number of what the Claimant describes as "highly efficient hydro and thermal plants, as well as less efficient plants that have the ability to burn a range

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generators (in addition to spot price revenues) in order to remunerate generators for their (proven) generation capacity". *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 268.

[44] *See Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 266. "Distributors do not pay for electricity at the spot prices (which are hourly-determined and, therefore, variable) but pay at a 'seasonal tariff', which the [Secretariat of Energy] fixes every six months. The 'seasonal tariff' is, therefore, the price to be paid by distributors during a six-month period and is calculated by CAMMESA on the basis of various factors [….] [T]he 'seasonal tariff' is a projection by CAMMESA of the spot prices for the next season. Because there can be differences between the actual spot prices and the 'seasonal tariff' to be paid by distributors, Resolution 61/92 provides for a '[q]uarterly stabilization system of the prices for the Spot Market, intended for the purchase from distributors." ¶¶ 264, 265.

[45] (Unofficial translation). Resolution SEE 61/1992, (*Procedimientos*), **AES Ex. 086**, Section 5.7.

of fuels". AES made its first investment in Argentina in 1992/1993 by acquiring a controlling stake in the generator San Nicolás.[46]

A. Central Térmica San Nicolás ("CTSN" or "San Nicolás")

76. CTSN is a 650MW coal, oil and gas-fired plant. It is located in the city of San Nicolás, Argentina and it is the sixth largest thermal plant in Argentina. The facility consists of five operational generating units, the largest of which is 350MW and can be fueled by either oil, coal, natural gas, and/or a blend of coal and petroleum coke. [47]

77. In 1993, AES and a partner (*Ormas Sociedad Anonima Industrial, Comercial, Inmobiliaria y Constructora*) participated in the privatization of San Nicolás. After a public auction, AES acquired a 34% stake.[48] Two years later, in 1995, AES acquired an additional 35% stake, which increased its equity to 69%. The remaining stakes were owned by PSEG Global, Inc (a US partner, 19%) and an employee stock ownership plan ("PPP", 12%). In July 2003, PSEG sold a 19% equity stake in San Nicolás to AES.[49]

78. While the Claimant indicates that AES now owns a 99.8% equity stake in San Nicolás, it clarifies that "only the 69% stake held at December 31, 2001 is relied upon in this Arbitration."[50]

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[46] Claimant's Updated Memorial, ¶¶ 116, 145.

[47] The AES Investor Fact Book (September 2003), **AES Ex. 225**, p. 64.

[48] According to Decree 967/93, 88% of the share package was awarded to AES and its partner for US$66.1 million. See Decree No. 967/93, May 17, 1993, **AES Ex. 099**; Abdala-Spiller Report, ¶ 30 b and Claimant's Updated Memorial, ¶ 147.

[49] Decree No. 584/93, April 7, 1993, **AES Ex. 098**; Decree No. 265/1994, February 22, 1994, **AES Ex. 102**; AES Corp. 1996 10-K Form, **AES Ex. 116**, pp. 7, 61 (pdf); AES Paraná S.C.A. 2003 Financial Statements, **AES Ex. 408**, note 6, pp. 52, 53; "Megacompra eléctrica por 376 millones." *La Nación*. August 28, 2001, **AES Ex. 165**. See also Claimant's Updated Memorial, ¶ 147 and fn 258.

[50] Claimant's Updated Memorial, ¶ 148.

B. Cabra Corral and El Tunal

79. On November 1995 and as result of a bidding process, AES was awarded 98% of Hidroeléctrica Río Juramento for US$41.1 million (subscribing to US$3.5 million in debt). The remaining 2% was held under a PPP.[51]

80. Hidroeléctrica Río Juramento leases and also operates a 112MW hydroelectric station in the province of Salta. The station consists of a 102MW hydro plant ("Cabra Corral") and a 10MW hydro plant ("El Tunal"). AES has exclusive rights, through its subsidiary, to operate the facilities under a 30-year concession agreement, and sells electricity in the Argentine spot market.[52]

81. The Claimant indicates that, while it currently owns 99.8% of Cabra Corral and El Tunal, only the original 98% equity stake is relied upon in this arbitration.[53]

C. Ullum and Central Sarmiento

82. On March 1996, AES was awarded 98% of Hidrotérmica San Juan for US$12.3 million (subscribing to US$3 million in debt). San Juan is a 78MW electric generating company located in San Juan Province, Argentina.[54] Hidrotérmica San Juan owns and also operates two plants: i) Ullum, a 45MW hydro plant; and ii) Central Sarmiento, a 33MW thermal plant. The remaining 2 % was held under a PPP.[55]

83. The Claimant indicates that, while it currently holds a 99.8% interest in Ullum and Central Sarmiento, only the original 98% stake is relied upon in this Arbitration.[56]

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[51] Decree No. 717/95, November 20, 1995, **AES Ex. 111**.

[52] Claimant's Updated Memorial, ¶ 149. AES Corporation 1996 Annual Report (10-K) p. 8 (pdf), **AES Ex. 116**. See also The AES Investor Fact Book (September 2003), **AES Ex. 225**, p. 64.

[53] Claimant's Updated Memorial, ¶ 149.

[54] The AES Investor Fact Book (September 2003), **AES Ex. 225**, p. 64.

[55] Decree No. 217/96, March 7, 1996, **AES Ex. 114**; Claimant's Updated Memorial, ¶ 150 ("AES took a 98% interest in the Ullum plant's 30-year Concession Agreement, while purchasing outright the 98% interest in Sarmiento".)

[56] Claimant's Updated Memorial, ¶ 150.

D. Alicurá

84. Alicurá is a 1,050MW hydro plant located west Argentina, on the Limay River between the provinces of Río Negro and Neuquén. In 2000, AES acquired a 98% stake in Alicurá (59% from Southern Energy, Inc. and 39% directly from the government of Argentina). The remaining 2% was held under a PPP, however, it diminished after AES made a capital contribution of more than US$100 million, which resulted in a 99.8% stake by December 31, 2001.[57]

85. AES's total equity investment in Alicurá was US$253.6 million, including the absorption of US$100 million in outstanding debt. AES operated Alicurá under a 30-year concession contract that expired in 2023.[58]

E. Paraná

86. AES owns 99.8% of AES Paraná S.A. ("Paraná"), the operating company for a thermal generator located in San Nicolás. An amount of $448 million was invested by AES and PSEG to construct the plant, a greenfield project for which US$214.2 million were financed with debt. The construction began in 1999, and operations began in January 2002.[59]

87. Paraná is an 870 MW facility comprising an 845 MW combined cycle thermal power plant, and a 25 MW gas turbine located in San Nicolás, Buenos Aires. The combined cycle can operate with natural gas, diesel oil and biodiesel.[60] Initially, Paraná was owned by AES (66.67%) and PSEG Global, Inc. ("PSEG") (33.33%), however, in July 2003, PSEG sold its 33.33% stake to AES.

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[57] Claimant's Updated Memorial, ¶ 151; The AES Investor Fact Book (September 2003), **AES Ex. 225**, p. 64; AES Corp. 2001 10-K Form, **AES Ex. 406**, p. 77; Decree No. 265/1994, February 22, 1994, **AES Ex. 102**; Alicurá S.A. 2001 Financial Statements, **AES Ex. 410**, notes 7 and 13.

[58] Claimant's Updated Memorial, ¶ 151; Alicurá S.A. 2001 Financial Statements, **AES Ex. 410**, note 2.4.

[59] Claimant's Updated Memorial, ¶ 152.

[60] Abdala-Spiller, ¶ 30 a; "Parana, is an 870MW facility comprising a 845 MW combined cycle thermal power plant, and a 25 MW gas turbine located in San Nicolás, Buenos Aires*."* The AES Investor Fact Book (September 2003), **AES Ex. 225**, p. 64.

88. In September 2018, AES added a 25 MW gas turbine to the Paraná facilities, resulting in a total installed capacity of 870 MW.[61] The Claimant clarifies that only its original 66.7% stake is relied upon in this Arbitration.

F. TermoAndes

89. TermoAndes was purchased between 2000 and 2001 with the acquisition of 98% of Gener S.A for US$1,300 million. It is a 643MW combined cycle thermal plant in the province of Salta. The plant was built in 1999 and began operations in 2000. AES also invested, through two subsidiaries, in a 263-kilometer transmission line to transport the electricity produced by TermoAndes to Chile. This is the only international transmission line connecting the Chilean grid to the Argentine power grid. The investment for both the power plant and the transmission line amounted to approximately US$400 million.[62]

90. AES currently owns a 67% equity stake in TermoAndes through AES Gener (previously known as Gener S.A.).[63]

91. The TermoAndes plant is operated by TermoAndes S.A. (a company in which AES currently has a 67% indirect stake). The other power plants are operated by AES Argentina Generación S.A., a company in which AES has a 99.8% indirect stake.[64]

92. The Claimant clarifies that there are other generation investments that do not form a basis for the arbitration. In particular, Quebrada de Ullum (a 45MW hydro power plant in the province of San Juan, which AES returned to the Government in 2004, but continued to operate until 2014), Caracoles (a hydro plant of 125MW of nominal capacity), Punta Negra (a hydro plant with 65MW of nominal capacity), Central

[61] Abdala-Spiller, ¶ 30 a; Claimant's Updated Memorial, ¶ 152; AES Argentina Generación S.A. 2018 Financial Statements, **AES Ex. 407**, p. 46.

[62] Claimant's Updated Memorial, ¶ 153; *AES analiza vender la eléctrica TermoAndes*, LA NACIÓN, February 18, 2002 **AES Ex. 181**; Abdala-Spiller, ¶ 30 f; TermoAndes S.A. 2001 Financial Statements, **AES Ex. 416,** note 1.

[63] Abdala-Spiller, ¶ 30 f; AES Corp. 2019 10-K Form, **AES Ex. 406**, pp. 22, 23.

[64] Abdala-Spiller, ¶ 32.

Dique (owner of a 68MW thermal plant in the province of Buenos Aires) and AES's distribution investments: EDEN/EDES, and EDELAP.[65]

4. The Crisis

93. Starting from 1998, a series of external financial shocks "hit Argentina […] and […] made the pegged parity increasingly unsustainable […]".[66] In December 1999, Fernando De la Rúa became President of Argentina, at which point "[t]he government thought reducing the budget deficit would instil (sic) confidence in government finances, reducing interest rates and thereby spurring the economy, which was showing signs of recovery in late 1999. Among the options for reducing the deficit, cutting spending was politically difficult; the government doubted that cutting tax rates would spur enough growth in the short term to offset lost revenues; it did not wish to abandon the convertibility system and simply print money; and it suspected that financial markets would be unwilling to finance higher debt […]".[67]

94. In January, April and August 2001, three tax increases were approved. "The increases came on top of already high tax rates. The highest rate of personal income tax, 35

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[65] Claimant's Updated Memorial, ¶¶ 157-165. The Claimant indicates that AES also operates Central Térmica Guillermo Brown ("Brown"), a 576MW gas and diesel facility which was constructed under the FONINVEMEM program and for which it expects to receive a 30% ownership stake. It further clarifies that this plant is excluded from AES's damages claim relating to Argentina's interference in price and dispatch, but the amounts withheld from AES and ultimately used for the construction of Brown are part of the claim. Claimant's Updated Memorial, fn. 275.

[66] These have been described as follows. "a. A reversal in capital flows to emerging markets following the Asian crisis and the Russian default in August 1998. This was an episode of "sudden stop" of capital inflows that hurt many emerging market economies in 1998 and 1999 by making the cost of borrowing in international capital markets higher and its quantity much more limited. […] b. Weakening of demand in major trading partners of Argentina, notably in Brazil during 1998 when the Asian crisis became global with the collapse of Russia and the contagion to Latin America and other emerging market economies. c. The strong fall in oil and other commodity prices that sharply worsened Argentina's terms of trade; i.e. the price of Argentina's exports relative to its imports in international markets fell significantly after 1998. d. The sharp devaluation of the Brazilian currency against the U.S. dollar in early 1999 […] e. The general strengthening of the U.S. dollar against the euro and other major currencies between 1998 and 2001 […] f. The tightening of monetary policy by the U.S. Fed between mid 1999 and mid 2000 (increase in the U.S. Fed Funds rate by 175 basis points)". Roubini WS, ¶ 18. "There were many external factors that contributed to the chaotic situation Argentina experienced in late 2001 and early 2002. Among them, those frequently mentioned are the problems suffered by Mexico in 1995, Russia as from 1998, the southeast Asian countries and, especially, Brazil in 1998 […]". *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008, **AES Auth. 168**, ¶ 195.

[67] U.S.CONGRESS JOINT ECONOMIC COMMITTEE, Argentina's Economic Crisis: Causes and Cases (June 2003) ("U.S. Congress Report"), **AES Ex. 030**, pp. 8, 10.

percent, was near the level of the United States, but the combined rate of federal payroll tax paid by employer and employee was 32.9 percent, versus 15.3 percent in the United States; the standard rate of value-added tax was 21 percent, versus state sales taxes of 0 to 11 percent in the United States; and Argentina imposed taxes on exports and (from April 2001) on financial transactions […]".[68]

95. These events along with the slowdown of output, the drop of economic activity, the growing fiscal deficit, the increase of public debt and constant recession which deepened overtime, contributed to the forthcoming of a severe economic, political, institutional and social crisis that hit Argentina in 2001.[69] Despite the adoption of measures by the government,[70] the situation would continue to worsen.[71] The exchange rate link of the peso to the US Dollar was switched in April and June 2001 and the government refinanced much of its debt at higher interest rates.[72] The country risk measuring financial solvency reached an all-time high.[73]

96. "At the end of 2001, savings were massively withdrawn from the banks. In order to control the situation, the Government issued Decree No. 1570/01, known as the

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[68] U.S.CONGRESS JOINT ECONOMIC COMMITTEE, Argentina's Economic Crisis: Causes and Cases (June 2003) ("U.S. Congress Report"), **AES Ex. 030**, p. 10.

[69] "Since mid 1998 the country was facing a constant recession, possibly the longest and deepest crisis of its modern history. The drop in economic activity restricted government revenues and, consequently, produced a growing fiscal deficit and increase of public debt. Concomitantly, restrictions on exports brought about by foreign markets subsidies to agricultural products and other protectionist measures negatively affected foreign-trade revenues and contributed to a persisting trade-balance deficit." Ratti WS, ¶ 1; Roubini WS, ¶ 20. "Argentina's crisis of 2001-2002 occurred after three years of deep recession and deflation." *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 72.

[70] Respondent's Updated Counter-Memorial, ¶ 97. See also Law 25,239 of Fiscal Reform, 30 December 1999, **Exhibit RA 144**; *Argentina recorta gasto público*, La Nación, 30 March 2000, **Exhibit RA 145**; *De la Rúa anuncia hoy el blindaje financiero*, Clarín, 18 December 2000, **Exhibit RA 146**; Presidential Decree 648/01, 17 May 2001, **Exhibit RA 147**; Presidential Decree 803/01, 18 June 2001, **Exhibit RA 148**); Law 25,453, 30 July 2001, **Exhibit RA 149**; *see also La Ley de Déficit Cero impone drásticos recortes en el gasto público en Argentina*, El País (Spain), 31 July 2001, **Exhibit RA 150**.

[71] "The crisis brought about a worsening of substantial social and personal hardship in the general population, already heavily burdened by three years of deep recession." *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 79.

[72] U.S.CONGRESS JOINT ECONOMIC COMMITTEE, Argentina's Economic Crisis: Causes and Cases (June 2003) ("U.S. Congress Report"), **AES Ex. 030**, pp. 10-12.

[73] *Argentina se rompe: alcanza su nivel más bajo de reservas, con un riesgo de inversión mayor al de Nigeria*, Diario de León (Spain), 25 November 2001, **Exhibit RA 028**.

'*Corralito*,' on 1 December 2001, restricting bank withdrawals and prohibiting any transfer of currency abroad."[74] In December 2001, "the unemployment rate reached a record level of 18% and the indigence level increased by 358%, with most of the increase having taken place from May 2001 onward. Political demonstrations, riots and supermarket looting began in various locations and spread to major cities. At this point, the economic and social crisis acquired a political dimension. The government declared a state of siege and, at the end of December, after riots and demonstrations had caused tens of deaths, President De la Rúa resigned. The end of De la Rúa's government was followed by a *vacuum* in political power. After the resignation of President De la Rúa on December 20, 2001, and the unsuccessful appointment by Congress of three successive presidents between December 20 and December 30, Senator E. Duhalde was elected President by the Congress to complete the presidential term, and he assumed formal power on January 1, 2002."[75]

97. "The situation was indeed critical, and at the end of that month Argentina partly defaulted on its international obligations and abandoned the convertibility regime, replacing it by a dual exchange-rate system".[76]

98. In January 2002, Argentina issued Law 25.561 (the "Emergency Law")[77]. The law effectively declared a "public emergency […] with regard to social, economic, administrative, financial and money exchange affairs". The Executive Branch was

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[74] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 91. "The *Corralito* (Decree 1570 of December 1, 2001) entailed the blocking of withdrawals from banks and was initially introduced as a temporary measure. However, it was the first of the Emergency Measures that Argentina took while the crisis was developing, which culminated in the devaluation of the peso, the pesification of dollar denominated assets in Argentina and the default on public debt and its rescheduling." *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 78.

[75] *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 79. "[W]ithin a period of less than ten days, Argentina had a succession of five Presidents, who resigned one after the other. According to the GOA, 'Argentina seemed to be on the brink of anarchy and the abyss'." *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 91.

[76] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 91. See also IMF*, Evaluation Report: The IMF and Argentina, 1991-2001*, 2004, **Exhibit RA 135**, p. 3.

[77] Law No. 25.561, January 7, 2002, **AES Ex. 176.**

bestowed with powers to "undertake the restructuring of the financial, banking and money exchange market system, [t]o reactivate the functioning of the economy and raise the level of employment and income distribution, with emphasis on a development program for regional economies, [t]o create conditions for sustainable economic growth that is compatible with the restructuring of public debt, and [t]o regulate the restructuring of current obligations affected by the new money exchange system".[78] In accordance with this Law, adjustment clauses in dollars, indexing clauses or mechanisms in contracts executed by the public administration would be null. Prices and fees would be established at the exchange rate of 1 peso=1 dollar. Cash payments established in US Dollars in contracts between private parties would also be modified to the rate already referred and the obligations of the contracts would be renegotiated.[79]

99. "Following the enactment of the Public Emergency Law […] CAMMESA resolved to pesify the Electricity Regulatory Framework and, with it, the contracts existing on 6 January 2002 and the transactions on the spot market after that date. By a series of resolutions, the GOA's Energy Secretariat then extended pesification to all values in that Framework. While under the latter, VCPs, capacity payments and other values had been calculated in US dollars, power generators now had to express their VCPs in pesos at an exchange rate of 1:1, which accounted for substantially lower spot prices; electric power export agreements were, however, excluded from pesification."[80]

100. The crisis of 2001-2002 "resulted in a massive default […] on the domestic as well as the international level. The real gross domestic product decreased by about 10% in 2002, the cumulative decline since 1998 amounting to 20%; and inflation rose to approximately 10% in April 2002 but eventually reached 40% for that entire year. […] So alarming was the situation that the United Nations General Assembly

[78] Law No. 25.561, January 7, 2002, **AES Ex. 176**, Art. 1.

[79] Law No. 25.561, January 7, 2002, **AES Ex. 176**, Arts 8-11.

[80] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 98.

resolved to reduce Argentina's membership dues on account of the crisis, which was the first case in history".[81] "The regular functioning of the democratic institutions was re-established only with the general elections held on May 25, 2003, when Néstor Kirchner was duly elected president of Argentina."[82]

5. Regulatory Changes to the Electricity Sector

101. The following section presents an overview of the regulatory changes implemented by Argentina through a series of regulations issued between 2002 and 2020 affecting the electricity market.

A. Resolution SE No. 8/2002

102. The Resolution imposed an overall cap on spot prices of AR$ 120/MWh (equivalent to US$ 40/MWh at the prevailing exchange rate). The cap initially applied only in normal conditions (i.e., without the presence of the risk of loss of load[83]). Other modifications were introduced, such as the way in which VCP were declared by reducing the periodicity of the declaration and breaking down the components to variable fuel costs, variable maintenance costs and other non-fuel variable costs. Such

[81] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 92. "The Argentine crisis of 2000–02 was among the most severe of recent currency crises […] [t]he crisis had a devastating economic and social impact." IMF*, Evaluation Report: The IMF and Argentina, 1991-2001*, 2004, **Exhibit RA 135**, p. 3.

[82] *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 79.

[83] "'Loss of load' risk is a technical term for the risk of power outages. Before March 2002, the MEM had caps that varied with three tiers of 'loss of load risk' situation. For example, if the risk of loss of load was low (up to 1.6% of total demand), the cap on the spot price was US$ 120/MWh. For the second tier of median risk of loss of load (up to 5% of total demand), the cap would double to US$ 240/MWh. If, however, the risk of loss of load was high (up to 10% of total demand), the cap would be US$ 1,500/MWh. The latter value was consistent with SE's survey studies conducted in 1992 on the maximum willingness to pay by the average consumer to avoid an outage episode. On March 18, 2002, the SE enacted SE Resolution 2/2002 mandating the forceful conversion of the three tiers of caps, which were set in US Dollars, into Argentine pesos. This had the immediate effect to lower all caps to one third of their prior US dollar values. On April 9, 2012, SE Resolution 8/2002 eliminated the three tiers and left a single cap, at AR$ 120/MWh, irrespective of the loss of load risk situation, with the sole exception of demand rationing due to political violence. SE Resolution 240/2003 made the cap more stringent, by establishing that even if there is demand rationing, spot prices would always be capped at AR$120/MWh." Abdala Regulatory Report, fn. 138. See also SE Resolution 2/2002 of March 14, 2002, **AES Ex. 185**; SE Resolution 8/2002, 5 April 2002, **AES Ex. 186**; SE Resolution 240/2003 of August 19, 2003, **AES Ex. 224.**

modification was not applied to natural gas. A specific procedure was also established for the advanced purchase of energy from generators in an advanced spot market.[84]

103. Generators whose declared variable costs exceeded the cap would be compensated for the difference between their declared variable costs and the overall price cap, but would not determine the marginal spot price formation.[85]

104. The AR$ 120/MWh overall cap to spot price formation remained in force, with no adjustment, since April 2002 until 2017, i.e. for 14 years.[86]

B. Resolution SE No. 317/2002

105. This Resolution supplemented Resolution SE 246/2002[87] and increased the value of capacity payments from AR$ 10/MW to AR$ 12/MW during non-valley hours on weekdays.[88]

C. Resolution SE No. 240/2003

106. Through this Resolution, the scope of the AR$ 120/MWh cap was extended to apply at all times. The Resolution also excluded non-natural gas plants from the

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[84] "OPERATION OF MACHINES WITH CVP HIGHER THAN THE FIRST STAGE OF FAILURE. The body in charge of dispatch (OED) will operate by first dispatching the available generation whatever its cost before applying restrictions on demand. The maximum spot price will be ONE HUNDRED AND TWENTY PESOS PER MEGAWATT HOUR ($120/MWh) to the extent that it is not necessary to apply restrictions to the demand. Machines that operate with higher costs than the established limit will receive their recognized cost as remuneration and the differences between the node price and the recognized cost will be collected through the 'Subaccount of Transitory Dispatch Cost Overruns.'" (Unofficial translation). SE Resolution 8/2002, 5 April 2002, **AES Ex. 186**, Annex I, Section 5; Abdala-Spiller, ¶ 64; Respondent's Rejoinder Memorial, ¶ 158; Ruisoto Second WS, ¶ 25.

[85] Abdala-Spiller, ¶ 64.

[86] Abdala-Spiller, ¶ 65. SEE Resolution 20-E/2017, **AES Ex. 334**, Art. 14; Under Secretary of Energy Disposition 97/2018, **AES Ex. 350**, Art. 5; and Secretariat of Renewable Resources and Electricity Market's ("SRREM") Resolution 38/2019, **AES Ex. 367**, Art. 5.

[87] This Resolution "established a new methodology for capacity payments" (Abdala Regulatory Report, ¶ 95) and "partially de-linked the remuneration for capacity from dispatch" (Respondent's Rejoinder Memorial, ¶ 178). See Resolution SE 246/02, 4 July 2002, **AES Ex. 205**. The Claimant indicates: "This resolution is not part of AES's claim and is irrelevant to the issues in dispute." Claimant's Reply Memorial, ¶ 121.

[88] Abdala Regulatory Report, ¶ 96; Claimant's Updated Memorial, ¶ 195. "[T]he Secretariat of Energy increased the generators' remuneration regarding capacity made available by 20% and de-linked it from real dispatch" (Respondent's Updated Counter-Memorial, ¶ 167, referring in fn. 217 to Resolutions 246/02 and 317/2002). See Resolution SE 317/2002, 18 July 2002, **AES Ex. 194**.

setting of hourly spot prices. Imports and hydroelectric generation, were also excluded unless their inclusion resulted in lower spot prices.[89]

D. Resolutions SE N° 406/2003 and SE N° 943/2003

107. Resolution 406/2003 established a "transitory" mechanism for the allocation of funds to pay the MEM creditors. It established a priority payment system, where any receivables that could not be paid by the limited amounts available became a debt of the Stabilization Fund towards generators. On the other hand, Resolution SE 943/2003 divided these receivables in two categories: (a) Receivables with a Determined Due Date ("*Fecha Cierta de Vencimiento*"); and (b) Receivables with an Undetermined Due Date ("*Liquidaciones con Fecha de Vencimiento a Definir"*).[90]

E. Resolution SE No. 712/2004

108. This Resolution creates the FONINVEMEM, which would administer the economic resources destined for investments that will allow increasing the supply of electricity towards the year 2007.[91]

109. The first FONINVEMEM program provided that receivables due to generators from January 2004 to December 2006 would be contributed to this program ("FONINVEMEM I"). The funds would be used to build two combined

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[89] Abdala-Spiller, ¶¶ 64, 67 and fn. 77; SE Resolution 240/2003 of August 19, 2003, **AES Ex. 224**, Art. 1. See also Abdala Regulatory Report, fn. 138. Gas was also subject to measures, for example, in May 2002 a resolution was issued ordering ENARGAS to maintain the natural gas values of the winter period 2001 expressed in pesos. Abdala-Spiller, fn. 162; ENARGAS Resolution 2,606/2002, **AES Ex. 211**, Art. 1. In relation to both gas and electricity, Resolution SE No. 354/2020 establishes firm volumes of gas for CAMMESA and that adhesion to the centralized dispatch implies the transfer by the generators, of the product and transportation, defined in the contract(s) signed by the Generator with the Signatory Producers and/or Transporters, so that the contracts are used by CAMMESA. It also instructs CAMMESA to assign the natural gas quotas for consumption in thermal generation in such a way as to minimize the total supply costs in accordance with a specific priority dispatch order, and establishes that the new maximum prices at the POINT OF ENTRY TO THE TRANSPORTATION SYSTEM (PIST) for natural gas, will be applicable for the valuation of the volumes of natural gas that are not included in the GasAr Plan for the generation of electricity to be sold in the [MEM] or, in general, destined for the provision of the electricity distribution public service. Resolution SE No. 354/2020, December 1, 2020, **AES Ex. 713.** Arts. 1, 2, 3, 9.

[90] Claimant's Updated Memorial, fn. 598; Resolution SE 406/2003, September 9, 2003, **AES Ex. 226**; Resolution SE 943/2003, December 10, 2003, **AES Ex. 228**. See also Abdala-Spiller, ¶¶ 88, 89.

[91] Resolution SE 712/2004, July 15, 2004, **AES Ex. 237**; Respondent's Rejoinder Memorial, ¶ 214.

cycle plants (800MW each), Central Térmica José de San Martín ("San Martín") and Central Térmica Manuel Belgrano ("Belgrano").[92]

F. Resolution SE No. 826/2004

110. Through this Resolution, an invitation was extended to all creditors in the MEM with receivables with an undetermined due date to contribute in the FONINVEMEM by investing their credits. According to the recitals of the Resolution, for those that decided not to participate, "the SECRETARIAT OF ENERGY would carry out the pertinent studies and steps, then proceed to dictate the detailed regulations for the issuance of documents representing a volume of electricity MEGAWATT HOURS (MWh) compatible with the receivables not involved […] for the purpose of their exchange, which would begin to be paid from the date on which the works built […] have sufficient genuine income". [93]

G. Resolution SE No. 1427/2004

111. Through this Resolution, creditors in the MEM had to inform the authorities of their decision to participate in the FONINVEMEM. The decision would be taken as an "irrevocable compromise". The act would be perfected through the Adhesion Act for the Readaptation of the MEM and the Definitive Agreement.[94] The object of the Adhesion Act was to "establish basic guidelines on which the [MEM] will be readapted, such readaptation being understood as the action of recomposing the regular functioning of the MEM as a competitive market, with sufficient supply, in which Generators, Distributors, Suppliers, Participants and Large Users of energy can buy and sell electricity at prices determined by supply and demand, without regulatory distortions and within the framework established by Law No. 24,065 [the

[92] "Generators would 'contribute' their accounts receivable to each of these programs, and the Government would also contribute cash to expand the system. In exchange, generators were granted the right to be repaid the contributed accounts receivable in 120 monthly installments (i.e., over a period of ten years), once the new plants were built and started operations." Abdala-Spiller, ¶ 95; Claimant's Reply Memorial, ¶ 181.

[93] Resolution SE No. 826/2004, August 6, 2004**, AES Ex. 238**. (Unofficial translation).

[94] Resolution SE 1427/2004, December 7, 2004, **AES Ex. 236**, Art.1.

Electricity Law]".[95] The Adhesion Act also provided for the establishment of two working groups that would evaluate possible projects and inform the Secretariat of Energy. The Adhesion Act indicated that "[o]nce the Market has been readapted starting from the entry into commercial operation of the new equipment(s) built with FONINVEMEM resources, Resolution […] No. 240 of August 14, 2003 will be annulled and generators will be remunerated with the Marginal Price of the System sanctioned in accordance with the provisions of 'THE PROCEDURES', in a free 'Spot' market, taking into account the cost of not supplied energy […]."[96]

H. Resolution SE No. 3/2005

112. Through this Resolution, the decision of the MEM creditors to participate in creating the FONINVEMEM was accepted.[97] The Resolution provides for the formation of working groups and indicates "as long as the credits committed by each of them represent a minimum participation percentage of EIGHT PERCENT (8%) with respect to the total of the credits committed corresponding to Article 4 c) of

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[95] Resolution SE 1427/2004, December 7, 2004, **AES Ex. 236**, Annex "Adhesion Act for the Readaptation of the MEM", section 1 "Object". (Unofficial translation)

[96] Resolution SE 1427/2004, December 7, 2004, **AES Ex. 236**, Annex "Adhesion Act for the Readaptation of the MEM", sections 3 and 4.1. (Unofficial translation)

[97] "AES ALICURA S.A on behalf of "Hidroeléctrica ALICURA" and "Central Térmica San Nicolás"; AES JURAMENTO S.A. on behalf of "Hidrotérmica San Juan" and "Hidroeléctrica Juramento"; AES PARANA S.C.A. on behalf of "Central Térmica AES PARANA"; CENTRAL TERMICA GUEMES S.A.; CENTRALES TERMICAS MENDOZA S.A. on behalf of "C.T. MENDOZA" and "C. T. MENDOZA – Cogenerator"; CENTRAL COSTANERA S.A; CENTRAL DIQUE S.A.; CENTRAL DOCK SUD S.A.; CENTRAL PIEDRA BUENA S.A.; CENTRAL PUERTO S.A.; CENTRALES DE LA COSTA ATLANTICA S.A.; GENERACION MEDITERRANEA S.A.; GENERADORA CORDOBA S.A.; HIDROELECTRICA PIEDRA DEL AGUILA S.A.; HIDROELECTRICA AMEGHINO S.A.; HIDROELECTRICA EL CHOCON S.A; PETROBRAS ENERGIA S.A. on behalf of "Central GENELBA" and "Hidroeléctrica PICHI PICUN LEUFU"; SIDERCA S.A.I.C.: on behalf of "SIDERCA S.A." (EX-ARGENER-GEN.PAR)". Resolution SE 3/2005, 5 January 2005, **Exhibit RA 205,** Art. 1; Respondent's Updated Counter-Memorial, ¶ 220. See also Memorandum of Agreement for a New Invitation to Participate in the FONINVEMEM, 15 March 2005, **Exhibit RA 206**, whereby the Secretariat of Energy issued a new invitation in the following terms: "[a]n important group of Generators have accepted the invitation made through Resolution SE No. 1427/2004, expressing their decision to participate, with a minimum of 65% of their credits corresponding to Art. 4 c) of Resolution SE No. 406/2003, in the formation of FONINVEMEM, whose purpose is to make the necessary investments for the readaptation of the MEM [...] these agents have committed to the construction of the generation units that satisfy said objective [...] the Secretariat of Energy proposes to invite all those other Agents producing Electricity that have not done so on the aforementioned opportunity to participate in a new invitation [...]". (Unofficial translation). This new agreement was accepted by the Generators that had previously accepted to participate in FONINVEMEM through Resolution SE 3/2005.

Resolution […] [406/2003], and […] [943/2003], […] for the period between January 2004 and December 2006 […]."[98]

I. Resolution SE No. 1281/2006

113. This Resolution established "Energía Plus", a new regime that would address supply shortages.[99] Under this Program, "demand from MEM large users and from large clients of distribution companies in excess of the demand recorded in 2005 [i.e. the previous year] was to be met through new generation supply. New supply was defined as that provided by generators which, as of the date of publication of this provision (that is, as of 5 September 2006), were not MEM participants, did not have generation facilities to commit to such service, or were not connected to the SADI".[100]

J. Resolution No. 1506/2006

114. By virtue of this Resolution, the agreement between the Secretariat of Energy and participants of the MEM as established in Resolution 1371, in the Adhesion Act and the Definitive Agreement, was approved.[101]

K. Resolution SE No. 564/2007

[98] Resolution SE 3/2005, 5 January 2005, **Exhibit RA 205,** Art. 4. (Unofficial translation). The final conditions of the FONINVEMEM I program can be found in the Annex to SE Resolution 1,193/2005, October 7, 2005, **AES Ex. 259** and **A-RA-218.** See Abdala-Spiller, ¶ fn. 324. Additionally, through Resolution 1,371/2005, the Secretariat of Energy accepted the participants' decision to engage in the in the construction, operation and maintenance of the Electric Power Generation Plants, as provided in the Definitive Agreement. Resolution SE 1,371/2005, 27 October 2005, **AES Ex. 260**, Art. 1.

[99] Claimant's Updated Memorial, ¶ 216; Resolution SE 1281/2006, September 5, 2006, **AES Ex. 264**, Art. 2 and Annex I.

[100] Respondent's Updated Counter-Memorial, ¶ 390. "[L]arge users with electricity demand exceeding their previous year's consumption were required to procure the 'additional' demand by signing PPAs with new plants, new capacity, or plants newly connected to the Argentine grid." Claimant's Updated Memorial, ¶ 216.

[101] Resolution No. 1506/2006, Ministry of Planning, August 18, 2006, **AES Ex. 271**, Art. 1. The Resolution refers to the same participants enumerated in Resolution SE Nº 3/2005 except for: CENTRALES DE LA COSTA ATLANTICA S.A.; HIDROELECTRICA CERROS COLORADOS S.A.; HIDROELECTRICA DIAMANTE S.A.; HIDROELECTRICA LOS NIHUILES S.A.; and SIDERCA S.A.I.C.

115. Through this Resolution, participants were required to inform their decision to contribute with 50% of their receivables accumulated between January 2007 and December 2007 into a new fund, FONINVEMEM II.[102]

L. Resolution SE No. 724/2008

116. This Resolution stablished a framework whereby generators could allocate their receivables ("LVFVDs") to the repair and/or capacity upgrade of generation equipment.[103]

M. Resolution SE No. 95/2013

117. This Resolution established a new remuneration scheme. In particular, "remuneration for energy and remuneration for available capacity were established based on the technology (combined cycle, steam turbine, gas turbine, hydroelectric) and the scale of each plant (small, medium, large)." The scheme included three main components: i) "Remuneration for fixed costs (through payments for capacity made available, based on technology and the fulfilment of availability targets)"; ii) "Remuneration for variable non-fuel costs (based on energy generated per type of fuel)"; and iii) "An additional remuneration, divided into two portions: a portion settled in a direct manner […] and another portion allocated to a trust for its investment in infrastructure projects".

118. With this Resolution, the remuneration mechanism established in Resolution SEE 61/1992 as amended was abandoned and "the variable remuneration owed to generators ceased to be linked to the market prices derived from the economic dispatch. In other words, remuneration for the non-fuel and maintenance portion of

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[102] Resolution SE 564/2007, June 1, 2007, **AES Ex. 273.** "[W]ith four options to recoup the accounts receivable: a. Keep their share in the FONINVEMEM plants constant, and recover the contributed amount in 120 instalments, in US Dollars, with a LIBOR + 2% spread return if all generators agreed to contribute funds, or 1.5% spread if some generators did not agree to contribute the funds. The installments would begin to be paid after the plants start operating. b. Increase the share in the FONINVEMEM plants and recover the contributed amount in 120 instalments, in US Dollars, with a LIBOR + 1% spread, to be paid after the plants start operating. c. Present an investment project that, if approved by the Secretary of Energy, could be funded, up to 25% of its total cost, with accumulated accounts receivable. d. Recover the receivables in 120 installments in AR$ accruing a return equal to CAMMESA's return on its financial funds." Abdala-Spiller, ¶ 365.

[103] Respondent's Updated Counter-Memorial, ¶ 287; Resolution SE 724/2008, 21 July 2008, **Exhibit RA 267**.

variable production costs ceased to exist, along with market prices set on a time-of-day basis in accordance with Resolutions SE 246/2002 and 240/2003, and by application of Resolution SE 406/2003. Moreover, remuneration for capacity made available during hours when remuneration for capacity is payable (pursuant to Resolution SE 246/2002) was replaced with a remuneration that consider[ed] the average monthly availability of generating units. This involved completely excluding payment for generating units' available capacity from the economic dispatch". Additionally, "it modified the order of priority for payments, giving first priority to the payment of fixed costs, own fuel costs and variable non-fuel costs, and second priority to the additional remuneration."[104]

119. The Resolution centralized in CAMMESA the purchasing of fuels and suspended the possibility of generators entering into new electricity-supply term contracts or renewing existing term contracts upon expiration.[105]

N. Decree 134/2015

120. This Decree declared emergency in the National Electric Sector until 31 December 2017. The Decree indicates that the contractual renegotiation has not been completed and that this has resulted in "the absence of a tariff scheme that provides signals towards an efficient and rational consumption for the different segments and types of users". According to the Decree, "the remuneration systems established in the [MEM] as of 2003 have not given sufficient economic signals to make private actors make the investments that are required in the Electrical System to allow the necessary growth in the supply of electricity to supply the growth of the demand for that service"; "the delay in the levels of investment in infrastructure for the electricity distribution networks and the dependence of the supply on emergency mobile generation equipment, in the face of demanding weather conditions or in the face of unforeseen failures of critical equipment without a sufficient level of reserve or redundancy, has resulted in an increase in the number of supply interruptions and

[104] Respondent's Updated Counter-Memorial, ¶¶ 326, 327, 329, 330; Resolution SE 95/2013, March 22, 2013, **AES Ex. 304**.

[105] Resolution SE 95/2013, March 22, 2013, **AES Ex. 304**, Arts. 8 and 9.

their duration, evidencing a gradual and progressive decrease in the quality of the service"; and "the financial situation of the [MEM], affected by a remuneration system that does not reflect the real production costs and the general situation of debts of distribution agents with said market, has required a continuous transfer of contributions from the NATIONAL TREASURY".[106]

O. Resolution No. 6/2016

121. Through this Resolution, Argentina approved a quarterly schedule with seasonal reference prices from February to April 2016. The preamble of the Resolution indicates that: "the remuneration systems established in the [MEM] since 2003 implied the progressive adoption of regulatory decisions that did not meet the objectives set forth in Law No. 24,065 [the Electricity Law] in terms of ensuring supply and its quality in the defined conditions, at the lowest possible cost for the Argentine Electrical System," "the Electrical Regulatory Framework integrated by Laws Nos. 15,336 and 24,065 prescribe that the price to be paid for the demand of electric energy in the [MEM] must be sufficient to satisfy the economic cost of supplying it", "the abandonment of economic criteria in the definition of prices in the [MEM] distorted the economic signals, increasing the cost of supply, discouraging private risk investment aimed at efficiently increasing supply and subtracting incentives for savings and for the adequate use of energy resources by consumers and users", and "simultaneously, only a minor proportion of the supply cost was faced by the electricity demand, resorting to the resources of the NATIONAL TREASURY to cover the substantial portion of said cost, which contributed significantly to a progressively increasing tax pressure on the entire population, situation that at the current magnitude becomes unsustainable."[107]

[106] Decree No. 134/2015, December 16, 2015, **AES Ex. 317**. (Unofficial translation)

[107] Resolution MINEM 6/2016, January 27, 2016, **AES Ex. 320.** (Unofficial translation)

P. Resolution SEE No. 21/2016

122. Through this Resolution, Argentina called interested parties in offering new thermal generation and electricity production capacity to satisfy essential demand requirements in the MEM. According to the Resolution, the offers made will not be able to compromise, at each proposed connection point, "a generation capacity less than FORTY MEGAWATTS (40 MW)" and, where applicable, the net power of each generating unit conforming the offer for said location may not be "less than TEN MEGAWATTS (10 MW)". Also, the equipment committed to the offers must have dual fuel consumption capacity to be able to operate interchangeably as required by the economic dispatch of the MEM.[108]

123. The Resolution makes reference to Resolution 6/2016 and the situation of the electricity market addressed in its preamble. In addition, it states that "[i]t is essential to implement immediately a call for expressions of interest from investors outside the NATIONAL STATE who are already or are in a position to enter as generators, co-generators or self-generating agents of the [MEM] for the installation of new generation supply linked to the ARGENTINE SYSTEM OF INTERCONNECTION (SADI)".[109]

Q. Resolution SEE No. 19-E/2017

124. Through this Resolution, Argentina determined that the remuneration charges would be set in US Dollars.[110]

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[108] Resolution SEE 21/2016, 22 March 2016, **AES Ex. 328**, Arts. 1 and 2.

[109] Resolution SEE 21/2016, 22 March 2016, **AES Ex. 328**. (Unofficial translation)

[110] Resolution SEE 19-E/2017, February 2, 2017, **AES Ex. 336**. "Resolution SE 19/2017, provided for an increase in the electricity prices and capacity payments that the generators received. More importantly, the Resolution established that payments would be set in US dollars, as they had been when AES made its investments in Argentina". Claimant's Reply Memorial, ¶ 160. Resolution 19-E/2017 "introduced an automatic indexation mechanism (remunerations were set in US$), which remained in place with frequent changes in the base levels of remunerations." Abdala Regulatory Report, fn. 223. "SEE Resolution 19/2017 normalized the collection cycle, but, as of the date of this Report, AES still has substantial balances of unpaid remuneration for non-recurring maintenance revenues accrued before 2017." Abdala-Spiller, ¶ 373.

R. Resolution SGE No. 70/2018

125. Through this Resolution, Article 8 of Resolution 95/2013 centralizing in CAMMESA the purchase of fuel was substituted, authorizing generators, co-generators and self-generators in the MEM to "procure their own fuel supply for the generation of electricity". [111]

S. Disposition SEE No. 97/2018

126. Through this Decision, Argentina increased the Maximum Spot Price to AR$480/MWh, i.e. the cap that had initially been fixed at AR$120MW/h in Resolution 8/2002 and then updated to AR$240/MWh in Resolution No. 20-E/2017 of January 2017. [112]

T. Resolution SE No. 1/2019

127. This Resolution repealed Resolution 19/2017 and adjusted the remuneration scheme. The Resolution indicates that the emergency in the National Electric Sector had finalized in December 31, 2017, and states in its preamble that: "the remuneration systems established in the [MEM] tend to ensure the sufficiency and quality of the supply under the conditions defined in Law 24,065 [the Electricity Law], at the lowest possible cost for the Argentine Electrical System", "[i]n order to ensure the sustainability of the [MEM], it is necessary to adapt the remuneration criteria established in resolution 19/2017 [...], to economically reasonable, efficient conditions that are assignable and/or transferable to demand", and "the remuneration system that is hereby approved will be of temporary application and until the regulatory mechanisms aimed at achieving an autonomous, competitive and sustainable operation that allow free contracting between supply and demand, and a technical, economic and operational functioning that enables the integration of different generation technologies to ensure a reliable and minimal cost system, are defined and gradually implemented."[113] According to this resolution, CAMMESA

[111] Resolution SGE No. 70/2018, November 6, 2018, **AES Ex. 353**, Art. 1. (Unofficial translation)

[112] Disposition SEE No. 97/2018, October 26, 2018, **AES Ex. 350**, Art. 5.

[113] Resolution SE No. 1/2019, March 1, 2019, **AES Ex. 359**. (Unofficial translation). "Resolution SE 1/2019, once again reduced the electricity prices and capacity payments […]". Claimant's Reply Memorial, ¶ 161.

would convert the denominated securities in US Dollars to Argentine Pesos, using the exchange rate published by the Central Bank of the Argentine Republic.[114]

U. Law No. 27.541

128. Through this Law, Argentina declared a Public Emergency in economic, financial, fiscal, administrative, social security, tariff, energy, health and social matters, delegating certain powers to the Executive Branch.[115] The Law established as basis for such delegation: to create conditions to ensure the sustainability of public debt, which in turn must be compatible with the recovery of a productive economy and with the improvement of basic social indicators; to regulate the tariff restructuring of the energy system and to promote productive reactivation, among others.[116]

129. According to its provisions, the Executive Branch is authorized to maintain the electricity and natural gas tariffs that are under federal jurisdiction and to either initiate renegotiation of the current comprehensive tariff review or to initiate an extraordinary review tending to a reduction of the real tariff burden on homes, businesses and industries. Also, The Executive Branch is to administratively intervene the ENRE and ENARGAS (Gas) for a year.[117]

V. Resolution SE No. 12/2019

130. This Resolution reinstated Article 8 of Resolution SE 95/2013, centralizing in CAMMESA the purchase of fuel, which had been abrogated a year earlier through Resolution SGE No. 70/2018.[118]

"[O]nce the objective of increasing reserve availabilities was met, the remuneration was reasonably adjusted in order to bring it closer to the conditions of other countries as well as to avoid maintaining costs that could be considered excessive and/or unnecessary in the electricity system and that would increase electricity prices". Ruisoto WS, ¶ 170.

[114] Resolution SE No. 1/2019, March 1, 2019, **AES Ex. 359**, Art. 8.

[115] Law No. 27.541, December 23, 2019, **AES Ex. 371,** Art. 1.

[116] Law No. 27.541, December 23, 2019, **AES Ex. 371**, Art. 2.

[117] Law No. 27.541, December 23, 2019, **AES Ex. 371**, Arts. 5 and 6. While the Resolution refers to ENARCAS, the Tribunal notes that Claimant's Updated Memorial as well as other exhibits refer to ENARGAS.

[118] Resolution SE 12/2019, December 30, 2019, **AES Ex. 372.**

W. Resolution SE No. 31/2020

131. Through this Resolution remuneration charges were set in pesos, subject to periodic inflation adjustments.[119] This adjustment mechanism was later suspended through Note: NO-2020-24910606-APN-SE#MDP, issued by the Secretariat of Energy in April 2020.[120]

6. Initiation, Suspension and Recommencement of the Arbitration

132. In November 2002, AES submitted its Request for Arbitration. Three years later, in December 2005, the Parties agreed to suspend procedures to try to reach a settlement.[121]

A. The Suspension Agreement[122]

133. By virtue of a letter dated December 20, 2005, addressed to the then-Members of the Tribunal, the Parties agreed to suspend the arbitration and so informed the Tribunal. The letter refers expressly to the Adhesion Act approved by Resolution SE No. 1427/2004 and the Definitive Agreement approved by Resolution No. 1193/2005.

134. In particular, the letter refers to Article 4.1 of the Adhesion Act and the commitments therein undertaken by the Secretariat of Energy, such as: to sanction seasonal prices that can be passed through to tariffs and cover, as minimum, "the total monomial costs" of the MEM; to sanction seasonal prices to ensure payment to MEM generators through tariff collection; remuneration of the available power in the hours in which the power is remunerated at the equivalent in pesos to what was paid before Act No 25561, starting commercial operations of the new equipment constructed with FONINVEMEM's resources and establishing as basis for the calculation, the VCP

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[119] Resolution SE 31/2020, February 27, 2020, **AES Ex. 379**. This Resolution abrogated Article 8 of Resolution 1/2019.

[120] Note SE No. NO-2020-24910606-APN-SE#MDP, April 8, 2020, **AES Ex. 383** in Claimant's Reply Memorial, fn. 383, also referred as **AES Ex. 705** in Abdala Regulatory Report, fn. 223.

[121] Request for Arbitration, November 5, 2002; Claimants Updated Memorial, ¶ 29; Respondent's Updated Counter-Memorial, ¶¶ 21, 197.

[122] Suspension Agreement, **AES Ex. 560**.

(maximum VCP to be recognized); the indication that once the market is re-adapted as of the starting of commercial operations of the new equipment, Resolution 240/2003 will have no effects and generators will be remunerated with the Marginal Price of the System in accordance with the Procedures in a free spot market; transfer of resources to the fund in order for the projects to be carried out and for the re-adaptation of the MEM; contracting of natural gas for electric energy generation, among others.

135. Pursuant to the letter and subject to the fulfillment of those conditions by Argentina, the Parties agreed to the suspension as to specific claims by AES (Alicura-CTSN, Parana SCA, Juramento S.A. and Central Dique). The suspension could be extended by mutual agreement. The letter indicates the conditions under which AES would be entitled to unilaterally resume arbitration as well as to withdraw its claims.

B. The 2005 Definitive Agreement[123]

136. The Definitive Agreement is a continuation of the Adhesion Act and has the purpose to initiate the process of re-adaptation for the MEM. Pursuant to this agreement generators assumed a compromise for the construction of two Combined-Cycle Plants of 800MW each and to the conformation of two Generating Companies in charge of the equipment, construction, operation and maintenance of each of the plants (of which the National State would be a shareholder). According to the Agreement, the Supply Contract with the MEM would contemplate a remuneration that would include, in addition to all the fixed and variable costs incurred in the normal operation and maintenance of the Plants, a remuneration for management (the "Management Charge"), in US$/MWh, which would be the only remuneration for the Generating Companies once payment obligations were met; the Generating Companies would be supplied with natural gas; the price of the Supply Contract would include fuel costs and the necessary charge for the payment of the debt acquired with financial investors and the payments to the creditors of LVFVDs.

[123] Definitive Agreement, **A RA 218**.

137. As to the participants with LVFVDs that subscribe the Agreement and those who make capital contributions, the Agreement states that they would have right to a shareholding in the Generating Companies representative of their LVFVDs with respect to the total capital involved and to receive, starting from the commercial operation of the Plants and in 120 installments (equal and consecutive), the return of their credits represented by the LVFVDs, taking into account Article 3 of Resolution No. 406/03 and converted to US dollars. This capital would have an annual return (annual LIBOR rate + 1%). The obligations of both Parties (Secretariat and Generators) were also outlined in Article 6 of the Agreement.[124]

138. On January 11, 2019, AES formally requested to recommence the Arbitration.[125]

IV. APPLICABLE LAW

139. The US-Argentina BIT does not contain a specific provision on the law applicable to investment disputes; however, Article 42(1) of the ICSID Convention, which is applicable between the Parties, provides the following:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. *In the absence of such agreement*, the Tribunal shall apply the *law of the Contracting State party* to the dispute (including its rules on the conflict of laws) and such *rules of international law as may be applicable*." (Emphasis added)

140. Although certain disagreements have been expressed between the Parties,[126] in substance, both Parties have recognized that the dispute should be governed by the

[124] Resolution 1,193/2005, October 7, 2005, **AES Ex. 259** and **A-RA-218**. Article 4 of the Definitive Agreement also contemplated the situation of LVFVD holders that did not subscribe the Agreement.

[125] Claimants Updated Memorial, ¶ 34.

[126] On one hand, the Respondent has indicated that "the parties do not agree on the scope of or the link between the legal rules that govern the dispute" and "AES seeks to distort the scope of Article 42(1) of the ICSID Convention, by requiring an interpretation that indirectly excludes the application of Argentine law." Respondent's Rejoinder Memorial, ¶ 599. On the other, the Claimant has argued that "[…] AES does not 'attempt to exclude Argentine law from the resolution of this dispute.' […] AES does not have to demonstrate that Argentina violated its domestic laws. Whether or not Argentina acted legally under its domestic law is irrelevant to determining Argentina's liability for a breach of the Treaty." Claimant's Reply Memorial, ¶¶ 291, 293.

rules of law indicated in the preceding paragraph;[127] and in particular, that a breach to an obligation in the BIT must be established. In consequence, pursuant to Article 42(1) of the ICSID Convention, the Tribunal determines that the law applicable to the present dispute includes the BIT, any other relevant rule of international law, as well as Argentine law.

V. PRELIMINARY ISSUES

1. Admissibility of the Claim: Waivers, Consent and Estoppel

A. The Respondent's Position

141. The Respondent contends that the actions of the Republic on which AES's claims are based were consented to by the Claimant and that AES in fact granted "express waivers" when formally "participating" in the agreements it entered into as well as in the overall regulatory scheme to which it adhered.[128] The Respondent refers in this regard specifically to: i) the 2005 Definitive Agreement; ii) the 2008-2011 Agreement; and iii) the scheme established by Resolution SE 95/2013.

142. As to the 2005 Definitive Agreement, the Respondent argues that the Claimant "gave its express and formal consent to the terms thereof" and in particular: i) agreed to participate in the management, operation and maintenance of the Manuel Belgrano Thermal Power Plant and the Timbúes Thermal Power Plant; ii) accepted to invest 65% of its receivables for the 2004/2006 period, 50% of its total LVFVDs for the 2007 period and the LVFVDs for the 2008-2011 period; iii) accepted that in exchange for the investment of 65% of its receivables for the 2004/2006 period and the LVFVDs for the 2008-2011 period, it would be entitled to shareholding in the respective Generation Companies; iv) accepted that the return of 65% of its receivables would be carried out from the date of each plant's authorization to

[127] "[…] this Tribunal should analyze AES's claims in accordance with the Treaty and the relevant rules of international law, recognizing that Argentine domestic law plays a role in establishing the network of rights and obligations to which AES was subject upon making its investment." Claimant's Reply Memorial, ¶ 294. "[T]he law governing this dispute includes the provisions of the BIT, as well as the relevant rules of international law and the rules of Argentine law, taken together". Respondent's Rejoinder Memorial, ¶ 605.

[128] Respondent's Updated Counter-Memorial, ¶¶ 473-474; Respondent's Rejoinder Memorial, ¶¶ 474, 475, 481, 551-578; Respondent's Post-Hearing Brief, ¶¶ 93-97, 110, 132.

conduct business, in 120 equal and consecutive instalments; v) accepted that the return of receivables for the LVFVDs for the 2008-2011 period would be carried out from January 2013, in the remaining number of monthly, equal and consecutive instalments provided for in the Definitive Agreement; and vi) accepted that the return of receivables regarding 50% of its LVFVDs for 2007 would be carried out from the date of each plant's authorization to conduct business in 120 equal instalments.[129]

143. As to the 2008-2011 Agreement, the Respondent argues that the Claimant "gave its express and formal consent to the terms thereof" and in particular: i) agreed to participate in the construction, operation and maintenance of the Guillermo Brown Thermal Power Plant; ii) agreed to invest in the execution of that project its receivables represented by LVFVDs for the 2008-2011 period not allocated to certain schemes, those originally invested under the Resolution SE 724/2008 scheme, receivables related to the increase in remuneration and those for the January 2012-January 2013 period; iii) agreed that in exchange for its participation it would receive a shareholding in the Guillermo Brown S.A. Thermal Power Plant; iv) agreed that the return of its receivables would be carried out as from the date of each plant's authorization to conduct business, in 120 equal and consecutive instalments; and v) "expressly and irrevocably waived all rights it might have and withdrew all actions and/or claims filed or pending against the Argentine State and/or the Secretariat of Energy and/or CAMMESA relating to the application of Resolution SE 240/2003 and Resolution SE 406/2003, as amended and supplemented, and other instructions issued by the Secretariat, during the period between the entry into force of the abovementioned resolutions and 31 December 2011, inclusive".[130]

144. As to the scheme provided in Resolution SE 95/2013, the Respondent argues that the Claimant "gave its express and formal consent to the terms thereof", in particular: i) "expressly accepted and agreed to abandon the remuneration mechanism based on marginal costs"; ii) "agreed to receive remuneration pursuant to the

[129] Respondent's Updated Counter-Memorial, ¶ 475.

[130] Respondent's Updated Counter-Memorial, ¶ 476.

methodology established in Resolution SE 95/2013"; iii) deemed the 2008-2011 Agreement terminated on December 2011 in relation to "Remuneration for Power Made Available" and "Maximum Maintenance Costs and Other Non-Fuel Costs"; iv) "waived and withdrew all claim against the Argentine State and/or the Secretariat of Energy and/or CAMMESA in connection with the 2008-2011 Agreement and/or in relation to Resolution SE 406/2004"; and v) "agreed that the portion of the additional remuneration to be placed in trust was to be provided through its investment in new infrastructure projects."[131]

145. According to the Respondent, all the measures taken after 2013 "placed AES in a position that was better than or identical to the one it was in under the regime it chose to accept by adhering to Resolution SE 95/2013" and Claimant's arguments are "in flagrant contradiction with its previous acts, representations, waivers and acceptances with respect to the Argentine Republic".[132]

146. The Respondent contends that the Claimant's participation in the agreements, its withdrawals and waivers were voluntary,[133] that the Claimant has acted in bad faith and committed an abuse of rights by refiling its claim and that, in consequence, the claim must be rejected.[134] In its Updated Counter-Memorial, the Respondent also mentioned the doctrine of estoppel, it indicated that this doctrine related to the

[131] Respondent's Updated Counter-Memorial, ¶ 477.

[132] Respondent's Updated Counter-Memorial, ¶¶ 478, 479.

[133] "If AES had deemed that participating in the 2005 Definitive Agreement and the 2008-2011 Agreement was the result of 'coercion' or that they amounted to a violation of the BIT, as it contends in its Updated Memorial, it would have acted in a manner consistent with such conviction and would not have suspended this arbitration proceeding for more than 13 years on the basis of those very agreements" […] "the 2005 Definitive Agreement and the 2008-2011 Agreement were the result of negotiations between the generators, including AES, and the Secretariat of Energy. In addition, AES has expressly consented to and accepted their terms, not only by signing them, but also by complying with and benefiting from them for nearly 15 year[s] […] with regard to the 2008-2011 Agreement, AES was the architect and promoter of the construction of the Guillermo Brown Thermal Power Plant". Respondent's Updated Counter-Memorial, ¶¶ 487, 489; see also ¶¶ 480-498.

[134] Respondent's Updated Counter-Memorial, ¶¶ 499-505; Respondent's Rejoinder Memorial, ¶ 482. In its Post-Hearing Brief, the Respondent also submits that the claim cannot succeed due to Claimant's "acquiescence". Respondent's Post-Hearing Brief, ¶¶ 131-142.

principle of good faith and that the Argentine Republic's trust had been betrayed by the Claimant's conduct.[135]

B. The Claimant's Position

147. The Claimant argues that AES never waived its claims. According to the Claimant, only two of the instruments that Argentina relies upon contain "purported waivers" but neither address matters at issue in this Arbitration; there is no waiver as a matter of law; and the parties' conduct demonstrates there is no waiver. The Claimant alleges that a waiver is effective when the language is unequivocal and the parties to an alleged waiver are identical to those in the dispute. In this sense, the Claimant points to the fact that, in other cases, Argentina has included express language regarding international arbitration proceedings or extending the waivers to parent companies. AES indicates that The AES Corporation is not part of the purported waivers.[136] In its Post-Hearing Brief, the Claimant expresses that Argentina has not "advanced any argument whatsoever or any legal theory that would justify conflating AES Argentina and The AES Corporation. Piercing the veil is an extraordinary equitable remedy reserved for the gravest of circumstances […] none of which is present here".[137]

148. The Claimant also contends that "[t]he parties have a clear practice in this case of informing the Tribunal when claims have been waived or withdrawn, but they never did so for the claims relating to the AES Generators", which contrasts with the claims related to EDEN, EDES, EDELAP and Central Dique.[138]

149. The Claimant has expressed that "signing the Definitive Agreement and giving a speech at the Casa Rosada […] cannot mask the lack of choice that AES Argentina faced. Nor can AES Argentina's participation in the discussions on the

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[135] Respondent's Updated Counter-Memorial, ¶¶ 502-504. In its Rejoinder Memorial, the Respondent further elaborated its arguments indicating that pursuant to this doctrine, AES's claim had to be rejected. Respondent's Rejoinder Memorial, ¶¶ 579-597 and Respondent's Post-Hearing Brief, ¶¶ 91, 92, 110.

[136] Claimant's Reply Memorial, ¶¶ 273-280. Claimant's Post-Hearing Brief, ¶¶ 162-164, 166.

[137] Claimant's Post-Hearing Brief, ¶ 168. See also ¶¶ 170-173.

[138] Claimant's Reply Memorial, ¶¶ 281-283. Claimant's Post-Hearing Brief, ¶ 165.

construction of the FONINVEMEM plants or its leadership in building and operating Guillermo Brown be mistaken for choice"; that if the Claimant had not signed on to the new scheme, the other option was bankruptcy, that AES's participation in these regimes was conditioned to Argentina complying with its obligations to restore the MEM and AES's suspension of the Arbitration was conditioned to Argentina's compliance with the obligations it undertook.[139]

150. The Claimant has also indicated that "when the FONINVEMEM plants began operations in 2010, Argentina did not restore the MEM. Instead, it reaffirmed this obligation in the Generators' Agreement, while in parallel it began paying AES Argentina its monthly installments from the FONINVEMEM I and II plants. In light of Argentina's conduct, AES was cautiously optimistic about Argentina's commitment to restore the market". Regarding Respondent's arguments on the Claimant not initiating the Arbitration in 2013, the Claimant submits that "the resolution lacked clarity, and, at the time, AES was engaged in intense negotiations with Argentina to settle this Arbitration and another dispute between an AES subsidiary (AES Uruguaiana) and YPF"; that "President Mauricio Macri's election in 2015 […] raised AES's hope that the new government would make good on its promises […]. In this context of renewed political goodwill, AES saw a window to reactivate negotiations", "[f]rom 2016 to 2018, representatives from AES and Argentina continued negotiations", but to AES's surprise, Argentina abruptly ended settlement talks and told AES that 'no resolution of the claims was possible outside of the arbitration'", thus "AES had no choice but to recommence the Arbitration".[140]

151. With regards to the estoppel defense, the Claimant contends that the Respondent has not set out nor does it satisfy the elements of the test for estoppel. The Claimant refers that: i) Argentina cannot identify any clear statement that indicates settlement of the claims; ii) any alleged statement was involuntary and conditional; iii) Argentina has failed to establish detrimental reliance or a benefit to

[139] Claimant's Post-Hearing Brief, ¶¶ 178-182.

[140] Claimant's Post-Hearing Brief, ¶¶ 183-186.

AES; iv) the improvements in conditions experienced at times by certain of the AES Generators do not erase Argentina's breaches or the damages AES suffered; and v) if any party could assert estoppel in this case, it would be AES.[141]

152. As to the principle of good faith and abuse of rights, the Claimant argues that "AES has not attempted to manufacture a treaty claim against Argentina through any artificial business transactions"; tribunals will affirm evidence of abuse on exceptional circumstances, which do not exist here; AES has acted in good faith throughout this proceeding; Argentina has acted in bad faith by coercing AES to participate in the agreements and moreover ended settlement talks manifesting that no resolution would be possible outside of the Arbitration.[142]

C. The Tribunal's Analysis

153. The Respondent has raised several issues related to the admissibility of the claim. In particular, it has made reference to consent or acquiescence, waivers, the principle of good faith, abuse of rights and the principle of estoppel. The Tribunal understands that overall, Respondent's contention is that the claim is inadmissible on the basis of: i) express waivers; ii) consent or acquiescence; and iii) the principle of estoppel. The Tribunal will address these issues, in turn, in the following section.

i. Whether the Claimant Waived its Claims

154. The Respondent contends that "[t]he actions on which AES's claim is based […] *were expressly consented to* by Claimant and *are covered by the express waivers it granted in participating in those agreements and adhering to the scheme established by Resolution SE 95/2013."*[143] Respondent's submission on this point combines two allegations, the first, that the Claimant has consented to the measures, and second, that the Claimant waived any claim against Argentina. While the Respondent has combined both arguments, the Tribunal considers it appropriate to

[141] Claimant's Reply Memorial, ¶¶ 257-273. Claimant's Post-Hearing Brief, ¶¶ 174-189.

[142] Claimant's Reply Memorial, ¶¶ 284-288.

[143] Respondent's Updated Counter-Memorial, ¶ 474.

address first the argument on the issue of waivers and then the argument on the issue of consent.

155. While presenting its arguments, the Respondent refers primarily to three documents: i) the 2005 Definitive Agreement; ii) the 2008-2011 Agreement; and iii) Resolution SE 95/2013. At the outset, the Tribunal observes that once an investor has chosen to submit its dispute in accordance with paragraphs 2 c) and 3 of Article VII of the Treaty, arbitration is binding and so is any arbitral award rendered under this article.[144]

156. The issue of waivers has been addressed by other investment tribunals – in certain cases, in relation to contractual commitments that waive jurisdiction; in others, in relation to fork in the road provisions or estoppel. For example, when analyzing both the waiver of jurisdiction and fork in the road provision at issue in that case, the tribunal in *Azurix v. Argentina* considered as central elements the identity of the parties and the cause of action.[145] In its analysis of whether there had been a waiver and whether the dispute under the BIT (the same BIT at issue in the present dispute) was of contractual nature, the tribunal found that the "rights under the Concession Agreement and under the BIT [were] not the same"[146]

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[144] Treaty, Art. VII, paragraphs 2, 3, 4 and 6.

[145] "*Azurix has not filed with this Tribunal a claim against any of the parties to the Contract Documents but against the Respondent. The Respondent* itself has stated repeatedly in this proceeding that it *is not party to any of the Contract Documents* […] The tribunals in the cases cited concluded that such *forum selection clauses* did not exclude their jurisdiction because the subject-matter of any proceedings before the domestic courts under the contractual arrangements in question and the dispute before the ICSID tribunal was different and therefore the forum selection clauses did not apply. *This reasoning applies equally to the waiver of jurisdiction clause in this case.* […]." "Given the conclusion reached above *on the differentiation of the claims and the parties*, the Tribunal does not need to consider this matter extensively". *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Award on Jurisdiction, December 8, 2003, **AES Auth. 220**, ¶¶ 76, 78, 92. (Emphasis added).

[146] "[…] *Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot per se transform the dispute under the BIT into a contractual dispute.* […] The point is that *the rights under the Concession Agreement and under the BIT are not the same* […] […] In the dispute before the present Tribunal […] the State is not a party to any of the Contract Documents, and *there was no waiver commitment made by the Claimant in favor of Argentina*." *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Award on Jurisdiction, December 8, 2003, **AES Auth. 220**, ¶¶ 76, 81, 85. (Emphasis added)

157. In *Enron* and in *Pan Am v. Argentina* the tribunals also considered the identity of the parties and the cause of action as relevant.[147] On the other hand, the language used and its clarity as to the specific intention was also highlighted as a determining element by the tribunal in *Occidental v. Ecuador*.[148] That tribunal, while recalling *Aguas del Tunari v. The Republic of Bolivia*, determined that:

> "The tribunal in that case [*Aguas del Tunari*] further cautioned […] '*The Tribunal will not read an ambiguous clause as an implicit waiver of ICSID jurisdiction; silence as to the question is not sufficient.' That caution is apposite in the present case and this Tribunal adopts it*. […] Had the parties wished to exclude such disputes from ICSID jurisdiction and confer exclusive jurisdiction to the Ecuadorian administrative courts in this regard, they could have done so. They did not and the Tribunal will not imply such wording in the clause. […] nothing in the Participation Contract supports or even suggests that this language, when read in context, reveals *a common intention to waive ICSID jurisdiction over caducidad-related disputes, and the Tribunal so finds*. […] Had it been the parties' intention to exclude *caducidad* disputes from ICSID arbitration in favour of the exclusive jurisdiction of the Ecuadorian administrative courts, they could have very easily done so with language akin to that found in the above-quoted provisions."[149]

158. In the Tribunal's opinion, the analysis of a waiver that will potentially exclude jurisdiction expressly granted in an investment protection treaty must include a careful examination of the elements already identified, *i.e.*, the parties, the cause of action giving rise to the dispute and the specific language used. All this, taking into

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[147] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, **AES Auth. 227**, ¶¶ 97, 98. *Pan Am. v. Argentina,* ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, **AES Auth. 241**, ¶ 155, 156. Regarding fork in the road, *see Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 443.

[148] *Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Jurisdiction, September 9, 2008, **AES Auth. 236**, ¶ 71, recalling *Aguas del Tunari v. The Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, dated 21 October 2005, ¶ 119: "[I]t is the Tribunal's view than an ICSID tribunal has a duty to exercise its jurisdiction in such instances absent any indication that the parties *specifically intended that the conflicting clause act as a waiver or modification of an otherwise existing grant of jurisdiction to ICSID*. A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID. As stated above, an *explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal.* However, *the Tribunal will not imply a waiver or modification of ICSID jurisdiction without specific indications of the common intention of the Parties*." (Emphasis added)

[149] *Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Jurisdiction, September 9, 2008, **AES Auth. 236**, ¶¶ 72-74, 81. (Emphasis added)

consideration the particular circumstances of the case. A waiver should not be presumed nor construed broadly, in particular when the relevant instrument does not contain an express provision on this issue. While waivers in relation to investment disputes may be found to exist in certain circumstances, the Tribunal is of the view that such waivers must be clear and explicit, leaving no doubt that the intention of the parties was to withdraw from the dispute settlement regime conferred by the treaty at issue; in this case, this would mean a clear and explicit waiver by AES of the investment arbitration provided in Article VII of the Treaty.

159. Turning to the evidence, the first document alleged by the Respondent as constituting a waiver of claims by AES, the 2005 Definitive Agreement, is contained in Annex 1 to Resolution SE 1193/2005. Articles 1 to 5 and 7 to 9 contain several provisions detailing the object, scope, basic guidelines, remuneration and rights of participants, advisory groups, applicable law, termination and schedule regarding the process of readaptation of the MEM and in particular the construction, operation and maintenance of two power plants. Article 6 titled "Commitments and Responsibilities of the Parties" indicates the compromise undertaken by the generators to form the Generator Companies, to carry out the construction and commercial operation of the plants, to guarantee the availability of additional funds that may have been compromised and to guarantee the commercial operation of the plants.[150] Neither Article 6 nor any other provision of the Definitive Agreement contemplates a waiver of claims against Argentina.

160. Regarding the second document, the 2008-2011 Agreement, Article 3.2 provides in subparagraph (iv) the following:

> "The *GENERATORS* expressly and formally declare their full agreement with the terms established in this AGREEMENT and *expressly and irrevocably renounce and desist from all rights* that they *may eventually invoke* and *all actions and/or claims filed or in progress* against the NATIONAL STATE and/or the SECRETARIAT OF ENERGY and/or CAMMESA due to the application of Resolution SE No. 240/2003 and Resolution SE No. 406/2003, their amendments and supplements, *and other*

[150] Resolution SE 1193/2005, 7 October 2005, Annex: "Definitive Agreement for the Management and Operation of Projects for the Readjustment of the MEM under Resolution SE 1427/2004", **Exhibit RA 218**, Art. 6.

instructions issued by the SECRETARIAT in the period included from the entry into force of the resolutions herein mentioned up until December 31, 2011."[151]

161. At first sight, the Tribunal notes that the entities expressly renouncing the rights and claims identified in the Article are "the generators", which according to that instrument are "the undersigned companies represented by their representatives."[152] While AES Argentina is within the signatures and thus may be considered as part of "the generators", the Claimant in this case, *i.e.*, the AES Corporation is not.[153] The entities that assumed compromises with respect to the construction, operation and maintenance of certain power plants or that accepted to be involved, in accordance with the evidence presented by the Respondent, were AES Argentina Generación S.A, AES Alicurá S.A, AES Juramento, C.T AES Paraná, Hidrotérmica San Juan S.A and Central Térmica San Nicolás S.A. The Tribunal thus understands that compliance of those compromises was required from these companies or overall from AES Argentina Generación, S.A., not from the Claimant.[154] The Tribunal notes as well that there was no confusion as to the identity

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[151] 2008-2011 Agreement for Management and Operation of Projects, Increase in Thermal Generation Availability and Adjustment of Remuneration for Generation, 25 November 2010, **AES Ex. 290**, Art. 3.2. (Unofficial translation) (Emphasis added). This Agreement was modified in 2011 and 2012, however, this provision was not modified. *See* Addendum No. 1 to the 2008-2011 Agreement for Management and Operation of Projects, Increase in Thermal Generation Availability and Adjustment of Remuneration for Generation, 29 March 2011, **Exhibit RA 274** and Addendum No. 2 to the 2008-2011 Agreement for Management and Operation of Projects, Increase in Thermal Generation Availability and Adjustment of Remuneration for Generation, 25 June 2012, **Exhibit RA 268**.

[152] 2008-2011 Agreement for Management and Operation of Projects, Increase in Thermal Generation Availability and Adjustment of Remuneration for Generation, 25 November 2010, **AES Ex. 290**, preamble. (Unofficial translation).

[153] "In order for the alleged contractual waiver by Claimant to be *effective*, *the parties involved must be identical*. The parties to the contracts which, according to Respondent, would have given effect to the waiver by Claimant of the BIT arbitration, *i.e.* the two Licence Contracts, should be Ulysseas, on one side, and the State of Ecuador, on the other. *Only these two parties could have in fact waived a dispute settlement method available to them under the BIT by adopting the one regulated by Article 30 of the Licence Contracts*." *Ulysseas, Inc. v. Ecuador,* Interim Award, September 28, 2010, **AES Auth. 253**, ¶ 151. (Emphasis added)

[154] The Respondent has made reference to several other documents, such as: See Letter B-31305-1 from CAMMESA of 20 October 2005, **Exhibit RA 219**; Resolution SE 1371/2005, 27 October 2005, **Exhibit RA 370**; Memorandum on Conversion of Receivables into US Dollars of 13 October 2006, **AES Ex. 265**; Resolution SE 564/2007, 31 May 2007, **AES Ex. 273**; Statements by AES Alicurá S.A., AES Juramento, Central Térmica San Nicolás S.A. and Central Térmica AES Paraná – Resolution SE 564/2007, 14 June 2007, **Exhibit RA 246**; Letter B-38419-1 from CAMMESA to the Secretariat of Energy of 19 June 2007, **Exhibit RA 244**; Letter B-38419-2 from CAMMESA to the Secretariat of Energy of 25 June 2007, **Exhibit RA 245**; Letter SE 4230 of 16 December 2008, **Exhibit RA 243**; Letter from the shareholders of Termoeléctrica José de

of the signatory by Argentina's Secretary of Energy at the time this Agreement was signed either.[155] The rights (and obligations) of the investor and those of a subsidiary that is its investment are different. The Treaty confers rights upon an investor, *i.e.*, the Claimant; therefore, any potential contractual waiver by AES Argentina would not be a waiver of the rights conferred upon the AES Corporation as an investor under the Treaty.[156]

162. Related to this point, a further element to analyze to determine the existence or not of a waiver is the cause of action that gives right to this arbitration. Pursuant to Article VII of the Treaty, the Request for Arbitration was submitted by the AES Corporation as beneficiary of certain obligations that must be accorded by Argentina pursuant to the Treaty.[157] While certain claims have been dropped, the fact remains that the legal basis for this dispute is a breach of obligations under the Treaty, more specifically, FET, Minimum Standard of Treatment, Arbitrary and Discriminatory Measures as well as FPS. In this sense, any rights that could have been renounced

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San Martín S.A. and Termoeléctrica Manuel Belgrano S.A. of 5 November 2008, with Methodology for Application of the US-Dollar Conversion Memorandum attached, **Exhibit RA 242**; Letter submitted by the generators to the Secretariat of Energy on 28 April 2011, **Exhibit RA 261**; Resolution SE 1261/2012, 26 July 2012, **Exhibit RA 262**; Order MPFIPyS 2489/2012, 10 December 2012, **Exhibit RA 263**; Letter B-84261-1 from CAMMESA of 7 October 2013, **Exhibit RA 265**; Financial Statements of AES Argentina Generación S.A. as of 31 December 2018, **AES Ex. 407**, p. 730; Letter from AES to CAMMESA of 23 March 2011, attached Project, pp. 1 and 3, **Exhibit RA 272**; Statement by AES Generación Argentina S.A., 24 September 2013, **Exhibit RA 262**; Letter SE 3327, 19 June 2013, **Exhibit RA 285**; Letter SE 6030, 7 October 2013, **Exhibit RA 286**; Letter SE 6413, 21 October 2013, **Exhibit RA 287**; Letter B-93691-1 from CAMMESA of 12 November 2014, pp. 1-3, **Exhibit RA 288**. The Tribunal observes that, while those documents demonstrate participation of certain companies such as AES Alicurá S.A, AES Juramento, C.T AES Paraná, Hidrotérmica San Juan S.A or Central Térmica San Nicolás S.A., none of them refer to the Claimant in this arbitration nor its allegation as to a waiver made by this party.

[155] Referring to the signing of the 2008-2011 Agreement: "It's not signed by AES Corp.; right? A. Who? Q. AES Corporation. A. Who is AES Corporation? It's signed in this case by the President of AES Argentina." Day 5, Tr. (Eng), P1547: 13-18 (Cameron)

[156] To express question by the Tribunal: "Are you aware whether or not there was any consultation between AES Argentina and Corp. in respect of this matter? THE WITNESS: In respect to this language in this letter? ARBITRATOR DRYMER: Yes. THE WITNESS: No. ARBITRATOR DRYMER: Okay. In respect to the generators agreement, the 2008 to 2011 Agreement generally? THE WITNESS: Yes, there were discussions about the generator's agreement, of course. But specifically in this, you know, waiver, this is a decision from AES Argentina Generación. I don't recall we had any discussions on this." Day 3 Tr. (Eng), P777:7-21 [redacted]. See also P778:11-14.

[157] Request for Arbitration, November 5, 2002.

under the 2008-2011 Agreement do not extend to the Claimant's rights under the Treaty.[158]

163. As to the language used in the text of the Agreement, the Tribunal observes that it is quite broad. The text refers to "all rights" that may eventually be invoked by the generators and "all actions and/or claims". While the first part related to "all rights" is drafted to include future events, the second part related to "all actions and/or claims" seems to be limited to past and present events due to the reference "filed or in progress". Moreover, the text does not indicate which actions and claims are being renounced or withdrawn. In addition to this, the legal basis and temporal scope is also broad. While the text refers to two resolutions of 2003, it also widens the basis to "amendments", "supplements" and "other instructions" for a relatively long period of time up to 2011.[159]

164. Even if this Tribunal were to find a basis to equate AES Argentina Generación, S.A. with the Claimant (which it does not), the exceedingly broad language used in Article 3.2 would arguably be at odds with the clarity and precision that must characterize a waiver. To deem such a text as a waiver in the sense attributed to it by the Respondent could perhaps also be said to go against the very objective of the Treaty.

165. In this regard, the Tribunal recalls that the preamble of the US-Argentina BIT clearly contemplates as an objective "to conclude a Treaty concerning the encouragement and reciprocal protection of investment", it recognizes the desirability of a stable framework and the impact that the treatment of investments may have over

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[158] *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Award on Jurisdiction, December 8, 2003, **AES Auth. 220**, ¶¶ 76 and 81; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, **AES Auth. 227**, ¶¶ 97-99; *Pan Am. v. Argentina,* ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, **AES Auth. 241**, ¶ 156 and 157; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶¶ 550 and 551.

[159] Resolution 240/2003 extended the AR$ 120/MWh cap to apply at all times and excluded non-natural gas plants from the setting of hourly spot prices. Resolution 406/2003 established a transitory mechanism for the allocation of funds to pay the MEM creditors, establishing a priority payment system. Through a further resolution, Resolution 943/2003, receivables were divided in two categories: Receivables with a determined due date and Receivables with an undetermined due date.

the flow of private capital and the economic development of the Parties. Such an intention between the United States and Argentina as Parties to this Treaty, reflected as well in Article VII.4, would be hard to reconcile with Article 3.2 of the 2008-2011 Agreement.

166. An entirely separate basis to dismiss Respondent's argument is derived from the regular letters submitted to this Tribunal by the Parties. The language used in the joint letters submitted every 6 months from 2006 to 2016 refers to "degree of progress", "pending claims", "commitments […] pending", "maintain the suspension", "extend the suspension", "continue with the dialogue", "not modify the status of suspension". In the Tribunal's view, such statements directly contradict Argentina's assertion that the claims were settled or waived; on the contrary, there is an express recognition that the claims were "still there".[160] Those letters were signed by Argentina's Representative, therefore such recognition extends to the Respondent as well. If according to the Respondent, AES's claims had been already waived by virtue of the 2008-2011 Agreement, the Tribunal cannot fathom why after 2010 it continued submitting joint letters referring to "pending claims"[161] or why it extended the suspension of this arbitration up to 2018.[162] In the Tribunal's view, rather than supporting its interpretation on the meaning and the party subject to the alleged waiver, the evidence is entirely at odds with it.

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[160] The letters submitted separately from July 2017 to September 2018 do not reflect a different intention. Suspension Letters, **AES Ex. 562** in general and pp. 53-73 on the separate letters. See also language in the Suspension Agreement: [s]ubject to the Argentine Republic's fulfillment of the conditions prescribed in article 4.1. of the referred ADHESION ACT FOR THE RE-ADAPTATION OF THE WHOLESALE ELECTRIC MARKET […]. The AES Corporation and the Argentine Republic *agree to suspend the arbitration* […]". Suspension Agreement, **AES Ex. 560**, p. 4 (Emphasis added), as well as Letter from AES to the Arbitral Tribunal of 27 November 2005, **Exhibit RA 376** and Joint letter from the parties to the Arbitral Tribunal of 20 December 2005, **Exhibit RA 306**. The language used regarding Empresa Distribuidora La Plata S.A and Central Dique S.A on "desistimiento" and "withdrawal" is substantially different. *See* Suspension Letters, **AES Ex. 562**, pp. 30, 31; Joint Letter to the Tribunal, August 9, 2006, **A RA 296** and Joint Letter to the Tribunal, November 14, 2011, **A RA 297.**

[161] Letter dated 11 December 2010; Letter dated 11 June 2011; Letter dated 11 December 2011; Letter dated 11 June 2012; Letter dated 11 December 2012; Letter dated 11 June 2013; Letter dated 11 December 2013; Letter dated 11 June 2014; Letter dated 11 December 2014; Letter dated 11 June 2015; Letter dated 11 December 2015; Letter dated 11 June 2016; Letter dated 11 December 2016. Suspension Letters, **AES Ex. 562**, pp. 23-52.

[162] Letter dated 5 July 2017 and emails sent on 13 December 2017, 11 June 2018 and 11 September 2018. Suspension Letters, **AES Ex. 562**, pp. 53-54, 63, 68 and 73.

167. Accordingly, the Tribunal finds that the Claimant in this arbitration did not waive its rights, actions and claims towards Argentina through Article 3.2 of the 2008-2011 Agreement.

168. Regarding the third document, Resolution SE 95/2013 established a new remuneration scheme. The resolution highlights in its recitals the importance of the activity of power generation and among the considerations expressed therein, it states:

> "That, for the purposes of receiving the total remuneration defined in this regulation, the Agents reached by it must ensure the absence of ongoing administrative claims or judicial processes raised by them against the NATIONAL STATE, the SECRETARIAT OF ENERGY and/or CAMMESA regarding the AGREEMENT FOR THE MANAGEMENT AND OPERATION OF PROJECTS, INCREASE IN THE AVAILABILITY OF THERMAL GENERATION AND ADJUSTMENT OF REMUNERATION FOR GENERATION 2008-2011" (hereinafter, the "2008-2011 AGREEMENT") and any administrative and/or judicial claim related to Resolution S.E. No. 406/2003."[163]

169. Virtually the same statement is made through the obligation established in Article 12 of this Resolution:

> "It is established that this resolution will be applicable from the Economic Transactions corresponding to the month of February 2013, and specifically for each generating agent, prior sending to CAMMESA by this SECRETARIAT OF ENERGY, of the acceptance of withdrawal that each of the generating agents must make, of any administrative and/or judicial claim that may have been made against the NATIONAL STATE, the SECRETARIAT OF ENERGY and/or CAMMESA regarding the AGREEMENT FOR THE MANAGEMENT AND OPERATION OF PROJECTS, INCREASE IN THE AVAILABILITY OF THERMAL GENERATION AND ADJUSTMENT OF REMUNERATION FOR GENERATION 2008-2011" (hereinafter, the "2008-2011 AGREEMENT") and any administrative and/or judicial claim related to Resolution S.E. No. 406/2003. Likewise, each generating agent must undertake to renounce making administrative and/or judicial claims against the NATIONAL STATE, the SECRETARIAT OF ENERGY and/or CAMMESA regarding the aforementioned AGREEMENT and the Resolution referred to in this article."[164]

170. Through letter dated 31 May 2013, AES ARGENTINA GENERACIÓN S.A, complied with this requirement and expressed:

> "[…] within the framework of Resolution S.E. N° 95 of March 22, 2013, under the understanding that both Parties will comply with their obligations, I come to comply

[163] Resolution SE 95/2013, 22 March 2013, **AES Ex. 304**, Preamble. (Unofficial translation).

[164] Resolution SE 95/2013, 22 March 2013, **AES Ex. 304**, Art. 12. (Unofficial translation).

> with the provisions of Article 12 thereof and to formally adhere to the aforementioned Resolution, accepting it in all its terms.
> In this regard, AES ARGENTINA GENERACIÓN S.A. desists from any administrative and/or judicial claim that may have been made against the NATIONAL STATE, the SECRETARIAT OF ENERGY and/or CAMMESA regarding the AGREEMENT FOR THE MANAGEMENT AND OPERATION OF PROJECTS, INCREASE IN THE AVAILABILITY OF THERMAL GENERATION AND ADJUSTMENT OF REMUNERATION FOR GENERATION 2008-2011, which we deem concluded on December 31, 2011, with respect to numeral 4 and 5, and of any other administrative and/or judicial claim related to Resolution S.E. N° 406 dated September 8, 2003. Likewise, it desists from initiating new administrative and/or judicial claims against the NATIONAL STATE, the SECRETARIAT OF ENERGY and/or CAMMESA regarding the AGREEMENT and the Resolution mentioned above."[165]

171. The letter was submitted by AES ARGENTINA GENERACIÓN S.A. as one of "the generators" recognized in other documents. Therefore, the party desisting from administrative and judicial claims can only be AES ARGENTINA GENERACIÓN S.A. The requirement of identity of the parties is thus not fulfilled.

172. In addition to this, the considerations on the cause of action that gave rise to this arbitration are pertinent once more. Without specific evidence that the AES Corporation consented to the text presented in that letter or through any other means, the Tribunal cannot presume a waiver on the Claimant's part of a dispute settlement mechanism expressly granted through the Treaty, neither can it equate the investor with its investment.

173. Furthermore, the Tribunal finds that the language used does not support Respondent's contention. The wording refers to "any administrative and/or judicial claim" and "new administrative and/or judicial claim". There is no mention of arbitration/international arbitration/investor-State arbitration, proceedings that differ in nature from administrative or judicial procedures. The Tribunal notes a sharp contrast with the language expressed in other clauses included in renegotiation agreements, such as: "[suspension or withdrawal]" at "administrative, arbitral or

[165] Letter from AES of 31 May 2013 to the Secretariat of Energy, **Exhibit RA 122**.

judicial level of our country or abroad"[166] and "shall extend to the rights and actions that could be pursued before administrative, arbitral, or judicial bodies, whether domestic or foreign".[167] Therefore, in the Tribunal's opinion, by their own terms, whatever may be the effect of the Resolution and of AES Argentina Generación's 31 May 2013 letter, it cannot amount to a waiver applicable to this proceeding.

174. The considerations expressed above as to the language used in the joint letters submitted to the Tribunal suspending the arbitration and referring to "pending claims" are also applicable. At the hearing one of Respondent's witnesses indicated that he was not aware of the arbitration or the suspensions when occupying the position of Secretary of Energy and that after Resolution 95/2013 with the waiver, it was "a fresh start" for them. Another witness indicated that in 2018 he advised the government on AES's claim, concluding it was without a basis. By this time, Argentina had already extended the suspension of the arbitration for eight years since the 2008-2011 Agreement and five years after Resolution 95/2013.[168] The Tribunal finds a contradiction between alleging on one hand that, due to the waivers there was no basis for a claim, and that there was a fresh start, and on the other hand, willfully extending the suspension of a claim for several years on account of the fulfillment of commitments and the dialogue between the Parties.[169]

175. In light of the above, the Tribunal determines that the Claimant did not waive claims against Argentina through the letter complying with the requirement established by Article 12 of Resolution 95/2013.

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[166] (Unofficial translation). Letter of Understanding between Unidad de Renegociación y Análisis de Contratos de Servicios Públicos ("UNIREN") and EDELAP, November 12, 2004, **AES Ex. 549,** Sections 21.1.1, 21.1.5, 21.2.8. *See also* Decree No. 1957/2006, **AES Ex. 564**, Sections 22.1.1, 22.1.5, 22.2.1, 22.2.9, 22.3.1; Decree No. 385/2006 (Gas Natural Ban S.A.), **AES Ex. 561**, Sections 18.1.1, 18.1.5, 18.2.1, 18.2.7.

[167] (Unofficial translation). Decree No. 1959/2006, **AES Ex. 565**, Section Nine, 21.1.1, 21.1.5, 21.2.1 and 21.2.7.

[168] Letter dated 11 June 2013; Letter dated 11 December 2013; Letter dated 11 June 2014; Letter dated 11 December 2014; Letter dated 11 June 2015; Letter dated 11 December 2015; Letter dated 11 June 2016; Letter dated 11 December 2016. Suspension Letters, **AES Ex. 562**, pp. 23-52.

[169] "[…] to us, it was just we start from scratch. This is a new stage", Day 5, Tr. (Eng), P1501:19-20 (Cameron) and Day 6, Tr. (Eng), P1702:1-P1704:1 (Sruoga).

ii. Claimant's Consent or Acquiescence

176. The Respondent has raised the issue of consent. Such issue, in the Tribunal's understanding, has two sides: *first*, whether the Claimant consented to a waiver of its claims, and *second*, whether the Claimant consented to the terms of the Agreements. The Tribunal considers that both points have been disposed of in the preceding section. It reiterates two points. *First*, the evidence presented does not indicate that the Claimant ever agreed to a waiver of its claims against Argentina. The texts presented as waivers by the Respondent referred to the generators and the AES Corporation was not included in that group. Also, while the basis for the arbitration may cross paths with the legal basis under domestic law, this arbitration was initiated pursuant to the obligations established in the US-Argentina BIT and in exercise of the protections granted to the Claimant as an investor. Additionally, the text made no reference to international arbitration claims but to "all rights" and all "actions and claims" in one case, and "administrative and judicial claims" in the other. Finally, the letters submitted by the Claimant itself in this arbitration did indicate the intention to "suspend" the claims rather than "withdraw" them.

177. *Second*, regarding whether the Claimant consented to the terms of the agreements and schemes contained therein, once again the evidence in the record refers to the "generators" and not to the Claimant. The Claimant was not a generator that undertook those commitments. Moreover, even if for the sake of argumentation those actions could be said to have impacted on the Claimant for waiver purposes, those documents reflect a participation in schemes which the Tribunal is unable to

find was "free" rather than based on the pressure exerted by Argentina in the circumstances,[170] as developed further in this Award.[171]

178. Accordingly, the Tribunal considers that the generator's participation in the agreements does not have a bearing on the admissibility of Claimant's claims against Argentina in this arbitration.

iii. Whether the Claimant is Estopped from bringing the Claim

179. The Respondent has also invoked the principle of estoppel indicating that the principle of good faith "prevents parties from blowing hot and cold, affirming at one time and denying at another."[172] In this regard, the Tribunal recalls that such principle requires: i) a clear and unequivocal representation previously made; ii) on which another party relied; and iii) with the result that the party who relied on the

[170] Referring to Resolution 95/2013, "By the fourth quarter of 2012, almost 100 percent of hours--and that was the last part of the year when there's less demand, these were above that max of 120. This means that if generators had not adhered to this, or Argentina Generación, then their situation would have been dramatically different because there weren't any hours anymore during which combined-cycles were profitable because of this. So reality is that there wasn't any other alternative but to accept this." "If we hadn't joined 95, our combined-cycles would have been above the spot price, and we would have failed for sure. There was no other possible decision." "ARBITRATOR DRYMER: What are you referring to here? Can you explain that idea of trying to avert bankruptcy of certain plants? THE WITNESS: Yes. Okay. (In Spanish.) What I am saying here is that with Resolution 95, once again, this is related to what the attorney asked me at the outset about the small power plants. AES did have small plants, small plants in their portfolio. They still have them in El Tunal, Cabra Corral, in San Juan there are some smaller ones also with 30 megawatts. These plants were--or the cost of these plants above was being paid through Resolution 95. AES Argentina had to subsidize these plants that were above the average cost or this number that the Secretary of Energy gave us. These plants needed to continue working, in particular because they were needed in San Juan or Salta to have electricity. At the end of the day, AES Argentina, with revenue from the combined-cycling in Paraná or Alicurá had to continue to survive and subsidizing plants that if they were a stand-alone, they would not cover their own costs. ARBITRATOR DRYMER: Here, too, you maintain that these other plants were at risk of bankruptcy. I mean, that's a big--that's a big word. THE WITNESS: Yeah, because this--(In Spanish.) Yes. Yes, because these plants had a negative net result. These plants did not cover even fixed costs." Day 4 Tr. (Eng), P1160:13-P1161:1; P1175:13-16; P1179:10-P1180:21 [redacted]. See also P1220:2-11, 14-16 (Fagan).

[171] *See below*, ¶¶ 319-324, 327-332 and 397.

[172] Respondent's Rejoinder Memorial, ¶ 585. See also *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **AES Auth. 126**, ¶ 475.

representation has been prejudiced (or conversely the party making the representation has obtained some benefit or advantage).[173]

180. As stated in *Nova Scotia v. Venezuela* "it is not enough that a party has adopted an inconsistent conduct. It is also necessary to determine that the opposing party was aware of such conduct, relied on it, and acted on the understanding that the first party would not depart from the original position."[174]

181. As to the first element, the Tribunal has already determined that Article 3.2 of the 2008-2011 Agreement lacks the clarity and precision that must characterize a waiver and that the language is so broad that it could potentially encompass virtually anything. In this regard, such Article cannot be a "clear and unequivocal" representation. Regarding compliance with Article 12 of Resolution SE 95/2013 through AES ARGENTINA GENERACIÓN's letter, the Tribunal has also determined that, while the language is less broad, it does not refer to international arbitration, still less treaty arbitration, thus, in the Tribunal's opinion it cannot constitute a "clear and unequivocal" representation. More importantly, none of those declarations were made by the Claimant in this arbitration. Accordingly, the first condition for the application of the doctrine is not fulfilled.

182. In addition, the Respondent has failed to demonstrate two fundamental issues. *First*, it has failed to demonstrate in what manner Argentina in fact (allegedly) relied on the generators' representations. The measures were enacted by the government and it was the government that set the terms and conditions. It cannot be said that Argentina's actions were determined by the generators' conduct. Acceptance by the generators (considering rejection was not a commercially feasible choice) was the result sought by Argentina itself. *Second*, even if for the sake of argument it could

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[173] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I,* PCA Case No. 2007-02/AA277, Partial Award on the Merits, March 30, 2010, **AL RA 192**, ¶¶ 350, 351, referring to the *Case Concerning the Temple of Preah Vihear.* In the same sense, *Pan Am. v. Argentina,* ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, **AES Auth. 241**, ¶¶ 151, 159; *Philippe Gruslin v. Malaysia II,* ICSID Case No. ARB/99/3, Final Award, November 27, 2000, **AES Auth. 244,** ¶ 20.2.

[174] *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela,* PCA Case No. 32825, Award on Jurisdiction, 22 April 2010, **AL RA 102**, ¶ 143. (Unofficial translation).

be said that Argentina somehow relied on the fact that the generators accepted the terms or agreed to renounce to all rights, all actions, and all administrative and judicial claims, something that was specifically required by Argentina itself, the Respondent has not explained what prejudice/detriment Argentina suffered as a result, still less whether or how such prejudice resulted from conduct by the Claimant (and not the generators) exercising its rights as an investor under the BIT or how the Claimant (as opposed to the generators) has obtained a benefit or advantage. In this regard, the Tribunal is not convinced that the Respondent's allegation would fulfill any of those two elements of the standard.

183. In consequence, the Tribunal finds that the Claimant is not estopped from bringing the claim.

iv. Abuse of Rights

184. In its Updated Counter-Memorial, the Respondent argued that Claimant's claim must be rejected since it is "contrary to the general principle of good faith," referring to the doctrine of abuse of rights as an application of such principle.[175] In a subsequent submission, the Respondent referred to the principle of good faith as preventing parties "from blowing hot and cold," and continued to develop its arguments under the doctrine of estoppel. In its Post-Hearing Brief, the Respondent did not develop its contentions any further, although it did state that AES was "trying to perpetrate [an abuse] through this arbitration by requesting […] windfall profits that are not protected under the Treaty or international law and, which, therefore, do not constitute damages entitling AES to compensation."[176]

185. The Tribunal recalls that "the threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume an abuse, and will affirm the evidence of an abuse only 'in very exceptional circumstances'," taking into account

[175] Respondent's Counter-Memorial, ¶¶ 499-501.

[176] Respondent's Post-Hearing Brief, ¶ 89.

all the circumstances of the case.[177] Naturally, this "high" burden of proof lies with the party alleging abuse, here the Respondent.[178]

186. The contention raised by the Respondent has often been alleged in cases where there has been a corporate restructuring to obtain treaty protection. This is not the case here, and while abuse of rights (or abuse of process) can manifest in different ways, in the Tribunal's view, the Respondent has not developed and pursued this contention with the required degree of seriousness and close attention to applicable law and relevant evidence. In its Updated Counter-Memorial, abuse of rights seems to be mentioned in passing when addressing good faith and the arguments on consent, waivers and estoppel. In its second submission it is mentioned only in response to Claimant's arguments on the applicability of the case *Import Prohibition of Certain Shrimp and Shrimp Products* and when arguing against the payment of interests during the suspension period. In its Post-Hearing Brief it is also mentioned but not developed.[179]

187. The burden of proof to establish abuse fell on Argentina. It was up to Argentina to establish the applicable legal standard and to put forward compelling arguments supported by specific evidence to demonstrate that Claimant's conduct fell afoul of that standard, including how this case constitutes an exceptional circumstance. It did not do so in this case. A finding of abuse of rights cannot rest on mixed allegations without any specificity.

188. In consequence, the Tribunal determines that the Respondent has not discharged its burden of proof such as to establish any abuse of rights on Claimant's part.

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[177] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, January 9, 2015, **AES Auth. 247**, ¶ 186, quoting *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* and *Mobil v. Venezuela.*

[178] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I,* PCA Case No. 2007-02/AA277, Partial Award on the Merits, March 30, 2010, **AL RA 192**, ¶ 348.

[179] Respondent's Post-Hearing Brief, ¶¶ 89, 284.

2. Defense under Article XI

A. The Respondent's Position

189. The Respondent indicates that Article XI "limits general obligations to protect investments agreed under the Treaty in cases where measures are needed to maintain public order or protect a State's essential security interests." In its view, in the cases where Article XI is applicable, "any substantive obligation under the BIT will cease to be enforceable and, therefore, any measure taken under such article will be legal and consistent with the BIT."[180]

190. According to the Respondent, Article XI of the Treaty only requires that the measures adopted must be necessary for any of the regulatory purposes provided for therein: maintaining public order, fulfilling obligations to maintain or restore international peace or security, or protecting essential security interests. It also emphasizes that such requirements are different from those under the state of necessity.[181] In the Respondent's view, Article XI of the Treaty is self-judging and the United States has maintained its position on non-precluded measures provisions since at least 1984, a position that it claims Argentina knew before ratifying the Treaty.[182]

191. The Respondent contends that "the crisis was a turning point in Argentina's history, and the electricity sector, as well as every other sector in the Argentine economy and society, was not exempt from its devastating effects". Therefore, "the measures that Argentina took in 2002-2003 were the only possible means to safeguard essential security interests amidst the economic, social, institutional and political crisis of 2001 in accordance with Article XI of the BIT." [183]

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[180] Respondent's Post-Hearing Brief, ¶ 219.

[181] Respondent's Updated Counter-Memorial, ¶¶ 535-539. "The Argentine Republic's position is that the invocation of Article XI is subject to a requirement of good faith, as regards the object and purpose of the treaty". Respondent's Rejoinder Memorial, ¶ 634.

[182] Respondent's Updated Counter-Memorial, ¶¶ 540-542. On the self-judging nature, see also Respondent's Rejoinder Memorial, ¶¶ 623-634.

[183] Respondent's Post-Hearing Brief, ¶ 234. Respondent's Updated Counter-Memorial, ¶¶ 547-551.

192. The Respondent contends that the Tribunal "should take into account the intention of the State parties to the Treaty to determine by themselves whether the relevant circumstances require that measures be taken under Article XI" and that, since measures applied pursuant to Article XI are lawful, there is no duty to compensate.[184]

B. The Claimant's Position

193. The Claimant contends that Argentina cannot invoke Article XI "if it has contributed to the emergency situation, either intentionally or by omission" and that "only those economic crises that are so grave as to threaten the country's public order or its essential security interests will qualify under that provision". In the Claimant's view, "[t]he Treaty is designed specifically to protect investments during difficult times (including economic crises)". In this regard, the Claimant alleges that even if an economic crisis is so grave, only necessary measures are allowed, *i.e.* "the least restrictive measure available".[185]

194. In addition to this and contrary to the Respondent's position, the Claimant indicates that "Article XI is not self-judging".[186] The Claimant argues that no *travaux préparatoires* have been presented to demonstrate the self-judging intention and that to attribute such nature to Article XI would "defeat the object and purpose of the Treaty, which is to protect investors against unjust State measures".[187] According to the Claimant, in any event, "the provision applies only during the limited period within which all the requirements are satisfied", therefore, once the measures cease to be necessary, the Treaty obligations are no longer excused.[188]

195. With regards to both defenses under Article XI and Article 25 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts, the Claimant

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[184] Respondent's Updated Counter-Memorial, ¶¶ 546, 552-554. Respondent's Rejoinder Memorial, ¶ 635.

[185] Claimant's Reply Memorial, ¶¶ 424-426.

[186] Claimant's Post-Hearing Brief, ¶ 145.

[187] Claimant's Reply Memorial, ¶¶ 429, 432.

[188] Claimant's Reply Memorial, ¶¶ 436, 437

alleges that they fail since Argentina has failed to explain: i) the temporal scope of the crisis; and ii) the link between the measures and the crisis.[189] As to the first of these two arguments, the Claimant submits that Argentina cannot invoke the defenses after the crisis ended. In particular, that "Argentina has been unable to point to any situation threatening its essential interests taking place after 2003 that would permit or excuse the application of the Measures to date"[190] and that "[…] the defenses do not permit (or excuse) measures taken after a crisis had ended, nor do they permit (or excuse) measures in anticipation of some future crisis (for which Argentina has not offered any evidence)."[191] Regarding the second argument, the Claimant posits that "Argentina failed to explain how the Measures (such as withholding spot payments, or freezing capacity payments for over ten years) were necessary [under Article XI] (let alone "the only way" under Article 25) to overcome the economic crisis."[192]

196. While the Claimant clarifies that it does not dispute that Article XI can cover economic crises, it indicates that "only those economic crises that are so grave as to threaten the country's public order or its essential security interests will qualify under that provision. And even if the 2001-2003 economic crisis was extraordinary, this is not in itself an escape route for Argentina to avoid liability for any measures; it must prove a link between the Measures and the crisis […]".[193] In addition to arguing there is no nexus between the measures and the crisis, AES claims that "the Measures worsened the situation" and that Argentina has not explained "why honoring its Treaty commitments would have prevented it from fulfilling its human rights obligations." Thus, the defenses "must be rejected".[194]

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[189] Claimant's Post-Hearing Brief, ¶ 146.

[190] Claimant's Post-Hearing Brief, ¶ 147.

[191] Claimant's Post-Hearing Brief, ¶ 150, referring to *Continental*, ¶ 187, **AES Auth. 139**; *LG&E*, ¶ 261, **AES Auth. 165**. See also Claimant's Reply Memorial, ¶¶ 472-478, 486-489.

[192] Claimant's Post-Hearing Brief, ¶ 152.

[193] Claimant's Post-Hearing Brief, ¶ 153.

[194] Claimant's Post-Hearing Brief, ¶¶ 156, 158, 159.

C. The Tribunal's Analysis

i. The Standard under Article XI for Non-precluded Measures

197. Article XI of the US-Argentina BIT establishes that:

> "This Treaty *shall not preclude* the application by either Party of measures *necessary* for the *maintenance of public order*, the fulfillment of its obligations with respect to the maintenance or restoration of *international peace or security*, or the *Protection of its own essential security interests*." (Emphasis added)

198. This provision, contrary to Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts which will be addressed later, does not preclude the wrongfulness of measures that may be "necessary …". Rather, the language "shall not preclude the application […] of measures", indicates an express permission to adopt measures that comply with the requirements set forth. As stated in *CMS*, it is "a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply".[195]

199. This provision has been the subject of diverse and non-unanimous interpretations in several cases against Argentina under both arbitral and annulment procedures. The Tribunal is aware of the interpretations rendered and, while not legally binding, those cases are still pertinent to address. At the outset, the Tribunal agrees with the statement made in *Sempra v. Argentina* that:

> "[…] the object and purpose of the Treaty is, as a general proposition, for it to be applicable in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the defined obligations cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory."[196]

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[195] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 553, quoting the Annulment Decision in CMS, ¶ 129. See also: "Art. XI restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met". *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **AES Auth. 139**, ¶ 164.

[196] *Sempra Energy International v. Argentine Republic*, ICSID case No. ARB/02/16, Award, September 28, 2007, **AES Auth. 188**, ¶ 373.

200. As follows from the text of the provision, the first condition that must be complied with is that the measures are *necessary* for one of the listed objectives: i) the maintenance of public order; ii) the fulfillment of obligations with respect to the maintenance or restoration of international peace or security; or iii) the protection of the host State's essential security interests. The second objective is not at stake here. Only the first and third objectives are at issue. Specifically, the Respondent argues that "*the crisis* that broke out in late 2001 jeopardized public order and essential security interests, as well as the very survival of the Argentine State".[197]

201. The Tribunal begins with the ordinary meaning of the word "necessary", which can be understood as "absolutely needed: required; of an inevitable nature: inescapable; logically unavoidable; that cannot be denied without contradiction; determined or produced by the previous condition of things; compulsory".[198] In the Tribunal's view, this word conveys that something is strongly or mandatorily required, needed, essential. In this case, that *something* is the "measures [now challenged by the Claimant] […] for the maintenance of public order" or for the protection of "essential security interests".

202. As to the first concept, the Tribunal observes that one of the meanings of "order" is "the state of peace, freedom from confused or unruly behavior, and respect for law or proper authority".[199] On the other hand, among the meanings of the term "public" one can find: "of, relating to, or affecting all the people or the whole area of a nation or state; […] relating to people in general: universal".[200] This would indicate that public order refers to a situation of peace, where the law and authorities are abided by the people. To what extent, it is unclear, and should be subject of analysis under the circumstances of each case.

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[197] Respondent's Rejoinder Memorial, ¶ 621. (Emphasis added)

[198] "[N]ecessary". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/necessary 25 March 2024.

[199] "[O]rder". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/order 25 March 2024.

[200] "[P]ublic". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/public 25 March 2024.

203. When interpreting this provision, the tribunal in *Continental* understood this phrase to mean:

> "The expression 'maintenance of public order' indicates however rather clearly that 'public order' is intended as a broad synonym for 'public peace,' which can be threatened by actual or potential insurrections, riots and violent disturbances of the peace. This is the ordinary and principal meaning of '*orden público*' in the Spanish text of the BIT […] Thus, in the Tribunal's view, actions properly necessary by the central government to preserve or to restore civil peace and the normal life of society (especially of a democratic society such that of Argentina), to prevent and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order, even when due to significant economic and social difficulties, and therefore to cope with and aim at removing these difficulties, do fall within the application under Art. XI."[201]

204. The Tribunal agrees for the most part with this interpretation and considers it to be in line with the ordinary meaning of the terms used in Article XI. Regarding the second concept, "essential" can be understood to mean "relating to, or constituting essence: inherent; of the utmost importance: basic, indispensable, necessary".[202] In other words, something vital. Finally, the compound term "security interests" can mean that being "secure"; "free from danger"; "protected"; is something that causes "concern", arouses "attention", or is even viewed as an "advantage or benefit" for a particular subject.[203] The tribunal in *Continental* understood that a "severe economic crisis" may affect an essential security interest under Article XI.[204] In particular, it expressed its view that:

> "It is impossible to deny […] that a crisis that brought about […] the near-collapse of the domestic economy; the soaring inflation; the leap in unemployment; the social hardships bringing down more than half of the population below the poverty line […] the widespread unrest and disorders […] the abrupt resignations of successive Presidents and the collapse of the

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[201] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **AES Auth. 139**, ¶ 174.

[202] "[E]ssential". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/essential 25 March 2024.

[203] "[S]ecurity"; "[I]nterest". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/security; https://www.merriam-webster.com/dictionary/interest 25 March 2024.

[204] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **AES Auth. 139**, ¶ 178.

> Government, together with a partial breakdown of the political institutions and an extended vacuum of power; the resort to emergency legislation […] does not qualify as a situation where the maintenance of public order and the protection of essential security interest of Argentina as a state and as a country was vitally at stake. […] The protection of essential security interests recognized by Art. XI does not require that 'total collapse' of the country or that a 'catastrophic situation' has already occurred before responsible national authorities may have recourse to its protection. [...] There is no point in having such protection if there is nothing left to protect."[205]

205. Once again, the Tribunal largely agrees with this statement. Before examining whether Argentina's actions are covered by this Article, the Tribunal would like to address the "self-judging nature" of this provision, an issue in which both Parties disagree.

206. The Respondent has referred to the position adopted by the US as to the self-judging nature of non-precluded measures provisions since 1984. A position that it alleges has not changed and has become more explicit over time. According to the Respondent, Argentina was aware of that position and agreed to it when ratifying the Treaty.[206] On the other hand, the Claimant submits that the text of the provision does not indicate it is self-judging, that no *travaux préparatoires* or other documents were presented that would demonstrate such common intention by the Parties and that attributing that character would go against the object and purpose of the Treaty.[207]

207. The Tribunal agrees with the Claimant that the text of the provision does not suggest a self-judging provision. While the text refers to "its obligations" and "its own essential security interests" it does not follow that, whatever the State considers as "public order", "essential security interest" and "necessary" is outside the scope of consideration by a dispute settlement tribunal. In this regard, the Tribunal's view coincides with that of the *El Paso* tribunal:

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[205] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **AES Auth. 139**, ¶ 180.

[206] Respondent's Rejoinder Memorial, ¶¶ 541, 542.

[207] Claimant's Reply Memorial, ¶¶ 429-432.

> "The wording of the treaty is deemed to express the intention common to the Parties, and what the Parties effectively agreed to, even though a Party might have wished otherwise on one or another point. As long as such wishes are not expressed, the content of the treaty's provisions is paramount, and what is not there cannot be read into them. This prompts the further conclusion that in principle treaty rules must be regarded as being objective in nature, which means that, unless the contrary is specified, they are not self-judging: a State Party is not entitled to interpret unilaterally the terms of a treaty in an authoritative manner. […] The three elements embodied in Article XI of the 1991 Argentina-US BIT – and in similar provisions of other BITs – are part and parcel of the balance that must exist in such treaties. That balance would be disrupted if the legality of invoking one of the three elements present in Article XI were to be interpreted unilaterally by the State on whose territory the investments have been made."[208]

208. The Respondent has referred to statements by US officials as well as a report submitted in *Continental* which indicates the "lack of evidence that Argentina understood that provision as non-self-judging",[209] however, unilateral statements or that report for that matter cannot remedy the lack of express terminology in Article XI or the fact that the Parties to the Treaty, if indeed they understood such provision to be self-judging, did not seek to clarify it through subsequent means.[210]

209. In light of this, the Tribunal considers that Article XI is not self-judging and will proceed to analyze whether Argentina's actions are covered by it.

ii. Whether Argentina Fulfills the Requirements of Article XI

210. At the outset, the Tribunal notes that throughout its submissions, the Respondent has failed to demonstrate with any degree of precision what essential security interests it alleges were in fact at stake. It has referred vaguely and in general terms to the impugned measures being necessary to protect its "essential security

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[208] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶¶ 590. *See also* ¶¶ 594, 604 and *Sempra Energy International v. Argentine Republic*, ICSID case No. ARB/02/16, Award, September 28, 2007, **AES Auth. 188**, ¶¶ 379, 385, 386.

[209] First Report by Anne Marie Slaughter and William Burke White, submitted on 3 May 2006 in *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, **Exhibit RA 490**, ¶ 38.

[210] "[…] in principle treaty rules must be regarded as being objective in nature. This means that, unless the contrary is specified, they are not self-judging." *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, April 10, 2013, **AES Auth. 169**, ¶¶ 1037.

interests" without delving further into what those security interests were,[211] it has indicated that serious economic crises can be encompassed by Article XI as they may affect "essential security interests"[212] and it has referred to other investment disputes determining that "essential interests" were threatened such as *LG&E v. Argentina*.[213] In its Rejoinder, it also highlighted the importance of energy services as an essential element for access to adequate cooked food, adequate housing, lighting, use of appliances, healthcare, intensive and emergency care, better ventilation and air conditioning, schooling, communication, access to information and transportation.[214] Finally, it has alluded to the effects of the crisis in Argentina[215] and the fact that such situations can force a State to adopt measures aimed at ending the crisis or preventing it from getting worse, *i.e*., to prevent a collapse of the system.[216]

211. What the Tribunal can gather from Respondent's argumentation is that the economic crisis is a central element in its defense. In fact, its defense is rooted in it. While the Respondent has pointed to the effects of the crisis on its population in terms of poverty, starvation, shortages of medicines, diseases, etc. and certainly several measures were enacted across different spheres to address these scourges, on the evidence before it, it seems to the Tribunal that in relation to the measures at issue in this case, *i.e.,* measures enacted as to the electricity sector, the essential security

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[211] *See e.g*. Respondent's Updated Counter-Memorial, ¶¶ 547, 551 (referring to Article XI) and ¶¶ 710, 714 (referring to essential interests under Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts); Respondent's Rejoinder Memorial, ¶ 621.

[212] Respondent's Updated Counter-Memorial, ¶¶ 538, 716; Respondent's Rejoinder Memorial, ¶ 619.

[213] Respondent's Rejoinder Memorial, ¶ 135; Respondent's PHB, ¶¶ 221, 225.

[214] Respondent's Rejoinder Memorial, ¶ 649.

[215] "The life, health, freedom and security of the population were at serious risk, as well as the institutional continuity of the State […] The increase in unemployment, poverty and indigence reached unexpected levels, which led part of the Argentine population to look in the trash for food discarded by other sectors of the population in order to survive, and for recyclable materials to sell. The press informed about the thousands of starved and malnourished babies and kids. The emergency situation led to a shortage of medicine and clinical supplies and left many people without medical coverage. Diseases that had been eradicated (typhus, yellow fever, dengue, leishmaniasis, malaria, tuberculosis, leptospirosis, trichinosis, hantavirus, etc.) resurfaced among the population. This also meant that, from a sanitary point of view, the population was at risk. If these are not essential interests, then what are?" Respondent's Rejoinder Memorial, ¶ 788.

[216] Respondent's Rejoinder Memorial, ¶ 807; Respondent's PHB, ¶ 225.

interest that the measures sought to protect was the continuous supply and access of energy, at affordable prices, in general for the population during this time of crisis.

212. The Tribunal understands that electricity is a basic commodity on which the general population, industries, health services, security and intelligence services, and more broadly, the proper functioning of government depends. It is reasonable to conclude that without it, the population and the proper functioning of certain pillars of the State, which was already undergoing a severe economic crisis would have been affected in terms of its security. The Respondent has also referred to the violent demonstrations, protests, looting and deaths that occurred during this period of time,[217] which in turn also relates to the maintenance of public order.

213. In the Tribunal's view, in light of the economic crisis, access and supply of such commodity in a time of need is capable of being characterized as an essential security interest. The effects of such crisis were not only economic but also political and social which inevitably impacted public order. The Tribunal now turns to whether the measures enacted were "necessary" to fulfill those objectives.

214. The Treaty does not define the term "necessary". As already established, the Tribunal understands necessary to mean "absolutely needed, required, inescapable, logically unavoidable", in other words, "something that is strongly or mandatorily required, needed, essential". The Tribunal also notes that, in contrast to Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts, which refers to "the only way", Article XI simply refers to measures that are "necessary", which could indicate that there is no specific requirement that a measure be the only one available. In the Tribunal's opinion, for a measure to be necessary or essential it must at least have a rational or logical connection with the essential security interest at stake or the situation of public order that is sought to be maintained, which in this particular case is rooted in the economic crisis. If the measure does not have a rational connection to the objective, it would lack the mandatory and indispensable nature of

[217] Respondent's Rejoinder Memorial, ¶ 622, quoting *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 3 October 2006, **AES Auth 165**, ¶ 235.

a "necessary" measure to address it. In this regard, the Tribunal considers that measures that were enacted to ensure supply and access to this commodity during the economic crisis can certainly be considered as necessary to fulfill the objective of "[p]rotection of [the host State's] essential security interests" within the meaning of Article XI of the BIT.

215. The Tribunal observes that despite several opportunities to address the point, Argentina has failed to address the key question of when the 2001 economic crisis that, in its view, justified the impugned measures, actually ended. It has made general statements such as "after the crisis, the Secretariat of Energy had to implement reasonable changes to the regulations governing the electricity sector".[218] It has also contested Claimant's affirmation that the crisis ended by 2003 based on an assessment of the GDP, alleging that other indicators are to be taken into account and that "[i]n any case, if we consider GDP measured in US dollars at current prices, it was only in 2010—*i.e.*, 12 years later—that the levels prior to the beginning of the recession were exceeded".[219] On the other hand, as to the term market, it has mentioned that "[a]fter the crisis, the volume of contracts did not increase; they actually decreased" referring to CAMMESA's Annual Report from the year 2004, which would necessarily imply the crisis had ended by then.[220]

216. The Tribunal recalls that other cases analyzing Argentina's crisis such as *LG&E v. Argentina* (relied on by the Respondent) and *El Paso* have found the crisis to have ended in 2003.[221] The tribunal in *Continental* indicated that regular functioning of democratic institutions was reestablished on May 25, 2003, that GNP grew by more than 8% in 2003 compared to 2002, consumer prices rose less than 4%

[218] Respondent's Updated Counter-Memorial, ¶ 724.

[219] Respondent's Rejoinder Memorial, ¶ 129.

[220] Respondent's PHB, ¶ 202; CAMMESA Annual Report for the year 2004, p. 19 (**JR_39**).

[221] See *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, **AES Auth. 165**, ¶ 244; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 670.

and the peso improved against the dollar.[222] In *Total*, the tribunal also expressed that by May 2003 Argentina had emerged from the crisis as commentators, international organizations and other arbitral tribunals had recognized.[223] As to some of the economic indicators presented by Respondent's expert, the Tribunal observes that GDP grew in 2003 and up to 2008, unemployment decreased in 2003 and subsequently, and the population in extreme poverty and under poverty line also decreased in 2003 and subsequently.[224] These indicators certainly indicate, at the very least, an improvement of the situation that prevailed in 2001 and 2002.

217. The Tribunal also notes that in 2010 President Kirchner referred to "a policy that was developed from 2003 onwards" and to a period of "eight years" in which Argentina "achieved the most important economic growth in the 200 years of history."[225] In the Tribunal's view, this reference serves to demonstrate that as of 2003 Argentina was experiencing a period of recovery rather than a continued period of crisis. In light of this, and considering that the Respondent has not pointed this Tribunal to specific economic or social indicators that rise to the levels that prevailed when the crisis broke out or during the 2001-2002 period, or to evidence of other, related violent shocks or events such as would jeopardize the political or economic stability of Argentina, for purpose of its examination of the issues in this case the Tribunal considers appropriate the reference by other investment tribunals to May 2003 as the date at which the crisis can be said to have ended.

218. While the Respondent has relied on one of Claimant's witnesses mentioning that certain effects of the crisis continue to this day, in the Tribunal's opinion such quote is misplaced since what the witness in fact referred to was the defective operation of the sector (beginning in 2002) and the subsequent measures enacted by

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[222] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **AES Auth. 139**, ¶ 157.

[223] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 171 and "It is generally recognized that Argentina's economy quickly recovered from the crisis—by the end of 2003 and the beginning of 2004." ¶ 172.

[224] Quadrant Economics Expert Report, figures 6 to 9, pp. 21, 24, 25.

[225] President Cristina Kirchner Speech to UN General Assembly, www.cfkargentina.com, September 24, 2010, **AES Ex. 605**. (Unofficial translation).

the government which in its opinion depressed prices and led to the sector's current problems.[226]

219. Continuing with our analysis, in the case at hand, most of the challenged measures were enacted after May 2003. Only Resolution 8/2002 first establishing the spot price cap as well as Resolution 317/2002 modifying the amount of capacity payments were enacted during the economic crisis. In fact, the spot price cap established through Resolution 8/2002 and then extended through Resolution 240/2003 was barely applied until 2005.[227] In addition to this, the Tribunal notes that not only were the rest of the measures enacted after such period, but also they continued to be applied indefinitely in practical terms (including the spot price cap and capacity payments previously established through Resolutions 8/2002 and 317/2002). In this sense, the Tribunal cannot find within these measures a rational connection to the essential security interest alleged by Argentina, *i.e.*, the continuous supply of electricity at affordable prices during a time of economic crisis and the need to avoid deepening that situation.

220. Beyond including general statements about the country's state of emergency (Resolutions 8/2002 and 317/2002, which continued to be applied), the risk to the sustainability of electricity generation and supply to users (Resolutions 8/2002 and 95/2013) or the economic situation of certain demand segments (Resolution 712/2004), there is no connection between those measures and the alleged interest, no indication that such interest was the reason for the issuance of those measures, of why the measures were necessary or how they would address or protect that interest.

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[226] "The Government of Argentina subsidizes the energy sector with about $12 billion per year. From the National Treasury, $12 billion per year goes into the energy sector as a whole. Obviously, this is a problem derived from defective operation of this sector, which began to operate incorrectly starting with the crisis of 2002, and all the decisions that were made. […] All the measures adopted by the Government of Argentina in the first phase, 2002 to 2005 or 2006, are measures which sought to depress or to lower, arbitrarily or artificially, the prices in the wholesale markets, so that it wouldn't have such a marked effect on rates paid by users. […] That's why I gave such an automatic and quick response. And I said, the effects of the crisis of 2002, and especially because of the measures that were adopted after the crisis to see how the situation could be improved, all of that has led to our current problems where correcting the energy sector will require a very big effort." Day 6 Tr. (Eng), P454:3-10,15-20; P455:15-21 (Bastos).

[227] According to Respondent's witness, 238 hours. Day 6 Tr. (Eng), P1571:5-P1571:15 (Ruisoto).

221. The Tribunal has not found evidence in the record that in periods subsequent to May 2003, public order in Argentina was at risk, nor that access and supply of electricity would represent a security concern for the population and the regular functioning of the State during its period of recovery. While certainly there can be many essential interests for a State, such interests must relate to *security*, *i.e.*, they must constitute a security interest. As follows from its ordinary meaning, "security" implies being "free form danger" or "protected".

222. The Tribunal recalls that this standard is high, and it should not be used as an escape route for a State's obligations:

> "[…] in order to allege state of necessity as a State defense, it will be necessary to prove the existence of serious public disorders. Based on the evidence available, the Tribunal has determined that the situation ended at the time President Kirchner was elected. […] Thus, Argentina is excused under Article XI from liability for any breaches of the Treaty between 1 December 2001 and 26 April 2003. […] This exception is appropriate only in emergency situations; and *once the situation has been overcome, i.e. certain degree of stability has been recovered; the State is no longer exempted from responsibility* for any violation of its obligations under the international law and shall reassume them immediately."[228]

223. With regards to the argument made by the Respondent that its measures were enacted to protect users, the Tribunal also notes that the Resolutions do not particularly address user protection. The Resolutions, such as Resolutions 8/2002, 712/2004, 826/2004, 1427/2004 and 95/2013, only make passing references to users. It is not plainly apparent from the text of those measures that the public policy objective for their implementation is a specific concern by the State for user protection. As a result, while Argentina may have sought to address particular interests for its population in its recovery period, measures taken past its economic crisis or measures taken pursuant to a crisis that no longer existed were not rationally or logically connected to its objective, and thus, were not necessary or ceased to be necessary for purposes of invoking Article XI.

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[228] *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 3 October 2006, **AES Auth 165**, ¶¶ 228, 229, 261. (Emphasis added)

VI. MERITS OF THE DISPUTE

1. The Overall Position of the Parties

A. The Claimant's Underlying Claim

224. The Claimant posits that, prior to its investment, Argentina "constructed a stable regulatory framework to attract long-term foreign investors with the financial resources and expertise to make the large-scale investments necessary to modernize […] generation infrastructure."[229] It describes Argentina's actions as "embark[ing] on a vigorous campaign to market the new electricity regime to potential foreign investors" which, "[e]ncouraged by the government", "flocked to Argentina". Within and in reliance on this context, AES acquired a diversified portfolio of assets. [230]

225. AES contends that starting from 2002, Argentina adopted a series of regulatory measures that led to: "(i) spot price intervention (caps and exclusionary policies); (ii) insufficient capacity payments; (iii) payment withholdings and forced investment schemes (FONINVEMEM); and (iv) the adoption of a pseudo cost-plus system (the "Measures")."[231] The Claimant submits that the measures taken by Argentina "destroyed the regime upon which AES […] made its [long-term] investments and eviscerated its expected return on [them]."[232]

226. With regards to the capped spot price introduced by Res. 8/2002, AES indicated that there was no explanation on how it was calculated or how it would help mitigate the crisis. It also submits that it was barely triggered and that, "since the cap was established as a fixed price in Argentine pesos in 2002, the value of AR$120 per MW went from US$40 to US$6 between 2002 and 2020 *(i.e.,* an 85% decrease)."[233]

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[229] Claimant's Post-Hearing Brief, ¶ 2.

[230] Claimant's Post-Hearing Brief, ¶ 3. "Confident in the characteristics and stability of the market Argentina had created, AES set out to acquire a portfolio of assets of varied technologies and sizes. It focused on more efficient generators, which would be expected to dispatch more electricity and at higher margins." Claimant's Post-Hearing Brief, ¶ 62.

[231] Claimant's Post-Hearing Brief, ¶ 65.

[232] Claimant's Post-Hearing Brief, ¶ 4.

[233] Claimant's Post-Hearing Brief, ¶¶ 67, 71.

227. As to Res. 240/2003, the Claimant argues that it "[e]xcluded non-natural gas-fueled plants from setting the spot price […] [it] excluded plants using more expensive fuels (like diesel or fuel oil), thus lowering the spot price. Through this mechanism, up to 92% of available machines were excluded from price formation."[234] Such exclusion had the effect of artificially reducing the marginal cost as well as the spot price, "thus reducing the margins of all *non-excluded* generators." Excluded generators "would be unable to cover their variable costs" and CAMMESA would make a payment to cover those costs with no margin. The spot price "did not reflect the 'economic cost of the system' and was not 'uniform'." "The spot price was even further depressed because the price of gas was controlled by the government and kept artificially low".[235]

228. Regarding the capacity payments, the Claimant argues that, through Res. 2/2002 setting payments at AR$10/MWh, the value of capacity payments "dropped from US$10 to US$3.50." After the pesification and in the absence of indexation, facing constant devaluation, payments "dropped to […] US$2.40 between 2002 to 2012".[236] In the Claimant's view, "Argentina failed to establish capacity payments at a level that reflected the 'economic cost of the system' and included the 'cost of unsupplied energy to the community'. It also failed to keep capacity payments at a level that would incentivize investments in capacity expansion, as required by the Electricity Law."[237]

229. The Claimant also alleges that "the Secretary of Energy froze end-user tariffs and failed to update the seasonal price paid by distributors", which "depleted the Stabilization Fund".[238] "[I]n 2004, CAMMESA began to withhold a large part of the

[234] "[I]n order to set the price, CAMMESA would assume that all dispatched units used natural gas as fuel." Claimant's Post-Hearing Brief, ¶ 73.

[235] Claimant's Post-Hearing Brief, ¶¶ 74, 75.

[236] Claimant's Post-Hearing Brief, ¶ 79.

[237] Claimant's Post-Hearing Brief, ¶ 84.

[238] "These additional measures depleted the Stabilization Fund and CAMMESA was unable to cover the difference between the frozen seasonal price and the already depressed spot prices". Claimant's Post-Hearing Brief, ¶ 85.

generators' receivables […] and issued promissory notes […] without due date […]."[239] In relation to this, the Claimant submits that "[r]ather than requiring CAMMESA to pay this debt, the Secretary of Energy […] launched the FONINVEMEM programs, forcing AES Argentina to apply its promissory notes to finance the construction of new plants [….] needed because the Measures had disincentivized any investment from the private sector".[240]

230. Finally, it contends that under Res 95/2013, "generators in the MEM are remunerated differently depending on technology and size. This is price discrimination that violates the requirement in the Electricity Law of 'a uniform tariff for all' […] does not reflect the 'economic cost of the system', […] it is backward looking and incorporates past inefficiencies […] the remuneration for each category of generators is not based on their *real* costs, but it is determined by the Secretary of Energy under parameters that remain unknown […] by prohibiting certain generators from entering term contracts, [it] abolished the competitive term market envisaged in the Electricity Law […] by prohibiting generators from procuring their own fuel (the main variable cost of production), [it] left no room for competition"[241]

B. The Respondent's Overall Position

231. The Respondent alleges that the Claimant's case in this arbitration depicts a world "completely detached from reality, […] unsupported by the evidence filed before this Tribunal and […] not protected under the Treaty or international law."[242] According to the Respondent, "the substantial economic benefits obtained by AES in

[239] Claimant's Post-Hearing Brief, ¶¶ 85, 86. "These measures destroyed the essential promise under Article 36, second paragraph, of the Electricity Law that required the Secretary of Energy to establish seasonal prices so that the price paid by distributors to CAMMESA would always be sufficient to pay the generators". ¶ 86.

[240] Claimant's Post-Hearing Brief, ¶ 87.

[241] Claimant's Post-Hearing Brief, ¶¶ 101-105.

[242] Respondent's Post-Hearing Brief, ¶ 1. "AES submitted no document prepared by the company […] which may support the arguments put forward [...] AES […] has been operating in Argentina for decades; therefore, had the facts been as represented by it, there would be supporting documents (at the very least, some sort of internal document)." "[It] has not met its burden of proof". ¶ 4. The Respondent also indicates that there are no documents provided by the Claimant that demonstrates the "alleged coercion" when entering into agreements with the Argentine State, when signing waivers, that its only option was to enter such agreements or that it would have been in a state of insolvency had it not accepted the new global remuneration in 2013. See ¶ 8.

the Argentine Republic allowed it not only to distribute large dividends but also to expand its investment, so much so that it concentrated its investments in Argentina and sold its investments in other countries due to their failure to reach the return rate required by AES. […] The Argentine regulatory framework allowed generators not only to cover their costs but also to reap massive profits."[243]

232. The Respondent contends that "there were no assurances of any kind regarding regulatory immutability or certain profitability […] there was no commitment of the Argentine Republic guaranteeing certain profitability to generators, including AES"[244] and the Claimant "has also failed to identify any specific commitment made by Argentina on which AES could base an alleged expectation of obtaining a significantly higher return than it actually obtained."[245]

233. The Respondent points to the fact that AES restated its arbitral claim in 2019 indicating that it is "seeking alleged unearned benefits that are substantially higher than those projected in the but-for scenario when it first commenced arbitral proceedings"[246] and that the "the profitability of its plants counters AES's allegations that it had been coerced into investing its receivables in the FONINVEMEM projects and adhering to the remuneration scheme established in Resolution 95/2013." It also considers that "at most, the disputed measures might have precluded AES from obtaining extraordinary profits derived from the abnormal operation of the marginal costs-based system" and that "AES has not sustained any damages".[247]

234. The Respondent refers to the 2001 crisis and argues that "[n]ot only did this crisis significantly alter the economic reality of the country, but it also contributed to the de-adaptation ("*desadaptación*") of the electricity sector." […] "the much-needed

[243] "[W]hile—in 2001—AES's investment in Argentina accounted for 6.7% of AES Group's total generation capacity, in 2020, that percentage was already at 18.8%." Respondent's Post-Hearing Brief, ¶ 3. "AES's investment developed positively and even expanded to the present day […]." ¶ 12.

[244] Respondent's Post-Hearing Brief, ¶ 13.

[245] Respondent's Post-Hearing Brief, ¶ 14.

[246] Respondent's Post-Hearing Brief, ¶ 7. "AES's claim is based on the false assumption that the company would have any right or guarantee to obtain windfall profits." See ¶ 11.

[247] Respondent's Post-Hearing Brief, ¶¶ 84, 86.

adaptation of the MEM's rules of operation to this new context cannot be understood as a modification contrary to the legal framework."[248]

2. Fair and Equitable Treatment (FET) Claim

A. The Claimant's Position

235. AES contends that Article II.2.a) of the Treaty, providing for FET, requires Argentina to: "(i) provide a stable and predictable legal framework, (ii) respect AES's legitimate expectations, and (iii) act in a non-arbitrary, transparent and consistent manner."[249]

236. According to the Claimant, it was Argentina's "clear promises of legal stability in the privatized electricity sector -in the form of both general statements and specific assurances to AES" that led AES to invest in Argentina.[250] The Claimant submits that "the stability of the legal framework is a freestanding protection". In this regard, it alleges that the United States and Argentina were "unequivocal when emphasizing […] that 'fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment'."[251]

237. The Claimant also argues that tribunals and scholars have recognized that "dramatic legal or regulatory changes can constitute a breach of the fair and equitable treatment standard".[252] Regarding the test to determine whether there has been a breach of the obligation to afford a stable legal environment, the Claimant refers to three elements: i) tribunals have not required that the investor demonstrate "specific

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[248] Respondent's Post-Hearing Brief, ¶¶ 42, 43.

[249] Claimant's Post-Hearing Brief, ¶ 111. See also Claimant's Updated Memorial, ¶ 254; Claimant's Reply Memorial, ¶ 304.

[250] Claimant's Post-Hearing Brief, ¶ 54. See also ¶ 124. The Claimant alleges that the tribunals in *Total* and *El Paso* "agreed that Argentina's legal framework created legitimate expectations". ¶ 116 b). Regarding the alleged promise of a stable regulatory framework, see Claimant's Updated Memorial, ¶¶ 274-279; Claimant's Reply Memorial, ¶¶ 28, 75-86.

[251] Claimant's Post-Hearing Brief, ¶ 113. See also Claimant's Updated Memorial, ¶¶ 259-264. The Claimant relies, among others, on *CMS v. Argentina* **(AES Auth. 136)**, *LG&E v. Argentina* **(AES Auth. 165)** *Occidental v. Ecuador* **(AES Auth. 176)** and *Tatneft v. Ukraine* **(AES Auth. 175)** for its contention that stability of the legal framework is an essential element of the FET standard.

[252] Claimant's Updated Memorial, ¶ 257. See also Claimant's Reply Memorial, ¶ 334.

assurances" made by the State to the investor; ii) the cumulative effects of such changes may be considered; and iii) the extent and degree of the changes will be assessed to determine the degree "of change to the legal environment".[253]

238. In the Claimant's view, Argentina "intervened (and distorted) every key aspect of the electricity market, stripping it of all of its essential characteristics."[254] Therefore, "Argentina violated its Treaty obligation to provide a stable regulatory framework […] by eliminating the essential characteristics of the electricity regulatory regime".[255]

239. Separately, AES alleges that the adoption of the measures breached the FET standard since Argentina failed to protect its legitimate expectations.[256] In other words, the Claimant indicates *first*, that "Argentina has failed to maintain a stable legal framework and therefore breached the FET standard of the Treaty",[257] and *second*, that "by destroying the essential characteristics of the electricity regime that Argentina had designed to attract AES's investment, Argentina frustrated AES's legitimate expectations, in breach of the FET standard of the Treaty."[258] The Claimant

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[253] Claimant's Updated Memorial, ¶¶ 265-268. "AES does not argue that Argentina is prevented from making regulatory modifications, but rather, AES's position is that, under the fair and equitable treatment standard, 'the legal framework that induced an investment' cannot be 'stripped of its essential characteristics'." Claimant's Reply Memorial, ¶ 330.

[254] Claimant's Post-Hearing Brief, ¶ 128. "[T]he Electricity Law was specifically created to attract foreign investors (like AES) and AES reasonably relied on its essential characteristics. Thus, AES had a legitimate expectation that Argentina would maintain those essential characteristics." Claimant's Post-Hearing Brief, ¶ 132. See also Claimant's Updated Memorial, ¶¶ 280-289.

[255] Claimant's Post-Hearing Brief, ¶ 123. "Argentina destroyed the essential characteristics of the electricity regime, in complete disregard of the Electricity Law (which remains in force). […] the question is what effect those measures had on the essential characteristics of the regulatory framework." ¶ 126. "Argentina is in breach of its obligation to afford AES and its investments a stable legal environment. This conclusion is supported by (i) the plethora of investment arbitration tribunals that have found Argentina to be in breach of analogous claims by investors, (ii) the irrefutable evidence (accepted by all tribunals) that Argentina used the promise of stability to induce investment and (iii) the fact (accepted not only by other investment tribunals but by Argentina itself) that the impugned Measures in combination have eviscerated the regulatory framework." See, Claimant's Updated Memorial, ¶ 271.

[256] Claimant's Updated Memorial, ¶¶ 290-324.

[257] Claimant's Updated Memorial, ¶ 130.

[258] Claimant's Post-Hearing Brief, ¶¶ 134. "Argentina's commitments to promote market competitiveness and encourage private investment were enshrined in the Electricity Law and formed the basis of AES's legitimate expectations." Claimant's Reply Memorial, ¶ 126; see also, ¶¶ 358-379.

clarifies as well that it "does not rely on a finding that any *one* specific Measure breaches the fair and equitable treatment standard (although it could). Rather, AES's claim is that […] the 'cumulative effect of the measures was a total alteration of the entire legal setup for foreign investments'."[259]

240. As part of its FET contention,[260] the Claimant asserts that the dismantling of the regulatory framework was made through "measures that were arbitrary and lacked transparency", which is evidenced by Argentina's: "(i) […] issuance of numerous administrative resolutions that directly contradict the Electricity Law (which remains in force); (ii) labelling resolutions as 'temporary' and then, *de facto*, maintaining them permanently; (iii) imposing price caps and depressing capacity payments without any technical studies to support those decisions; (iv) withholding payments for over a decade and forcing AES Argentina to finance construction projects under uncommercial and uncertain terms; (v) promising to restore the regulatory framework and then failing to do so; and (vi) setting remuneration of the pseudo cost-plus system in its discretion and without any technical parameters".[261] According to AES, "[m]ost of these were 'measure[s] taken for reasons different from those put forward,' with the true sole purpose of keeping end-user tariffs artificially low at no cost to the state."[262]

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[259] Claimant's Updated Memorial, ¶ 287, referring to *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 517, **AES Auth. 148.** See also Claimant's Reply Memorial, ¶¶ 354-356.

[260] "Argentina has acted arbitrarily and without transparency, therefore committing a double breach of the Treaty; under Article II.2(b), as well as a breach of the prohibition to act in an arbitrary, non-transparent or inconsistent manner, *as part of the FET standard*". (Emphasis added). Claimant's Post-Hearing Brief, ¶ 139.

[261] Claimant's Post-Hearing Brief, ¶ 136. See also, Claimant's Reply Memorial, ¶¶ 381-387, on the failure to treat AES's investments with transparency, contrary to Article II.2.a).

[262] Claimant's Post-Hearing Brief, ¶ 137, quoting *EDF*, ¶ 303, **AES Auth. 144**. "Haphazard, opaque, contradictory and inconsistent decisions and decision-making constitute a breach of the transparency element of the fair and equitable treatment obligation." Claimant's Updated Memorial, ¶ 326. The Claimant argues that it was "completely in the dark as to what measures would be implemented, when they would be implemented, and for how long they would be in place"; that "from 2003 to 2017, Argentina directed CAMMESA to withhold from AES payment of some US$514 million that CAMMESA had collected on AES's behalf for energy supplied. This policy began without warning"; "with respect to one sort of withholding, the applicable Resolution expressly notes that it would be paid at an undetermined date in the future, and only if funds were available"; "to this day the exact terms of these forced investments remain unclear […] AES does not know the

241. The Claimant also argues that other tribunals interpreting the Treaty have found that "its protections linked to customary international law are distinct from the FET and FPS standards, and operate as an absolute floor", that "the FET standard is not limited by the MST" and that "the MST has evolved so as to provide protections equivalent to the FET and FPS standards".[263] As to the right to regulate, the Claimant posits that "[it] does not insulate Argentina from Treaty liability […] Argentina may regulate as it wishes, but it must compensate investors if it regulates in a manner that destroys the fundamental elements of the framework pursuant to which the investment was made, resulting in a Treaty violation."[264]

B. The Respondent's Position

242. The Respondent indicates that all of the measures "on which AES's claim is based were adopted by the competent authorities and were duly founded on reasons of fact and law", "it was possible to apply for review of such measures before administrative and judicial bodies" and "[t]he measures […] pursued public policy goals established in the regulatory framework from which AES intends to derive its rights and they entailed appropriate means to achieve those goals".[265]

243. The Respondent contends that "Argentina did not make any specific commitment, neither in the Electricity Law nor in the concession contracts of the

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percentage of equity it will hold, whether these plants will be granted PPAs (or what energy price the plants will receive), or whether it will receive any return on its equity contribution." Claimant's Updated Memorial, ¶¶ 331-333.

[263] Claimant's Post-Hearing Brief, ¶ 114. Claimant's Reply Memorial, ¶¶ 306-327.

[264] Claimant's Post-Hearing Brief, ¶ 115. In the Claimant's view, "[s]uch a right to regulate, however, is not absolute and does not insulate Argentina from Treaty liability, as such an outcome would nullify the Treaty's protections. This is made clear by Article III of the Treaty, which states that "[t]his Treaty shall not preclude either Party from prescribing laws and regulations in connection with the admission of investments … provided, however, that such laws and regulations shall not impair the substance of any of the rights set forth in this Treaty." In other words, Argentina's right to regulate is not limitless and it must ensure that the regulations are undertaken in a manner consistent with the substance of the Treaty protections, and must compensate investors for any resulting Treaty violations. ¶ 116 c). "[…] the right to regulate is not absolute". Claimant's Reply Memorial, ¶ 331.

[265] Respondent's Updated Counter-Memorial, ¶¶ 599, 600. "[A] all the measures adopted by the Argentine Republic have been introduced with the purpose of having a sufficient supply in safe and sustainable conditions, in order to ensure the supply of electricity to all users." […] "all the regulations were applied equally to all similarly situated generators, regardless of their nationality". Respondent's Rejoinder Memorial, ¶¶ 704, 705.

hydroelectric power plants operated by AES, to refrain from modifying the remuneration system for electricity generation. […] the Electricity Law is a general regulation, it cannot be interpreted as a specific commitment to an investor, nor can it be assumed that it will remain unchanged forever. […] the Electricity Law itself does not define a mechanism, currency or specific values for the remuneration of electricity generation, but rather establishes general principles so that the Secretariat of Energy, in the exercise of its regulatory powers, may adopt the necessary rules and adapt the regulatory framework to the changing circumstances of the MEM."[266]

244. The Respondent further submits that AES's position is based on an erroneous interpretation of the Electricity Law for several reasons: first, the Electricity Law does not provide for a marginal cost system;[267] second, the Electricity Law does not establish a single price for all generators;[268] third, the Electricity Law does not set the value, currency, nor to whom the capacity made available should be remunerated;[269] fourth, the Electricity Law does not provide for a deregulated market;[270]

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[266] Respondent's Post-Hearing Brief, ¶¶ 17, 18.

[267] "[…] [T]he Electricity Law establishes that the price received by generators must reflect the 'economic cost of the system,' which is not synonymous with a marginal cost system." Respondent's Post-Hearing Brief, ¶ 20.

[268] "[…] [T]he principle of 'uniform tariff for all' provided for in the Electricity Law does not mean that all generators would receive the same price regardless of the differences among them, but rather that all generators operating under similar conditions would receive the same remuneration at a certain dispatch spot." Respondent's Post-Hearing Brief, ¶ 28.

[269] "[…] [W]hen designing the regulatory framework for the electricity sector, the Argentine Congress decided to leave a wide margin of discretion to the Secretariat of Energy for determining capacity payments. Indeed, [redacted] confirmed that AES's understanding regarding capacity payments was that they represented a fixed amount established by the Secretariat of Energy to ensure reserve capacity, and that it was aware that such payments could be subject to future adjustments." (Emphasis omitted). Respondent's Post-Hearing Brief, ¶ 31. "[…] [T]here is no official document supporting the setting of the capacity payment at USD 10, nor any special assurance given to AES." Respondent's Post-Hearing Brief, ¶ 32.

[270] "[…] [T]he generation sector is described as an activity of general interest, related to the public services of transmission and distribution. It is not a completely deregulated sector; on the contrary, the activity is carefully regulated due to its impact on the general interest and the proper functioning of the electricity market." Respondent's Post-Hearing Brief, ¶ 34. "[…] the electricity sector is a key utility for the society, for the population, whereby the State has to guarantee provision of that service and also decides on the law and the other instruments through[...]" Day 6, Tr. (Eng) P1715:15-17 (Sruoga)

fifth, the Electricity Law does not guarantee generators a certain profitability. [271, 272]

245. In the Respondent's view, AES's performance indicates that the concession contracts were not "excessively burdensome", which "logically implies that, even if the modifications to the pricing criteria implemented by the Secretariat of Energy were substantial and arbitrary —which Argentina denies—, according to the provisions of the concession contracts themselves, there would be no compensable damage. […] there is no specific commitment by Argentina in the Electricity Law or in the concession contracts to refrain from modifying the remuneration system for electricity generation, let alone guaranteeing AES —or any other generator— a certain return on its investment."[273] In relation to this, it argues that "the measures taken to face the de-adaptation of the MEM allowed AES's plants to have a financial performance that surpassed AES's own expectations from before the crisis."[274]

246. The Respondent also points out that "AES overlooks the non-fulfilment of the commitments undertaken by the generators under the Memorandum of Adhesion, which gave rise to the need to reformulate, by mutual agreement, the commitments of both parties, firstly in the Definitive Agreement and then in the 2008-2011 Agreement."[275]

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[271] "The Electricity Law expressly provides for a 'reasonable rate of return' for electricity transmission and distribution companies that operate efficiently, and establishes that this rate must 'be related to the degree of operating efficiency and effectiveness of the company' and must 'be similar, as an average of the industry, to the rate of other activities with similar or comparable risk, both nationally and internationally.' However, there is no similar provision regarding electricity generation. If the legislator had wanted to provide for a rate of return for generators, it would have done so in the Law." Respondent's Post-Hearing Brief, ¶ 45.

[272] Respondent's Post-Hearing Brief, ¶ 19.

[273] Respondent's Post-Hearing Brief, ¶¶ 51, 52. "[I]t must be taken into account that the *Total* tribunal understood that, for a violation of fair and equitable treatment to be constituted, the remuneration had to be reduced to the extent of precluding the generators from covering their costs and making a return. […] the revenues obtained by AES throughout the relevant period proves that this has not been the case", […] "AES further claims that the 'Energía Plus' and FONINVEMEM programmes established differentiated remuneration for new generators, but fails to explain how this would be contrary to the criterion discussed in the previous paragraph, especially because AES had access and benefitted from both programmes". Respondent's Updated Counter-Memorial, ¶¶ 617, 618.

[274] Respondent's Post-Hearing Brief, ¶ 74. (Emphasis omitted).

[275] Respondent's Post-Hearing Brief, ¶ 54.

247. Regarding the FET standard, the Respondent argues that the aim of the FET standard is "to offer a minimum international law standard to measure the treatment accorded by a State to foreign investors." Therefore, in its view, Article II.2.a) is consistent with the customary rule.[276]

248. The Respondent considers that Claimant incurs in a "fundamental error" and that it "ignores not only the text of Article II.2.a […] but also the interpretation of both Argentina and the United States regarding the limited nature of the obligation agreed […]."[277] It alleges that "the minimum standard of treatment imposes fewer restrictions on the State's conduct, and therefore provides a lower level of protection than the autonomous FET standard AES invokes" and that "the FET standard set forth in the Treaty only protects investors against denial of justice and manifest arbitrariness."[278]

249. In the Respondent's opinion, even if the Tribunal were to consider that the scope of the FET standard is broader than the minimum standard of treatment, such standard "does not guarantee absolute legal stability[279] nor does it restrict the State's right to exercise its sovereign power to legislate and adjust its legal system to

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[276] Respondent's Updated Counter-Memorial, ¶ 581. "The fair and equitable treatment standard has its origins in customary law and that is precisely the source of Article II.2.a. Its customary roots make it possible to define its content: the host State must guarantee investors access to justice, due process and police protection against third-party actions that may harm investors or their property"; see ¶ 578. Also, Respondent's Rejoinder Memorial, ¶ 659.

[277] Respondent's Post-Hearing Brief, ¶ 162.

[278] Respondent's Post-Hearing Brief, ¶¶ 163, 165. The Respondent relies on *Neer*, *International Thunderbird Gaming Corporation v. Mexico*, *Glamis*, *S.D. Myers v. Canada* and *Genin v. Estonia.* The Respondent also contends that subsequent practice is relevant in the interpretation according to the VCLT, that the US has not consented to include an autonomous FET standard and that Argentina has also recognized that the FET standard contained in BITs "is equivalent to the minimum standard of treatment under customary international law". […] "[T]he applicable general rules on treaty interpretation not only lead to the conclusion that the scope of FET is limited to the minimum standard of treatment under international law, but also prevent the incorporation of the alleged expectations of investors and the stability of the regulatory framework into the content of FET". Respondent's Rejoinder Memorial, ¶¶ 662-667, 679.

[279] The Respondent indicates that "[i]n the absence of express promises or specific commitments, any expectations that investors might actually or purportedly have do not give rise to obligations binding on States." Thus, the FET standard is "far from providing a general and absolute guarantee of legal stability." "The norms that the States undertake not to alter throughout the duration of bilateral investment treaties are the provisions of the treaties themselves, not the regulations of the domestic legal systems of the States. There are no domestic regulations that Argentina and the United States have agreed to freeze throughout the duration of the BIT." Respondent's Updated Counter-Memorial, ¶¶ 588, 604.

changing circumstances. On the contrary, in a heavily regulated environment such as the energy sector, the regulator should have some leeway to react to changes of circumstances allowing it to avoid unreasonable results."[280] According to the Respondent, "the generators' economic interests cannot prevail over the interests of consumers" and "States retain their sovereign power to regulate the energy sector, which is critical to their economy, especially when facing negative externalities or crisis scenarios that impinge on their normal operation and distort the sector."[281]

250. The Respondent argues in relation to legitimate expectations[282] and regulatory immutability that "[t]he mere existence of general rules and regulations cannot be equated to a specific commitment by the State to the investor" and that there is no specific promise or guarantee that can be legitimately invoked by the Claimant to justify that the remuneration mechanism for electricity generation in force in the 1990s would remain unchanged or that the investments would earn a certain return ensuring extraordinary profits.[283] The Respondent submits that even if the Tribunal considers that the FET standard guarantees that the State will not change the essential characteristics of the regulatory framework, "the challenged measures were reasonable and did not amount to a substantial departure from the principles of the Electricity Law".[284]

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[280] Respondent's Post-Hearing Brief, ¶ 167. "A clear example of the reasonableness of the measures taken by Argentina while legitimately exercising its right to issue regulations is Europe's response to the energy crisis it is currently going through"; see ¶ 168. "[I]n applying the fair and equitable treatment standard, tribunals must take into consideration the circumstances of the State in which the investment is made, the circumstances under which the measures are taken and, as previously stated, the power of States to regulate in order to protect the public interest". Respondent's Updated Counter-Memorial, ¶ 593.

[281] Respondent's Post-Hearing Brief, ¶ 170.

[282] According to the Respondent, "[e]ven if it were assumed that legitimate expectations are protected under Article II.2.a of the Treaty, which is not the case, any investor who attempts to base a claim on such expectations must prove at least three elements. First, there must be a specific promise made to the investor. Second, the alleged expectations must be assessed at the time of making the investment. Third, the alleged expectations must be objective and reasonable." Respondent's Updated Counter-Memorial, ¶ 647.

[283] Respondent's Post-Hearing Brief, ¶¶ 171, 172; see also ¶¶ 173, 174.

[284] Respondent's Post-Hearing Brief, ¶ 194. "[T]he Electricity Law does not establish a system of marginal costs (short or long term) for the remuneration for generation, but the price received by generators must reflect the 'economic cost of the system.' […] the fact that the Secretariat of Energy, in the exercise of its legal powers, has used different mechanisms to determine the remuneration for generation does not make them incompatible

251. Finally, the Respondent also alleges that the suspension of the arbitration for 13 years would be "implausible for an investor whose expectations were purportedly thwarted" and that Argentina was transparent in relation to AES's investments. In particular, that the withholding of payments was in fact a postponement, where there was a dialogue and negotiation process to organize the collection of receivables due; that the projects under the 2005 Definitive Agreement and the 2008-2011 Agreement were negotiated with the generators at all times and AES has already accepted its equity participation and agreed to an addendum to determine its participation in the Guillermo Brown Thermal Power Plant; and that AES expressly accepted Resolution 95/2013 in full and generators have competed for dispatch both before and after the introduction of the regulations challenged by AES.[285] In relation to this argument, the Respondent alleges that "the threshold for the existence of a violation of the FET standard due to lack of transparency is high".[286]

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with the regulatory framework, let alone with the FET standard. […] The measures adopted by the Secretariat of Energy as from 2002 were aimed at mitigating the impact of the MEM de-adaptation in the context of a serious economic and social crisis, and guaranteeing both the sustainability of the electrical system and the availability of supply at a reasonable and customer-accessible cost. […] Given that all generators operating under equal conditions as to technology used and plant scale receive a uniform price, the average cost mechanism provided for in Resolution 95/2013 and its supplementary regulations, respects the principle of uniformity"; see ¶¶ 195, 197, 198.

[285] Respondent's Updated Counter-Memorial, ¶¶ 679-683.

[286] Respondent's Rejoinder Memorial, ¶ 702, referring to *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Quantum, 30 December 2019, **AL RA 216**, ¶ 660; *Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020, **AL RA 249**, ¶359 and *Stadtwerke München GmbH et al v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December, 2016, **AL RA 250**, ¶ 311.

C. The Tribunal's Analysis

252. The Claimant has argued that the FET obligation enshrined in the Treaty requires Argentina to: i) provide a stable and predictable legal framework; ii) respect AES's legitimate expectations; and iii) act in a non-arbitrary, transparent and consistent manner.[287] In its view, Respondent has failed on each of those grounds. In addition to this, the Claimant clarifies that it is not relying on a finding that one specific measure breaches the FET standard, but that (referring to *El Paso*) "taking an all-encompassing view of consequences of the measures complained of […] by their cumulative effect, they amount to a breach of the fair and equitable treatment standard".[288]

253. Article II.2.a) of the BIT has been interpreted by other tribunals in cases that share a factual base with this one. The Tribunal does not disregard those findings; however, it asserts that in accordance with its mandate, its analysis of the dispute must begin with the text of the provision at issue applied to the concrete set of facts of this case.

254. 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*". This provision establishes several obligations as to the State's treatment of investments. As in many other treaties, FET is not defined. Yet, the obligation is expressed with rigor when indicating "shall" and "at all times". The Tribunal agrees that the ordinary meaning of the terms "fair" and "equitable" is "just, unbiased, equitable, impartial, legitimate" and "'characterised by equity or fairness', where 'equity' means 'fairness; impartiality; even-handed dealing'", respectively.[289] In particular, the last phrase "shall in no case be accorded treatment less than that

[287] Claimant's Post-Hearing Brief, ¶ 111.

[288] Claimant's Updated Memorial, ¶ 287, quoting *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148,** ¶ 517.

[289] *Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018, **AES Auth. 159**, ¶ 518; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, **AES Auth. 130**, ¶ 360.

required by international law" serves the purpose of setting a floor. In other words, FET must be accorded and whatever is accorded must not be below the minimum standard.[290]

255. In this sense, the Tribunal agrees with the statement in *Azurix v. Argentina* that: "[t]he clause, as drafted, permits to interpret fair and equitable treatment […] as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling […]". Yet, it also considers that the distinction between FET and the minimum standard of treatment is of no material significance for the application of the standard in this case[291] for two reasons: *first*, the Tribunal agrees with other tribunals that the minimum standard of treatment has evolved since early arbitral disputes and certain features are not substantively different;[292] and *second*, the Tribunal notes that the Parties do not seem to dispute that non-arbitrariness and transparency are inherent elements of FET.[293] In any event, and most importantly,

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[290] The Tribunal observes that, while other treaties refer to treatment in accordance with international law "including" FET, such language is not used here.

[291] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, **AES Auth. 130**, ¶¶ 361 and 364.

[292] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, **AES Auth. 130**, ¶¶ 361, 364; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, **AES Auth. 141**, ¶ 337; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, **AES Auth. 182,** ¶ 611; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, **AES Auth. 136,** ¶ 284 (except as referred to stability and predictability).

[293] Although in its Post-Hearing Brief it indicated that "the FET standard set forth in the Treaty only protects investors against denial of justice and manifest arbitrariness" (Respondent's Post-Hearing Brief, ¶ 165), the Tribunal observes that the Respondent previously indicated "[..] the acts that give rise to a breach of the FET standard are those which fall below internationally acceptable levels and which, when weighed against the given factual context, amount to manifest *arbitrariness*, discrimination, a gross denial of justice or the lack of due process leading to an outcome which offends judicial discretion." "[…] the *threshold* for the existence of a *violation of the FET standard due to lack of transparency is high*". (Emphasis added). Respondent's Rejoinder Memorial, ¶¶ 682, 702. The Respondent also quoted "*Arbitrariness*, and not the protection of legitimate expectations, was the preferred tool of the traditional customary law for dealing with the mistreatment of aliens (…). It is not obvious that modern practice has changed this structure. (…) [A]n approach more with the grain of general practice would be to articulate the analysis in terms of *arbitrariness*, discrimination, *transparency*, and due process (…)." (Emphasis added). See ¶ 681, Martins Paparinskis, ―The International Minimum Standard and Fair and Equitable Treatment‖, *EJIL Talk!*, 2013, **AL RA 242**. Additionally, the Tribunal observes that the cases referred by the Respondent indicate arbitrary conduct and transparency as part of FET. See Respondent's Updated Counter-Memorial, ¶¶ 584-592 quoting (*International Thunderbird Gaming Corporation v. Mexico* ("manifest arbitrariness"), *S.D. Myers v. Canada* ("unjust or arbitrary manner"), *Glamis Gold, Ltd. v. United States of America* ("manifest arbitrariness"), *Waste Management, Inc. v. United Mexican States* ("conduct is arbitrary"/"complete lack of transparency").

from the Respondent's argumentation, the Tribunal understands that the main disagreement between the Parties lies with the concepts of stability of the legal framework and legitimate expectations.[294]

256. As to whether the stability of the legal framework forms part of this standard, the Claimant has referred to the Preamble of the Treaty, which expresses the Parties' agreement that "*fair and equitable treatment* of investment is *desirable* in order to *maintain a stable framework for investment* and maximum effective use of economic resources".[295] The Tribunal is also aware that other tribunals have considered the language used, such as "[d]esiring to *promote* greater economic cooperation between them, with respect to *investment*", "*stimulate the flow* of private capital and the economic development" and "*encouragement* and reciprocal *protection* of *investment*" as indicating that stability is an essential element of FET. [296] Among the many cases cited, the Claimant has mentioned the findings in *Infrastructure Services Luxembourg (Antin) v. Spain*, where the tribunal concluded that the obligation under Article 10(1) of the ECT to provide FET to protected investments comprised: "an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments".[297]

257. Notwithstanding this finding, that same tribunal also emphasized that:

> "[…] the *content and scope of the FET standard must be assessed within the context of the Treaty in which it is found*. Reference to decisions on the stability of a regime based on treaties whose text is substantially different and where no specific obligation of stability is contained may be of no assistance in the interpretation of this specific feature of the ECT. Not only does the ECT expressly state that its purpose is to provide a legal framework to promote

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[294] Respondent's Rejoinder Memorial, ¶ 681.

[295] Claimant's Updated Memorial, ¶ 255.

[296] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 276, **AES Auth. 136,** ¶ 274; *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, October 3, 2006, **AES Auth. 165**, ¶ 124. Regarding a different treaty with similar wording in the Preamble and the FET provision, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, July 1, 2004, **AES Auth. 176,** ¶ 183.

[297] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018, **AES Auth. 159**, ¶ 532.

> long-term cooperation in the energy field in accordance with the objectives and principles of the Charter —which stresses the need for a stable and transparent legal framework,— it also contains a specific obligation —as opposed to a mere declaration in the preamble, and with language that suggests and imperative and not merely a recommendation— to encourage and create stable conditions for investments. Regardless of how the relationship between stability of the legal framework and the obligation to accord FET is conceived, *it seems clear that, in the context of the ECT, the concepts are associated in a manner that merits their joined assessment*."[298]

258. This is precisely what the tribunal in that dispute did: analyze the particular context which it considered made stability an intrinsic feature of FET under the treaty in question.[299] In the present case, the Preamble of the US-Argentina BIT recognizes that FET is *desirable*, [*i.e.* worth seeking or wanted] to maintain a stable framework. Such recognition on its own cannot, in the Tribunal's view, be equated to a far-reaching declaration that FET includes stability of the legal framework or an obligation that the State parties to the Treaty necessarily formulate and maintain a stable legal framework in favor of investments. Contrary to the ECT and the European Energy Charter, this Treaty contains no particular obligation for the parties to encourage and create stable conditions for investors, to formulate or to provide a stable framework.[300] Although the Preamble shows that the promotion and protection of investment is among the objectives, and that in the words of the tribunal in *Azurix v. Argentina*, it "reflects a positive attitude towards investment",[301] the Tribunal cannot agree that legal stability forms part of the FET standard in this particular Treaty.

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[298] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018, **AES Auth. 159**, ¶ 533. (Emphasis added)

[299] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018, **AES Auth. 159**, ¶¶ 519, 522, 524-526.

[300] *See e.g.,* Article II.4 of the European Energy Charter "In order to promote the international flow of investments, the signatories *will* at national level *provide for a stable*, transparent *legal framework* for foreign investments […]" and Article 10(1) of the ECT "Each Contracting Party *shall*, in accordance with the provisions of this Treaty, *encourage and create stable*, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area". (Emphasis added)

[301] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, **AES Auth. 130**, ¶ 360.

259. With regards to legitimate expectations, several tribunals have considered it as part of the FET standard.[302] The tribunal in *Saluka v. The Czech Republic* indicated that "[t]he standard of 'fair and equitable treatment' is […] closely tied to the notion of legitimate expectations which is the dominant element of that standard"[303] and in *Charanne v. Spain* the tribunal shared the view that "based on [the] good faith principle of customary international law, […] a State cannot induce an investor to make an investment, hereby generating legitimate expectations, to later ignore the commitments that had generated such expectations".[304] While the Tribunal agrees with certain views expressed in those cases, it is of the opinion that in the present dispute, Claimant's arguments on legitimate expectations are inextricably linked with the stability of the legal framework that the Tribunal has determined does not form part of the FET provision in this Treaty. Indeed, the Claimant argues overall that: "Argentina's adoption of the impugned Measures […] totally altered the regulatory framework that was in place at the time of investment, thereby breaking its promises and upending AES's legitimate expectations"[305] and "Argentina created a legitimate expectation that the essential characteristics of the MEM would remain stable".[306]

260. To some degree, Claimant's argumentation on stability of the legal framework forming part of the FET standard is reused for Claimant's legitimate expectations claim. Under these circumstances, the Tribunal is not convinced that legitimate expectations on an issue that is not protected by the Treaty should be within the BIT's

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[302] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, **AES Auth. 144**, ¶ 216. *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, **AES Auth 146**, ¶ 7.75. *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, Award, December 11, 2013, **AES Auth. 160**, ¶ 667.

[303] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, **AES Auth. 184**, ¶ 302." See also ¶¶ 301, 303. In a similar sense, *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic (II)* (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*), ICSID Case No. ARB/03/19, UNCITRAL, Decision on Liability, 30 July 2010, **AES Auth. 193**, ¶¶ 222-223.

[304] *Charanne and Construction Investments v. Kingdom of Spain,* SCC Case No. V 062/2012, Award, 21 January 2016, (Unofficial English translation by Mena Chambers), **AL RA 146,** ¶ 486.

[305] Claimant's Updated Memorial, ¶ 321.

[306] Claimant's Reply Memorial, ¶ 369.

scope regardless of that. Nonetheless and for the sake of argumentation, the Tribunal recalls that there are certain objective criteria that must be examined to determine a breach of legitimate expectations. One of those criteria is that the expectations must derive from specific commitments or representations made by the State.[307] In this regard, even if the Tribunal were to consider that legitimate expectations should be analyzed regardless of the determination on stability, it is not convinced that Argentina made specific representations that could rise to a level of breach of this obligation, as explained below.

261. The Claimant contends that specific assurances were made in the regulatory framework, marketing and bid documents, concession contracts and by various authorities. Regarding the first one, the Tribunal notes that: i) there is no mention on the stability of the legal framework, any specific obligation in that regard or stabilization clause in the Electricity Law or the Procedures (Resolution SE 61/1992). In other words, there is no indication that the characteristics alluded to by the Claimant were subject to a commitment not to be modified; and ii) Article 36 of the Electricity Law provides that the Secretariat of Energy "shall issue a resolution containing the economic dispatch rules for energy and capacity transactions included in article 35(b) to be applied by the DNDC" and thus allows regulation by that Secretariat.[308] Regarding the second one, while the selling memorandums refer to specific characteristics on payments, dispatch, remuneration or free negotiation, those characteristics were founded on regulations where no such specific commitment was made and the documents do not go as far as to attempt to make such commitment either. Regarding the third one, the concession contracts indicate that the rights are granted in accordance with the rules governing the MEM with no further restriction

[307] *Charanne and Construction Investments v. Kingdom of Spain,* SCC Case No. V 062/2012, Award, 21 January 2016, (Unofficial English translation by Mena Chambers), **AL RA 146,** ¶¶ 495, 499. *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018, **AES Auth. 159**, ¶ 538. *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 375.

[308] Electricity Law, Article 36 (Unofficial translation).

and recognize the possibility of change to the regime, while making a caveat as to the possibility of obtaining compensation.[309]

262. The Claimant has presented witness statements in support of the contention that Argentine authorities made assurances on the stability of the regime at road shows as well as in meetings. While the Tribunal does not deny that senior officials may have had an agenda to attract investors and that statements could have been made along the lines claimed by AES, it cannot go as far as to qualify them as specific commitments that would create legitimate expectations in law,[310] particularly when basic instruments make no reference to the stability alleged in those witness statements and without further evidence on the assurances made by the State when it allegedly "induced" the investment.

263. In this regard, the Tribunal agrees with certain statements made by the *El Paso* tribunal:

> "At the beginning of the 1990s, the GOA aggressively targeted foreign investors and conducted several road shows […] to promote privatization […] such political and commercial incitements cannot be equated with commitments capable of creating reasonable expectations protected by the international mechanism of the BIT. […] The Tribunal […] cannot consider that any rule or even clear commitment embodied in a general piece of legislation or regulation – as in Decree No. 1589/1989 – is in itself a special commitment towards the foreign investors […] The legitimate expectations of any investor entering the electric power generation market of Argentina had therefore to include the possibility of changes in the procedures regulating the WEM.[311]

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[309] Alicurá Concession Contract, **AES Ex. 21,** Arts. 8, 9.1, 56.1.4. Article 9.1: "Amendments of a general nature made to the rules and proceedings relating to the generation of electric energy, to the operation of the Wholesale Electricity Market (MEM) […] shall not entitle the [concessionaire] to any claim […] except when […]". See also: San Juan Concession Contract, **AES Ex. 22**, Arts. 7 and 8.

[310] According to one of Claimant's witnesses: "we conveyed the same thing we said (*sic*) everyone as to what the regulatory framework was". Day 2 Tr. (Eng), P368:5-6 (Bastos); and "No, there were no special assurances, just the assurance that this was the legal framework to be maintained, and this is what we conveyed to all of the investors". Day 2 Tr. (Eng), P468:8-11 (Bastos). The Tribunal gathers that whatever assurances were made about the regulatory framework or its stability, were general in nature. Day 2 Tr. (Eng), P317:7-11, 15-21; P369:4-7; P469:1-4 (Bastos).

[311] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶¶ 392, 394, 404.

264. The Tribunal also largely agrees with the views expressed in *Infracapital v. Kingdom of Spain* as to:

> "[…] *absent a specific and unambiguous assurance, promise or commitment* by a competent authority that it will freeze the legislation in favour of a specific investor as an inducement to invest, an investor cannot legitimately expect that the legal framework will not change or evolve in future […] Laws, regulations, policies and official statements, may influence the expectations of investors that cause them to invest in the host State. A guarantee in law, policies and other authoritative statements often cause investors to reasonably expect that authorities will conduct themselves in the implementation of laws and regulations in a manner consistent with the provisions of such legal instruments and policies. *This is a reasonable expectation, but one that all investors have, regardless of whether there is a specific assurance to that effect*. Thus, a failure of the State to implement, enforce or comply with its own laws or a regulatory change in general legislation which results in the disappointment of the investor's expectations, may, but would not automatically constitute a breach of the FET standard."[312]

265. In consequence, and in addition to its considerations expressed above on the stability of the legal framework as an issue not covered by FET within this Treaty, the Tribunal has not found a specific commitment or representation made by Argentina to induce AES's investment that would allow it to determine a breach of the Claimant's legitimate expectations.

i. Whether the Respondent's conduct constitutes a breach of the FET standard

266. As stated above, the Parties do not disagree that arbitrary conduct gives rise to a breach of FET. Both Parties have referred to *ELSI*: "not so much something opposed to a rule of law, as something opposed to the rule of law… It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[313] Among others, the Claimant has also relied on *Ronald S. Lauder v. Czech Republic* ("not founded on reason or fact*")*,[314] *EDF v. Romania*

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[312] *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Quantum,13 September 2021, **AES Auth. 289**, ¶¶ 566, 568. (Emphasis added)

[313] *Elettronica Sicula S.P.A. (ELSI) Case (United Stated of America v. Italy)*, Judgment of July 20, 1989, ICJ, Reports of Judgments, Advisory Opinions and Orders, 1989, **AES Auth. 019**, ¶ 128; referred by the Claimant in Claimant's Updated Memorial, ¶359, fn. 633 and Respondent's Updated Counter Memorial, ¶ 688, fn. 1114.

[314] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, **AES Auth. 030**, ¶ 232.

("without serving any apparent legitimate purpose […] not based on legal standards but on discretion, prejudice or personal preference […] taken for reasons that are different from those put forward by the decision maker […]")[315] and *Cervin v. Costa Rica* ("not in accordance with law, justice or reason […] based on caprice […] a deliberate repudiation of the goals and objectives of a State policy.")[316]

267. On the other hand, the Respondent indicates that a measure "may be considered arbitrary if it has not been taken through a rational decision-making process"[317]; it relies on *Glamis Gold v. United States* and *Philip Morris v. Uruguay*, where the tribunals referred to a "manifest lack of reasons", a "reasonable connection" [between the harm and the proposed remedy][318] and a "purpose" [the protection of public health in the latter].[319]

268. Ordinarily, the word "arbitrary" is associated with "capricious and unreasonable act[s]", something "based on or determined by individual preference or convenience", "not restrained or limited in the exercise of power", or "depending on individual discretion".[320] In the Tribunal's view, those are elements that have previously been considered as describing arbitrary measures within investment case law. While the Respondent has expressed reservations on a broad interpretation of

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[315] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, **AES Auth. 144**, ¶ 303.

[316] *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Final Award, March 7, 2017, **AES Auth. 135**, ¶ 527. The Tribunal observes that the Respondent also referred to *Ronald S. Lauder v. Czech Republic* in its Updated Counter Memorial, ¶ 689 and that, while it made reference to the examples given in *EDF v. Romania*, it indicated that "these categories may not be interpreted broadly". Respondent's Updated Counter Memorial, ¶ 690.

[317] Respondent's Updated Counter Memorial, ¶ 691.

[318] "[I]t appears to the Tribunal that the government had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy". *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA Arbitration, Award of 8 June 2009, **AL RA 132**, ¶ 805.

[319] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, ¶¶ 390, 391.

[320] "[A]rbitrary". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/arbitrary 03 April 2024.

certain categories, the Tribunal observes that its argumentation points towards "rationality", "reasonableness", "reasons".[321]

269. In the Tribunal's view *disregard of due process*, *caprice*, *whim* and *unreasonableness* are elements that, when present in a measure, will render it arbitrary.[322] This is in line with the ordinary meaning of the term as well as the meaning given by other tribunals. The Tribunal also agrees that a deliberate repudiation of the goals and objectives of a State policy, a measure based on sole discretion or personal preference rather than on law or facts, or a measure taken for reasons different than those put forward by the decision maker may also constitute arbitrariness. It is within the task of tribunals to identify whether such elements exist in accordance with the circumstances of each case. In the case at hand, the Respondent has adopted measures affecting spot price formation and dispatch, capacity payments, the withholding of revenues and investment programs, as well as the cost-plus system and prohibition of PPAs. The Tribunal will analyze whether such measures were arbitrary and thus, in breach of the FET standard provided by Article II.2.a).

a. Preliminary Considerations

270. The Claimant has argued that several measures adopted by Argentina breach the FET standard. In particular, as regards the overall spot price cap, the exclusion from spot price formation of variable cost declarations based on fuels other than natural gas, the lowering of capacity payments, the cost-plus system and prohibition on PPAs, it seems to the Tribunal that Claimant's overall argumentation revolves around the allegation that the Electricity Law on the basis of which AES made its investment established certain features that made the MEM a *competitive* market, yet

[321] "A measure may be considered arbitrary if it has not been taken through a rational decision-making process." Respondent's Updated Counter-Memorial, ¶ 691 (referring to *Glamis Gold v. United States* ("manifest lack of reasons")). See also ¶ 692 (referring to *Philip Morris v. Uruguay* ("legitimate purpose") and ¶ 702 ("they were [the measures] reasonable".

[322] "[T]he underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law". *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, **AES Auth. 163**, ¶ 262.

Argentina subsequently gutted that scheme. It also seems to the Tribunal that certain prejudicial effects of the measures derive from the pesification, the impact of which the Claimant has clarified it is not contesting.[323]

271. In this sense, the Tribunal recalls its view that, while the US-Argentina BIT indicates that FET is desirable in order to maintain a stable framework for investment, it does not follow that stability is an element of FET under the BIT or that Argentina was impeded from adjusting its legal framework. Therefore, whether such measures are arbitrary should not be based on those premises, but rather on whether the measures implemented were *reasonable*, *i.e.*, founded on reason or fact as opposed to measures based on caprice, sole discretion, personal preference, in disregard of due process, as stated above.

272. The Tribunal notes that pursuant to Article 35 of the Electricity Law, the Secretariat of Energy will determine the rules for dispatch in accordance with the following principle: "[d]ispatch the required demand, based on the recognition of energy and capacity [*potencia*, in Spanish] prices established in the following article […]". On the other hand, Article 36 states that "the Secretariat of Energy will issue a resolution with the economic dispatch rules for energy and capacity [*potencia*, in Spanish] transactions […] The aforementioned rules will provide that generators receive *a uniform rate for all* for the energy sold in each delivery location established by the DNDC, based on *the economic cost of the system*. For its estimation, the cost that the unsupplied energy represents for the community must be taken into account."[324] It is undisputed that the Electricity Law continues to be in force.

273. What were generators entitled to, and what do they continue to be entitled to under the Electricity Law? They were and are entitled to: i) a *uniform* rate for all; ii) that is based on *the economic cost of the system*; and iii) that takes into account the cost of unsupplied energy. These concepts relate to one another. The Electricity Law

[323] See for example: "On March 18, 2002, the SE enacted SE Resolution 2/2002 mandating the forceful conversion of the three tiers of caps, which were set in US Dollars, into Argentine pesos. This had the immediate effect to lower all caps to one third of their prior US dollar values." Abdala-Spiller Regulatory Report, fn. 138.

[324] (Unofficial translation. Emphasis added).

does not define what "uniform" means. According to its ordinary meaning, "uniform" means: "having always the same form, manner or degree: not varying or variable; consistent".[325] The Respondent alleges that uniform means that generators "operating under similar conditions, will receive the same remuneration at a certain delivery spot".[326] However, that is not what the Law says. The Law does not qualify or restrict "uniformity" to generators *in similar circumstances*, or based on the technology they use or the scale of their plants. The only requirements associated with the tariff are the elements of economic cost and unsupplied energy. In this sense, the ordinary meaning of the word seems to be more closely aligned with the understanding of energy as "homogenous".[327]

274. That being said, "the economic cost of the system" is also not defined. Claimant's witness, former Secretary of Energy, Mr. Bastos, testified that "[t]he economic theory defines as an economic cost an avoidable cost and places the responsibility of avoiding or not avoiding that cost on the demand, on the one that uses energy. When you want to determine an economic cost, you never look at the--into the past. You never look at the production costs or factors. Instead, you look into the future because you are trying to determine the cost of additional energy that will be required in the future."[328] The Tribunal does not consider it appropriate to equate the concept of "economic cost of the system" with a marginal cost methodology, more so, when it is recalled that reference to marginal cost was removed from the Law. Moreover, the Tribunal does not see that Article 36 entitles generators to a specific margin of profit or revenue, nor does it see a restriction in the rates to be obtained by generators either. In other words, Article 36 does not address the degree of

[325] "[U]niform". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/uniform 03 May 2024.

[326] Respondent's Updated Counter-Memorial, ¶ 71.

[327] "It means that the kilowatt hour that is placed at a node has the same price for everyone who is placed in that –at that node, regardless of the technology used in its production." […] "So the concept of a uniform cost is one of replacement. Energy is homogenous. Energy at the node, regardless of what technology is being used, what we look at is the cost of replacement. One kilowatt hour here is replacing one kilowatt hour from another generator. The price is the same for everyone, independently of what technology is being used to produce that energy". Day 2 Tr. (Eng), P388:20-P389:1; P450-5-12 (Bastos).

[328] Day 2 Tr. (Eng), P446:1-10 (Bastos).

profitability, whether high or low. More importantly, Article 36 refers to the "economic cost" of the "system". It does not specify or distinguish which costs should be taken into account, from which type of plants or inputs, etc. The economic cost of the system would logically encompass the costs that make up the overall cost for the generation of electricity.[329]

275. The Tribunal observes as well that a concept that is given importance in the Electricity Law is "competition". Article 2 of the Law identifies among the objectives of the national policy to "promote competition" in the electricity supply and demand markets and to "ensure competitiveness". Articles 19 and 56 also state that "unfair competition" is prohibited and anti-competitive practices will be prevented by ENRE. The Claimant asserts that a competitive market is one in which prices are set by the forces of supply and demand.[330] In its submissions, the Respondent seems to disagree. It argues that "Claimant's such restrictive position is wrong. AES's approach is only possible in the case of an adapted market, which would only exist if there were a sufficient level of supply to address the growing demand".[331] The Tribunal does not accept this statement, since it suggests that even after all of the measures enacted since 2002 and all of the time elapsed since the end of the crisis (by any reasonable measure), by virtue of the continuation in force of the essential components of Argentina's crisis-era regulatory framework, Argentina's electricity market is still not "readapted" and thus, it is not competitive. This would contradict its statement that generators *compete* in the spot market for economic dispatch.[332] At the hearing, the somewhat startling view that Argentina's electricity market is still not readapted some

[329] "[…] beyond approaches or the methodologies that one establishes, one needs to bear in mind that for the system to be stable, you need to acknowledge all the costs, capital costs, the cost of investment and operational costs or variable costs. In the case of economic costs, we are calculating the cost of capital, of recovering that capital, based on what we might need for future equipment." Day 2 Tr. (Eng), P448:8-16 (Bastos).

[330] Claimant's Reply Memorial, ¶ 96.

[331] Respondent's Rejoinder Memorial, ¶ 76.

[332] Respondent's Updated Counter-Memorial, ¶ 682; Respondent's PHB, ¶¶ 71, 198.

22 years or so after the impugned measures were first adopted was reiterated by Respondent's witnesses.[333]

276. The Tribunal observes that the Adhesion Act to Resolution 1427/2004 indicates that "readaptation" of the MEM was to be understood as: "the action of repairing the *regular functioning* of the MEM as a *competitive market*, with *sufficient supply*, in which Generators, Distributors, Traders, Participants and Large Energy Users *can buy and sell electricity at prices determined by the supply and demand, without regulatory distortions and within the established framework by Law No. 24,065*."[334] This would indicate that Argentina's understanding of the regular functioning of the electricity market as *competitive* was actually based on prices being determined by demand and supply without distortions, as alleged by the Claimant. So much that, within the framework of the FONINVEMEM programs, "readaptation" [to a competitive market as regularly understood] was a concept used as "the objective" to be achieved with the implementation of Argentina's measures. In this sense, while the text of the Electricity Law provides a margin of discretion for the Secretariat in the elaboration of rules for dispatch, a uniform tariff for all generators and a competitive market based on prices being set through supply and demand are central concepts that establish the boundaries within which the authority must act.

277. While the Tribunal will proceed with its analysis on the measures, it nonetheless notes that in 2016 and 2017 Argentina recognized that there were specific

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[333] "Q. And that has not happened to date; right? A. Exactly. Because we were in the same situation as in 2003. […] ARBITRATOR DRYMER. I want to ask the witness to clarify. Did you just say, sir, that this (iv) has not been fulfilled to date, as of today? I think that's what you said a moment ago. Am I right? MR. CAMERON. In a previous comment this morning, I said that if I look at the situation as regards of readaptation of the system, even nowadays, since 2003, the system has not been readapted." Day 5, Tr. (Eng) P:1422:4-1422:6; 14522:14-17 (Cameron) See also "ARBITRATOR DRYMER: Is that a yes, the market has been readapted? THE WITNESS: To what it was or compared to what it was in the '90s, the answer is no. So it adapted to the new reality with the current rules." Day 7, Tr. (Eng) P1947:9-14 (Mendoza).

[334] (Unofficial translation. Emphasis added) Annex 1 to Resolution SE 1427/2004 (Adhesion Act), issued by the Ministry of Energy, December 7, 2004, **AES Ex. 236**. See also: "So it was a combination of actions. It was not just one action. So you cannot say readaptation is this. No. It was putting together all the commitment to the Government to restore the market to the original condition and adding capacity. Because if you don't add capacity, then it's difficult. But if you don't take the action that the Government promised, you don't stop the problem, because if you don't pass the right signal to the customer, they will, you know, continue growing as crazy without paying the actual cost of the generation, so the accounts receivables would remain." Day 3 Tr. (Eng), P917:10-22 [redacted].

economic criteria established in the Electricity Law, related to the remuneration systems and the definition of prices in the MEM, that have been abandoned since 2003 through the progressive adoption of regulatory decisions; regulatory decisions that were outside such criteria according to the text of Resolutions 6/2016 and 19/2017.[335]

278. Finally, Articles 35 a) and 6 of the Electricity Law also entitle generators to *enter contracts* directly with large users and distributors and the *free execution* of those contracts. This right is plainly established in the text and is not subject to a specific limitation other than the *caveat* as to what must be understood by "generators".

b. Measures affecting Spot Price Formation and Dispatch

279. The Tribunal has already found that unreasonable measures, measures based on sole discretion rather than on law or facts and measures taken for reasons different than those put forward by the decision maker, can constitute arbitrariness. Bearing this in mind, we begin our examination.

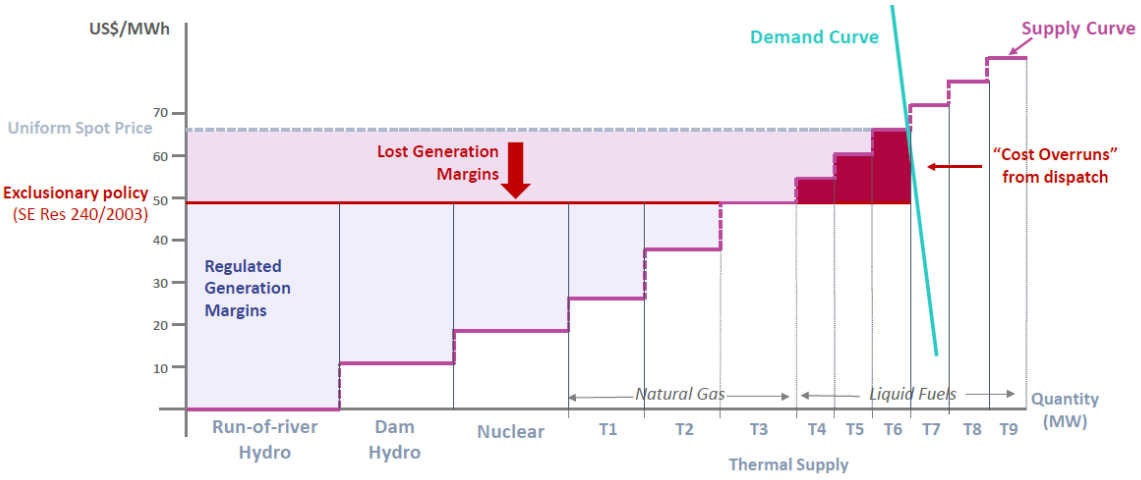
280. The measures implemented by Argentina imposing an overall spot price cap as well as affecting spot price formation and dispatch stem from Resolutions 08/2002 and 240/2003. Resolution 08/2002 imposed an overall cap on spot prices of AR$ 120/MWh (equivalent to US$ 40/MWh) which initially applied to normal conditions. Previous to this measure, the dispatch was determined in accordance with the efficiency of the generators and the spot price was determined in accordance with the last plant called for dispatch, *i.e.*, the least efficient or most expensive generator (declared higher variable costs of production).[336] Therefore, generators with the most efficient (lower) costs of production would be dispatched first and could thereby

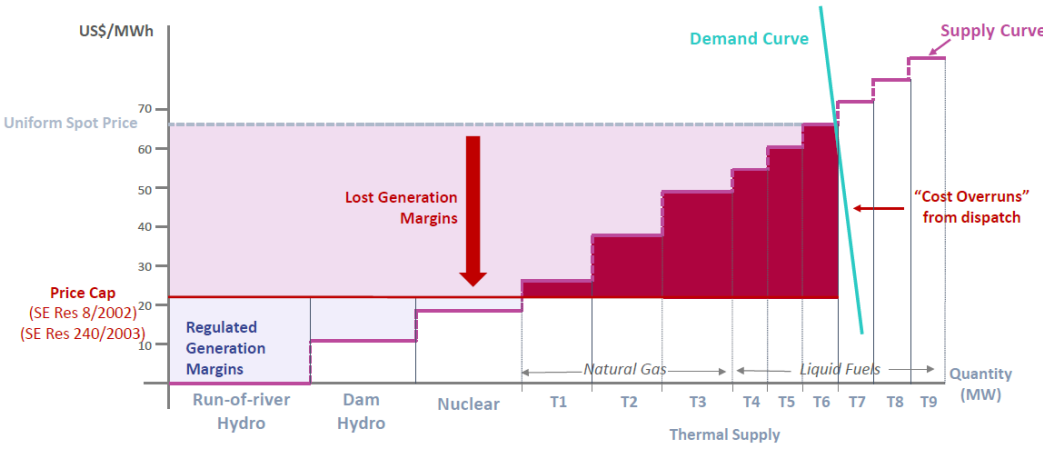
[335] Resolution MINEM No. 6/2016, 1st, 2nd and 3rd recitals, **AES Ex. 320** and Resolution SEE No. 19/2017, February 2, 2017, 3rd Recital, **AES Ex. 336**.

[336] While prior to the measures there were caps on spot price, such caps were associated with a "risk of load situation". For a low risk of loss of load (up to 1.6% of total demand), the cap was US$ 120/MWh. For a median risk of loss of load (up to 5% of total demand), the cap would double to US$ 240/MWh, and if the risk of loss of load was high (up to 10% of total demand), the cap would be US$ 1,500/MWh. Abdala-Spiller Regulatory Report, fn. 138.

receive higher profit margins through the spot price based on the last plant called for dispatch. Although not all generators received the same margin over their variable operating costs, they all received the same uniform spot price. This incentivized and rewarded efficiency and productivity.

281. Resolution 240/2003 on the other hand extended the cap to apply at all times and excluded non-natural gas plants (more expensive liquid fuels) from the setting of hourly spot prices. Hydro electrics were also excluded. By using only natural gas plants to establish the spot price, the margins for certain generators were either reduced (for example in the case of hydroelectric plants that had previously a profit margin due to their efficient costs) or eliminated (in the case of plants that did not cover their costs through the spot price). Cost overruns were paid for the latter, which had the function of providing the difference between the spot price and the variable costs.





Claimant's Opening Presentation, 78, 79.

282. The recitals of Resolution 8/2002 refer to the need to "adapt the rules … to the new macroeconomic context" derived from the exit from the convertibility and the "urgency and priority" for such regulatory adaptation.[337] It continues to indicate that without adapting the current methodology in certain provisions of the PROCEDURES, "future variations in the exchange rate between the peso and foreign currencies could produce imbalances" that make the values of VCP "unrepresentative" and put at risk "the sustainability of the generators' activity and, consequently, the *supply* to *end users* throughout the country."[338] The Resolution also indicates that the Secretariat fully retains the power to establish ex post limits, maximum prices, and additional tools for spot price calculation.[339] According to the text of the Resolution, it was a *temporary* measure (*transitoria,* in Spanish).

283. On the other hand and as indicated above, Resolution 240/2003 extended the applicability of the spot price cap to apply at all times. Resolution 240/2003 refers in its recitals to an "abnormal situation" in the supply of natural gas, to the power of the Secretariat regarding the spot price calculation and to the urgency in the implementation of such regulations within the context of the emergency affecting the economy. These references are general and do not develop further what the abnormal

[337] Resolution 8/2002, 5 April 2002, **AES Ex. 186**, 3rd and 4th recitals. (Unofficial translation).

[338] Resolution 8/2002, 5 April 2002, **AES Ex. 186**, 6th recital. (Unofficial translation).

[339] Resolution 8/2002, 5 April 2002, **AES Ex. 186**, 18th and 23rd recitals. (Unofficial translation).

situation in the supply of gas is, how it is affecting the power plants, which power plants, how the market is being affected or the status of the emergency. This Resolution also expressly indicates that it is *temporary*.[340]

284. With regards to the spot price cap, the Tribunal notes that the cap was rarely used until 2005. Between 2002 and 2005 it was applied during 238 hours. According to one of Respondent's witnesses, during that period it had no "impact".[341] According to the Claimant, the cap was also binding for a limited time during 2007, 2008 and 2009, however, "between 2010 and 2013, the spot price cap was the binding spot price between 70% and 98% of the dispatch hours".[342]

285. Resolution 8/2002 makes several adjustments, among them, how VPC would be declared. This related to the variations in the exchange rate between the peso and foreign currencies that could impact such values. The Resolution briefly explains that imbalances may put at risk the sustainability of the activity and the supply to end users. However, it is not clear what the rationale for the spot price was, beyond the mere fact that the Secretariat was authorized to set maximum prices and establish additional tools for the spot price calculation. The Resolution does not indicate how the AR$ 120 was calculated or how or why the Secretariat determined that such price was appropriate. The Respondent has failed to point the Tribunal to a contemporaneous document which would shed light on this. Furthermore, while this Resolution was adopted in a context of economic crisis and it refers to the "urgency" of the regulatory adjustment, this is completely at odds with the fact that the spot price was practically not applied for 3 years. The Tribunal cannot understand what the urgency, necessity, or utility of the measure was if it was effectively inapplicable during that period. Finally, the cap remained unadjusted until 2017 regardless of other external factors, for instance inflation.[343] The Tribunal struggles once more to find

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[340] SE Resolution 240/2003 of August 19, 2003, **AES Ex. 224**, 2nd, 4th and 5th recitals. (Unofficial translation).

[341] "[D]id not have any impact". Day 6 Tr. (Eng), P1572:6-9 (Ruisoto). *See also* Claimant's PHB, ¶ 67 and Day 6 Tr. (Eng), P1571:15-19 (Ruisoto).

[342] Claimant's Reply Memorial, ¶ 107.

[343] "Q. Well, let us just stop and think of 2003--2013, rather. So between 2002 and 2013, the temporary cap of 120 pesos continued to be applied; correct? A. Yes, sir. Q. There was inflation throughout those 11 years;

any rationale in a measure being expressly labelled as temporary yet remaining in place for more than ten years.

286. These elements, rather than pointing to the reasonableness of the measure and its motivation for being imposed, point to the authority's discretion and to a disconnect between its alleged urgency, utility, or contribution, and the then-prevailing factual context. In other words, they point towards arbitrariness.

287. The Tribunal has also indicated that Article 36 of the Electricity Law provides for a "uniform tariff for all [the generators] at every delivery point". It does not distinguish between the circumstances or technology of generators. While the Tribunal can understand the logic or desirability that underlies Respondent's proposed interpretation of this concept, the fact is that the Law simply does not support such an interpretation.

288. In this regard, the Tribunal can observe that the exclusionary policy established through Resolution 240/2003 in combination with the spot price cap, had as a side effect that generators were paid different tariffs depending on their costs. Thus, while some generators were paid cost overruns exceeding the spot price, other generators recovered the spot price, *i.e.*, not all generators received a uniform tariff, in violation of what Article 36 of the Electricity Law mandates.[344] In other words, generators were no longer in competition. The Respondent has indicated that the exclusion mechanism of certain machines has direct precedent in the MEM regulation and referred to the exclusion of diesel and gas oil machines provided in Resolution

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correct? A. Yes. Q. Since the cap was peso-denominated, in addition to inflation, there was devaluation, so the 120 peso dollar would represent a dollar-denominated value that was even lower; correct? A. Yes, based on the declaration. Q. For example, in 2002, we agreed that the cap represented $40, and in 2013, when the exchange rate was 6-to-1; correct. So in that case, let me represent to you it was 6-to-1. Then the cap price was 20 instead of $40; correct? A. Yes. If you do that math, yes, that is the right result". Day 6 Tr. (Eng), P1569:21-P1570:19 (Ruisoto). The cap remained fixed at AR$120 until 2017 when it was increased to AR$240. See Res. SEE 20-E/2017, **AES Ex. 334**.

[344] See Abdala Regulatory Report, ¶¶ 133, 134. Also: "Q. If I'm a plant with a high production cost, I charge 120 pesos and the difference because of those temporary excess costs. Now, if I'm an efficient--an efficient hydroelectric plant with low production costs, then I still keep those 120 pesos per megawatt hour. Q. So at a certain time, you have generators receiving different amounts for the same generation service? A. Yes. They also use different technologies. They came from different backgrounds and histories where the hydraulic ones all came from the country, and then were given away in concessions at a specific flow, and yes, those were the numbers that remained ultimately." Day 5 Tr. (Eng), P1331:19-P1332:11 (Cameron).

SEE 61/1992.[345] It is not this Tribunal's task to determine the compatibility of the exclusion of certain machines under Resolution SEE 61/1992 with the Treaty. However, it is not clear to the Tribunal how the effect of that exclusion is comparable in terms of the uniform tariff. Particularly when it was announced prior to privatization, temporarily applied for three years, affected 5% of installed capacity, and more importantly, was due to the fact that the machines listed did not enter the electrical network for reasons of economic cost, but rather were machines whose need within the system was determined due to technical reasons regardless of their cost, as opposed to this case where the generators would enter if not for the Resolution.[346]

289. In this sense, the exclusions to spot price formation together with the spot price cap had a generalized effect on the dispatch of electricity which undermined the current rules for competition among generators and squeezed generators' earnings. Whereas previous to the measures generators would compete for dispatch on the basis of their efficiency and declared variable costs, after the measures, whatever the dispatch order, the spot price and the remuneration for electricity generation was

[345] Respondent's Rejoinder Memorial, ¶ 182. See also Res. SEE 61/1992 (*Procedimientos*), Art. 2.3.4.1 and Annex 5, **AES Ex. 086**.

[346] "The regulatory framework excludes these pieces of machinery because they are not a part of the machinery to be borne in mind to establish the short-term marginal cost. Q. That's because you decided to exclude them? A. No. It is the grid itself and the physical system of facilities that exclude them. […] For economic reasons, these units would not be used. We have included them because of physical reasons. The remaining ones show the marginal cost of the system. For those that come in for economic reasons, some will not come in to operation because demand does not require that, but these that came in because of physical reasons are not related to the economic costs. […] Annex 5 lists, with name and surname, those pieces of machinery that will not be considered because they were those deemed unnecessary at the time. Diesel engines, well, you say this is technology. Diesel engines had no raison d'etre, save for the fact that they were working due to technical restrictions. In a scheme organized on an economic base, there are no diesel engines. […] At the time, a technical study was carried out by the technical teams at the Secretariat, and they say they are entering in to operation because of technical restrictions. […] There are types of equipment that have to be present regardless of their cost because there are technical reasons why the system requires that type of equipment to be present. And there can be different technical reasons in an area, for example, in the northwest of Argentina, there was a situation where the transmission system was precarious. It wasn't robust enough to send the energy over there. So some types of equipment are necessary, that need to be present there, regardless of any other considerations. So if you have an energy generation park of 30 generators, for example, there are seven or eight that need to be present due to certain conditions. Those generators will generate energy independently of any economic decisions. […] So those that are called in, come in based on economic considerations under the rules of dispatch that say, this and this and this generator will be called because that is what is established for economic dispatch, but those others that are there, regardless of the cost, those had to be there due to those technical considerations of the system." Day 2 Tr. (Eng), P394:1-7, P395:15-22; P396:17-P397:3, P398:21-P399:3; P457:8-22; P458:7-13. (Bastos).

affected by the costs that the Secretariat determined to take into account in relation to natural gas and not in itself by the interaction of the generators in the market. This impacted generators' earnings since it limited the amount of profits that they could receive through the spot price cap and left out of spot price formation other types of, sometimes more expensive, fuels. In other words, it was the regulatory action of the State which shrunk the generators' remuneration.

290. With regards to the anomaly that Resolution 240/2003 was intended to address, Respondent has referred the Tribunal to a letter dated 13 August 2003 from CAMMESA to the then Secretary of Energy. Through this letter, dated one day before Resolution 240/2003, CAMMESA informed the Secretary that there had been operational inconveniences derived from the unpredictability of gas supply to certain power plants starting a week earlier. It refers to unforeseen restrictions to gas supply to four power plants located in two regions and then mentions restrictions to other power plants in three other regions, though clarifying that these latter had been more predictable due to the temperatures expected. It mentions that on August 6 other unforeseen restrictions took place in the GBA region, which put at risk the supply of electricity and increased the operating costs of the MEM.

291. Even though the letter indicates that some restrictions to the gas supply in certain regions remained and emphasizes the "unprecedented" nature of the duration of such situation, it also states that by 13 August 2003, the gas system had gradually released gas to the power plants and that the recovery of MW in relation to the original estimate was under way. The letter reiterates the need for as much information as possible to ensure the predictability of gas supply, mentioning that the actions taken had been only partially successful.[347]

292. The measure was suspended in October 2003 since the anomaly had disappeared, but was reimposed in January 2004 and remained until 2013.[348]

[347] CAMMESA Note B-21615-1 to the Secretary of Energy, **AES Ex. 536**.

[348] SSEE Note No. 526/2003, 9 October 2003, **JR 90**; SSEE Note No. 65/2004, 30 January 2004, **JR 91**; Day 5 Tr. (Eng), P1338:1-20 (Cameron).

According to the former Secretary of Energy, it became "permanent".[349] The Tribunal understands that Respondent alleges, to use the words of its witness, that the anomaly of August 2003 (restrictions in the availability of gas) became "a new reality".[350] The Tribunal considers that there are three problematic aspects of this measure. *First*, the fact that such a general restriction had been imposed when CAMMESA's letter referred to unforeseen events on certain specific plants; *second*, that Resolution 240/2003 expressly stated that it was temporary yet, once it was re-imposed, it remained in effect for nine years without any stated basis or rationale; and *third*, the fact that the fundamental aspect of the measure as to the exclusions and its effect on spot price formation, which was envisioned to address an "anomaly", remained unadjusted to address what became a "new reality".[351]

293. There is one other issue that the Tribunal considers important. Through a letter dated 19 January 2010, the Secretary of Energy indicated that if Resolution 240/2003 were annulled, "undue and inequitable income would be generated for the different generating agents of the MEM."[352] To an express question by the Tribunal, Respondent's witness and former Secretary of Energy, Mr. Cameron, was not able to indicate whether the determination of such supposedly "undue" or "inequitable"

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[349] Day 5 Tr. (Eng), P1404:17-20 (Cameron).

[350] "A. Well, let's say 2004-2005 and going forward that supply was reduced, yes. Q: So it was not an anomaly; it was a new reality? A. It was a new reality, which doesn't change anything." Day 6 Tr. (Eng), P1603:2-P1603:7 (Ruisoto).

[351] "[…] I instruct you, taking into account that the circumstances that determined the issuance of the SECRETARY OF ENERGY Resolution No. 240 of August 14, 2003 have been reproduced, to apply what is established therein as of 0:00 time on the day of the date." (Unofficial translation). SSEE Note No. 65/2004, 30 January 2004, **JR 91**.

[352] SE Note No. 496 to CAMMESA, **AES Ex. 596**. "Q. So not all the generators were paid the same? A. They had different costs, we can say. What the Resolution 240 sought to do was to not generate extraordinary revenue for some generators compared to others." "[…] A marginal system works adequately when you are in a balanced market, and basically, when you come out of that balanced market and capacity arrives at a limit, and you can't cover demand or you have lost your main fuel, then there's that mechanism, and it generates excess costs or additional costs. And it was understood that this was generated in some sectors in hydro. If they received what we recognize as certain costs, then everything that's above that additional revenue, above what they would normally receive." "[T] his happens when the mechanism you use to determine the pricing that's going to become the seasonal prices--the spot price that's going to become the seasonal price has an influence that it is not adjusted. It maladjusts the system; and thus, a number is established that is relevant for all of them, but it generates a price that doesn't make economic sense. It's not the optimal situation economically." Day 5 Tr. (Eng), P1332:12-17; P1332:21-P1332:10; P1383:1-9 (Cameron).

income was based on any particular criteria or parameter.[353] On the evidence, the determination of whether generators would earn "inequitable income" seems to have been based on the discretion of the authority. This also points to the existence of a reasoning different than the one plainly provided for in the applicable law.[354]

294. Ultimately, the measures established by the Respondent had the effect of lowering the prices and controlling or squeezing the level of profitability[355] of the generators according to the discretion of the authority rather than in accordance with reasonably defined parameters, for an undefined period of time, while indicating they were temporary measures. The Tribunal has indicated that Article 36 does not establish specifically a marginal cost system and does not address the degree of profitability for generators; however, it does establish as *fundamental* elements: a uniform tariff for all generators based on the economic cost of the system, not based on only certain costs. These elements were disregarded by Argentina through measures where an essential component did not have a reasonable basis, which privileged the discretion of the authority, undermined the scheme provided under the applicable law, and/or were adopted for reasons other than those indicated.

295. For the foregoing reasons, it is this Tribunal's view that the measures establishing a spot price cap and excluding fuels other than natural gas to determine

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[353] Day 5 Tr. (Eng), P1383:14-P1384:4 (Cameron).

[354] "[…] an abnormal situation in the supply of natural gas to power plants, which is causing a mismatch in the functioning of the market and the prices that result from it." (Unofficial translation). SE Resolution 240/2003 of August 19, 2003, **AES Ex. 224**.

[355] "This shows what I told the Tribunal a couple of minutes ago. This is the 2011 report. We can see that the average price every month of the year at 30 cents of a peso, not dollars, from the cap. So every month, they average 119, 119 flat or 119.8, and the cap was 120. That means that, basically, there was no marginal revenue because the price was constantly reaching the cap for the combined-cycles. If you look at the next year, you are going to see higher average, and then for 2013, it was 100 percent of the times. So this also confirms what I told the Tribunal some time ago. Since the spot price was reaching the cap, it was impossible to have a marginal profit or margin for the combined-cycle, which is an important platform in Argentina, and it was, like, 70 percent of the generators. […] As a matter of fact, if you look at the first line, you are going to see the spot price. This is the spot price, and you see that all of the hours are at about 120 pesos. The next four lines, additional energy on the cost of fuel and the cost of dispatch, were components paid above the spot price to the generators that use alternative fuels. If you add up all the lines, we can say that they could have reached the marginal cost. So you can see that they had 119. So Average, the last column to the right, the average spot price was 119, capped at 120, but beyond the spot price with other charges, almost an additional 130 pesos were paid which could have been the proxy for a marginal cost. So we adapt the four columns, we go to a marginal cost of 130." Day 4 Tr. (Eng), P1183:21-P1184:16; P1185:6-P1186:1 [redacted].

the spot price were unreasonable, and thus, arbitrary. In consequence, the Tribunal determines that through these measures, Argentina has breached its obligations to accord FET under Article II.2.a) of the Treaty.

c. Measures affecting Capacity Payments

296. Prior to the adoption of the measures at issue, capacity payments were established at US$10/MW. In March 2002, those payments were converted to Argentine pesos at a 1:1 rate, resulting in capacity payments of AR$10/MW (approximately US$3.41/MW).[356] This rate was later adjusted to AR$12/MW.[357] Claimant indicates that "by the end of 2012, capacity payments had decreased by over 75% to around US$2.40/MW" and that "[t]he reduction in capacity payments, coupled with the artificially low spot prices, resulted in lower revenues that did not permit generators to recover their investments and did not incentivize them to increase capacity".[358]

297. Claimant contends that "the component of the system designed to cover the cost of unsupplied energy to society (as per Article 36 of the Electricity Law) was reduced to a level so low that it no longer served the intended purpose. Consequently, the spot price and the capacity payment together no longer reflected the economic cost of the system".[359]

298. The Parties disagree as to the purpose of capacity payments. While the Claimant indicates that these payments are "intended to incentivize long-term investments and thus account for the cost of unsupplied energy",[360] Respondent opposes this interpretation. In Respondent's view, "capacity payments aim to pay for

[356] Resolution SE 2/2002, March 18, 2002, **AES Ex. 185**.

[357] Resolution SE 317/2002, 18 July 2002, **AES Ex. 194**.

[358] Claimant's Updated Memorial, ¶ 195.

[359] Claimant's Updated Memorial, ¶ 195.

[360] Claimant's PHB, ¶ 2. "Capacity payments are a forward-looking concept aimed at ensuring that remuneration is set at a level to ensure sufficient capacity is available to avoid incurring losses due to unsupplied energy." Abdala Regulatory Report, ¶ 94. "In practical terms, it is the socio-economic cost of electricity outages and thus the critical need to avert such outages by ensuring investment in future capacity." Claimant's PHB, ¶ 37.

the existing capacity availability, rather than working as an incentive for investments in additional capacity."[361]

299. Article 35 of the Electricity Law indicates that demand will be dispatched based on the recognition of energy prices and capacity prices (*potencia,* in Spanish). Article 36 indicates that the Secretariat of Energy will enact the regulations on the economic dispatch for the transactions of energy and capacity. Further on, it provides for a uniform tariff based on the economic cost of the system and mandates that the cost of unsupplied energy to the community is considered. The Respondent does not dispute that the Electricity Law mandates capacity payments.

300. The Tribunal agrees that the Electricity Law does not provide for a specific mechanism to calculate capacity payments, a particular currency or a fixed rate for that matter. The Tribunal understands that one of the Parties' disagreements as to the function of capacity payments concerns whether such payments are intended to remunerate existing generation capacity availability or whether they serve as an incentive for investment in additional "future" capacity. The Law does not expressly indicate what the objective of these payments is, and the Tribunal cannot decide in the absence of concrete evidence whether these payments were intended for investors to recover their investment or not.

301. What does emerge from the Law is that generators are entitled to receive a price for the "energy sold in each delivery location" as well as for capacity, and that to "encourage investments to secure long-term supply" is an objective of the national electricity policy.[362] While Respondent has indicated that capacity payments aim to remunerate "*existing* capacity availability", such limitation does not follow from the text of the Law and it is difficult for the Tribunal to accept that the Law intended to (or could) encourage investments to secure long-term supply and to remunerate capacity if "capacity" meant only *existing* capacity availability. To some extent, Article 36 lacks clarity when referring to the "unsupplied energy cost". From the text,

[361] Respondent's Updated Counter-Memorial, ¶ 824. "[T]hey were designed to ensure a certain reserve margin rather than encouraging investment". Respondent's Rejoinder Memorial, ¶ 93.

[362] Electricity Law, Article 2 b).

it would seem that such concept must be taken into account for the uniform tariff and thus, the energy price that generators must obtain. However, generation capacity availability seems to also be related to the concept of "unsupplied energy". One of Respondent's witnesses has explained that:

> "The cost of unapplied energy, the way that it's looked at in dispatch, can be subject of different methodologies. In general, what is sought in terms of dispatch in order to reduce the risk of unsupplied energy is to increase operational reserves […] So what we seek to do is to have sufficient reserves in order to prevent a situation where one of these common failures that happen prevent it from having an impact. So it's absorbed without a blackout happening. That's the risk of unsupplied energy that the law refers to […] So I need machinery that is on a rotation without generating energy, so that if demand goes up, I can supply it, or if there is a loss of other supply from other places, I can again make up for that, to maintain the same level of supply. Conceptually, that is how we avoid unsupplied energy, and if I have more machinery, I'm paying more for capacity and rotating reserves."[363]

302. In this sense, the Tribunal does not deny that capacity availability could derive from companies that already have more capacity than the one used, but it also certainly derives from companies that create greater capacity to meet future demand,[364] particularly if one seeks to assure long-term supply. The Tribunal understands that the electricity market is not static and demand in Argentina did continue to grow, something that one of Respondent's witnesses pointed out in relation to the power plants that were supposed to begin operating in 2007.[365] In fact, in 2016 Argentina recognized that, among the consequences of the abandonment of economic criteria in the definition of prices in the MEM, was "discouraging private

[363] Day 6 Tr. (Eng), P1604:8-13; P1605:19- P1606: 3; P:1606:11- 19 (Ruisoto)

[364] While one of Respondent's witnesses did not agree with this characterization as the ENRE is not the "specialist entity in the MEM", the Tribunal observes that ENRE understood capacity payments as payments remunerating "capacity expansion", indicating as well that this payment reflected "capacity shortage" valued through the "unsupplied energy cost." ENRE, *El informe eléctrico, cinco años de regulación y control 1993 – Abril – 1998*, 1998 at 72, **AES Ex. 132**. In addition to this, the Electricity Law indicates that ENRE is the entity that "must carry out all the necessary measures to meet the objectives set forth in article 2" and has the power to "enforce" the law. (Unofficial translation). Electricity Law, Articles 54 and 56 a).

[365] "Let's see if we can do a practical exercise. 2004 to 2007, when they had to be commissioned, growth was 24-27 percent. But the plants did not come in. They came in in 2010. This is to say that between 2007-2010, there was another 23 percent growth because it's a dynamic country.". Day 5 Tr. (Eng), P1388:9-14 (Cameron).

risk investment aimed at efficiently increasing supply".[366] In the Tribunal's view generation capacity availability related to the concept of unsupplied energy means that capacity is available at the time needed to avoid shortages in the future, and thus, ensure a long-term supply of electricity.

303. AES's claim seems to be based in part on the fact that capacity payments were set at US$10/MW and subsequently modified to AR$12/MW. As indicated above, Article 36 of the Electricity Law does not provide a rate for such payments, and it grants the Secretariat of Energy with a margin of discretion as to the rules on the economic dispatch. At the hearing, Former Secretary of Energy, Mr. Bastos, explained how capacity payments were calculated:

> "The general formula of the economic field, it is not something that we create ad hoc, and this recovery factor is quite accepted and it is used to estimate the annual value to be recovered from an investment. […] If I have an investment that I carry out today, that formula allows you to know how much has to be recovered on a yearly basis so that the value from this series is equivalent to the investment you make. There, you have the discount rate, because these are payments that have been displaced in time, but--and just to better understand that, first, you needed to consider the yearly value based on a 500 investment. Where does that 500 come from? Well, that was the mean price for a gas piece of equipment. If you asked me today about the cost, the investment cost of a combined cycle, I am going to tell you that it is between 1 and $1.2 million. So that was the value. That was the market value that my technical teams used. It was the market value of a gas turbine."[367]

304. The Tribunal agrees that capacity payments should be "tethered to an economic reality" and not simply "pull[ed] out of the air".[368] However, the Respondent has not pointed this Tribunal to any methodology or study or other basis showing that a capacity payment of AR$12/MW would be able to effectively remunerate capacity availability in the future, how it took into account the cost of unsupplied energy, or what that cost was when it modified the payments first to AR$10/MW and then to AR$12/MW.

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[366] Resolution MINEM No. 6/2016, 3rd recital, **AES Ex. 320**. (Unofficial translation).

[367] Day 2 Tr. (Eng), P473:17-21; P474:6-22 (Bastos).

[368] Day 2 Tr. (Eng), P559:3-9, 17-22; P560:1-3 [redacted].

305. Regardless of the powers granted to the Secretariat to regulate dispatch and adjust those payments, which this Tribunal does not deny, without such a basis, this Tribunal cannot conclude that the reduction to capacity payments was reasonable. There is simply no evidence in the record as to how those figures were determined; what elements were considered; why such amount was appropriate to remunerate capacity availability for so many years: and why such payments would "secure long-term supply."

306. In consequence, the Tribunal considers that the capacity payments reduction was arbitrary and thus breaches the FET obligation provided in Article II. 2 a) of the Treaty.

d. Withholding of Receivables and Investment Programs

307. The first investment program, FONINVEMEM I, was established pursuant to Resolution SE 712/2004.[369] The recitals of the Resolution refer to the "situation of economic and social emergency which particular demand segments suffer from". It indicates that the Stabilization Fund is in "deficit since June 2003" (*i.e.* a year earlier); that through Resolutions 406/2003 and 943/2003 a "*transitory mechanism*" was put in place for the allocation of insufficient and scarce resources; that generators have mostly accumulated credits documented with LVFVDs (with an undetermined due date) for significant amounts of money;[370] that there has been an abnormal situation in the supply of natural gas, and that "taking into account the current and future state of the system and sectoral macroeconomic conditions as well as the evident financing difficulties for the sector, it is advisable to define and implement a procedure to *finance* and *manage* the *necessary investments* that allow *increasing the supply of electrical energy* available in the demand centers *with affordable costs* for the normal

[369] Resolution SE 712/2004, July 15, 2004, **AES Ex. 237**.

[370] "Q. When you received this letter in February 2004, was the Government up-to-date in their payments to generators? […] Had the generators been fully remunerated or compensated? No. Why? Because since we accepted to recognize all of the price increases, the system was not collecting all of the funds. And 406, which included as the items there Since we wanted to guarantee the operation of the plant, there was a partial payment, and also a payment that was a sales liquidation." Día 5, Tr. (Eng) P1354:15-17; P1355:5-13 (Cameron).

functioning of the WHOLESALE ELECTRIC MARKET (MEM), *achieving its readaptation*."[371]

308. The recitals also indicate that "the participation of the Creditor Agents of the [MEM] should be *encouraged*"; that "it is convenient to *give the opportunity* for the Creditor Agents […] *to invest* part of their [LVFVDs]" and that "it is *necessary to begin the formation* of said Fund by establishing the fundamental bases in order to direct the necessary investments".[372]

309. In August 2004, Resolution 826/2004 was enacted.[373] According to this Resolution, for those Agents that decided *not* to participate in the Fund, "pertinent studies and procedures" would be carried out, a detailed regulation would be enacted as to the *issuance of documents* representing a volume of energy compatible with the credits not used for the Fund, for the purpose of their *exchange* and which would be paid starting from the date on which the works built with the [Fund's] resources have *sufficient genuine income*". The credits to be invested were those from January 2004 to December 2006 and those who accepted would be able to participate in the management of the projects.[374]

310. In December 2004, Resolution 1427/2004 was issued, establishing general guidelines. The Resolution contemplated an Adhesion Act (contained as an annex to

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[371] (Emphasis added). The Tribunal observes that through Resolutions 406/2003 and 943/2003, the mechanism for the allocation of resources and payment was effectively modified. In accordance with the Preamble, Article 1 and Article 8, Resolution 406/2003 was "transitory". See Resolution SE 406/2003, September 9, 2003, **AES Ex. 226** and Resolution SE 943/2003, December 10, 2003, **AES Ex. 228**.

[372] (Emphasis added). The Resolution contains three articles that establish the Fund and the organization that will administer the Fund, and it identifies who will give the instructions to administer the economic resources. According to this program, receivables would be used to build two combined cycle plants (800MW each), San Martín and Belgrano. Claimant's Reply Memorial, ¶ 181.

[373] Resolution SE No. 826/2004, issued by the Ministry of Energy, August 6, 2004, **AES Ex. 238**. This Resolution indicates that "in order for Creditor Agents […] to collect the total amount of the debts […] and for a prolonged period of time, in which seasonal prices will be adapted to the wholesale prices of the […] [MEM], it will be necessary for the NATIONAL STATE to complement the income obtained […] with specific contributions from the NATIONAL TREASURE". It also refers to "encourage the participation of Creditor Agents […] on investments, striving for sustainability and the readaptation of the electricity sector to the benefit of users and investors" and to "give the opportunity to those Agents […] to invest".

[374] Resolution SE No. 826/2004, issued by the Ministry of Energy, August 6, 2004, **AES Ex. 238**, Arts. 1 and 2.

the Resolution) to which agents would have to adhere and manifest their "irrevocable compromise" and the Definitive Agreement would be a subsequent step.[375]

311. The Respondent contends that "[a]fter the most serious stage of the crisis was over, the Argentine Republic made regulatory adjustments in good faith aimed at improving the situation throughout the sector" and that the adjustments were "made in consideration of the circumstances and the needs of all the parties involved (including users), were reasonable and had legitimate purposes".[376] It also contends that it has made efforts to maintain a fluent dialogue with generators, to consider the interests of all the parties involved, and that if AES had been in a state of perpetual uncertainty, it would not have suspended the arbitration for 13 years.[377]

312. Argentina has also insisted that it did not deny the right of generators to collect the amounts owed to them, but rather postponed payment; that generators did collect their receivables plus interest; that efforts to make the necessary funding to maintain and repair the plants were made and that neither the BIT nor the regulatory framework guarantees a certain return on an investment.[378] In addition to this, Argentina submits that the Claimant agreed to invest its LVFVDs and benefitted from that.[379]

313. Respondent's contention seems to be based on the premise that the measure had a legitimate purpose, and that it was justified in light of the circumstances of the sector; that payments were merely postponed; and that the Claimant voluntarily accepted to participate in FONINVEMEM from which it economically benefited.

314. At the outset, when looking at the relationship between generators and Argentina, the Tribunal is unable to characterize such relationship as one of equality, or even *primus inter pares.* In heavily regulated sectors such as energy and in the case of long term and expensive investments, there may be instances where, when faced

[375] Resolution SE 1427/2004, issued by the Ministry of Energy, December 7, 2004, **AES Ex. 236**.

[376] Respondent's Updated Counter-Memorial, ¶ 696.

[377] Respondent's Updated Counter-Memorial, ¶ 698.

[378] Respondent's Updated Counter-Memorial, ¶¶ 699-701.

[379] Respondent's Rejoinder Memorial, ¶ 769.

with an arbitrary and even prejudicial measure, the only option for the investor is to "accept" it in order to continue operating and/or try to maximize its profits in light of the circumstances. The consequences of acquiescence to such a measure should be assessed with great caution and in the light of the relevant circumstances. A decision to antagonize a government or to exit an investment may be fraught. When the underlying reason for trying to maintain or to engage in an investment derives from the effective imposition of an arbitrary measure, "acceptance" of the regulatory scheme should not be automatically viewed as voluntary.

315. Nor does the fact that a measure has an objective that may be deemed legitimate mean that it cannot be arbitrary.

316. The Tribunal observes that Resolution SE 712/2004 establishing the investment program was enacted in July 2004. As already indicated, other investment cases faced with disputes intrinsically linked to Argentina's economic crisis have considered that the crisis lasted from December 2001 to April/May 2003 and that Argentina's economy had recovered by the end of 2003.[380]

317. While Resolution SE 712/2004 establishing FONINVEMEM mentions a "situation of economic and social emergency" and mentions "accessible costs for the normal functioning of the MEM", the text of the measure indicates that the rationale behind the program was the deficit of the Stabilization Fund, the accumulated credits of the generators, the difficulty of financing in the sector, the constant increase in demand for electricity and the need of investments to increment the supply of electricity.

[380] See *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, **AES Auth. 165**, ¶ 244; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 670 (referring to 2003 when discussing Arbitrator Stern's disagreement with the majority's conclusion). In a similar way: *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **AES Auth. 139**, ¶ 157. In *Total,* reference was made that by May 2003 "Argentina had emerged from the crisis" and "Argentina's economy quickly recovered from the crisis—by the end of 2003 and the beginning of 2004". *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶¶ 171, 172.

318. From these first three Resolutions (SE 712/2004, 826/2004 and 1427/2004) the Tribunal gathers that the generators had two options: i) to participate in the government's investment program with the receivables from 2004 to 2006 with an irrevocable compromise;[381] or ii) to not participate, in which case studies would be conducted, documents representing the volume of energy would be issued for their exchange and payment would be made once the projects constructed had "sufficient genuine income". Although there is not much clarity on how those situations would be determined, it appears that the generators' choice had to be expressed very quickly.[382] Not providing such declaration would have the effect of being interpreted as a "rejection" of the government's invitation.[383] According to the Definitive Agreement of 7 October 2005, the options that the generators ultimately had were the following:

> To sign the Agreement, form part of the Generator Companies (participate in the management and obtain a share of the ownership), receive 120 installments for the receivables owed once the projects began operating, outstanding credits would be converted to USD and would have an annual return equivalent to LIBOR + 1% interest.
>
> To receive 120 installments for the receivables owed once the projects began operating, outstanding credits would be converted to USD and would have an annual return equivalent to LIBOR + 1% interest.

[381] The object of the Adhesion Act (as annex to Resolution 1427/2004) was to set the basic rules for the "readaptation" of the MEM, which was to be understood as: "the action of repairing the regular functioning of the MEM as a competitive market, with sufficient supply, in which Generators, Distributors, Traders, Participants and Large Energy Users can buy and sell electricity at prices determined by the supply and demand, without regulatory distortions and within the established framework by Law No. 24,065." (Unofficial translation) Annex 1 to Resolution SE 1427/2004 (Adhesion Act), issued by the Ministry of Energy, December 7, 2004, **AES Ex. 236**. Article 1.- Object. The Respondent has clarified that the irrevocable compromise in Resolution 1427/2004 entailed executing the Memorandum of Adhesion but did not mean that generators were under the obligation to execute the Final Agreement or participate in the management or operations of the plants. Cameron Second WS, ¶¶ 38, 39 and Letter SE 1,593 of 14 December 2004, **Exhibit RA 202**.

[382] Resolution SE 1427/2004 indicated that the declaration had to be made by 17 December 2004. Resolution SE 1427/2004, issued by the Ministry of Energy, December 7, 2004, **AES Ex. 236**, Article 1.

[383] Resolution SE 1427/2004, issued by the Ministry of Energy, December 7, 2004, **AES Ex. 236**, Article 1.

> To receive 120 installments for the receivables owed once the projects began operating in accordance with CAMMESA's interest.[384]

319. The Tribunal observes that immediate (or short-term) payment of the debts was not an option provided by the government.[385] The government did provide a choice for the generators as to the situation in which they could be placed once the projects the government determined needed to be implemented for the readaptation of the market were finished, *i.e.*, i) to obtain payment, contribute in the management, obtain a share, receivables converted to USD with a return; ii) obtain payment, receivables converted to USD with a return; and iii) obtain payment. While these choices were presented, there was only one way in which payment would be ultimately made: *once the projects began operating*. In other words, payment was tethered to the projects.

320. Generators were clearly constrained and put by the government in a situation where the payments admittedly owed to them would not be made for a long time. The Claimant has argued that from the options given, only the first one – adherence to the scheme with participation in the Generator Companies – was "commercially

[384] Annex to SE Resolution 1,193/2005 (Definitive Agreement), October 7, 2005, **AES Ex. 259** and **A-RA-218**¸Article 4. (Unofficial translation). See also Resolution SE 406/2003, September 9, 2003, **AES Ex. 226**, Abdala Regulatory Report, ¶ 112.

[385] Generators that did not agree to the Definitive Agreement were still placed in a position where payment was to be made after the projects were in operation: "And when the time came for the final agreement, those who did not wish to adhere to that were committed to contributed 65 percent of their revenue, which were their sales with undefined settlement dates, and that they would collect that once the power plants were operational, in 120 installments with interest, and so on. The other 35 percent, they were already collecting." Día 6, Tr. (Eng), P1837:17-P1838:3, (Mendoza).

reasonable",[386] in the sense that it was "the least damaging".[387] One of Respondent's witnesses has also pointed to adherence as the best option considering the situation in which generators were placed.[388]

321. According to Claimant's witnesses:

> "[…] Argentina unilaterally decided to require private electricity generators […] to finance the building of new power plants. […] through a fund created with so-called 'voluntary' contributions from the private generators, but actually consisting of receivables that were already due to them. […] the AES Generators' contributions were anything but 'voluntary' as they could not

[386] Claimant's Reply Memorial, ¶ 187. Referring to Resolution 564/2007, "[t]hey were not alternatives that made any sense from the commercial point of view. If you want, we can see one by one. But to collect in pesos with the CAMMESA placement rate once the plants got to the commercial stage, and 120 installments in a country that has chronic devaluation, for a company such as AES that has a dollar balance, it wouldn't have made any sense. […] Another one was to collect that through shares, and it was impossible to see how that plant was going to operate after the tenth year, and then it was also referring to projects with their own contributions. And what the regulation stated as part of the four regulations was that the generator had to contribute an amount that was four times higher than the receivables to be applied. So that would have implied to allocate four times more money in Argentina than the withholding, and then in a system in which the conditions were not suitable. So the alternatives in that resolution, as you showed it to me, based on what I heard and also based on my experience with AES, were not actual options." Day 4 Tr. (Eng), P1118:14-22; P1119:10-22; 1120-1-4 [redacted].

[387] "Argentina gave them the option of either investing in its programs or retaining a credit note with an unspecified payment date whose real value was declining over time. Generators would have not voluntarily adopted any of the schemes offered had Argentina not interfered with their accounts receivables. Forcefully investing in new plants sponsored by the state were not attractive commercial propositions that generators would have pursued independently. […] The best option for generators was to participate in the schemes to partially mitigate the loss associated with the alternative of not recovering the withheld revenue amounts. […] Option A entailed the possibility of obtaining additional returns as equity holders from the new generation plant. This option, however, involved greater responsibilities and risks, as generators would also need to participate in the construction and management of the plants and eventually become minority shareholders after the completion of the installment payments." Abdala Regulatory Report, ¶¶ 111, 116. Claimant's Expert also indicates that some generators opted for the second option in which no equity was granted.

[388] "Q. And I imagine that you recommended to Ameghino to sign the agreement; right? A. Of course. Q. Why? A. Because it was advisable. Q. Why was it advisable? A. Because those who didn't join could collect as well but didn't have certain benefits. […] Those were the options. The best option was adhesion. In all three cases, they would collect, and they were all receiving 35 percent of 2004-2005, and they received it for 2006. Q. So that was the best option available to generators? A. It was the best option available to the generators, from that perspective. And also, not building the plants would have led the system to collapse, and that would have been chaos because in Argentina at the time, they were still going through very difficult situations, in particular in the energy sector. It was very complex. […] So for Ameghino the best deal and, honestly, for 90-something percent of the generators, it was the case too. They saw it that way. Q. What was not an option for Ameghino and the other generators was to collect the entirety of their receivables at the time. A. If you say that it's because you don't understand the crisis that Argentina was going through, and if you look at the technical groups, and these are signed by AES people as well, they understood the inability to obtain financing, et cetera, and funds." Day 6, Tr. (Eng), P1847:1-8; P1847:22-P1848:13; P1849:11-22 (Mendoza).

> realistically refuse Argentina's 'invitation' […] if they wanted to obtain any value from their misappropriated receivables."[389]
>
> "[…] every option provided by the Government involved waiting many years, until the FONINVEMEM I plants had been constructed and had entered commercial operations, before receiving any payment at all […] The AES Generators chose the only commercially reasonable option, which we hoped would diminish some of the damages caused by the Government's refusal to pay. […] The Government did not offer any alternative for repayment other than participating in FONINVEMEM."[390]
>
> " […] the resolution warned that, for all generators not participating in the program, the SE would carry out studies in order to adopt detailed regulations relating to the exchange of the LVFVDs for other instruments, which would only start to be paid once the works built using the program's resources were generating sufficient income […] The alternative at that time was to wait for the findings of studies—and, incidentally, we did not know when the studies would be carried out or what issues they would cover— […] All of this was more uncertain than the terms of the program. […] In short, the adhesion to the program was essentially coerced. We knew that, if we did not consent to it, the situation would be worse […]."[391]

322. Holding investors captive through the payments owed to them, allowing them merely the option to decide certain "benefits" related to the interest rate, conversion to USD or ownership shares, cannot be viewed as allowing a free choice. It cannot be viewed as other than a measure based on the discretion and preference of the government, as unreasonable and thus, as arbitrary. Ultimately, the government used the debts it had as leverage to retain the investors and induce, in effect to coerce, them to accept the result it desired, *i.e.*, to invest in specific projects to increase supply of electricity and to finance the generators' own payments once those future projects became operational. In the Tribunal's view, the fact that the government provided certain options as to participation in the company to be created or the interest to be

[389] Second WS, [redacted], ¶ 16. "FONINVEMEM I was the only way for the AES Generators to recover a portion of their receivables (they would receive 35% by virtue of participating), and to have any chance of recovering the other 65%. In addition, the AES Generators agreed to participate because Argentina represented that FONINVEMEM was part and parcel of returning to a wholesale electricity market that reflected the original core principles of the Electricity Law." ¶ 18. *See also* Third WS, Carlos Bastos, ¶ 114.

[390] Third WS, [redacted], ¶¶ 6, 7. See also Day 3 Tr. (Eng), P881:11-P882:4; P884:16-P885:1 [redacted] referring to payment being "tied to the new generation plants" and "tied to FONINVEMEM".

[391] WS Roberto Fagan, ¶¶ 24-26.

obtained does not take away from the underlying fact that this was the scenario in which the government placed the investors.

323. In this sense, the Tribunal agrees with the characterization provided in *Total:*

> "[…] the conversion offered by Argentina as of August 11, 2004 cannot be defined as 'voluntary'. If not 'forced', it was certainly strongly induced by putting generators in a situation where they had no choice other than to accept the scheme or otherwise risk suffering higher losses. First, generators were faced with a situation in which the institution (CAMMESA) […] was unable to pay for the electricity produced and distributed to consumers because consumers were charged an insufficient tariff. Second, the generators were put in the position of choosing either to contribute 65% of their past and future receivables to FONINVEMEM and become shareholders of the generators that were to be built with the corresponding funds, or to hold unpaid receivables, payment of which was legally and factually uncertain in regards to when, how, and how much would be paid. This scheme must be considered as a kind of forced, inequitable, debt-for-equity swap […] due to governmental policy and conduct by Argentina."[392]

324. The Claimant should not be faulted for, in light of the circumstances, trying to maximize its income by adhering to one of the options provided by a scheme which was tainted with arbitrariness in the first place. In view of the foregoing, based on its analysis of the evidence presented, the Tribunal considers that FONINVEMEM I was an arbitrary scheme to which Claimant cannot be said to have adhered voluntarily.

325. There were two additional FONINVEMEM programs established: FONINVEMEM II and FONINVEMEM III. FONINVEMEM II was issued through Resolution SE 564/2007. The recitals indicate how FONINVEMEM itself came to be; it recounts that in one of the last calls made by the government, the "lack of […] proposals to provide the necessary financing to carry out generation projects aimed at readapting the [MEM] was indicated" and it expresses the need to "complement" the capital contributions and of additional financing to finalize both power plants.[393] The Resolution mentions that formal conversations took place with shareholders of

[392] *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, **AES Auth. 196**¶¶ 337, 338.

[393] According to the Preamble, technical requirements, the location and the conditions of the international and domestic market resulted in a higher cost.

the Generation Companies for them to provide additional financing in return for shareholding control. It also indicates that after seven months of negotiation between the Secretariat and the generators, no agreement had been reached but it would be necessary to define who would be responsible for providing the additional financing necessary to finalize the construction of both plants. In the Tribunal's view, this on its face would seem to indicate that acceptance did not take place.

326. The Resolution went on to provide that it is convenient to incentivize participation, therefore the government invited participants to contribute 50% of their receivables from January to December 2007. The compromise had to be again irrevocable.[394] The options as to *how* to recover their receivables were four:

- Keep the share in the FONINVEMEM plants, recover the amounts contributed in 120 installments in USD with a LIBOR +2% return if all generators contributed funds or 1.5% if some did not agree.
- Increase the share in the plants, recover the amounts in 120 installments in USD with a LIBOR +1% return.
- Present an investment project (25% of the cost could be funded with accumulated accounts receivable)
- Recover the receivables in 120 installments in AR$ with a return equal to CAMMESA's.[395]

327. The Tribunal recalls that the generators continued to be in the position where the payments owed to them would begin to be made only once the projects started operations; therefore, finalization of the projects logically involved a condition to recover their payments. The Tribunal does not lose sight of this essential circumstance. Whatever their decision as to how to recover the receivables and what position to be in once that moment came, generators continued to be tethered to the scheme that the government had proposed based on the fact that it was unable to meet its payment obligations as well as its need for further investment to increase supply.

[394] Resolution SE 564/2007, June 1, 2007, **AES Ex. 273.**

[395] Resolution SE 564/2007, June 1, 2007, **AES Ex.** 273, Arts. 1-9; Abdala-Spiller Report, ¶ 365.

328. According to one of Claimant's witnesses, the situation leading up to FONINVEMEM II was the following:

> "[…] So our portfolio was thinner and thinner, our money was shrinking […] So at that time when Resolution 406 was issued, and it's cited in this judgment, that was the beginning or one of the beginning points of this whole situation. What little I had left was taken from me. That's what happened for the generators. How could you live, you might ask? Well, what CAMMESA was doing was saying, tell me how much you need to pay salaries, how much do you need to pay the additives for the fuels, to pay for fuels. Anything that was operation and maintenance costs, they would give me the money. But what was not cost, they would not cover. So how did we feel? This wallet no longer belongs to us. We have lost the wallet […] In 2004, FONINVEMEM was created, generators were invited to the Adhesion Memorandum, and the Adhesion Memorandum, what it had, this was an element that for generators seemed rather positive was that it included ten commitments by the Secretariat of Energy. This is under 4.1 from i to x. If we look at the first two, the first one said specifically that by July of 2005 all the big demand users were going to pay market costs. So by that point, at least on this side of the account, debt to the generators was not going to continue to accrue because that part was paying all of the costs. Costs that, by the way, were now diminished through Resolution 240, which had lowered spot prices, but at least we were collecting. The second clause of 1427 said that in November of 2006, all demand, all users, were going to pay costs, which meant that by December 2006, that was going to end, that debt that had accumulated was going to end. […] We said that it was too late because we had already signed and the Government had not made good on its word for the first two commitments. If they had fulfilled small i and ii, then this resolution would not have existed because there wouldn't have been receivables to invest in anything. The Government tricked us. They said, we're going to start paying. At the end of 2006, you're going to get all of it. And then in 2007, we realized not only had we not collected, but the Government again was saying, oh, you want to get that wallet back for 2007? Well, the only way you can get it back is for you to invest it in generation just like you did for 2004, 2005, and 2006. That's why I said it was too late to turn back. Our bets were placed."[396]

329. Debts to generators continued to accumulate. According to Claimant's expert, the government withheld US$ 83 million worth of AES's plants revenues between 2005 and 2007, it withheld US$ 66 million in 2008, US$ 55 million in 2009 and

[396] Day 4 Tr. (Eng), P1212:22-P1213:1, P1213:9-P1215:2, P1215:17-P1216:11 (Fagan).

US$ 72 million in 2010.[397] In November 2010, 40 generators entered into an Agreement with the government, so-called FONINVEMEM III (the Generator's Agreement).

330. The Generator's Agreement states that "it is important to create additional mechanisms that are appropriate to incentivize new investments necessary to increase the supply of electricity". The text of the Agreement also indicates that the process of "readaptation" of the MEM continues. Pursuant to this Agreement, credits accumulated between 2008 and 2011 could be recovered through their contribution to building new capacity.[398] One notable difference with FONINVEMEM I is that generators could propose a project.[399] Once the new project started operations, the first of 120 installments would be received, converted to USD with a LIBOR +5% annual return.[400]

331. In the Tribunal's view, FONINVEMEM II and FONINVEMEM III are of the same nature as FONINVEMEM I. Both stem from the government's incapacity to pay its debts owed to the generators while at the same time using those debts to finance the investments that it determined were needed in the sector. The constraint imposed on investors was based on the sole discretion and preference of Argentina, which effectively placed investors in the position where their receivables would not

[397] Abdala-Spiller Report, ¶ 367. "By the time FONINVEMEM III was proposed around 2010, the Government owed AES Argentina more than US$200 million dollars". Second WS, [redacted], ¶ 22 and AES Corporation, 10-K 2010 at 23, **A RA 317**. The Tribunal understands that the installments of Manuel Belgrano and San Martín plants were paid in 2020 and that those of the Guillermo Brown plant are still outstanding. Respondent's PHB, ¶ 6; Day 3 Tr. (Eng), P879:3-15 [redacted].

[398] Acuerdo de los Generadores, November 25, 2010, **AES Ex. 290**. The Claimant indicates that through a subsequent agreement, receivables accumulated between January 2012 and January 2013 were allocated. With this, most of Claimant's receivables from 2008 to 2013 were allocated to FONINVEMEM III. See Abdala-Spiller Report, ¶ 369 and fn. 336; AES Argentina Generación S.A. 2017 Financial Statements, **AES Ex. 407**, p. 217, 463. 624 (pdf). AES would receive a stake after 10 years of operation.

[399] AES allocated the credits to the construction of the Brown Plant. Claimant's Reply Memorial, ¶ 198. While Claimant's expert report indicates the funds were allocated to the Belgrano Plant, the Tribunal understands from the Reply Memorial and the Second Addenda that it was the Guillermo Brown Plant. *See* Second Addenda to the Acuerdo de los Generadores, July 20, 2012, **AES Ex. 300**.

[400] Accounts receivable would be updated at CAMMESA's rate to November 2010 and converted to USD. The LIBOR interest would accrue from that point forward. See Abdala-Spiller Report, ¶ 368 and Acuerdo de los Generadores, November 25, 2010, **AES Ex. 290**, section 6 (Agreement with the MEM) Unofficial translation).

be recovered for several years, giving them the option to decide only how or in what position to be in when that moment came.

332. The recovery of its receivables seems to have been a constant need for the Claimant.[401] As indicated by Claimant's witnesses:

> "When the Government continued to withhold payment of the amounts accrued between January 2012 and January 2013, we asked that these amounts be included in the FONINVEMEM III program to ensure, at least, their partial payment, and the Government agreed.
> AES Argentina started to receive installments under FONINVEMEM III in April 2016, when Brown began its operations.
> The Government, through CAMMESA, went on withholding the amounts due and payable to AES Argentina that had accrued between February 2013 and January 2017. […] In 2017, the Government finally ceased withholding amounts from the generators."[402]

> "When I joined AES Argentina in 2012, the company had already acceded to invest the amounts withheld by CAMMESA between 2008 and 2011 in a new plant known as Central Térmica Guillermo Brown ("Brown") under the FONINVEMEM III scheme. […] AES Argentina agreed to participate in the FONINVEMEM III program because it was the only option we had if we wanted to recover the amounts withheld."[403]

> "FONINVEMEM II was nothing more than a tool to have generators make additional contributions to the FONINVEMEM I projects under construction using the receivables for 2007, which otherwise appeared to be uncollectible. Again, in the absence of a real alternative, the Government managed to get the desired adherence to FONINVEMEM II that it required. In 2010, […] the

[401] "The generators that had receivables already committed under 2008-2011 Agreement for that period decided to remove the receivables that were for that period that had LIBOR plus 5 to contribute them to FONINVEMEM I and II that yielded LIBOR plus 2. Why did we do that? The only intent was to collect. So we stopped collecting LIBOR plus 5 to collect LIBOR plus 2 just because the installments of FONINVEMEM I and II were going to be canceled off ahead of time. So we had liquidations of an asset that would yield LIBOR plus 5, and we moved to a LIBOR plus 2 asset just because by then, the installments that would be outstanding would be fewer. That was the logic behind this." Day 4 Tr. (Eng), P1122:15-P1123:7 [redacted]. "724 is a resolution that provided for AES to make maintenance with receivables. So all the work was put together, but they were unpaid. […] At Tab 78, also in the last paragraph, we see that there is a request to include under 2008-2011 Agreement the remunerations committed to by the Secretary for those parties that signed the Agreement. That had not been complied with, either, and AES had the outstanding debt. So the only way to guarantee the recovery of the funds was by attributing them to Brown, to the 2008-2011 Agreement. That's why I was referring to mitigation." Day 4 Tr. (Eng), P1132:9-13, P1132:16-1133:3 [redacted].

[402] WS, [redacted], ¶¶ 13-15, 19.

[403] Second WS, [redacted], ¶ 15. See also ¶¶ 17-24.

> Argentine Government had not restored the system for determining energy prices in a competitive market. In addition, the generators' receivables continued to accumulate as from 2008. […] It was not the generators that decided on the critical aspects of the projects—nor did we voluntarily promote the projects' development. The generators would have been satisfied with the payment of their outstanding receivables. […] In sum, the three phases of the FONINVEMEM revolved around the same idea: generators had no real alternative for the payment of their receivables and, in that context, the least harmful decision was to participate in the program. In each scenario, not participating in the program meant even more uncertainty as to how and when the amounts owed would be collected."[404]

333. In light of this, the Tribunal determines that FONINVEMEM II and III, being the two investment programs that followed FONINVEMEM I, also constitute arbitrary measures.

334. In addition, there are four circumstances which reinforce and corroborate the arbitrary nature of the investment schemes at issue. *First*, at the same time as the FONINVEMEM I scheme was proposed (and during FONINVEMEM II and III), the investor was subject to other arbitrary measures such as the spot price cap, the exclusions from spot price formation of non-natural gas plants and reduction of capacity payments. Thus, the investor was already subject to measures which hampered its ability to operate normally in the electricity market.

335. *Second*, the Tribunal also observes that, just like the measures affecting spot prices (cap and exclusions), whereas in 2003 the scheme under which the mechanism for payments was modified and labelled by the government as "transitory",[405] *i.e.*, temporary, by 2010 when the Generator's Agreement was signed, receivables continued to be accrued and the government continued withholding receivables until 2017. The fact that this measure which formed the basis of the withholding scheme was characterized as transitory (and presented as such to generators), yet it was *de facto* permanent cannot be considered as something other than arbitrary.

[404] WS, Roberto Fagan, ¶¶ 35-37, 51, 57.

[405] Resolution SE 406/2003, September 9, 2003, **AES Ex. 226.** Resolution SE 712/2004 establishing the first investment program (FONINVEMEM I) was also transitory. Resolution SE 712/2004, July 15, 2004, **AES Ex. 237.**

Fundamentally, it was the continued withholding of receivables that tied the generators to the investment schemes and ultimately made possible the projects that the government sought for its readaptation.

336. *Third*, the Adhesion Act had as objective to set the rules for the adaptation of the MEM. Such adaptation was to be understood as: "the action of repairing the regular functioning of the MEM as a *competitive market*, with sufficient supply, in which Generators, Distributors, Traders, Participants and Large Energy Users can buy and sell electricity at prices determined by the supply and demand, without regulatory distortions and within the established framework by Law No. 24,065."[406]

337. Article 4.1(iv) indicated also that once the MEM was readapted, Resolution 240/2003 would be without effect and generators would be remunerated with a marginal price in a free spot market.[407] The Claimant has indicated that AES's participation in the FONINVEMEM scheme was subject to that result, and that in fact is what emerges from the letter sent on December 17, 2004.[408] What the Tribunal derives from this is that within the FONINVEMEM scheme, Argentina depicted to the generators a panorama expressly including conditions of competition, prices set by supply and demand, marginal prices in the spot market and no exclusions under Resolution 240/2003, *i.e.*, referring to certain measures that had been affecting the generators – a panorama, and a suite of conditions, with which it ultimately did not comply. Nonetheless, as one of Claimant's witnesses indicated, "the bets were placed." Participation in the government's investment schemes was necessary if readaptation, the recovery of receivables and the panorama depicted were to be at all attainable.

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[406] (Unofficial translation). Annex 1 to Resolution SE 1427/2004 (Adhesion Act), issued by the Ministry of Energy, December 7, 2004, **AES Ex. 236**.

[407] The Tribunal notes that the suspension of this arbitration agreed by both parties was clearly subject to the fulfillment of those commitments. Suspension Agreement, **AES Ex. 560**, p. 4.

[408] Letter from AES to the Secretary of Energy concerning Resolution SE No. 1427/2004 and Resolution SE No. 826/2004, December 17, 2004, **AES Ex. 552**, p. 1.

338. While the Respondent has pointed to Claimant's non-compliance with certain commitments under FONINVEMEM, the Tribunal is not convinced that an initial obligation to obtain the necessary funding to carry the projects (which was later modified and undertaken by Argentina in the Definitive Agreement) or the fact that the plants did not enter operations in 2007 relates to how Argentina depicted to the generators the conditions under which the market would operate once readaptation was achieved nor the way in which readaptation was defined in the Adhesion Act. Both Parties undertook certain commitments towards the end pursued and set by the government. More so, at the hearing, the Republic's former Secretary of Energy indicated that once it became clear that the plants would not enter operations, no notification was sent to the generators in relation to any change between the obligations, and once the plants became operational[409] it is clear that Argentina did not undertake any actions to fulfill its part of those commitments either.

339. *Fourth*, the Parties disagree as to when the generators that signed the agreements were able to determine the equity that was to be obtained for the plants to be built. While the Respondent submits that, from 2012 they could all calculate the shareholding, the Tribunal is not convinced that despite knowing the methodology, a percentage could have been calculated with certainty at that point.[410] If that had been in fact the case, there would have been no need to ask in 2019 for an analysis of the shares recognized for the generators and the State.[411] The fact that there were disagreements as to the State's shareholding is corroborated through minutes of the shareholders held in 2020.[412] The fact that there was uncertainty even as to the equity the generators would obtain while facing the measures imposed by the government and its effects on the market highlights a situation in which the generators were basically at the mercy of the government.

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[409] "No. We tried to continue solving the problem." Day 5 Tr. (Eng), P. 1365:19-P1366:18 (Cameron).

[410] Day 4 Tr. (Eng), P. 945:20-P946:8; P946:20-P947:1; P951:12-15; P954:5-8 [redacted].

[411] GASE Note N° 0558, November 6, 2019 at 1, **A RA 266.**

[412] Minutes of Extraordinary Meeting of Shareholders of Termoeléctrica Manuel Belgrano S.A., May 4, 2020, p.2, **GM-54**, and Minutes of Extraordinary Meeting of Shareholders of Termoeléctrica José de San Martín S.A., May 8, 2020, p. 2, **GM-55.**

340. For all of these reasons, the Tribunal determines that the withholding of receivables and investment programs tied to their payment, *i.e.*, FONINVEMEM I, FONINVEMEM II and III are arbitrary measures in breach of the FET obligation established in Article II.2.a) of the Treaty.

e. Cost-Plus System and Prohibition of PPAs

341. The Claimant has also argued that the scheme established pursuant to Resolution 95/2013 breaches FET. As indicated above, Resolution 95/2013 established a new remuneration scheme, whereby energy and available capacity were remunerated in accordance with technology (combined cycle, steam, turbine, gas turbine, hydroelectric) and the scale of each plant (small, medium, large). The remuneration included fixed costs, variable non-fuel costs and an additional remuneration. Pursuant to this scheme, the order of priority for payments was also modified.[413]

342. The Tribunal has already set forth what Articles 35 and 36 of the Electricity Law provide and what generators, and in particular the Claimant's investments, were entitled to. Simply put, pursuant to these provisions, generators were entitled to a remuneration for *energy* and for *capacity*. This translated to: i) a uniform rate for all (based on the economic cost of the system and estimated taking into account the cost of unsupplied energy); and ii) capacity payments. In addition to this, generators are also entitled under the Law to the free negotiation and execution of contracts entered with large users and distributors.

343. Resolution 95/2013 indicates in its recitals the convenience to adapt the rules as to the remuneration for generators. It also indicates the need to establish "a new remuneration scheme" and provides for the "replacement".[414] In its submissions, the Respondent has recognized this and further indicated that:

[413] Respondent's Updated Counter-Memorial, ¶¶ 326-330.

[414] (Unofficial translation). Resolution SE 95/2013, 22 March 2013, 4th, 10th, 11th, and 13th recitals, **AES Ex. 304**.

> "Resolution SE 95/2013, establish[] a *new remuneration scheme*. […] This resolution *involved abandoning the remuneration mechanism based on marginal costs* set forth in Annex I to Resolution SEE 61/1992 *as amended*. […] remuneration for the non-fuel and maintenance portion of variable production costs *ceased to exist*, along with market prices set on a time-of-day basis in accordance with Resolutions SE 246/2002 and 240/2003, and by application of Resolution SE 406/2003. Moreover, remuneration for capacity made available during hours when remuneration for capacity is payable (pursuant to Resolution SE 246/2002) was *replaced* with a remuneration that considers the average monthly availability of generating units." (Emphasis added)

344. By Respondent's own admission, the modification established through this Resolution implies a "new" scheme and translates into the "abandonment" of the remuneration mechanism established prior to this. In particular, remuneration is established in accordance with the technology and scale of the plants. While the Respondent has explained that the scheme is consistent since "uniformity" is to be understood as "the same remuneration to all generators that are in the same position (in terms of technology used and plant scale) and deliver to a certain node of the system",[415] Article 36 of the Electricity Law contains no such distinction, *caveat* or limitation. By its own terms it indicates that generators will receive "a uniform rate for all at each delivery location". The Electricity Law continues in force. Its terms have not been modified nor any addition or clarification as to its terms has been made. The fact that the new remuneration mechanism distinguished between generators for remuneration purposes on this basis demonstrates its arbitrariness.

345. Regardless of the fact that the Respondent established other remuneration schemes such as Energía Plus, Resolution 95/2013 had the effect of resulting in different remunerations for generators supplying energy previous to that scheme.[416]

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[415] Respondent's Updated Counter-Memorial, ¶ 331.

[416] "¿We have an Energía Plus under a differential regime for the previous system. This regulation refers to the compensation of generation previously installed; this is, the one before Energía Plus. A. Yes, that's it. […] Q. So what remuneration did a generator have the right to or was entitled to, it depend on two things, first of all, on the technology it used and secondly, on its capacity? A. Right. Q. Thanks. That's why not all of them were remunerated equally? A. Right. Q. To be clear about this, when we say they were not all--or did not all have the same remuneration, all those regarding previous generation before the Energía Plus program; is that so? A. Yes." Day 5 Tr. (Eng), P1463:18-P1464-2; P1465:22-1466:13 (Cameron). The Tribunal observes that Energía Plus is described as a discriminatory regime and that it also benefited TermoAndes, allowing the Claimant to

In this sense, the basis on which this Resolution distinguishes between generators contradicts one of the fundamental tenets of the Electricity Law: uniformity.

346. With regards to the term market and the prohibition on PPAs, the Tribunal observes that the recitals of Resolution 95/2013 indicate that:

> "[…] as of the entry into force of the new remuneration regime implemented by this act, the Large Users of the MEM must acquire their demand for electricity from [CAMMESA], temporarily suspending the incorporation of new electricity purchase contracts in block between the [generators] […]."[417]

347. This is reiterated in Article 9, which establishes the "transitory suspension" of new contracts in the term market, the obligation for large users to acquire the electricity demand from CAMMESA and the prohibition to renew or extend the contracts in the term market. At plain sight, this provision directly contradicts Articles 6 and 35 a) of the Electricity Law. The Respondent seems to justify this by saying that the Claimant has not really been affected since "as of December 2001, AES's sales in the term market accounted only for approximately 14% of its total sales" and it was not a complete elimination due to the fact that "generators have been able to enter into contracts under other schemes".[418] The Tribunal does not consider this to be a valid justification. The Electricity Law provides for a right to generators, a right which has been eradicated. To which degree this may have impacted AES is another issue, to be addressed in terms of damages. For present purposes the salient fact is that the possibility to even enter into those contracts is now gone. Generators do not have the possibility of entering into new contracts to supply energy to large users,

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mitigate certain damages. While it is addressed by Claimant in its Updated Memorial as part of the measures that allegedly "rewrote the rules of the game", the Claimant does not specifically develop this argument with further detail as to the breaches claimed. It is mentioned within the FET claim to indicate that this program is "evidence of the degree of change effected by Argentina and that the changes were unsustainable" (Claimant's Updated Memorial, ¶ 282 b). In Claimant's Reply, it is also mentioned when arguing that Argentina eliminated the uniform price as providing "more beneficial pricing" and when contesting whether the situation had in fact improved *versus* the need to entice new entrants. (Claimant's Reply, ¶¶ 342, 377 b, 410 b) Finally, the matter is not addressed in the Claimant's PHB. Rather than being examined in relation to the provisions at issue, it would seem this measure is addressed as another example of the distorted regime alleged by the Claimant. It is not clear to the Tribunal whether Energía Plus is also being challenged. In any event, the Tribunal does not consider that the nature and effects of that scheme have been sufficiently briefed, particularly as regards the alleged damages caused by the scheme. In consequence, the Tribunal does not make a specific finding on it.

[417] (Unofficial translation). Resolution SE 95/2013, 22 March 2013, 13th recital, **AES Ex. 304**.

[418] Respondent's PHB, ¶¶ 201-203.

CAMMESA's task now. As to the fact that PPAs may be entered into under other schemes, the Tribunal recalls that those other schemes, such as Energía Plus is not readily open to any generator. Thus, whereas the Electricity Law grants the possibility to all generators (except those listed under law 23.696 and the Argentinian side of binational entities), such possibility is now conditioned to fulfilling the requirements of those other schemes, such as consisting of "new generation". Additionally, Resolution 95/2013 indicates that such suspension was to be *temporary*. The Tribunal understands that such suspension has not been lifted and thus continues to be in place.[419]

348. In light of the above, the Tribunal determines that the new cost-plus system and the prohibition of PPAs established by Argentina are also arbitrary and thus breach the FET obligation established in Article II.2.a) of the Treaty.

349. The Tribunal has analyzed Argentina's measures and determined their arbitrariness. Among the reasons stated, it has found inconsistencies regarding the Electricity Law. In this regard, the Tribunal considers that a final ground that reinforces a finding of the arbitrariness of the measures taken as a whole and their effects derives from Argentina's own recognition in 2016 that its policies had represented an "abandonment" and were "outside" the criteria established under the Electricity Law:

> "That the remuneration systems established in the [MEM] since 2003 implied the *progressive adoption of regulatory decisions that did not meet the objectives set forth in Law No. 24,065* in terms of ensuring supply and its quality under the defined conditions, at the lowest possible cost for the Argentine Electrical System.
>
> That the Electrical Regulatory Framework integrated by Laws Nos. 15,336 and 24,065 prescribe that the price to be paid for the electricity demand in the [MEM] must be sufficient to satisfy the economic cost of supplying it.
> That the *abandonment of economic criteria in the definition of prices in the [MEM]* distorted economic signals, increasing the cost of supply, discouraging private risk investment aimed at efficiently increasing supply

[419] Day 5 Tr. (Eng), P1500: 21-22, P1501: 1-4 (Cameron).

and subtracting incentives for savings and the adequate use of energy resources by consumers and users."[420]

350. The Respondent has referred in its submissions to protecting the interests of users as an objective of the Electricity Law, yet the Tribunal cannot help but notice that many of the most important Resolutions implemented in relation to the challenged measures do not refer at all to users or consumers. For example, Resolution 317/2002 (capacity payments), 240/2003 (gas exclusions), 406/2003 and 943/2003 (temporary mechanism for the allocation of receivables), 564/2007 (FONINVEMEM II) and the Generator's Agreement (FONINVEMEM III) are silent in this regard. Resolutions that do refer to users, such as Resolutions 8/2002 (spot price cap), 712/2004, 826/2004, 1427/2004 (Resolutions related to FONINVEMEM I) and 95/2013 (cost-plus system), also do so only in general terms, referring for example to the supply of electricity to users and to the readaptation of the electricity sector to the benefit of users, but do not clearly indicate that the reason for their implementation is to protect the interests of users and consumers.

351. In conclusion, for the reasons already stated, the Tribunal determines that Argentina's measures affecting spot price formation and dispatch; capacity payments; withholding of receivables and investment programs; as well as cost-plus system and PPAs prohibition, breached the FET obligation established under Article II.2.a) of the Treaty. Although in its FET claim the Claimant has also argued that Argentina's measures were not transparent, in light of our previous findings the Tribunal does not consider that a finding in respect of this argument would have a separate or distinct impact on the outcome of the case. Thus, it considers appropriate to exercise judicial economy by not addressing this particular allegation.

[420] Resolution MINEM No. 6/2016, 1st, 2nd and 3rd recitals, **AES Ex. 320**. (Unofficial translation) (Emphasis added). See also "the remuneration systems established in the [MEM] since 2003 involved the *progressive adoption of regulatory decisions outside the criteria underlying Law No. 24,065*, consisting of ensuring the sufficiency and quality of the supply under the defined conditions, at the lowest possible cost for the Argentine Electrical System." (Unofficial translation) (Emphasis added). Resolution SE No. 19/2017, February 2, 2017, 3rd Recital, **AES Ex. 336.**

3. Full Protection and Security (FPS) Claim

A. The Claimant's Position

352. The Claimant argues that, "while independent, this claim is closely related to the obligation to ensure stability of the regulatory framework".[421] In this regard, it posits that the FPS standard "obligates the host State 'to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued'." It also indicates that the standard "encompasses the duty to provide a legal framework that offers legal protection to investors."[422]

353. The Claimant submits that "the Treaty's FPS standard requires both legal and physical security", the former being "understood to encompass the stability of the legal framework and legal security of the investment."[423] In its view, "[n]othing in the Treaty suggests that the FPS language is limited to physical security" and "[a] textual analysis of the Treaty therefore requires that FPS protection extend to legal protection and security."[424]

354. The Claimant refers to the word "full", qualifying the term "protection and security", which in its view indicates the broad scope of the standard and also argues that the FPS standard is "linked in the Treaty with the fair and equitable treatment standard".[425] In this regard, the Claimant contends that the total evisceration of the regulatory framework violated AES's legal security and AES experienced years of

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[421] Claimant's Updated Memorial, ¶ 336 and Claimant's Reply Memorial, ¶ 388.

[422] Claimant's Updated Memorial, ¶ 338, quoting to *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, **AES Auth. 013,** ¶ 613 and *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, **AES Auth. 152**, ¶ 263.

[423] Claimant's Post-Hearing Brief, ¶ 119, referring to *National Grid*, ¶¶ 187, 189, **AES Auth. 174**. "[A] host of tribunals have found that the requirement that a State provide full protection and security goes far beyond the archaic interpretation of this standard as only relating to a State's obligation to provide physical protection." Claimant's Updated Memorial, ¶ 339. The Claimant relies on *Azurix v. Argentina*, *Vivendi II*, *Siemens v. Argentina, National Grid v. Argentina* and *Total v. Argentina.*

[424] Claimant's Post-Hearing Brief, ¶ 120. "[T]he Treaty does not qualify the full protection and security obligation in any restrictive way. Therefore, it does not limit the obligation to providing protection and security from physical interferences only". Claimant's Updated Memorial, ¶ 342.

[425] Claimant's Updated Memorial, ¶¶ 344 and 345.

uncertainty by "having to endure the unpredictability of the Measures, while at the same time being led to believe that a functioning MEM would be reinstated and that AES would be compensated for its losses", which did not happen.[426]

355. The Claimant specifies that certain tribunals have found that the FPS standard has been breached because the investment was subject to unfair and inequitable treatment, even if no physical violence or damage took place and others have found that the FET obligation was breached due to a failure to provide full protection and security.[427] Therefore, it contends that "since Argentina violated its FET obligations to provide a stable legal framework, it also has breached its FPS obligation under Article II.2(a) of the Treaty, which entails a similar obligation of regulatory stability."[428]

B. The Respondent's Position

356. The Respondent indicates that "[t]he obligation assumed by the Argentine Republic under Article II.2.b of the BIT requires it to provide police protection against any criminal acts causing physical damage to the investor or its investments" and the Claimant seeks to unfoundedly expand the notion of this standard.[429]

357. The Respondent contends that "the standard of full protection and security is a residual obligation of customary international law that consists in using due diligence to prevent wrongful injuries to the person or property of aliens caused by third parties."[430] In this regard, the Respondent argues that "AES did not contend, let alone demonstrate, that it had suffered any damage to its physical integrity or property

[426] Claimant's Updated Memorial, ¶¶ 346-348 and Claimant's Reply Memorial, ¶¶ 397 and 398.

[427] Claimant's Updated Memorial, ¶¶ 349 and 350.

[428] Claimant's Post-Hearing Brief, ¶ 140 and Claimant's Reply Memorial, ¶ 399-401.

[429] Respondent's Updated Counter-Memorial, ¶ 595. See also Respondent's Rejoinder Memorial, ¶¶ 754-757.

[430] Respondent's Post-Hearing Brief, ¶ 209, referring to *El Paso v. Argentina*, Award, ¶¶ 522-523, **AES Auth. 148**.

over these twenty years, and so its claim regarding the alleged lack of protection and security under Article II.2.a of the Treaty should be rejected."[431]

358. In the Respondent's view, the Claimant relies on cases in which the tribunals addressed the FET and FPS standards jointly, and "construed them as if they were one and the same guarantee". In addition to this, the language used in the Argentina-US BIT is different, being the sole purpose of Article II.2.b) to "protect investors against denial of justice or manifestly arbitrary measures ('fair and equitable treatment') and to ensure police protection against criminal acts affecting their investments ('full protection and security')".[432]

359. It is in this regard that Argentina argues that it has "ensured the full protection and security of Claimant and its investments, which were never alleged to have been physically harmed by third parties in all these years."[433] The Respondent clarifies that in case the Tribunal agrees with a broad interpretation of the FPS standard, "AES actively participated in the 2008-2011 Agreement, under which the provisions established in previous agreements were adjusted and the generators waived their right to claim against the regulations that had been introduced so far. Following this, AES agreed to Resolution SE 95/2013; thus, any differences that may have existed in relation to the remuneration scheme applicable to electricity generation were definitely settled".[434]

C. The Tribunal's Analysis

360. The Tribunal begins its analysis with Article II.2.a) of the BIT, which provides 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."

[431] Respondent's Post-Hearing Brief, ¶ 211.

[432] Respondent's Updated Counter-Memorial, ¶¶ 597, 598.

[433] Respondent's Updated Counter-Memorial, ¶ 600.

[434] Respondent's Updated Counter-Memorial, ¶ 685.

361. At the outset, the Tribunal notes that this provision establishes FET and FPS as separate obligations. Investments shall be accorded FET; and they shall also be accorded FPS. As indicated above, the last sentence of the Article reinforces that the treatment provided must not be less than that required by international law as a "floor" rather than a "ceiling".

362. The Treaty does not indicate what is to be understood by "protection and security". Ordinarily, to "protect" means to "cover or shield from exposure, injury, damage, or destruction: guard"; to "defend"; "to maintain the status or integrity of especially through financial or legal guarantees".[435] The term "security" also refers to "being secure"; "free from danger: safety"; "something that secures: protection".[436] In addition to this, the word is qualified by the adjective "full". The Parties disagree as to the scope of this obligation. While the Claimant considers that the obligation is not restricted to physical protection and it entails providing a stable legal framework, the Respondent considers that it is limited to providing police protection against any criminal acts causing physical damage to the investor or its investments.

363. Although traditionally these types of clauses were understood as restricted to physical protection, the Tribunal agrees with the Claimant that there is no textual basis in Article II.2.a) to restrict FPS in that sense. As noted by other tribunals, the definition of "investment" also covers intangible property, thus, such a restriction would not be compatible with those types of assets. In addition to this, the adjective "full" also seems to indicate a fairly wide scope of the protection and security to be granted. Nonetheless the obligation is not meant to be a guarantee against all injuries that investments may suffer. The Tribunal agrees that FPS is an obligation of *vigilance*, of *due diligence* and not of strict liability.[437] Moreover, "[t]he precise

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[435] "[P]rotect". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/protected 06 May 2024.

[436] "[S]ecurity". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/security 06 May 2024.

[437] *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, **AES Auth. 184**, ¶ 484; *Suez, Sociedad General de Aguas de Barcelona, and InterAgua Servicios Integrales del Agua S.A v. The Argentine Republic (I)*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, **AES Auth. 191**, ¶ 158; *Infinito Gold Ltd. v. Republic of Costa Rica,* **AL RA 217**, ¶ 627.

degree of care, of what is 'reasonable' or 'due', depends in part on the circumstances" of each case.[438]

364. Even though Article II.2.a) is not restricted to physical protection and security, the Tribunal does not consider that legal protection can be equated to "stability of the legal framework". It is one thing for a State to provide legal means, for example, judicial or administrative means, to protect assets that may be either tangible or intangible and which do not necessarily entail police protection. However, it is something else to suggest that this includes an obligation not to change its regulations. Therefore, while the text of this provision is not restricted to physical protection and can encompass legal protection, in our view there is no inter-relationship between the two standards in this particular treaty that would justify equating stability of regulations to legal protection nor that would justify that a breach to FET automatically translates to a breach of FPS.[439]

365. As indicated in preceding sections of this award, whether stability and predictability can be considered as part of FET are to be determined in accordance with the text of the provision at issue and the treaty in which it is found. Whether such stability forms part of legitimate expectations is also to be determined in accordance with specific commitments or representations made by the host State to investors in order to induce investment, taking into account also whether those expectations were reasonable. Those elements are not present in this case.

366. The Tribunal further notes that Claimant's allegations do not refer to Argentina's non-compliance with its obligation to protect the investment from wrongful injury by any third Party,[440] but rather that the lack of protection derives from Respondent's modification and application of its legal regime. In consequence,

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[438] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 323.

[439] The Tribunal observes that the text of Article II.2.a) does not provide an express link between FPS and FET as was the case in the provision analyzed in *Total v. Argentina*.

[440] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 524; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, **AL RA 217**, ¶ 623.

the Tribunal determines that Claimant's allegations are not covered within the scope of the FPS obligation.

4. Minimum Treatment Claim

A. The Claimant's Position

367. The Claimant argues that "Argentina's conduct in breach of its FET and FPS obligations also constitutes a breach of the minimum standard of treatment under customary international law, which the Treaty sets as a floor". AES refers to "Argentina's evisceration of the regulatory framework, through arbitrary and non-transparent measures, in disregard of a higher law […] and ignoring its representations of regulatory stability towards AES", which it qualifies as "so extreme that they also would violate the Treaty provision on the minimum standard of treatment were it to apply".[441]

368. According to the Claimant, one purpose of Article II.2.a) is "to make 'clear that no BIT provision authorizes treatment which is less than that required by international law'."[442] In its view, this provision requires Argentina "to observe its obligations in international law", which include principles such as goof faith and *pacta sunt servanda*. In this sense, AES submits that "Argentina is prohibited from significantly amending its laws and regulatory framework to the detriment of the foreign investor, without providing compensation in accordance with international law."[443]

369. The Claimant posits that Argentina's measures constitute a breach of Article II.2.a) of the Treaty, as well as of the minimum standard of treatment under customary international law and it is entitled to a separate finding of liability on this ground.[444]

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[441] Claimant's Post-Hearing Brief, ¶ 141. "[T]his provision adds an additional layer of protection for the investor, operating as an absolute floor below which no treatment is accepted." Claimant's Reply Memorial, ¶ 402.

[442] Claimant's Updated Memorial, ¶ 353, quoting Kenneth J. Vandevelde, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (Kluwer Law and Taxation Publishers, 1992), **AES Auth. 123,** p. 77.

[443] Claimant's Updated Memorial, ¶ 355.

[444] Claimant's Updated Memorial, ¶ 357.

In other words, the Claimant contends, *first*, that "Argentina's conduct in implementing the Measures is in breach of the fair and equitable treatment standard, thus also breaching the minimum standard of treatment under customary international law", and *second*, "Argentina's breach of its repeated promises to reinstate the MEM to how it had functioned prior to the Measures also constitutes a violation of the minimum standard of treatment under customary international law."[445]

B. The Respondent's Position

370. The Respondent contends that Article II.2.a) establishes the minimum standard of treatment under customary international law. It indicates that the Claimant's position on the FET standard afforded in the Treaty as "autonomous and independent" from the minimum standard of treatment under customary law is "a fundamental error" that ignores the text of such provision as well as the interpretation of the United States and Argentina.[446]

371. The Respondent submits that the minimum standard of treatment imposes fewer restrictions on the state conduct than the autonomous FET standard.[447] As to Claimant's alternative argument that the minimum standard of protection has evolved to the point that its content is equivalent to the autonomous FET standard, it argues that the Claimant has "the obligation to establish the existence and content of the customary international law standard it invokes, based on State practice and *opinio juris*", yet it has not made any reference to it in its written submissions.[448] Overall, the Respondent alleges that "the Argentine Republic has always complied with the standard required by the minimum standard of treatment under international law set forth in Article II.2.a" regarding adjustments to spot prices, the term market, capacity

[445] Claimant's Reply Memorial, ¶ 403.

[446] Respondent's Post-Hearing Brief, ¶ 162.

[447] Respondent's Post-Hearing Brief, ¶ 163.

[448] Respondent's Post-Hearing Brief, ¶ 166.

payments and the collection of receivables and agreements voluntarily entered into by AES.[449]

C. The Tribunal's Analysis

372. The Tribunal has already stated that it does not consider the distinction between the FET standard under the BIT and the minimum standard of treatment to be of material significance for this case, in particular, since arbitrariness is an element traditionally analyzed when assessing mistreatment of aliens under customary international law and non-arbitrariness has in general been understood as an inherent element of FET.

373. In light of our finding that Argentina has breached its obligation under Article II.2.a) of the BIT to accord FET, the Tribunal considers that addressing this particular claim would not impact on the outcome of the dispute or the damages that may be awarded, thus, it determines to exercise judicial economy by not specifically addressing this claim.

5. Arbitrary and Discriminatory Measures Claim

A. The Claimant's Position

374. The Claimant contends that Argentina's dismantling of the regulatory framework was made through the implementation of measures that were arbitrary and lacked transparency, therefore breaching its obligation under Article II.2.b) not to "impair […] the management, operation, maintenance, use, enjoyment […] of investments"[450] and that most of the measures were taken "with the true sole purpose of keeping end-user tariffs artificially low at no cost to the state."[451]

375. In Claimant's view, "[t]he disjunctive 'or' makes it clear that measures need only be arbitrary *or* discriminatory to violate the BIT".[452] The Claimant refers that an act is arbitrary if "it is 'not founded on reason or fact … but on mere fear reflecting

[449] Respondent's Rejoinder Memorial, ¶ 707.

[450] Claimant's Post-Hearing Brief, ¶¶ 135-137.

[451] Claimant's Post-Hearing Brief, ¶ 137, quoting *EDF*, ¶ 303, **AES Auth. 144.**

[452] Claimant's Updated Memorial, ¶ 358 and Claimant's Reply Memorial, ¶ 404.

national preference'," and relies on *Cervin v. Costa Rica*, where the tribunal concluded that "there is arbitrariness where 'there has been a deliberate repudiation of the aims and purposes of a State policy'."[453]

376. The Claimant contends that Argentina's conduct in the context of the economic crisis was arbitrary and that this has been proved through the passage of time since Argentina continued the same course for almost twenty years.[454] It also argues that the arbitrary treatment "impacted a number of these factors including the management, operation, maintenance and enjoyment of AES's investments in Argentina."[455] As to the management, it indicates that "the incremental and one-off nature of the Measures (implemented long after the economic crisis) left AES in a state of perpetual regulatory uncertainty." As an example, it submits that "Resolution SE 95/2013 deprived AES of its ability to execute term contracts or to procure the majority of its own fuel, thereby interfering with AES's ability to make its own business decisions regarding suppliers" and that "the Measures have forced AES continuously to restructure debt and renegotiate loans, interfering with AES's relationships with its lenders", and adapting to "the ever-changing regulatory

[453] Claimant's Updated Memorial, ¶¶ 359 and 360, quoting to *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, **AES Auth. 030**, ¶ 232 and *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Final Award, March 7, 2017, **AES Auth. 135**, ¶ 527, respectively. The Claimant clarifies that "Arbitrary conduct by a host State is not itself sufficient to violate the non-impairment provision of the Argentina-US BIT. The arbitrary conduct of the host State must have certain *effects*". See Claimant's Updated Memorial, ¶ 363.

[454] Claimant's Updated Memorial, ¶¶ 364-367. The Claimant also argues that: "the mere fact that a measure addresses some legitimate public purpose is not enough to make the measure consistent with the Treaty. The measure must also be commensurate and proportional to the problem that it seeks to resolve, which must be – and remain – a 'real' problem. If the problem addressed by a measure ceases to exist and is no longer a 'real' issue, then the measure may become unreasonable." "[T]hese Measures did not serve a legitimate purpose, were not based on legal or technical standards, but on discretion, were neither commensurate nor proportional to the alleged problem that Argentina sought to resolve, and were maintained long after such situation ceased to exist. Thus, Argentina's conduct has been the very definition of arbitrary". Claimant's Reply Memorial, ¶¶ 408 and 411.

[455] Claimant's Updated Memorial, ¶ 368. See also Claimant's Reply Memorial, ¶¶ 412-419.

framework, thereby losing control over its strategic and business decisions, including its ability to choose its business partners and decide its contractual relations."[456]

377. Regarding the operation, it submits that "Argentina's unilateral withholding of receivables owed to the AES subsidiaries placed them in a straightjacket that limited their options to maintain their assets. […] when CAMMESA became the sole purchaser of fuel, its allocation of fuel to AES Generators interfered with AES's ability to make some of the most basic operational decisions about its plants, such as types and amounts of fuel to burn."[457]

378. As to the maintenance, it indicates that Argentina impacted its ability to continually possess and upkeep its assets when it "unilaterally directed CAMMESA to withhold payments due to the AES Generators but required them to continue producing energy, […] reducing AES's ability to inject necessary capital into its operations."[458] Finally, regarding the enjoyment of its investment, it contends that Argentina "deprived it of its right to use its property and receive the profits that it had projected. AES was therefore deprived of a reasonable return on its investments."[459]

379. In response to Argentina's arguments on the suspension of the arbitration, the Claimant points that "while Argentina continued to intervene in the MEM, it also promised AES that it would reinstate the MEM to how it had worked before the Measures, and persistently participated in settlement negotiations. Argentina now

[456] "[T]he question is whether Argentina's conduct had a negative effect on AES's ability to exercise its 'core rights to determine the organization's mission, budget, strategy and operational rights to assign, direct, hire and fire,' or, in other words 'making decisions for [its] business'." Claimant's Updated Memorial, ¶ 369.

[457] "[T]he question is whether Argentina impacted the 'recurring activities involved in the running of a business for the purpose of producing value for the stakeholders'." Claimant's Updated Memorial, ¶ 370.

[458] "[T]he question is whether Argentina negatively impacted AES's ability to continually possess and put in the work necessary to repair and upkeep its Argentine assets." Claimant's Updated Memorial, ¶ 371.

[459] "[T]the question is whether Argentina caused any negative impact on the 'exercise of a right which includes the beneficial use, interest and purpose to which property may be put, and implies right to profits and income therefrom'." Claimant's Updated Memorial, ¶ 372.

appears to assert that AES should have known all along that Argentina intended to breach its promises and never intended to settle this Arbitration."[460]

380. In response to the Tribunal's questions, the Claimant has indicated that "[w]hen analyzing the arbitrariness of Argentina's conduct, the Tribunal should do so through the lenses of Article II.2 b) of the Treaty (as a specific provision), and through the lenses of the FET standard (as a broader protection) […]".[461] It is in this regard, that AES claims that Argentina has committed a "double breach" of the Treaty when implementing its measures.[462]

B. The Respondent's Position

381. The Respondent agrees that the concept of "arbitrariness" must be defined according to the criterion set in *ELSI*. It also states that "[a] measure may be considered arbitrary if it has not been taken through a rational decision-making process" and the analysis must be limited to whether there was a manifest lack of reasons for the legislation.[463] The Respondent alleges that "[i]t is not enough for an investor to make unfounded statements and present hypothesis about the alleged hidden motives behind a certain measure. The investor bears the burden of proving with certainty that this was actually the case."[464]

382. According to the Respondent, "[a]fter the most serious stage of the crisis was over, the Argentine Republic made regulatory adjustments in good faith aimed at improving the situation throughout the sector […] These adjustments, which were made in consideration of the circumstances and the needs of all the parties involved

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[460] Claimant's Reply Memorial, ¶ 414. According to the Claimant, the state of perpetual uncertainty remains to this date: "Argentina imposed two new arbitrary measures that impact the AES Generators. *First*, Argentina issued a Central Bank resolution that forced AES Argentina to renegotiate debt held in US dollars. *Second*, Argentina issued Resolution SE 354/2020, which impacts TermoAndes' ability to obtain natural gas to meet its contractual obligations."

[461] Claimant's Post-Hearing Brief, ¶ 138.

[462] Claimant's Post-Hearing Brief, ¶ 139.

[463] Respondent's Updated Counter-Memorial, ¶¶ 688, 691. The Respondent relies on *Glamis Gold v. United States* and *Philip Morris v. Uruguay*. In this sense, the Respondent contends that the "reasonable and non-discriminatory measures standard must not be interpreted broadly". Respondent's Rejoinder Memorial, ¶ 759.

[464] Respondent's Updated Counter-Memorial, ¶ 694.

(including users), were reasonable and had legitimate purposes". The Respondent posits that AES has not explained how the measures it complains about fall within the category of arbitrary, that Argentina "has made efforts to maintain a fluent dialogue with the generators and to consider the interests of all the parties involved" and that if AES had been left in a state of perpetual uncertainty, it would not have requested the suspension of the arbitral proceeding for 13 years, rather it would have made use of the dispute settlement system.[465]

383. As to the payment of receivables, the Respondent indicates that the generators' right to collect such amounts was not denied and that "generators did collect the receivables due plus interest and a return expressly agreed by them, and they were given different options to use the receivables".[466] The Respondent also states that it has "made huge efforts to make the necessary funding to maintain and repair the plants available to the generators", that AES has used that funding, that "it is hard to understand how the failure to obtain a certain return on an investment constitutes an arbitrary measure" and that in any given case, "the revenues generated by AES's investments in the electricity generation sector in Argentina have been sufficient to cover its costs and generate profits."[467]

384. The Respondent alleges that the Claimant has not demonstrated that the measures "were manifestly without reason, that they were taken for unreasonable purposes, that they were taken in wilful (sic) disregard of due process, or, even less so, that they have inflicted any damage on AES". The Respondent also submits that the evidence it has presented demonstrates that the measures were taken "in exercise of the regulatory powers vested […] under the Electricity Law, and that such

[465] Respondent's Updated Counter-Memorial, ¶¶ 696-698.

[466] Respondent's Updated Counter-Memorial, ¶ 699.

[467] Respondent's Updated Counter-Memorial, ¶¶ 700, 701.

measures were aimed at adjusting the operation of the MEM to the new macroeconomic context."[468]

C. The Tribunal's Analysis

i. The Standard applicable to Article II.2.b) of the BIT

385. The Tribunal begins its analysis with the text of the provision at issue, which reads:

> *"Neither* Party *shall in any way impair* by *arbitrary or discriminatory measures* the *management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments*. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party." (Emphasis added)

386. The text of the provision clearly establishes the obligation of the Contracting Parties not to impair "in any way" essential aspects of an investment by arbitrary or discriminatory measures. The Tribunal notes *first*, that the use of the conjunction "or" indicates that the impugned measures can be one or the other, *i.e.*, either arbitrary or discriminatory; and *second*, that while the Article specifically distinguishes specific rights that an investor has over the investment, in more general terms it addresses the use, management, disposal and enjoyment of an investment.

387. The Tribunal recalls that discrimination is not being alleged by the Claimant. As to the definition of arbitrariness, the Tribunal has already found that *disregard of due process*, *caprice*, *whim* and *unreasonableness* are elements that will render a measure arbitrary. It has also found that a deliberate repudiation of the goals and

[468] Respondent's Post-Hearing Brief, ¶¶ 214, 215. The Respondent argues that it has complied with the reasonable and non-discriminatory measures standard. In particular, it states that: no specific promises were made to reinstate the MEM to how it worked prior to the measures; the substantial characteristics of the regulatory framework were not modified; the technical studies for the capacity payments are not an essential element in a competitive electricity market, since energy market prices guarantee its functioning; Resolution SE 240/2003 was issued in a context of operational inconveniences derived from the unpredictability of the gas supply to power plants, as evidenced in multiple communications from CAMMESA; AES never complained about the alleged lack of definition of fundamental aspects of the agreements reached despite its involvement in the negotiation; AES is not prevented from paying its debts in US dollars given that the Claimant has alternative means to obtain US dollars; and AES agreed to and benefited from the implementation of Resolution 95/2013, which now deems unreasonable. Respondent's Rejoinder Memorial, ¶¶ 764-769.

objectives of State policy, a measure based on sole discretion or subjective preference rather than on law or facts, or a measure taken for reasons different than those put forward by the decision maker can also constitute arbitrariness.[469]

388. Article II.2.b) of the Treaty contains an important *caveat* in terms of arbitrariness, which is that "[f]or the purposes of dispute resolution under Articles VII and VIII*, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review* such measure in the courts or administrative tribunals of a Party". Accordingly, availability of judicial or administrative remedies does not *per se* render a measure as non-arbitrary. In addition to this, it is not enough for a measure to be arbitrary, it must have a specific *effect* on investments.

389. In the case at hand, the Claimant has challenged measures adopted by Argentina affecting spot price formation and dispatch (cap and exclusions); capacity payments; withholding of receivables and investment programs, as well as the cost-plus system and prohibition on PPAs. In accordance with the text of the Treaty, the Tribunal must determine whether such measures: i) are arbitrary; and ii) impair the *management, operation, maintenance, use, enjoyment, acquisition, expansion,* or *disposal* of *investments*. In light of our findings of arbitrariness as to the FET claim,[470] the Tribunal considers that the first prong of this test has been satisfied and it will proceed to analyze the second prong. Before delving into that task, the Tribunal recalls that the second element of the standard under Article II.2.b) is not to "impair" in "any way" certain functions and benefits that typically derive from an investment. To impair means to "diminish in function, ability, or quality**:** to weaken or make worse".[471] In the Tribunal's view, this term alludes to diminishing, weakening or debilitating, therefore, such term should not be confused with an eradication, something that would be addressed by another provision of the Treaty. The Tribunal

[469] See para. 269, above.

[470] See paras. 294, 295, 306, 324, 333 340 and 348.

[471] "[I]mpair". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/impair 18 July 2024.

observes as well that the language "in any way" is clear as to the broadness of this provision.

ii. Measures affecting Spot Price Formation and Dispatch

390. The Tribunal has determined that the measures affecting spot price formation and dispatch, *i.e.* the spot price cap and exclusion of non-natural gas plants established by Argentina were not reasonable and thus, arbitrary. In particular, there was no indication as to how the spot price cap was calculated and deemed appropriate; and the cap was established in response to an urgent need to adapt the regulation, yet it was basically inapplicable for three years; and it was labelled as temporary but remained in place for more than ten years without any adjustment. As to the exclusions, the Tribunal indicated that it had been deemed as a temporary measure yet remained in place for nine years, that the fundamental aspect of it was never adjusted to what became a new reality and that there had been a different reasoning to impose the measure than the one put forward by Resolution 240/2003, one which ultimately resulted in controlling and squeezing the generators' profitability without any parameter or criteria. The Tribunal has also found that the spot price cap in combination with the exclusions had the effect that generators were paid different tariffs in contravention to the "uniform tariff for all" provided by Article 36 of the Electricity Law, which in addition to this was meant to be based on the economic cost of the system, not only on some costs.

391. Over time, the effect of those measures on the Claimant impaired at least the management and operation of its investment, to the point that its decision-making was constrained and driven by the need simply to keep the business "afloat". When explaining there was no other option than to adhering to Resolution 95/2013, one of Claimant's witnesses indicated at the hearing that "AES Argentina, with revenue from the combined-cycling in Paraná or Alicurá had to continue to survive and

subsidizing plants that if they were a stand-alone, they would not cover their own costs […] These plants did not cover even fixed costs".[472]

392. Thus, the Tribunal determines that Argentina's measures affecting spot price formation and dispatch impaired the management and operation of Claimant's investment in breach of Article II.2.b) of the Treaty.

iii. Measures affecting Capacity Payments

393. Capacity payments together with the uniform tariff comprise the remuneration established by Article 36 of the Electricity Law. The Tribunal has previously determined that the first element of that remuneration was affected by Argentina's measures. It has also found that the measure affecting capacity payments was not reasonable and thus, arbitrary.

394. The reduction to capacity payments, though implemented through a specific Resolution, is one of a series of measures enacted by Argentina in 2002 and 2003. It is not a measure isolated from the rest, but a measure that, along with Resolutions 8/2002 and 240/2003 produced over time an effect on the *whole* of Claimant's remuneration and thus on its economic situation and the management and operation of the investment. This is a situation which the Tribunal has already addressed and which translated into a risk of bankruptcy (at least of certain plants) for the Claimant.

395. While the Tribunal cannot determine without evidence as to the reasonability of the calculation of such payments that the measure affecting capacity payments impaired the investment on an isolated basis, it can determine that its application together with the measures affecting spot price formation (energy price) affected the generators' remuneration as a whole and thus impaired the management and operation of its investment in breach of Article II.2.b) of the Treaty.

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[472] Day 4 Tr. (Eng), P. 1180:9-13, 20-21 [redacted]. "A. It was the only decision we could make. If we hadn't joined 95, our combined-cycles would have been above the spot price, and we would have failed for sure. There was no other possible decision. […] ARBITRATOR DRYMER: […] --had you not acceded, it would have probably have pushed AES Argentina into bankruptcy. THE WITNESS: (In English.) Yes. Yes." Day 4 Tr. (Eng), P1175:13-16, P1178:5-10" [redacted].

iv. Withholding of Receivables and Investment Programs

396. The Tribunal has determined that the FONINVEMEM I, FONINVEMEM II and FONINVEMEM III investment programs implemented by Argentina were arbitrary. In particular, the Tribunal has found that: *first,* generators were constrained and put by the government in a situation where they were owed payment which would not be made for a long time; *second*, they had to continue producing electricity, and *third*, this situation could only have put a strain on the generators' ability to act and operate in an uncertain environment. Withholding payments for a good or service produced, which not only represent revenue to cover operation costs but also profits, would logically affect any investment. The fact that such income did not flow to the generators (Claimant's investment) affected decision-making, planning, and end use of resources that under normal circumstances would have been at the disposal of the investor. Claimant's witnesses corroborate this situation when indicating that:

> "As an obvious example of the climate of uncertainty, the AES Entities are presently in *default on various loan agreements* with several different banks."[473]
>
> "[…] [T]he loss in revenue and change in the market structure has dramatically *impaired the AES generation companies' relations with lenders*. For instance, *Parana has been force to default on its obligations under a loan granted* by the Inter-American Development Bank, one of the main sources of multilateral financing for the region. […] the AES Generators are operating in an environment in which the clear rules of the game have been completely turned upside down. This has in turn impacted on the *value of the companies as reflected in present and future cash flows*, damaged relationships with lenders and increased regulatory uncertainty to the extent that it *makes even shortterm business planning extremely difficult*."[474]
>
> "The situation was exacerbated by the fact that Argentina quit paying the AES Generators on time (or at all, in some cases) for the energy they produced. This had severe consequences for the AES Generators. Following a series of measures that started in 2002, it had become clear in the course of 2003 that CAMMESA was unable to meet its payment obligations to generators. From 2002, Argentina had frozen the tariffs consumers were required to pay for energy, and these tariffs were insufficient to cover the amounts due to generators for supplying energy. On top of that, from 2002, CAMMESA was prevented from cutting energy to distributors who did not pay. The situation quickly deteriorated to the point that CAMMESA did not have enough funds available to pay us. We had no idea when the AES Generators would receive payment for the energy they produced. […] The volatile situation with withheld payments due to the AES Generators had a *significant impact on our cash position and therefore on our day-to-day operations*. In short, CAMMESA's conduct injected

[473] WS, [redacted], ¶ 10. See also ¶¶ 11, 13.

[474] WS, [redacted], ¶¶ 60, 64.

> an unacceptable level of uncertainty into our operations, our management, and our relationships with our suppliers and our lenders."[475]
>
> "As a result of all of the above, the AES Entities and their holding companies have defaulted on, or are no longer meeting, all loan obligations. AES holding companies presently hold approximately US$750 million of debt associated with the AES Entities and all of it is in default. […] The impacts of Argentina's conduct on the AES Entities, as described above, have resulted in AES being deprived of a significant part of the value of its investment. This is manifested most obviously in the reduced values of those businesses and in the uncertainty that AES will be able to recover over the longterm on its investment made. The crisis facing the AES Entities has also diverted money, time and resources from AES in trying to keep the businesses alive. Further, the AES Entities' loan defaults have damaged relationships with lenders, contributed to a downgrade in our credit rating and also impacted adversely on AES's reputation in the USA, Argentina and elsewhere."[476]
>
> "[…] the truth is that we were in a situation where *there were plants that needed major maintenance works, and at the same time, our revenue was still being withheld* by the Government. The possibility of using such revenue to cover the cost of those works was an obvious way to mitigate the damage caused by the unavailability of the funds. Resolution SE No. 724/2008 offered us an option to monetize the revenues that the Government had withheld, at a time when, due to the measures adopted by the Government, our profitability was low."[477] (Emphasis added)

397. As indicated above, the debts to the generators continued to accumulate for a significant period of time. According to Claimant's expert, the government withheld US$ 83 million worth of AES's plants revenues between 2005 and 2007, it withheld US$ 66 million in 2008, US$ 55 million in 2009 and US$ 72 million in 2010.[478] According to one of Claimant's witnesses: "[b]y the time FONINVEMEM III was proposed around 2010, the Government owed AES Argentina more than US$200 million dollars". [479] The Respondent has not contested that amounts continued to be withheld and debts continued to accumulate. When referring to the suspension of the arbitration and the pending installments, it mentioned that "[t]hose instalments began to be paid in 2010 when the Manuel Belgrano and San Martín plants started operating and were fully repaid in 2020".[480] According to the Respondent, "the receivables which had been postponed were later paid *through schemes* which AES participated

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[475] Second WS, [redacted], ¶¶ 13, 15.

[476] WS, [redacted], ¶¶ 14, 19.

[477] Second WS, [redacted], ¶ 23.

[478] Abdalla-Spiller Report, ¶ 367.

[479] Second WS, [redacted], ¶ 22 and AES Corporation, 10-K 2010 at 23, **A RA 317**.

[480] Respondent's Post-Hearing Brief, fn. 313. See also Day 3 Tr. (Eng), P. 878:20-P:879:15 [redacted]

in and benefitted from."[481] The Tribunal reiterates that, whether the Claimant may have benefited in some form or attempted to choose the option that was more commercially beneficial is not apposite. The crux of the matter is that the government foreclosed the possibility of immediate payment or short-term payment. It instead offered payment *through its investment schemes*. This was the only solution given to the generators to the fact that debts were accumulated and the government was not able to pay: to differ payments and "finance" with those receivables the increase in supply needed. The Tribunal does not see that there was flexibility in that regard. Whether the "yes" or "no" depended on obtaining some or no benefit, with more or less certainty, were the result of the options imposed *through that same scheme.*

398. The Respondent has also argued that "AES had access to the Argentine courts at all times to demand payment of the debts in case it genuinely did not agree with their being converted into LVFVDs".[482] Since Article II.2.b) indicates that "[f]or the purposes of dispute resolution […] a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party", the Tribunal rejects this argument.

399. In light of the foregoing, the Tribunal considers that through the withholding of revenues and the implementation of FONINVEMEM I, II and III, Argentina impaired at least the management, operation, maintenance, use and enjoyment of Claimant's investments in breach of Article II.2.b) of the Treaty.

v. Cost-Plus System and Prohibition of PPAs

400. The Tribunal has determined that the cost-plus system and the prohibition to enter into PPAs established through Resolution 95/2013 are both arbitrary. The fact that the remuneration provided for generators under this scheme resulted in different payments being received, higher or lower, depending on the technology and scale of plants directly impacts the income received for the energy produced and capacity

[481] Respondent's Updated Counter-Memorial, ¶ 629.

[482] Respondent's Rejoinder Memorial, ¶ 367.

availability. The same situation arises from the inability to negotiate new contracts or renew them, contracts which at least according to Respondent represented 14% of AES's energy produced in 2002 and that currently have been eliminated unless entered under another specific scheme, in which case the requirements to participate must be fulfilled.

401. Prior to accepting this Resolution, Claimant's situation was difficult, and a bankruptcy risk existed. While the Tribunal does not deny that the effects of these measures were not catastrophic, in comparison to the situation that may have existed if not for the accession, based on the record it cannot say either that the effect they had on Claimant's revenues was minimal. Claimant's revenues and profits were restrained, which in turn restrained at least its management and operation. As indicated above, AES continued to subsidize smaller plants to avert their bankruptcy and was restricted as to its fuel procurement, a key element in electricity generation. According to one of Claimant's witnesses:

> "Given that AES Argentina owns both types of plants, it received additional resources for its thermal plants (which always have higher costs), but, at the same, its hydroelectric plants experienced greater harm (as they had less resources and much lower margins). This means that Resolution SE No. 95/2013 forced us to continue to use funds from more profitable plants to try to avert the bankruptcy of other plants. In short, Resolution SE No. 95/2013 somehow alleviated the impact of the Government's interference with the revenues of our thermal plants, but negatively affected hydroelectric plants. In addition, the resolution considerably impaired our ability to manage the company's risk profile because, by virtue of Resolution SE No. 95/2013, the Government prevented us from managing our own business and we became fully dependent on CAMMESA's decisions."[483]

402. In light of this, the Tribunal determines that the cost-plus system and PPAs prohibition impaired at least the management and operation of Claimant's investments in breach of Article II.2.b) of the Treaty.

[483] Second WS, [redacted], ¶ 30.

6. State of Necessity Defense under Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts

A. The Respondent's Position

403. As an alternative to the defense raised under Article XI, the Respondent also posits that any "potential wrongfulness" of the measures adopted in 2002-2003 would be precluded by the defense of necessity.[484] Regarding this defense, the Respondent indicates that the "state of necessity" is "a circumstance precluding the wrongfulness of a given conduct which may exempt a State from international responsibility".[485]

404. It indicates that a measure taken pursuant to such a state needs to meet the following requirements: "(i) they need to be the only way for the State to safeguard an essential interest against a grave and imminent peril, and (ii) the State must not have contributed to the situation of necessity."[486] It is Argentina's position that "in the face of the severe crisis that broke out in late 2001, the Argentina Republic had no other option but to take emergency measures to safeguard its essential interests", that "the Secretariat of Energy had to implement reasonable changes to the regulations governing the electricity sector in order to adjust them to the macroeconomic context and the new circumstances of the electricity market, as it was necessary to guarantee the supply of affordable electric power amidst the severe crisis at the time", and that it "did not contribute to the state of necessity in a manner that precludes it from invoking such situation as a circumstance precluding the wrongfulness of its acts under international law."[487]

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[484] Respondent's Post-Hearing Brief, ¶ 234.

[485] Respondent's Updated Counter-Memorial, ¶ 704.

[486] Respondent's Post-Hearing Brief, ¶ 220. See also Respondent's Updated Counter-Memorial, ¶¶ 714-737.

[487] Respondent's Updated Counter-Memorial, ¶¶ 714, 724, 726. See also Respondent's Rejoinder Memorial, ¶¶ 776-800. "The collapse of the State and the Argentine society have notyet been overcome and there are several aspects of social, institutional and financial life that still need to be normalized. Some of the pending issues include the reduction of poverty and extreme poverty to reasonable levels, the improvement of production and employment levels and the reduction of social conflict, among others […] the disappearance of the state of necessity would not imply a return to the scheme that existed before the crisis". Respondent's Rejoinder Memorial, ¶¶ 810, 812.

405. In this regard, the Respondent indicates that none of the provisions of the BIT preclude the possibility of invoking the state of necessity nor do they limit such defense. Thus, it is part of the international law applicable to this case. In addition to this, the measures "do not impair in any manner the essential interests of the other State party to the Treaty (i.e., the United States), a third State or the international community".[488] Finally, the Respondent posits that since the state of necessity precludes the wrongfulness of the act, "there is no duty to compensate".[489]

B. The Claimant's Position

406. The Claimant argues that necessity is an "extraordinary defense", that its determination is not self-judging and that Argentina cannot invoke such a state if it contributed to creating the situation.[490] In its view, "the object and purpose of the Treaty can only be interpreted to exclude reliance on economic difficulties as a basis for the non-performance of Argentina's obligations".[491] The Claimant also argues that a state of necessity is subject to temporal limitations and, contrary to Respondent's position, it does not exclude compensation.[492]

407. With regards to both of the defenses raised, *i.e.* Article XI and Article 25 of the ILC Articles, the Claimant alleges that they fail since Argentina has failed to explain: i) the temporal scope of the crisis, and ii) the link between the measures and the crisis.[493] As to the temporal scope, the Claimant submits that Argentina cannot invoke the defenses after the crisis ended. In particular, it submits that "Argentina has been unable to point to any situation threatening its essential interests taking place after 2003 that would permit or excuse the application of the Measures to date"[494] and that "[…] the defenses do not permit (or excuse) measures taken after a crisis had

[488] Respondent's Updated Counter-Memorial, ¶¶ 735, 736.

[489] Respondent's Rejoinder Memorial, ¶ 804. In the same sense, see ¶ 817.

[490] Claimant's Reply Memorial, ¶¶ 440, 441, 446.

[491] Claimant's Reply Memorial, ¶ 448.

[492] Claimant's Reply Memorial, ¶¶ 450-452.

[493] Claimant's Post-Hearing Brief, ¶ 146.

[494] Claimant's Post-Hearing Brief, ¶ 147.

ended, nor do they permit (or excuse) measures in anticipation of some future crisis (for which Argentina has not offered any evidence)."[495] Regarding the link between the measures and the crisis, the Claimant posits that "Argentina failed to explain how the Measures (such as withholding spot payments, or freezing capacity payments for over ten years) were necessary (let alone "the only way" under Article 25) to overcome the economic crisis."[496]

408. While the Claimant clarifies that it does not dispute that Article 25 of the ILC Articles can cover economic crises, it indicates that "only those economic crises that are so grave as to threaten the country's […] essential security interests will qualify […] (under Article 25 of the ILC Articles). And even if the 2001-2003 economic crisis was extraordinary, this is not in itself an escape route for Argentina to avoid liability for any measures; it must prove a link between the Measures and the crisis […]".[497]

409. In addition to arguing there is no nexus between the measures and the crisis, AES claims that "the Measures worsened the situation" and that Argentina has not explained "why honoring its Treaty commitments would have prevented it from fulfilling its human rights obligations." Thus, both defenses raised "must be rejected".[498]

C. The Tribunal's Analysis

i. The Legal Standard

410. The Tribunal has found that Argentina breached its obligations under the US-Argentina BIT. Thus, it is appropriate to analyze its defense under Article 25 of the

[495] Claimant's Post-Hearing Brief, ¶ 150, referring to *Continental*, ¶ 187, AES Auth. 139; *LG&E*, ¶ 261, AES Auth. 165. See also Claimant's Reply Memorial, ¶¶ 472-478, 486-489.

[496] Claimant's Post-Hearing Brief, ¶ 152.

[497] Claimant's Post-Hearing Brief, ¶ 153.

[498] Claimant's Post-Hearing Brief, ¶¶ 156, 158, 159.

Articles on Responsibility of States for Internationally Wrongful Acts.[499] Article 25 provides the following:

> "1. *Necessity may not be invoked* by a State as a ground *for precluding the wrongfulness of an act not in conformity with an international obligation* of that State unless the act:
> (a) is the *only way* for the State to *safeguard an essential interest* against a *grave and imminent peril*; and
> (b) *does not seriously impair an essential interest* of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
> (a) the *international obligation* in question *excludes* the possibility of *invoking necessity*; or
> (b) the State has *contributed to the situation of necessity*." (Emphasis added)

411. The Tribunal agrees that "a state of necessity is a most exceptional remedy that is subject to very strict conditions because otherwise it would open the door to States to elude compliance with any international obligation."[500] This follows from the language "may not be invoked […] *unless the act*" in paragraph 1, as well as "may not be invoked […] for precluding wrongfulness *if*" in paragraph 2. Both requirements constitute a double facet that expresses very clearly the exceptional nature of this defense.[501]

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[499] "[…] if the rules of general international law regarding necessity apply, this is a ground for precluding the wrongfulness of an act not in conformity with an international obligation and thus implies that the acts be analysed first." *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶553, quoting also the Annulment Decision in *CMS* at ¶ 129*:* "[…] Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations." See also "The customary international law defence of necessity acts to excuse an otherwise wrongful act and, thus, only becomes relevant once a breach of the BIT has been found". *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 221.

[500] "Article 25 accordingly begins by cautioning that the state of necessity "may not be invoked" unless such conditions are met." *Sempra Energy International v. Argentine Republic*, ICSID case No. ARB/02/16, Award, September 28, 2007, **AES Auth. 188**, ¶ 345. See also *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 220.

[501] "The plea of necessity is exceptional in a number of respects. […] Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other." See Commentary 2 to Article 25 of the Articles on State Responsibility.

412. The burden rests on Argentina to prove that: i) its measures were taken pursuant to an *essential interest*; ii) that such interest was to be safeguarded from a *grave and imminent peril*; iii) that those measures were the *only way* to safeguard the interest; iv) that the measures did not seriously impair an essential interest of the US or the international community; v) that the US-Argentina BIT does not preclude this defense; or vi) that Argentina did not contribute to the situation of necessity. If Argentina fails to prove one of the required conditions, the defense must fail as well.

ii. Whether Argentina has Demonstrated a State of Necessity

413. The Tribunal begins with the first requirement of subparagraph a), *i.e.*, that the impugned act is "the only way" to safeguard "an essential interest" against a "grave and imminent peril". The Respondent has argued that "in the face of the severe crisis that broke out in late 2001, the Argentina Republic had no other option but to take emergency measures to safeguard its essential interests", that "necessity may be invoked in situations of economic crisis" and that changes to the regulations governing the electricity sector had to be made "in order to adjust them to the macroeconomic context and the new circumstances of the electricity market, as it was necessary to guarantee the supply of affordable electric power amidst the severe crisis at the time".[502]

414. As indicated above, the Tribunal understands the word "essential" to mean something "of the utmost importance", something that is "basic, indispensable, necessary".[503] In the Tribunal's opinion, electricity, on which not only the population, but also industries and even health services are dependent of, is a basic commodity. Therefore, access to this commodity at affordable prices could constitute an essential interest, particularly during a time of crisis.[504] On the other hand, the use of the words

[502] Respondent's Updated Counter-Memorial, ¶¶ 714, 716, 724.

[503] "[E]ssential". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/essential 07 March 2024.

[504] "It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population […] The extent to which a given interest is "essential" depends on all the circumstances,

"safeguard […] against" followed by "a grave and imminent peril" indicates: *first* that the essential interest is to be defended or protected from damage,[505] and not any damage, but serious, important, considerable damage;[506] and *second*, it imposes a temporal scope, *i.e.*, that the danger is "imminent".[507]

415. While somewhat unclear, from the Respondent's overall argumentation, the Tribunal understands that Argentina's submission is that the "grave and imminent peril" was that the lack of access to electricity, shortages and high prices that it says would have arisen if Argentina had not taken the measures it took, would have worsened the economic, social and political situation. In other words, failure to adopt the measures at issue could have deepened even further the economic crisis that Argentina was already undergoing.

416. When analyzing whether the crisis affected an essential interest of the State, the tribunal in *Sempra v. Argentina* considered the situation did not "compromise [] the very existence of the State and its independence […] Questions of public order and social unrest could have been handled, as in fact they were, just as questions of political stabilization were handled under the constitutional arrangements in force.

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and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole." Commentaries 14 and 15 to Article 25 of the Articles on State Responsibility. Within the context of Article XI and the phrase "essential security interests", the tribunal in *Sempra v. Argentina* stated that: "there is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI. Essential security interests can eventually encompass situations other than the traditional military threats." *Sempra Energy International v. Argentine Republic*, ICSID case No. ARB/02/16, Award, September 28, 2007, **AES Auth. 188**, ¶ 374.

[505] "[E]xposure to the risk of being injured, destroyed, or lost**:** danger; something that imperils or endangers**:** risk". "[P]eril". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/peril 07 March 2024.

[506] "[M]eriting serious consideration**:** important; likely to produce great harm or danger; significantly serious: considerable, great. "[G]rave. *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/grave 07 March 2024.

[507] "[R]eady to take place **:** happening soon; often used of something bad or dangerous seen as menacingly near". "[I]mminent". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/imminent 07 March 2024. "Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate." Commentary 15 to Article 25 of the Articles on State Responsibility.

[…] there is no convincing evidence that events were actually out of control or had become unmanageable."[508]

417. The Tribunal need not comment on that issue here, since what it struggles with is not the magnitude of the crisis or whether a worsened scenario at that point in time might have represented an imminent peril, but the unassailable fact that economic crises do not last forever – and by all accounts the crisis relied on by Argentina as a defence in this case did not last forever. As already mentioned, other tribunals analyzing Argentina's situation at the time have considered the crisis to have ended in 2003, such as *LG&E v. Argentina*[509] and *El Paso*.[510] Similar findings were made in *Continental*[511] and *Total.*[512]

418. The Tribunal has also referred to the fact that even the head of State, President Kirchner, declared in 2010 that Argentina was long passed its crisis, achieving growth, reducing unemployment, poverty and indigence rates. As indicated above, the period of eight years referred does not indicate a period of crisis, but of *recovery*, which is not the same.[513]

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[508] See e.g. *Sempra Energy International v. Argentine Republic*, ICSID case No. ARB/02/16, Award, September 28, 2007, **AES Auth. 188**, ¶¶ 348, 349.

[509] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, **AES Auth. 165**, ¶ 244.

[510] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 670.

[511] "[t]he regular functioning of the democratic institutions was reestablished with the general elections held on May 25, 2003 when Nestor Kirchner was duly elected president of Argentina. The country's economy recovered progressively from the crisis from about the end of 2002 onwards. GNP grew by more than 8% in 2003, compared to 2002. Fears of resurgent inflation did not materialize: consumer prices rose less than 4% in 2003 compared with a 40% increase in the previous year. The peso improved against the dollar from 3.36 at the end of 2002 to less than 3 pesos per dollar at the end of 2003; and it has remained relatively stable against the U.S. dollar since." *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **AES Auth. 139**,¶ 157.

[512] "[w]hen President Kirchner took office in May 2003, no adjustment of TGN's tariffs had yet taken place. By this point, Argentina had emerged from the crisis as commentators, international organizations and other arbitral tribunals in investment disputes against Argentina have recognized […] It is generally recognized that Argentina's economy quickly recovered from the crisis—by the end of 2003 and the beginning of 2004." *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶¶ 171, 172.

[513] President Cristina Kirchner Speech to UN General Assembly, www.cfkargentina.com, September 24, 2010, **AES Ex. 605**. (Unofficial translation).

419. Despite this, the measures that Argentina took were not limited to the period of crisis of 2001-2003. The Respondent continued applying the measures (issued during the crisis and for the express purpose of resolving the crisis) beyond 2003 and, in addition to that, continued implementing new measures after 2003 whose application also extended for several years. To date, Argentina defends the extended application of these measures, yet Argentina has not provided evidence of how the grave and imminent peril that may have existed in 2001 and 2002 persisted past mid-2003, a date referred to by other tribunals and with which this Tribunal does not disagree.

420. What transpires from the record is that, instead of protecting an essential interest from a grave, imminent peril, Argentina used the regulations it put in place during its recovery period and onwards to control the profitability margin of generators, to use the leverage it had on the investors' need to recover the payments due to finance the supply of energy at affordable prices even when the situation had long been over and to modify the electricity market in accordance with parameters that did not follow the Electricity Law,[514] an abandonment of economic criteria that in turn triggered other consequences as recognized by Argentina itself in Resolution

[514] The Tribunal observes that in Total, a case very similar to this one, the tribunal, determined regarding the investments in power generation: "The above analysis of the electricity sector in Argentina from 2002 onward clearly shows that the infringing measures were in no way necessary to safeguard Argentina's essential security interests in preserving its people and their security of energy supply. More specifically, Argentina has not shown that the alteration of the price mechanism to the detriment of generators was necessary to ensure the supply of energy. On the contrary, the Tribunal recalls its finding (at paragraph 328) that the pricing system that the SoE put in place after 2002 resulted in unreasonably low tariff and encouraged a substantial increase in consumption that could not be covered. This caused shortages in the supply of electricity and power cuts to the detriment of the entire population and economy, exactly the opposite of safeguarding "an essential interest against a grave and imminent peril", as required by Article 25.1(a). In any case, even accepting Argentina's position as to the existence of a grave and imminent threat to its essential interest in ensuring electricity at affordable prices, the above pricing mechanism was not "the only way for the State to safeguard an essential interest against a grave and imminent peril." (Article 25.1(a)). […] As to the non payment of the generators' receivables and their forced conversion, Argentina has not explained nor provided any evidence as to which essential interest was being safeguarded by the measures. The Tribunal recalls that the inability of CAMMESA to pay the electricity supplied by generators was due to CAMMESA's insufficient revenues which has been caused, in turn, by the pricing mechanism established by the SoE after 2002. Since the receivables of generators were caused by Argentina's conduct in breach of the BIT, and were not justified by necessity, their subsequent forced conversion cannot be justified either. In any case, this forced conversion took place in 2004 when Argentina was not facing any "imminent and grave peril" to its essential interest. The Tribunal, therefore, concludes that Argentina's defence based on the state of necessity under customary international is groundless." *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, **AES Auth. 196**, ¶ 345.

6/2016. The purpose of this defense is not to provide a blank check simply for "difficult" situations which every country may have. It is also not intended to disregard international obligations in furtherance of essential interests in every situation.

421. The Tribunal has also expressed its concern as to the fact that the regulations in question did not indicate that their implementation responds to a user's protection concern, and in the case of Argentina's defense under Article XI, of the measures not having a rational connection with its alleged essential security interest. Even if this Tribunal were to assume that during the period of crisis, the measures taken up to that point were "the only way" to safeguard an essential interest over electricity, the Respondent has not demonstrated why, past 2003, the measures on spot price formation and dispatch, capacity payments, withholding and investment schemes, cost-plus system and prohibition to PPAs were "the only way" to safeguard its essential interests when the range of options at its disposal was certainly not the same one as that available in the 2001-2003 period. This is particularly relevant for measures taken four or ten years after 2003, but it is relevant even for measures taken in 2002 that continued beyond 2003. Respondent's expert has criticized the potential alternative measures proposed by Claimant's expert on the basis that the feasibility of those measures has not been demonstrated.[515] However, it was up to the Respondent alleging the defense under Article 25 to show that the measures implemented were "the only way" to safeguard an essential interest, which necessarily entails it proving why other possible alternatives were either not feasible or not reasonable. In this regard, the Tribunal considers that the Respondent has not proved its case.

[515] According to Claimant's expert, "Argentina could have alleviated tariff bills by partially waiving sales taxes"; "Argentina could have used indirect taxes to subsidize retail tariffs to low-income users"; "Argentina could have provided targeted direct subsidies"; "Argentina should and could have respected the electricity market's workings while granting focused subsidies to society's low-income sectors. Instead, Argentina indiscriminately transferred economic profits from generators to all consumers (including industries, exporters, and middle and high-income households)". Compass Lexecon Regulatory Report, ¶¶ 59, 147.

422. In consequence, the Tribunal concludes that the first element of this high standard is not fulfilled. While there is no need for the analysis to go any further, the Tribunal considers important to highlight the following.

423. While there is no evidence that the breach of obligations by Argentina seriously impairs an essential interest of the US or the international community as a whole (subparagraph b) of Article 25), and the BIT does not contain a provision excluding the invocation of necessity (paragraph 2, subparagraph a) of Article 25), one of the conditions to invoke Article 25 is that the State has not contributed to the situation of necessity. The Tribunal is of the opinion that Argentina's crisis cannot necessarily be attributed solely to external factors. According to the IMF Evaluation Report:

> "*Fiscal policy*, though much improved from the previous decades, *remained weak* and led to a steady increase in the stock of debt, much of which was foreign currency denominated and externally held. […] *The crisis resulted from the failure of Argentine policymakers to take necessary corrective measures sufficiently early, particularly in the consistency of fiscal policy with their choice of exchange rate regime* […] *The choice of the convertibility regime made fiscal policy especially important.* Given the restrictions on use of monetary policy, debt needed to be kept sufficiently low in order to maintain the effectiveness of fiscal policy as the only tool of macroeconomic management and the ability of the government to serve as the lender of last resort. Fiscal discipline was also essential to the credibility of the guarantee that pesos would be exchanged for U.S. dollars at par. Fiscal policy was thus rightly the focus of discussion between the IMF and the authorities throughout the period. *While fiscal policy improved substantially from previous decades, the initial gains were not sustained, and the election-driven increase in public spending led to a sharp deterioration in fiscal discipline in 1999.* As a result, result, the stock of public debt steadily increased, diminishing the ability of the authorities to use countercyclical fiscal policy when the recession deepened."[516]

424. The Report presented by the Respondent regarding the economic observations on the collapse of fixed exchange rates regimes, currency boards and the case of Argentina, refers to both "external and *domestic* shocks".[517] Besides the external shocks, it also mentions "serious structural rigidities in the economy that […] made the regime vulnerable to collapse […]", to "Argentina's fiscal deficits and debt

[516] IMF*, Evaluation Report: The IMF and Argentina, 1991-2001*, 2004, **Exhibit RA 135**, pp. 3, 4. (Emphasis added).

[517] Nouriel Roubini Expert Report, ¶¶ 13, 16 a. (Emphasis added).

accumulation", the "slowdown of GDP growth", increase in spending, domestic interest rates, "the worsening domestic fiscal position and the inability of successive governments to achieve primary surpluses large enough to stop an unsustainable debt dynamic", the reduction in tax revenues, the small degree of openness of the economy caused by a long history of inward-oriented trade policies and labor market rigidities.[518] These factors suggest a certain contribution on Argentina's part.

425. Support for this can be found in other awards that have analyzed "necessity" within the context of Argentina's crisis. In *Sempra v. Argentina*, the tribunal determined in relation to Article 25 of the Articles on State Responsibility:

> "In spite of the parties' respective claims that the factors precipitating the crisis were either endogenous or exogenous, *the truth seems to be somewhere in the middle, with both kinds of factors having intervened. This mix has in fact come to be generally recognized by experts, officials and international agencies*.
> *This means that there has to some extent been a substantial contribution of the State to the situation giving rise to the state of necessity, and that it therefore cannot be claimed that the burden falls entirely on exogenous factors.* This state of affairs *has not been the making of a particular administration*, given that it was a problem which had been compounding its effects for a decade."[519]

426. Within the context of Article XI, the tribunal in *El Paso* stated:

> "It is clear from the evidence filed in the present proceedings that *both internal and external factors were at the root of the economic crisis that occurred in Argentina at the end of 2001*. Having fully considered the Parties' arguments and the evidence before it, a majority of the Tribunal has reached the conclusion that *Argentina's failure to control several internal factors, in particular the fiscal deficit debt accumulation and labour market rigidity, substantially contributed to the crisis*. *The progressive worsening of internal factors diminished Argentina's ability to respond adequately to external shocks*, unlike what happened in other South American countries."[520]

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[518] Nouriel Roubini Expert Report, ¶¶ 16, 19, 21, 22, 23.

[519] *Sempra Energy International v. Argentine Republic*, ICSID case No. ARB/02/16, Award, September 28, 2007, **AES Auth. 188**, ¶¶ 353, 354. (Emphasis added). While this award was annulled, the Tribunal observes that this was a finding of fact made by the tribunal and that annulment followed due to the determination of the Annulment Committee that the tribunal had not applied Article XI.

[520] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 656. (Emphasis added). See also: "In the case of Argentina, no one bears more of the blame for the crisis than Argentina itself. We spent more than we earned; we failed to complete the full cycle of economic reforms; and we tied ourselves to the most productive economy in the world without building our own productivity. Of course, this was compounded by the global decline in commodity prices, by protectionism in key markets and by shifts in global capital flows. Yet Argentina's crisis is largely home grown",

427. In light of this, it seems that such contribution was not "merely incidental or peripheral",[521] but rather at least in part the result of Argentina's own policies. Therefore, even if the other elements had in fact been fulfilled, Argentina's contribution to the financial and economic situation that erupted in 2001-2002 would prevent it from invoking a state of necessity to preclude the wrongfulness of the breaches it committed under the US-Argentina BIT.

428. Accordingly, Respondent's defense under Article 25 does not prevail.

VII. QUANTUM

1. The Legal Standard

A. The Claimant's Position

429. The Claimant considers that the principle of full reparation as enunciated in *Chorzów Factory* is applicable and thus the damages to be awarded to it "should place AES in the same position it would have been in but-for Argentina's Measures."[522] The Claimant relies on the fact that the Treaty only provides for a compensation standard for expropriation claims, but not for other Treaty breaches, which are the bases of its claims, and that in other cases under similar circumstances, tribunals have determined that compensation must be based on "full reparation."[523]

430. In response to Respondent's arguments on this principle, the Claimant indicates that Argentina mischaracterizes the ILC's Articles on State Responsibility and its commentary, that the principle of proportionality is not relevant in the present

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at ¶ 661 referring to Former President Eduardo Duhalde's opinions in the *Financial Times*. In the same sense, see: "[w]hile accepting that 'in economic matters, the analysis of causation … does not lend itself to the same scientific analysis as in the domain of the so-called exact sciences and of natural phenomenon,' the evidence presented by the Claimant regarding the actions and omissions by Argentina until the end of 2001, and Argentina's own admission of its 'inability to maintain a fiscal discipline,' support the conclusion of a majority of the Tribunal that Argentina contributed to the crisis to a substantial extent, so that Article XI cannot come to its rescue." *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **AES Auth. 148**, ¶ 665.

[521] See Commentary 20 to Article 25 of the Articles on State Responsibility.

[522] Claimant's PHB, ¶ 192; Claimant's Updated Memorial, ¶¶ 376-384. The Claimant relies on the *Lusitania* case for its contention that: "The remedy should be commensurate with the loss, so that the injured party may be made whole". *See* ¶ 386 quoting Opinion in the Lusitania Cases, Mixed Claims Comm'n (U.S. and Germany), Opinion, November 1, 1923 **AES Auth. 177**, p. 39. Also, Claimant's Reply Memorial, ¶ 495.

[523] Claimant's Reply Memorial, ¶¶ 496-498.

case where AES is only seeking compensation (not restitution or satisfaction) and that considerations such as the behavior of the parties and the achievement of an equitable outcome are not relevant or appropriate grounds on which to reduce the amount of damages that are duly owed to an injured party.[524]

431. With regards to Respondent's criticism of AES's assessment of its damages based on "full reparation" as opposed to on a "fair market value" as it had been presented on its 2003 Memorial, the Claimant notes that the primary claim for its damages calculation in 2003 was an *expropriation* claim, which has since been expressly withdrawn. Since its claims do not concern the total deprivation of its investment on a given date, this modifies the compensation standard. The Claimant posits that "[t]o compensate AES for its remaining claims based on a fair market value assessment, would be inconsistent with the full reparation standard and would undercompensate AES."[525]

B. The Respondent's Position

432. The Respondent submits that the principle of full reparation is subject to a series of requirements not met by AES. In particular, it indicates that to determine compensation the following must be taken into account: a sufficient causal link between the damage and the act breaching the law, both of which must be proved; that damages are non-speculative; that compensation must be claimed only for the loss suffered; the investor has a duty to mitigate damage; double damages must be avoided and compensation must be proportional and equitable.[526] In addition to this, it contends that the change in criterion with regards to the fair market value is inconsistent with Claimant's original memorial, that such change has no other motive than to increase the claim and that if the current claim does not entail the loss of the

[524] Claimant's Reply Memorial, ¶¶ 499-503.

[525] Claimant's Reply Memorial, ¶ 510. *See also*: ¶¶ 506-509.

[526] Respondent's Updated Counter-Memorial, ¶¶ 741-746; Respondent's Rejoinder Memorial, ¶¶ 832, 833; Respondent's PHB, ¶¶ 276-278.

investment, then as a matter of logic, compensation cannot exceed the amount that would apply in a case of total loss of the investment.[527]

C. The Tribunal's Analysis

433. The Tribunal begins its analysis by noting that just like in many other BITs, the Treaty at issue does not contemplate a specific standard for compensation other than that stipulated in Article IV for expropriation, a provision which does not form part of AES's claims.[528] The Tribunal also notes that the Respondent, rather than contesting the applicability of the full reparation principle invoked by the Claimant,[529] has devoted its arguments to pointing out the requirements that must be followed in the damages calculation. From those arguments, it emerges that the main points of contention are the valuation *method* chosen by the Claimant, which differs from the fair market value presented in 2003, as well as the valuation *date*. The Tribunal will address those issues later.

434. For the time being, and in light of both the nature of Argentina's breaches as well as the fact that there is no dispute as to the applicability of the principle invoked by the Claimant, the Tribunal determines that the standard of compensation applicable to the case at hand is the principle of full reparation[530] established in Article 31 of the Articles on the Responsibility of States for Internationally Wrongful Acts, as reflected in the *Chorzow* case quoted by both Parties:

> "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in

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[527] Respondent's Updated Counter-Memorial, ¶¶ 747-751; Respondent's Rejoinder Memorial, ¶¶ 834, 835.

[528] "[…] The failure of Article II.3 of the Treaty to specify the relief which an aggrieved investor can seek does not imply that a violation of the FET standard may be left without redress: a wrong committed by a State against an investor must always give rise to a right for compensation of the economic harm sustained." *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **AES Auth. 164**, ¶ 147. *See also*: *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, **AES Auth. 166**, ¶ 29.

[529] "[T]he full reparation standard and fair market value are not opposing concepts." Respondent's Rejoinder Memorial, ¶ 834.

[530] "The Tribunal must accordingly exercise its discretion to identify the standard best attending to the nature of the breaches found." *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/08, Award, May 12, 2005, **AES Auth. 136**, ¶ 409.

> particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it- such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[531]

435. This principle has been applied in numerous investment cases which have deferred to the applicability of customary law in the absence of an express compensation provision in the BITs examined as well as the nature of the obligations breached,[532] two situations that are also present in this case. Accordingly, the Tribunal has no specific reason that would justify departing from this principle in this case, and as mentioned, none has been suggested by the Respondent.

2. Valuation as of the Date of the Award

A. The Claimant's Position

436. According to the Claimant, a valuation as of the date of the award is appropriate due to the nature of the Treaty breaches. The Claimant alleges that its claim for damages is focused on the economic losses it incurred during the historical period (*i.e.,* 2002-2020), not based on projections concerning Argentina's future conduct or the expected performance of AES's plants, and that its reliance on actual

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[531] *Chorzow Factory*, 1928 PCIJ (ser. A) Case No. 17, Judgment on the Merits, September 13, 1928, **AES Auth. 012**, p. 47.

[532] *9REN Holding S.a.r.l v. Spain*, ICSID Case No. ARB/15/15, Award of 31 May 2019, **AL RA 167**, ¶¶ 373, 376, 404; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **AL RA 125**, ¶ 846; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **AES Auth. 164**, ¶¶ 149, 150; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, **AES Auth. 166**, ¶¶ 31, 58; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/16, Award, February 25, 2016, **AES Auth. 170**, ¶ 120; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Award, November 27, 2013, **AES Auth. 198**, ¶¶ 26, 58; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. Mexico*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, **AL RA 158**; ¶¶ 12-51. "[…] Argentina, by reason of its international wrong in not respecting its obligations under the three BITs, is therefore subject to a new relationship toward the Claimants. Inherent in that relationship is the obligation to compensate the parties injured as a result of its failure to fulfill its international obligations." *AWG Group Ltd. v. The Argentine Republic,* UNCITRAL, Award, April 9, 2015, **AES Auth. 129**, ¶ 25; *also* ¶¶ 26, 27.

historical data proves with "reasonable certainty" the damages claimed.[533] Additionally, it submits that an earlier valuation date would be inappropriate due to Argentina's multiple breaches over almost two decades,[534] and that relying on AES's 2003 valuation would result in a windfall to Argentina and undercompensate AES. In this regard, it indicates that the 2003 valuation was based on information available at that time, projected future earnings on a number of assumptions that have proved to be overly optimistic and, importantly, did not account for the measures enacted by Argentina since that time, which also form part of AES's claim.[535]

B. The Respondent's Position

437. The Respondent challenges the change in the valuation date used in 2003 (*i.e.*, 31 December 2001) to a date approximating the award (31 December 2020). In the Respondent's view, there is no ground for this change than to inflate the damages since multiple measures causing different impacts do not change the turning point. In addition to this, the Respondent argues that the reference to historical damages is a fallacy since the determination of the alleged harm results from reliance on the difference between the gross margins obtained in an actual and a but-for scenario, the latter being hypothetical and conjectural by definition. The Respondent also argues that valuing damages as at the award date would lead to the absurd result that a claim for a FET breach would warrant higher compensation than a claim for expropriation. It refers to the standard set forth under the BIT for compensation in cases of expropriation and to the relevant time under general international law to determine the reparation for the injury, which is "the situation which existed before the wrongful act was committed."[536]

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[533] Claimant's Reply Memorial, ¶¶ 511-515.

[534] The Claimant relies on *Mobil v. Argentina, Siemens v. Argentina* and *El Paso v. Argentina*. *See* Claimant's Reply Memorial, ¶¶ 516-518.

[535] Claimant's Reply Memorial, ¶¶ 519-523.

[536] Respondent's Updated Counter-Memorial, ¶¶ 851-862. *See also* Respondent's Rejoinder Memorial, ¶¶ 906-909, referring as well to the change from an *ex ante* to an *ex post* approach and Respondent's PHB, ¶ 258.

C. The Tribunal's Analysis

438. The Tribunal has already indicated that the applicability of the full reparation principle has not been contested by the Respondent and that in light of this, as well as the nature of the breaches that have been determined, which are not expropriatory, the most appropriate standard for compensation would be full reparation.[537]

439. In *Crystallex v. Venezuela*, the tribunal stated that "to follow the BIT expropriation standard as opposed to 'full reparation' under *Chorzów* may in particular produce different outcomes where the BIT standard would lead to a valuation date as of the date of the expropriation, whereas full reparation may require, under certain circumstances, the valuation date to be fixed at the date of the award".[538] The Tribunal agrees. In fact, the Tribunal considers that the present case is an instance in which the valuation date must be fixed as of the date of the award, as proposed by the Claimant, due to the cumulative nature of Argentina's breaches which have spanned a significant period of time by virtue of a series of measures that applied to spot price formation, dispatch, revenues, capacity payments as well as the cost-plus system and prohibition on PPAs. In other words, measures affecting several aspects of the electricity generation sector over a prolonged period.

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[537] "The BIT establishes the rule that compensation for expropriation is to be based on '*fair market value*' of the investment; this principle, however, is of little use in the present arbitration, because the breach does not amount to the total loss or deprivation of an asset. Gala Radio still exists and Claimant still owns it: compensation thus cannot be based on fair market value of assets expropriated. It is generally admitted that in situations where the breach of the FET standard does not lead to total loss of the investment, the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT. […] Reparation can thus take the form of restitution or compensation. […]" *Joseph C. Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award, 28 March 2011, **AES Auth. 164**, ¶¶ 148-150. "In the Tribunal's view, this type of valuation is appropriate in cases of expropriation in which the claimants have lost the title to their investment or when interference with property rights has led to a loss equivalent to the total loss of investment. However, this is not the case. […] For the Tribunal, compensation in this case cannot be determined by the impact on the asset value; it does not reflect the actual damage incurred by Claimants. The measure of compensation has to be different. It may be added that FMV is referred to in Article IV of the Treaty as the measure of compensation in cases of expropriation. The Tribunal considers that its application does not extend similarly to other treaty standards. As noted by the tribunal in *SD Myers* when analysing the analogous situation under NAFTA, the treaty does not state that it applies to all breaches of its provisions but "*expressly attached it to expropriations*." *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, **AES Auth. 166**, ¶¶ 35-37.

[538] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **AL RA 125**, ¶ 843.

440. Commentary to Article 31 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts indicates that "reparation must, as far as possible, wipe out all the consequences of the illegal act". While the Respondent criticizes the change of approach taken by the Claimant when arguing for a date of valuation different than that proposed in its 2003 Memorial, the Tribunal notes that there are two fundamental aspects that in its view would actually impede adopting the date of valuation proposed in 2003 by the Claimant (31 December 2001). *First*, the fact that after 2003 Argentina both continued applying certain measures and adopted several others. In other words, the cluster of measures that form the basis of the claim to be determined by the Tribunal did not finish materializing in 2003. *Second*, as a result of the change in the Claimant's situation, the nature and very basis of the claim was also modified, therefore, the same valuation and valuation date presented for a different set of circumstances cannot be expected.

441. In its commentary to Article 36, the ILC Articles indicate that "the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act", in the case at hand, such actual losses would be most appropriately assessed in relation to a date as near as possible to the date of the award. The Tribunal does not see how applying an earlier valuation date would fulfill the objective of "wiping out, as far as possible, the consequences of the illegal act". In the Tribunal's view, it would not only be a mistake, but it would also go against any logic to establish an earlier date for purposes of valuing damages arising from a set of measures that continued to materialize and to cause damages for several years (and continue still).[539]

[539] "As opposed to fair market value, the actual loss approach allows for the totality of information available at the valuation date to be used. This is the most appropriate method when a particular valuation date cannot be chosen due to multiple measures taking place at different points in time, as in the present case. This approach makes it possible, when the valuation date is as close as possible to the date of the award, to estimate what the loss would be as accurately as possible. The Tribunal therefore considers that the best approach is the actual loss method. […] The Tribunal has concluded above that since the Claimants were not deprived of their entire investment, the standard of compensation is not fair market value but the actual loss suffered. Actual losses are best measured by the simple difference between what the income would have been in the absence of the unlawful measures, and what the actual income actually was. […] Since the Tribunal has decided that damages should be awarded for the period from January 2002 to 31 March 2014, the Tribunal determines that the

442. Finally, although the Respondent has posited that taking the award date as a valuation date would "lead to the absurd result that a claim for alleged breaches of the fair and equitable treatment standard warrants higher compensation that a claim for an alleged expropriation",[540] the Tribunal considers that this assertion cannot be made in a generalized manner and outside the context of the particular circumstances of the case. The BIT does not prescribe the degree of compensation based on the provision breached. The assessment of compensation for treaty violations and whether it is high or low will be based on the damage caused, and ultimately, on a case-by-case basis. Thus, the Tribunal will consider the date of issuance of the Award as a valuation date.

3. Burden of Proof and Causation

A. The Claimant's Position

443. AES contends that, had Argentina not adopted its measures, its earnings would not have been diminished and that such damages (which are financially assessable and correspond to lost profits) have been proved with a reasonable degree of certainty. In other words, Argentina's measures are the direct and proximate cause of those damages.[541]

444. The Claimant indicates that it is seeking compensation for the damages resulting from the application of all of the measures and that the precise quantification may be subject to some degree of approximation, therefore, it need only "provide a basis upon which [the] tribunal can reasonably estimate the extent of the claimant's loss of profits."[542] In its view, reliance on assumptions in its model does not

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Valuation Date should be 31 March 2014." *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/16, Award, February 25, 2016, **AES Auth. 170**, ¶¶ 127, 268.

[540] Respondent's Updated Counter-Memorial, ¶ 858.

[541] Claimant's PHB, ¶ 193. *See also*, Claimant's Reply Memorial, ¶¶ 533, 534, 536, 538, 539.

[542] Claimant's PHB, ¶ 195, quoting **AES Auth. 274** Gotanda, p. 6.

undermine the reliability of the damages calculated since it meets the required international standards of reasonableness.[543]

445. As to Respondent's arguments on the generators' profitability notwithstanding the measures in question, the Claimant contends that "[t]he fact that the AES Generators continued to earn revenues despite Argentina's Treaty breaches does not disprove that AES suffered harm".[544] In particular, it explains that relying on the EBITDA is problematic since it considers earnings even if they have not been received. In the case of the generators, Argentina withheld for over 16 years a significant portion of the net income that did not translate into cash flows. The Claimant also indicates that the returns over the historical period have been much lower than the minimum return investors demand when investing in Argentina's electricity generation sector (*i.e.,* relative to the size of the investment), that the new alleged investments include those under the FONINVEMEM schemes and under the renewable energy sector but do not include any new assets in the conventional electricity generation market and that the model presented accounts for the total impact of the measures, rather than by each individual measure, but this does not mean that causation has not been established.[545]

B. The Respondent's Position

446. The Respondent submits that it is widely acknowledged that the claimant bears the burden to proof the damages resulting from a treaty breach, that a failure to do so entails a reduction in the compensation amount or the dismissal of damages and that tribunals must apply this rule.[546] The Respondent argues that the damages claimed by AES are speculative and that the Claimant has failed to prove a causal link between the damages claimed and the alleged Treaty violations. In fact, it says,

[543] Claimant's PHB, ¶¶ 195, 196.

[544] Claimant's Reply Memorial, ¶ 540.

[545] Claimant's Reply Memorial, ¶¶ 543-546.

[546] Respondent's Updated Counter-Memorial, ¶¶ 752-756.

AES earned huge profits and benefits after 2002.[547] When expanding more its arguments, the Respondent indicates that the but-for scenario presented by the Claimant is based on a multiplicity of hypothetical and speculative assumptions, that the Claimant has failed to introduce the necessary evidence to assess the performance of its investments in the electricity generation in Argentina and failed to itemize the measures for which it seeks responsibility.[548] According to the Respondent, the Claimant has not satisfied its burden of proof since its claim is based on hypothetical losses, which have been calculated using a speculative and flawed methodology. In particular, it alleges that there is no record in the case of the dispatch model on which compensation is dependent, that Compass Lexecon's damage model depends on the dispatch model prepared by Quantum America that Argentina has not had the chance to examine and has not been disclosed to it. Due to this, it cannot replicate or verify the calculations without that model. In the Respondent's view, any compensation awarded by the Tribunal based on that would be tainted by the violation of the Argentine Republic's right to due process and a serious breach of a fundamental procedural rule.[549]

[547] Respondent's Updated Counter-Memorial, ¶¶ 757-766; Respondent's Rejoinder Memorial, ¶¶ 819-827, 829, 830, 839, 843-845; Respondent's PHB, ¶¶ 249-254.

[548] Respondent's PHB, ¶¶ 251-254; Respondent's Updated Counter-Memorial, ¶¶ 768-774; Respondent's Rejoinder Memorial, ¶ 828. The Respondent also argues that the price formation system in the 90s market, on which the Claimant relies, produced low returns that have nothing to do with the projections presented by the Claimant in the but-for scenario and which are unrealistic in its opinion (¶¶ 846-869).

[549] Respondent's PHB, ¶¶ 236-247. The Respondent also argues that Compass Lexecon's calculations depend on a gas model despite the fact that AES does not complain of any measure related to that sector. ¶¶ 255-257.

C. The Tribunal's Analysis

i. Burden of proof

447. The Claimant does not contest that it bears the burden of proving its damages, however, it argues that those damages need only be, and have been, demonstrated with a degree of reasonable certainty. The Tribunal considers that there is ample support in case law regarding the pre-requisites referred by the Respondent, namely, that damages must be proven, non-speculative and caused by illegal acts. [550] However, it considers that the distinction between the *burden* of proof of damages and the *degree* or *standard* of proof required for their quantification is pertinent. In the Tribunal's opinion, such distinction was clearly explained in *Crystallex v. Venezuela* as follows:

> "The issue of the *standard* of proof, by contrast, relates to the degree of proof required for the Claimant to discharge its burden of proof. […] First, the *fact (i.e., the existence) of the damage needs to be proven with certainty.* In that sense, *there is no reason to apply any different standard of proof than that which is applied to any other issue of merits* (e.g., liability). Second, *once the fact of damage has been established, a claimant should not be required to prove its exact quantification with the same degree of certainty. This is because any future damage is inherently difficult to prove.* […] Thus, an impossibility or even a considerable difficulty that would make it unconscionable to prove the amount (rather than the existence) of damages with absolute precision does not bar their recovery altogether. Arbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself."[551] (Emphasis added)

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[550] *See for example: Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. Mexico,* ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, **AL RA 158**, ¶ 12.56

[551] *Crystallex International Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **AL RA** 125, ¶¶ 865, 867, 868, 871. *See also* "*the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages*. Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, *less certainty is required in proof of the actual amount of damages*; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with *reasonable confidence*, estimate the extent of the loss." *Joseph C. Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award, 28 March 2011, **AES Auth. 164**, ¶ 246. (Emphasis added)

448. Thus, the first issue is whether the Claimant has proved *with certainty* the existence of damages. The Tribunal considers it has, and will provide its reasons below.

ii. Causation

a. Windfall Profits

449. In its Post-Hearing Brief, the Respondent expressed its view that the Claimant's objective in this arbitration is to "reap[] an ill-deserved windfall"[552] and that there is no right or guarantee to "windfall" profits.[553] The Respondent's argument seems to be that in this case the Claimant has in fact generated profits, and, more importantly, that the Treaty does not entitle an investor to claim for what it characterizes as lost "windfall" profits.

450. From an economic standpoint, the Respondent seems to understand "windfall" profits as "extraordinary" or "huge" profits that go beyond AES's expected performance.[554]

451. From a legal standpoint, the Tribunal observes that the concept of "windfall" or "unexpected" profits is nowhere addressed in the Treaty. Article VII.7 of the Treaty on investment disputes refers to the "*alleged damages*". In addition, Article 31 of the Articles on the Responsibility of States for Internationally Wrongful Acts establishes

[552] Respondent's PHB, ¶¶ 1 and 7. *See also*, ¶¶ 11, 249, 260.

[553] Respondent's PHB, ¶¶ 74, 85 and 89.

[554] Respondent's PHB, ¶ 85. "DR. FLORES: Basically, I would define windfall as unexpected gains. […] It's the idea of unexpected that is unrelated to expectations at the time the investment was made." Day 9 Tr. (Eng), P2747:22-P2748:1; P2748:22-2749:1 (Flores). In a similar way, the Claimant's expert understands the following: "[…] windfall profits in economics is a term used in regulation economics when extraordinary—unexpected events happen, allowing the regulator to try and review which are the regulated tariffs, and it can ultimately be used in certain agreements, including specific review clauses when there's an extraordinary or special event that is providing a benefit that was unexpected for both parties. That is the basic concept in economics, in my opinion. […] I think it's not just about the expectations or unexpected versus expected. It has to be an extraordinary event that has not been within the realm of what was contracted out or what was regulated. That's what typically windfall profits is understood in the economics of regulation." Day 9 Tr. (Eng), P2747:12-21; P2755:6-11 (Abdala). The Tribunal notes that the Claimant has also used this term when arguing that using the 2003 valuation, relying on the suspension period to avoid full compensation or using a risk-free rate would provide a "windfall" to Argentina and undercompensate AES. *See* Claimant's Reply Memorial, ¶¶ 523, 586 and 595; Claimant's PHB, ¶ 256.

that: "[t]he responsible State is under an obligation to make full reparation for the *injury* caused by the internationally wrongful act". In turn, injury includes "*any damage, whether material or moral*, caused by the internationally wrongful act […]." Any material damage must be "*financially assessable*".[555] Thus, the task of the Tribunal is to determine the damage or the injury that is proven to have been caused by the international wrongful act, which in this case means damages that are proven to have been caused by Argentina's breaches of the Treaty.[556] Nothing more, nothing less.

452. The Tribunal has found that Argentina breached certain obligations under the Treaty. It is uncontested that the legal consequence of an internationally wrongful act is reparation[557] and the Tribunal's task now consists in determining the appropriate compensation for such breaches. As noted above, this includes determining whether the Claimant has proven that it has suffered damage and, if so, the amount of such damage. Commentary 4 to Article 36 of the Articles on the Responsibility of States for Internationally Wrongful Acts indicates that "the function of compensation is to address the *actual losses incurred* as a result of the internationally wrongful act". This is the standard that the Tribunal must apply in its analysis, taking into account the elements that demonstrate the damages suffered are certain, financially quantifiable, and have a sufficient causal link to the breaches in question.

453. The Respondent has argued that neither the concession contracts nor the Electricity Law include any guarantee of profitability. The Tribunal concurs. However, the Respondent appears to extrapolate from this that an investor is neither entitled to nor permitted to obtain "unexpected" profits, a view not shared by the Tribunal for the following reasons.

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[555] Articles on the Responsibility of States for Internationally Wrongful Acts, Article 31 and commentary (5). (Emphasis added). *See also* Article 36.2: "The compensation *shall cover any financially assessable damage* including loss of profits insofar as it is established."

[556] Treaty, Article VII.1. (Emphasis added).

[557] Articles on the Responsibility of States for Internationally Wrongful Acts, Articles 28 and 34.

454. *First*, as already stated there is no provision in the Treaty imposing any limitation or threshold on the amount of lost profits that an investor may claim. *Second*, there is no threshold against which to measure whether a profit could be labelled as "windfall". *Third,* the fact that the investor obtained profits within a regulatory framework that breached its rights does not preclude the possibility of determining damages in this case. As mentioned earlier, an investor cannot be faulted for seeking to optimize its business outcomes despite facing unlawful obstacles.[558] The notion that a profitable investment, despite operating under the cloud of illegal measures, could somehow shield the Respondent from an obligation to compensate for damages caused by the illegal measures would require a clear waiver or exception under the applicable law.

455. The Respondent has also relied on *Metalpar v. Argentina* in support of its contention that the Claimant generated huge profits and benefits, expanded its investments and that this shows a contradiction in its damages claim. In the Tribunal's view, *Metalpar's* finding that the investment was successful and that the measures claimed did not have a ruinous effect cannot simply be applied in a general manner to the facts of this case since it ignores the specific factual and legal circumstances that differentiate that case from the present case. While the dispute in *Metalpar* involved Argentina as the responding party and also the crisis in 2001, that case dealt fundamentally with measures taken by Argentina that impacted the financial and foreign exchange system, in particular, the *pesification*, which is not at issue in the present arbitration. [559] The Tribunal considers that not only the measures, but also the claimant's situation in *Metalpar* is not comparable to the Claimant's situation in this case. More specifically, in that case the tribunal did not find *any evidence* that the intervention in the loan agreements produced "any negative effects"

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[558] *See supra*, ¶ 324.

[559] "Pesification, in Claimants' opinion, […] prevented METALPAR from collecting the dollars due, receiving instead Argentine pesos at a third of the promised value for the dollar". "[…] had the Argentine State not interfered in Metalpar Argentina's relationship with its clients (by establishing the 'pesification' of the credits in foreign currency), METALPAR and BUEN AIRE would have maintained their investments today in the currency of origin […]" (Memorial, paragraph 149). They argue that this intervention became apparent in the pesification of the credits, and the abandonment of the convertibility regime […]". *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic,* ICSID Case No. ARB/03/5, Award of 6 June 2008, **AES Auth. 168**, ¶¶ 94, 103.

on the investment and ultimately no evidence of direct or indirect expropriation. Regarding the FET claim, there were no legitimate expectations nor arbitrary governmental conduct.[560] In addition to that and in terms of their investment, the Tribunal found that the measures enacted contributed to "a beneficial environment" for *Metalpar* and its recovery, therefore, the tribunal could not conclude that the measures had ruined the investment.[561] This case does not involve an expropriation claim nor the pesification implemented by Argentina. The Tribunal has found that the Claimant's investments were in fact adversely affected in terms of their profit margins and remuneration as a result of the measures affecting prices, dispatch, capacity payments, receivables withholding and PPAs which violated the Treaty. While the Claimant's investment may not have been "ruined", the Tribunal recalls once more that this is not a case of expropriation and neither are the standard for Respondent's breaches or the resulting damage measured in terms of a "total deprivation".[562]

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[560] *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic,* ICSID Case No. ARB/03/5, Award of 6 June 2008, **AES Auth. 168**, ¶¶ 173, 174, 180-187.

[561] "What in actual fact took place, and on which *the Tribunal has no doubt whatsoever, is that the putting in order of public finances, the subsidies that Argentina granted to transport companies and the recovery of stability, in general, constituted a beneficial environment for Metalpar Argentina S.A. to make the business decisions that would enable it to make a speedy recovery*. […] Judging Metalpar Argentina S.A.'s business operation in Argentina *by almost any parameter, it is highly successful. After selling 56 bus bodies in 2000, it jumped to 431 in 2004 and 1,048 in 2005*. Further, Mr. Paredes declared that in 2007 they would be manufacturing 2400 bus bodies […] The increases in sales affected Metalpar Argentina S.A. in such a way that *it is currently one of the main bus body sellers in Argentina. This is remarkable if it is taken into consideration that in 2001 there were 28 companies engaged in this business and today there are only 5 left* […] it is obvious that this success cannot be attributed exclusively to the measures taken by Argentine authorities but it is evident that the Tribunal, in light of this scenario, *cannot come to a contradictory conclusion and rule that these measures had a ruinous effect on Claimants' investments*, the alleged ruin of which led to this proceeding." (Emphasis added). *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic,* ICSID Case No. ARB/03/5, Award of 6 June 2008, **AES Auth. 168**, ¶¶ 228, 231, 232.

[562] See for example: "The fact that the generators had a positive EBITDA, or that they would have paid no dividends also in the but-for scenario, does not exclude the existence of damages, as explained below, and in any case does not affect the Tribunal's conclusions in the Decision on Liability as to the existence of breaches by Argentina of Total's treaty rights in respect of the electricity sector. As explained in the Decision on Liability, this was because the new pricing regime to which the generators owned by Total were subjected from 2002 on did not remunerate them adequately, 'barely permitting them to cover their variable costs, contrary to sound economic management principles for power generators operating within a regulated system of public utilities', besides being also in "disregard of the basic principles of the Electricity Law". *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Award, November 27, 2013, **AES Auth. 198**, ¶ 127.

456. Finally, as a way to exemplify a type of "windfall" profit, the Respondent's expert pointed to the situation in California as well as in Europe in which regulations were established when there was a malfunction in the system.[563] Specifically, he noted that when prices are low, generators could "sit back," allowing prices to rise and creating scarcity. This would, in turn, lead to greater reliance on liquid fuels and higher prices, thereby restoring the profitability of the generators.[564] While the Tribunal acknowledges that the situation described by the Respondent's expert may occur in certain markets, there is no evidence to suggest that such scenario has taken place among the generators in the Argentine electricity market and, in consequence, of its impact on the damages calculation.

b. <u>The Effect of the Measures</u>

457. The Claimant has argued that the cumulative effect of the measures was that they depressed prices, altered dispatch and reduced the AES's generators margins.[565]

Dispatch and Prices (Exclusions and Spot Price Cap)

458. As to the measures affecting dispatch and prices, the Tribunal has found that the exclusions to spot price formation together with the spot price cap had a generalized effect on the dispatch of electricity which affected the generators'

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[563] "[California] the Federal Energy Regulatory Commission implemented the strict regional-wide caps on wholesale rates […] electricity prices in Europe increased dramatically in the last two years due to dis-adjustments in the market for fuels. […] Le Monde, is also talking that these producers of electricity are obtaining huge profits, not due to their investments, but only to the soaring prices of oil, gas and electricity. […] the European Commission makes an announcement that the goal was to avoid unexpected high financial gains with the aim to curve profits of these producers so that households and companies can benefit." Day 8 Tr. (Eng), P2409:14-16; P2410:2-4, 15-18; P2411:4-7 (Flores).

[564] "This is what companies were found to have done in California around this exact same time period […] sometimes manipulation of markets is very hard to detect. In California, you had the advantage that people were caught on tape actually calling each other, and the calls were caught. But sometimes you can have manipulation, and you cannot know about it if you don't see the smoking gun." Day 8 Tr. (Eng), P2414:4-13:P2415:4-11 (Flores). In relation to windfall profits: "there's an exogenous factor unexpected for all market players that doesn't entail profits going up from 10 to 12 percent per annum, but instead to 60 percent per annum, and that you can see in slides 13 and 14 of my presentation yesterday on Europe. […] there's an article--of the Le Monde article, on page 22, the profits obtained by the electricity companies are not related to their investments, only to the fact that the prices of gas and electricity have skyrocketed. […] the European Commission in November 2022 also said that the unexpected benefits of the electricity sector must be captured and provided to citizens". Day 9 Tr. (Eng), P2748:4-21 (Flores).

[565] Claimant's Opening, p. 143.

earnings.[566] In relation to the spot price cap, even though it was rarely applied from 2002 to 2005 and was binding 2%, 4% and 15% of the time in 2007, 2008 and 2009, it was binding between 70% and 98% of the time between 2010 and 2013 with the average monthly price of energy barely below the $ 120 cap.[567] This complicated scenario left no commercially viable option to the Claimant but to adhere to Resolution 95/2013.[568]

Capacity Payments

459. Regarding capacity payments, the Tribunal has already stated that it has not been presented with evidence that would allow it to find that Argentina had a considered, reasonable basis for fixing the amount of the capacity payments at AR$12/MW or for maintaining them at that level.[569]

Cost-Plus System

460. Regarding the cost-plus system established through Resolution 95/2013, the Tribunal has also found that such system, which remunerated generators in accordance with the technology and scale of the plants, resulted in different remunerations for different generators. Such differentiation, which is not justified in accordance with the Electricity Law, necessarily impacted the remuneration obtained by the plants since it was expressly defined by the parameters of that scheme. One example was provided at the Hearing by one of Claimant's witnesses:

> "AES did have small plants, small plants in their portfolio. They still have them in El Tunal, Cabra Corral, in San Juan there are some smaller ones also with 30 megawatts. *These plants were--or the cost of these plants above was being paid through Resolution 95*. AES Argentina had to subsidize these plants *that were above the average cost or this number that the Secretary of Energy gave us*. […] At the end of the day, AES Argentina, with revenue from the combined-cycling in Paraná or Alicurá had to continue to survive and

[566] *See supra* ¶ 289.

[567] CAMMESA Data Compilation, tab "Hourly Spot Price (2005-2013)", **AES Ex. 419**. *See also* CAMMESA's 2011 Annual Report, **AES Ex. 470**, pp. 8, 54 and CAMMESA's 2012 Annual Report, **AES Ex. 471**, pp. 8, 58.

[568] "If we hadn't joined 95, our combined-cycles would have been above the spot price, and we would have failed for sure. There was no other possible decision." Day 4 Tr. (Eng), P1175:13-16 [redacted]. See also P1180:3-21.

[569] *See supra*, ¶ 305.

subsidizing plants that if they were a stand-alone, they would not cover their own costs."[570] (Emphasis added).

PPAs

461. In addition to this, free negotiation of PPAs, which represented a source of sales for the generators was also eliminated. The Claimant's expert has put forward that as of 2000, the term market represented 45% of the electricity purchased in the market.[571] The Respondent has counterargued that as of December 2001 it only represented 14% of AES's sales.[572] However, even under the Respondent's explanation, that number has reduced to 0. There was no further possibility to enter into those contracts. In the Tribunal's view, the Respondent's explanation as to other energy schemes does not detract from this fact nor does it mean that any generator has access to those schemes.

462. In sum, the effect of these measures cannot be viewed in isolation since, ultimately, each of those measures contributed to the damage on Claimant's investments in the generation sector. While the spot price cap, the exclusions on non-natural gas plants and capacity payments were applied practically at the same time or close in time, the cost-plus system and PPAs prohibition still represented an affectation which occurred later in time.

Withheld Revenues

463. With regards to the withheld revenues which formed part of the investment schemes (USD 514 million according to the Claimant), such allegation has not been contested by the Respondent. The Tribunal observes that the Respondent has overall argued that the revenues were not withheld, but merely postponed, and that indeed AES has received payment of most of the accrued revenues plus interest.[573] However, such explanation does not take away from the fact that, ultimately, the generators

[570] Day 4 Tr. (Eng), P1179:19-P1180:5; P1180:9-13 [redacted].

[571] Abdala Regulatory Report, ¶ 138.

[572] Respondent's PHB, ¶ 202.

[573] Respondent's PHB, ¶¶ 204, 287.

were not paid in accordance with the agreed framework but instead were forced to adhere to schemes to finance their own payments.

464. These investment schemes involved re-investing their credits for a long period of time during which the government continued withholding revenues. The fact that the revenues did not translate into cash-flow for the generators impacted Claimant's investment, its ability as to decision-making on the income generated, planning, managing and its position as to its loans as indicated *supra*.[574] The effect of these measures was added to the effect already felt by the Claimant as to prices and dispatch. The Claimant's damage impacted its profit margin (due to measures affecting spot price formation and dispatch), revenues as to capacity payments, revenues as to electricity sold that was not paid, but withheld (withholding and investment schemes), and remuneration under the cost-plus system and the term market. All of it, in an ongoing manner.

c. Sufficient Causal Link

465. The Tribunal recalls that "[p]roof of causation requires that (A) cause, (B) effect, and (C) a logical link between the two be established."[575] In the words of the tribunal in *S.D Myers*, there must be a "sufficient causal link" between the breach and the loss sustained, "the harm must not be too remote", "the breach […] must be the proximate cause of the harm."[576] In the case at hand, the harm to the Claimant's profit margin was caused by the regulatory environment created by the Respondent's measures. The measures included those on spot price formation and dispatch, the exclusions on non-natural gas plants as well as the spot price cap that by 2013 placed the Claimant in a critical situation.

466. They include the Respondent's regulation that set capacity payments at a certain amount, which remained frozen despite inflation, without a reasonable basis

[574] *See supra*, ¶¶ 320, 331, 396, 401.

[575] *Joseph C. Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award, 28 March 2011, **AES Auth. 164**, ¶ 157.

[576] *S.D. Myers, Inc. v. Canada,* UNCITRAL/NAFTA Arbitration, Second Partial Award, 21 October 2002, **AES Auth. 049**, ¶ 140.

that would justify long term electricity supply. They include Argentina's regulation which determined the alleged temporary system for payments that formed the basis for the receivables withholdings and the investment schemes that would finance both the payment due to the generators as well as the capacity needed. And they included Argentina's regulation which determined the cost-plus system that would result in different remunerations for generators and would eliminate their possibility to obtain income from freely negotiated contracts. In the Tribunal's view, AES has demonstrated that there is a clear causal link between the measures enacted by the Respondent and the effect on – specifically, harm suffered by – its investment. The proximate cause is not something unconnected or external to the measures but the scheme that was directed and purposefully established by the government.

467. The Tribunal will address the valuation method and the quantification of damages further below.

4. Limitation to Compensation

A. The Respondent's Position

468. The Respondent contends that any potential compensation to which AES may be entitled is limited by the provisions of the relevant concession agreements. In particular, it notes that the concession agreements related to AES's hydroelectric plants exclude the possibility of claiming compensation for modifications of general scope of the rules and procedures related to the generation of electric power and the operation of the MEM, the only exception being when the modifications in the determination of prices are substantial, arbitrary and make it excessively onerous for the concessionaire to comply with the agreement. In this case, the agreements provide for termination due to the fault of the grantor and the concessionaire is entitled to compensation calculated according to the methodology provided in the concession agreements for such purpose, to the exclusion of any other remedy or compensation.

The Respondent posits that any potential compensation could in no case exceed this limit.[577]

B. The Claimant's Position

469. The Claimant contends that the compensation scenario postulated by the Respondent (which might be applicable if the AES Argentina hydro plants had invoked termination under the AES Hydro Concession Contracts) is incompatible with the full reparation principle since it concerns future damages only and would be dependent on Argentina auctioning the plants to an international buyer with compensation tied to the buyer's willingness to purchase assets in a regulatory system in which the hydros' value has been eviscerated.[578]

C. The Tribunal's Analysis

470. The Tribunal begins by addressing the Respondent's contention that any potential compensation is limited by the relevant concession agreements. The Respondent has relied on the Annulment Decision in *Venezuela Holdings v. Venezuela*. In that case, the Committee found that the tribunal did not consider the relevance of the price cap and of the limitations it imposed (based on the Association Agreement and the Congressional Authorization) on the investors' rights for the application of the criteria established in Article 6 c) of the BIT at issue, *i.e.,* for the calculation of compensation. The tribunal "simply set this 'limitation' aside as not relevant, and thus took no account of it".[579] After its analysis, the Committee determined to annul those parts of the award that ignored the potential relevance of those limitations for the calculation of compensation in the Cerro Negro Project.[580]

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[577] Respondent's Rejoinder Memorial, ¶¶ 891-899.

[578] Claimant's PHB, ¶ 248. The Claimant indicates that this is of particular importance since only four of AES's assets are hydro plants, and two of those have concessions expiring in 2023 (meaning that compensation under the concession contracts for these plants would be zero).

[579] *Venezuela Holdings et al. (Exxon Mobil subsidiaries) v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, dated 9 March 2017, **AL RA 259**, ¶¶ 177, 180-184.

[580] *Venezuela Holdings et al. (Exxon Mobil subsidiaries) v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, dated 9 March 2017, **AL RA 259**, ¶¶ 188 c).

471. While the Respondent relies in that case for its contention that compensation "could in no case exceed the limit established in the concession agreements" and that "the only possible potential compensation would be […] in accordance with the provisions of the concession agreements, to the extent that the conditions set forth therein —among others, that AES terminates the relevant concession agreements and returns the hydroelectric power plants— are met,"[581] the Tribunal does not find such Annulment Decision is dispositive and will explain its reasoning below.

472. At the outset, the Tribunal agrees with the Committee in that "in an appropriate case the resolution of a disputed issue under international law can itself entail the application of national law",[582] however, it is this Tribunal's view that the distinction between contract claims and treaty claims is nonetheless important. AES's investments are not only subject to rights and obligations under the BIT, but also under Argentina's legislation. Nonetheless, the Claimant chose this forum to vindicate the protections granted to its investments under the BIT. The fact that its hydro plants (Hidroeléctrica Alicurá S.A., Hidrotérmica San Juan S.A. and Hidroeléctrica Rio Juramento S.A.) have a right to terminate their concession contracts and to obtain certain compensation in case of a breach under Argentina's domestic legal regime does not translate into an obligation to utilize the parameters of that regime to determine the compensation for the breaches that are the subject of this dispute under the Treaty.[583] This is so, particularly when the Claimant is not a signatory to those contracts, the Claimant's investments that are the subject of the

[581] Respondent's Rejoinder Memorial, ¶¶ 897, 899.

[582] *Venezuela Holdings et al. (Exxon Mobil subsidiaries) v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, dated 9 March 2017, **AL RA 259**, ¶ 181.

[583] In relation to the issue of waivers, *see*: "The investment dispute which the Claimant has put before this Tribunal invokes obligations owed by the Respondent to Claimant under the BIT and it is based on a different cause of action from a claim under the Contract Documents. *Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot per se transform the dispute under the BIT into a contractual dispute*. […] The point is that the rights under the Concession Agreement and under the BIT are not the same […]". *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Award on Jurisdiction, December 8, 2003, **AES Auth. 220**, ¶¶ 76, 81. (Emphasis added)

dispute are not limited to the hydro plants which obtained those concession contracts, and the measures do not relate solely to price determination.

473. More importantly, the full reparation standard requires that reparation, in this case, compensation "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed". The rights protected under these contracts have not been invoked nor have the procedures for compensation (once the sale of shares has taken place) been initiated; using the compensation granted to the holders of these concessions as compensation for the Claimant for a violation of the protections granted to its investment would not place the Claimant in the same situation it would, in all probability, be in if Argentina had not implemented the measures at issue.[584] The compensation provided in the concession contracts is simply not relevant to determine the reparation in this particular case.

474. The Tribunal also observes that one of the key findings in *Venezuela Holdings v. Venezuela* was that compensation had to be calculated in accordance with Article 6 c) of the BIT at issue, which mandated that compensation had to represent "the market value of the investments."[585] In the present dispute, the underlying claim is not related to expropriation. More importantly, the appropriate compensation standard for Argentina's non expropriatory breaches is not the market value of the investment before the measures were taken or became public knowledge (as established in Article IV). To use such a standard as indicated *supra* would not only be inappropriate, but illogical in light of the cumulative breaches and the diverse measures taken.

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[584] "So in the compensation cost by Dr. Flores as at 2020, what he's looking at is which would eventually be the value at which Argentina could sell the concession into the future, knowing that there are only three years of operation left for Alicurá. And this has absolutely nothing to do with the historical claims." Day 9, Eng Tr., P2801:L21-P2802:L5. (Abdala)

[585] *Venezuela Holdings et al. (Exxon Mobil subsidiaries) v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, dated 9 March 2017, **AL RA 259**, ¶ 164.

475. These circumstances contrast with those in *Venezuela Holdings*. In consequence, the Tribunal cannot agree that the elements analyzed in that annulment procedure are dispositive for this case.

5. Criticism of Damages Quantification

476. The Claimant posits that the most appropriate scenario to quantify its losses is a comparison between the actual scenario and the but-for scenario, the damages being the difference between what AES actually earned and what it claims it would have earned without the measures.[586]

477. AES's experts have quantified AES's damages as of December 31, 2020 in the total amount of US$ 1.814 million. The damages calculation consists of: (i) damages due to measures affecting dispatch and prices; (ii) damages due to measures affecting withheld revenues; and (iii) an update factor. The damages are presented in categories that allow quantification of damages according to each Treaty breach. As to the first category, the Claimant submits that the appropriate damages calculation is based on the total effect of all the measures. The Claimant indicates that the model can be adjusted and re-run if the Tribunal determines that AES is not entitled to damages for one or more specific measures.[587]

478. The Respondent contests the use of this approach. Among its arguments, it points to the change in the current valuation with respect to the one presented in 2003 (discussed at length above) and it questions Claimant's claim for historical damages. In the Respondent's view, the quantification presented is highly speculative, based on unreliable projections and represents a claim for extraordinary earnings.[588]

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[586] Claimant's Updated Memorial, ¶¶ 387-391. Claimant's but-for scenario assesses what would have happened in the electricity market in the absence of the measures and also in the natural gas market, taking into account that natural gas prices are a key input in the determination of spot prices and the intrinsic links between both markets. As to natural gas, the but-for scenario assumes that prices would have been freely determined by supply and demand and that there would have been no scarcity. ¶ 395.

[587] Claimant's PHB, ¶¶ 190, 191. *See also*, ¶ 259.

[588] Respondent's PHB, ¶¶ 259-261.

479. For greater ease, the Tribunal will follow the order of the damages' calculation as presented by the Claimant, taking into account the arguments of both Parties.

A. Measures Affecting Dispatch and Prices

i. The Claimant's Position

480. In the but-for scenario the Claimant's experts have modeled but-for electricity demand, system expansion and spot prices as if the challenged measures had not been introduced. The variable cost of the least-efficient dispatched plant determines the uniform spot price, domestic electricity demand was modeled using empirical studies on price elasticity of demand, and system expansion (which would have been created in response to an increase in demand over time) was also taken into account.[589] The model also assumes that in the but-for and actual scenarios exports would have been the same[590] and capacity payments are set at levels that incentivize investment. According to the Claimant's experts, by 2013, a fixed level of capacity payments is required.[591] The model assumes that had Argentina not breached its Treaty obligations, the natural gas market would in all probability have remained governed by the market-based principles that applied prior to 2002; thus, it considers gas prices and availability determined by supply and demand forces, no scarcity, curtailments or expensive imports, adequate investment incentives and adequate balance of reserves-to-production ratios.[592]

481. The Claimant submits that the Respondent's criticisms over key inputs (natural gas exports, elasticity of demand, capacity payments, and additional generation capacity) are baseless. As to natural gas, it explains that in a but-for scenario, scarcity of natural gas would lead to very high spot prices of electricity. The

[589] Claimant's Updated Memorial, ¶ 406.

[590] Claimant's Updated Memorial, ¶ 410.

[591] The model calculates the required level of capacity payments of an average greenfield thermal plant beginning operations in 2013 to ensure that its internal rate of return (or "IRR") is at least equal to its weighted average cost of capital (or "WACC"). Claimant's Updated Memorial, ¶¶ 414-416. See "Abdala-Spiller's analysis shows that by 2013, a fixed level of capacity payments of US$11.85 per MW is required so that a project's IRR is equal to its WACC." Claimant's PHB, fn. 629.

[592] Claimant's Updated Memorial, ¶¶ 426, 427.

model assumes that if the electricity generation market had not been intervened, the natural gas market would also not have been intervened and in such a competitive market, price signals would prevent natural gas scarcity.[593] The Claimant further submits that the but-for natural gas prices are reasonable,[594] and its model assumes for but-for exports that Argentina would not have subjected exports to curtailments and interferences.[595] Regarding capacity payments and additional generation capacity, the Claimant's experts set but-for capacity payments at levels that provide incentives to invest when system capacity needs to increase[596] and assumes a 25-30% reserve margin to maintain "a reasonable capacity cushion over peak demand."[597] As to elasticity of demand, given that but-for electricity prices are higher than actual, but-for demand is lower than actual, such reduction in demand is accounted for using a -0.20 price elasticity based on an empirical market analysis prepared in 2011

[593] The Claimant explains that the inclusion of the but-for natural gas market in its model is not based on the assertion that Argentina's intervention constitutes a Treaty breach, but on the fact that this non-intervention would have been the most probable economic situation as a factual matter had Argentina not intervened in the electricity market. The Claimant presented an alternative scenario which is the result of assuming that intervened natural gas prices and availability (as observed in the actual scenario) would interact with a fully functioning (and un-intervened) electricity generation market. Such alternative scenario was presented in response to Argentina's criticism (resulting in higher but for spot prices), however, Claimant contends that Abdala-Spiller modelled natural gas prices and availability "in line with supply and demand forces, with no scarcity, curtailments or expensive imports, and with adequate investment incentives in exploration and development of resources, and adequate balance of reserves-to-production ratios." In its view, such methodology assumes that both natural gas prices and electricity prices are determined on a fully functional market. Claimant's PHB, ¶¶ 221-226. *See also*, Claimant's Reply Memorial, ¶¶ 560, 561.

[594] According to the Claimant, but-for natural gas prices are: i) lower than counterfactual estimates of long-run natural gas prices prepared by an independent third-party; ii) lower than the prices of substitute fuels; iii) lower than natural gas import prices from Bolivia; and iv) lower than natural gas export prices from Bolivia to Brazil, the closest regional benchmark to Argentine natural gas. Claimant's PHB, ¶ 227. *See also*, Claimant's Reply Memorial, ¶ 558.

[595] Abdala-Spiller assumed that but-for natural gas exports would have evolved according to the 2002 *Prospectiva* published by the Secretariat of Energy. These projections run through 2010 and were based on the natural gas permits that were issued as of 2002. This export forecast was extended beyond 2010 by assuming that, upon expiration, the Government would have renewed 50% of the maximum export volume authorized in the original permits. Claimant's PHB, ¶ 228.

[596] Specifically, the AR$12/MWh capacity payment was adjusted to account for domestic inflation until 2011. From 2011 onwards, Abdala-Spiller calculated the required level of capacity payments of an average greenfield thermal plant beginning operations in 2013, to ensure that its IRR was at least equal to its WACC. Claimant's PHB, ¶ 230.

[597] Claimant's Updated Counter Memorial, ¶ 414 and Claimant's Reply Memorial, ¶ 569. According to Claimant's experts "[t]he 25–30% reserve margin that we use is not arbitrary. Several analysts agree that a system with a reserve margin between 20% and 30% would be robust and safe. The Government recently used 20% as a target for long-term projections. We also note that Argentina's actual reserve margins have ranged between 24% and 30% between 2006 and2017." Abdala-Spiller Reply, ¶ 97.

consistent with similar empirical studies that assess changes in electricity consumption following price increases.[598]

482. The Claimant argues that the Abdala-Spiller model meets the reasonable certainty standard, as to measures affecting dispatch and prices, since: (i) it is based on the widely accepted but-for methodology (and conservative assumptions)[599]; (ii) heavily relies on historical data; and (iii) is an *ex post* valuation as of December 2020.[600] Regarding the first reason, it submits that the approach of quantifying damages by assessing the difference between actual and but-for margins has been accepted in investor-state cases such as *Mobil* and that the Respondent's expert also accepted the appropriateness of the methodology.[601] As to the second reason, the Claimant submits that its model is more reliable since it uses actual inputs rather than projections,[602] one example of such reasonable certainty being the dispatch for AES's hydro plants which account for 90 percent of AES's damages. It also indicates that the interactions between the key model's inputs have been incorporated. In order to test the model, first, Quantum America replicated the actual scenario incorporating the inputs used by CAMMESA resulting in outputs consistent with those of the actual scenario; and second, the model was compared against other sources. The Hancevic model resulted in comparable (but higher) electricity prices than those calculated in

[598] Claimant's Reply Memorial, ¶¶ 562, 563.

[599] The Claimant posits that the damages presented are premised on comparing AES's actual earnings (with the measures) with the but-for, or counterfactual scenario (without the measures) during the historical period (2002-2020).

[600] Claimant's PHB, ¶¶ 197, 209.

[601] Claimant's PHB, ¶ 198, quoting "Q. So just to be clear, you're not criticizing the fact that, as a minimum, you would need to extract the measures that are considered to be unlawful in order to undertake the economic analysis of that extraction? A. So if you want to go directly to analyzing whether there's any reliable amount of quantum of losses, then, yeah, you have to remove those four [Measures]. Q. Yeah, that's usually the starting point for most economic damages analysis, is you assume the breach, and then you calculate the loss? A. Yes. You said, any damages analysis. Once you get to the damages analysis, you remove the allegedly wrongful Measures." Day 8 Tr. (Eng), P2483:4-18 (Flores).

[602] "[I]n calculating the difference between the margins in the actual and but-for scenarios, the Abdala-Spiller model adopts in the actual scenario the actual dispatch and fuel consumption of electricity generators in Argentina during the relevant period, and accounts for all relevant macroeconomic factors. The but-for scenario only adjusts the actual scenario for Argentina's measures at issue in the arbitration (and for certain measures in the natural gas market that would, *in all probability*, not have been adopted had Argentina not breached the Treaty), but does not otherwise alter any other variables. This means that both the actual and but-for scenarios rely heavily on the same actual historical data." Claimant's PHB, ¶ 199.

the Abdala-Spiller Model, which in the Claimant's view proves its model is based on reasonable assumptions and properly accounts for all relevant interactions.[603] Regarding the third reason, the Claimant alleges that due to the nature of the breaches adopted over a two decade period, damages are assessed *ex post* rather than *ex ante*, accounting for all known data. It also submits that the 2003 valuation is not relevant since it mainly focused on an expropriation claim, it assumed the electricity but-for and actual prices would converge by 2010, and the actual and but-for scenarios involved projections of AES's revenues and variable costs.[604]

483. With regard to the Respondent's arguments on profitability, the Claimant contends that profitability does not exclude the existence of damages or of treaty breaches, that its claims are not based on a guaranteed rate of return and the profits are fully captured in its actual scenario. The Claimant explains that invoking profitability indicators is misleading since they do not reflect the particular situation during most of the historical period; that relative to the size of AES's investment, dividends between 2002 and 2019 averaged only 3.9% of the equity invested in the plants and net operating cash flows averaged only 4.2% of the book value of assets as of 2001. As to the expansion of investments, the Claimant indicates that such increases refer to forced investment schemes or participation under a different framework for the renewable energy sector.[605] Finally, the Claimant emphasized that the Respondent did not present any alternative damages model.[606]

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[603] The but-for electricity prices in AES's quantification was compared with the Hancevic academic study, which developed a similar counterfactual model to calculate electricity prices in Argentina absent many of the same impugned Measures. Claimant's PHB, ¶ 203. The Claimant also argues that "[a]long with the Abdala-Spiller Report, Argentina (and Dr. Flores) were provided with the outputs of Quantum's dispatch model, and with the natural gas model. With this data, Dr. Flores could have replicated Dr. Abdala and Prof. Spiller's results, or run alternative scenarios, by relying on an alternative dispatch model, such as CAMMESA's dispatch model […]". Claimant's Reply Memorial, ¶ 572.

[604] Claimant's PHB, ¶¶ 204-208. According to the Claimant, its 2003 but-for would produce higher damages for the period 2002-2010, therefore, the *ex-post* valuation is more conservative and reduces the amounts previously quantified.

[605] Claimant's PHB, ¶¶ 236-241.

[606] Claimant's PHB, ¶¶ 242-247.

ii. The Respondent's Position

484. As already discussed, the Respondent alleges that the Claimant did not sustain damages, but rather obtained benefits and huge profits after 2002. In this sense, it indicates that from 2002 to 2018 the AES plants generated an EBITDA of USD 139.8 million per year and a cumulative net income of USD 1.4 billion.[607] It also points that AES decided not only to maintain its investments in the electricity generation sector, but also to expand them, which in its view confirms that the Claimant obtained significant earnings and its operations were highly profitable.[608]

485. The Respondent also argues that the Claimant's experts project high but-for prices contrary to Argentina's stated goals and regulatory framework,[609] and that the assumptions of the model are highly speculative and unreliable, such as those related to natural gas prices, demand elasticity, capacity payments and additional capacity. As to natural gas prices, the Respondent contends that the consequences arising from the regulatory measures on gas should not be included since AES is not an investor in that sector and those measures are not invoked as treaty breaches in this arbitration. It also indicates that the assumptions on the expiration of natural gas export permits and higher physical loss percentages in natural gas production increase unjustifiably the but-for prices.[610]

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[607] Respondent's Updated Counter-Memorial, ¶¶ 776-781. Referring to the period 2002-2020 *see* Respondent's Rejoinder Memorial, ¶¶ 871-876. As to indicators such as return on assets (ROA), return on equity (ROE) and return on capital (ROC), the Respondent submits that they corroborate that AES's business has been profitable since 2001 (¶¶ 885-890).

[608] Respondent's Updated Counter-Memorial, ¶¶ 784, 785.

[609] Respondent's Updated Counter-Memorial, ¶¶ 806-810; Respondent's Rejoinder Memorial, ¶¶ 922-925.

[610] Respondent's Updated Counter-Memorial, ¶¶ 812-817; Respondent's PHB, ¶¶ 262-267. As to the reasonableness check performed by the Claimant, the Respondent contends that it "is inappropriate since import parity should not be used as a general rule to model but-for prices and those prices are not applicable to this case. The same is true for the prices of Bolivia's exports to Brazil, which have been lower, but close to the prices of Bolivia's exports to Argentina, since both are established on the basis of contractual formulas that are adjusted according to the evolution of oil prices. With respect to CAMMESA's reference prices for the closest natural gas substitutes for electricity generation in Argentina (i.e., gas oil, fuel oil and coal), it is to be expected that these fuels are more expensive than natural gas. […] Therefore, these prices cannot serve as a ―reasonableness check." Regarding Arabian Light, its expert indicates it is not valid since "Ing. Cameron explains in his second testimony, the Arabian Light was not an applicable reference for natural gas prices in Argentina and, during his tenure as Secretary of Energy from 2003 to 2014". As to the alternative using actual natural gas volumes and prices, its expert indicates it is "unreasonable to combine Compass Lexecon's but-for electricity prices and

486. Regarding demand price elasticity, the Respondent indicates that the Claimant has misanalysed the electricity demand study which has understated the elasticity and contributed to artificially increasing the claim for damages. As to capacity payments, it indicates that the projection is based on an incorrect premise, that capacity payments aim to pay for the existing capacity availability rather than working as an incentive for investments in additional capacity, that such projections are higher than in the 2003 projections and that the Claimant is cherry-picking the regulatory changes favorable and rejecting the unfavorable ones.[611] Regarding additional capacity, the Respondent argues that the reserve margin used by the Claimant, which is not related to the private sector's decision-making process, is arbitrary and the model assumes only thermal plants would be installed, which also artificially increases its claim.[612]

487. As to the Quantum America's dispatch model, the Respondent argues that the model's results are subject to the speculative assumptions made by the Claimant's experts, that no expert report accounting for the calculations was provided and the spreadsheets provided by the Claimant do not allow understanding the operation of Quantum's model, replicating and changing it or running alternative scenarios.[613]

iii. The Tribunal's Analysis

488. The Respondent has criticized many aspects of the valuation method presented by the Claimant. The Tribunal will first address the most weighty of

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dispatch with actual natural gas prices and quantities, due to the unrealistic results they produce in the marginal cost-based system devised by Compass Lexecon." See in general, Respondent's Rejoinder Memorial, ¶¶ 936-952.

[611] Respondent's Updated Counter-Memorial, ¶¶ 818-830; Respondent's PHB, ¶¶ 271, 273.The Respondent argues that "[t]he period over which Compass Lexecon calculates the alleged damages to Claimant spans almost 20 years. Thus, over such a long period of time, consumers would have the opportunity to adjust their energy consumption behavior and switch to durable goods that consume less energy. Therefore, relying on a short-term elasticity understates the elasticity and overstates the but-for demand". As to capacity payments it also indicates that "the method employed by Abdala and Spiller is so inconsistent that a drop in projected spot prices must be offset with higher but-for capacity payments." See in general, Respondent's Rejoinder Memorial, ¶¶ 954-971.

[612] Respondent's Updated Counter-Memorial, ¶¶ 831-834. The Respondent argues that the installed capacity in the but-for scenario is lower than that of the actual scenario and new capacity entrance is projected to be later than in the actual scenario. Additionally, it points that the model assumes "the entry of renewable energies, hydroelectric power and nuclear capacity in the same amount and at the same time as in the actual scenario, even though in the but-for model electricity prices are much higher than actual prices." See in general, Respondent's Rejoinder Memorial, ¶¶ 972-977.

[613] Respondent's Updated Counter-Memorial, ¶¶ 835-837; Respondent's Rejoinder Memorial, ¶¶ 978-983.

Respondent's criticisms before analyzing whether the valuation method presented by the Claimant is reasonable.

a. The Claimant has not Sustained Damages, on the Contrary it has Benefitted

489. According to the Respondent, since 2002 the Claimant has obtained huge benefits and profits. The Respondent relies on certain financial indicators, such as EBITDA, net income, accumulated net income, return on assets, return on equity and return on capital. At the outset, the Tribunal reiterates that obtaining benefits or profits does not necessarily translate in damage being non-existent,[614] and in particular, does not preclude the possibility of determining damages in this case. As previously stated, the notion that a profitable investment could shield the Respondent from a finding of liability for damages would require a clear waiver or exception under the applicable law.[615] When analyzing the existence of benefits a tribunal must examine the particular circumstances of the case. The Tribunal also recalls that, while the BIT does not define "damage" or "injury", the Articles on the Responsibility of States for Internationally Wrongful Acts indicate in their commentary that "material damage" should be "assessable in financial terms".[616] Particularly in a case such as this one, where several measures were implemented throughout a significatively long period of time and where the measures affected different aspects of the investment, using this premise or relying on financial indicators in a general way would not be appropriate.[617]

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[614] "The fact that the generators had a positive EBITDA, or that they would have paid no dividends also in the but-for scenario, does not exclude the existence of damages […] and in any case does not affect the Tribunal's conclusions in the Decision on Liability as to the existence of breaches by Argentina of Total's treaty rights in respect of the electricity sector." *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Award, November 27, 2013, **AES Auth. 198**, ¶ 127.

[615] *See supra*, ¶ 454.

[616] Articles on the Responsibility of States for Internationally Wrongful Acts, Article 31, Commentary (5). See also, Article 37, Commentary (3).

[617] "[…] the actual EBITDA and net income figures of AES's plants, which Dr. Flores presents, do not capture the economic impact on AES of the lack of collection of its receivables in the early years. Since the Government withheld AES's plants' revenues, a significant portion of the net income did not translate into cashflows to AES's plants. Consequently, EBITDA or net income figures are incomplete indicators of the AES plants' actual performance. Figure 14 below shows the impact of the withholdings on AES's plants' cashflows, with withholdings representing a substantial part of net income until 2014. Similarly, AES's plants paid US$ 693 million in dividends between 2002 and 2019. Over 58% of those dividends (US$ 402 million) were paid

490. In the case at hand, the Tribunal has already found that Argentina's measures did cause damage to Claimant's investment and that Argentina's measures were the proximate cause, such damage is financially assessable.

b. The Claimant Maintained and Expanded its Investment, its Damage is a Speculative Construct

491. Similar to the argument addressed above, the fact that the Claimant maintained its investments or expanded them does not on its own negate the damage caused by Argentina's measures nor does it make it financially non-assessable. In particular, the Tribunal recalls that the investment schemes implemented by the government whereby the generators reinvested their receivables, essentially funding their own payment and at the same time additional capacity, was not optional, but rather the only commercially reasonable option provided. In addition to these investment schemes, the Claimant invested in another regime subject to different rules. As indicated by one of Claimant's witnesses at the hearing:

> "A. Yes. This is an expansion in our renewable fleet, wind. […] A. Yeah, but it's under the RenovAR framework, so it provides the kind of guarantees we have seen since we invested in the renewal sector, you know, credible framework, you know, long-term PPAs, high quality of takers, if it's the case. […] THE WITNESS: No, I think that what I said in this statement and my footnote is that, you know, the one exception to the policy of new investment was the renewal investment in Argentina".[618]

492. The Tribunal is also aware that TermoAndes was considered as new generation by the Government pursuant to the Energía Plus scheme, however, such investment was made in 2000/2001 but not connected to the Argentine grid. While the Respondent has indicated that the Claimant has expanded its investment in the

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between 2017 and 2019, more than 15 years after the Measures started and only after Argentina began repaying AES's revenue withholdings. Companies can distribute dividends only when cash is available to make such payments. […] the low profitability of AES's plants is evident because dividends between 2002 and 2019 averaged only 3.9% of the equity invested in the plants, and cash flows to the firm averaged only 4.2% of the book value of assets as of 2001.250 Such returns are much lower than the minimum return investors demand when investing in Argentina's electricity generation sector". Abdala-Spiller Reply, ¶¶ 173, 174 and 179.

[618] Day 3 Tr. (Eng), P620:9-16; P804:16-19 [redacted]. See also Second WS, [redacted], ¶ 19.

generation sector, the Tribunal does not have evidence on new investment projects in the traditional generation sector subject to the measures challenged other than its own investment schemes. As to not selling its assets, one of Claimant's witnesses indicated at the hearing:

> "Q. Why did The AES Corporation not sell the Argentine generation assets? A. You know, at that time, the size of the portfolio and the relevancy of the portfolio was critical. You know, this is a very, you know, varied portfolio facets that includes coal, gas. You know, it's, you know, more than 3,000 megawatts of a generation portfolio. […] So I think the size of the portfolio, the complexity of the country, and the lack of buyers would be arguments to point to reasons why AES did not execute on selling the generation portfolio."[619]

493. In the Tribunal's view, the Claimant cannot be faulted for not selling its investment. The fact that it continued to manage its assets as best it could under the existing legal and regulatory regime cannot be equated to an inoculation as to the existence of damage. In this regard, and as previously stated, an investor cannot be faulted for seeking to optimize its business outcomes despite facing unlawful obstacles.[620]

c. <u>The 2003 Valuation Model</u>

494. In addition to indicating that the valuation method presented by the Claimant is tainted with errors, the Respondent submits that the current model openly contradicts the one submitted in 2003.[621] Among its arguments, it sustains that the amount of damages sought and the change in the valuation date make it inconsistent. The Tribunal will analyze the appropriateness of the model proposed by the Claimant below, however, it suffices to say that, again as discussed above, the change in the valuation date or in the model presented does not make it *per se* inappropriate. The Tribunal recalls that 21 years have elapsed since 2003. The claims as presented at that moment were different than those at issue here, the procedure was suspended pursuant to the parties' agreement for approximately 13 years and during that time,

[619] Day 3 Tr. (Eng), P795:22-P796-15 [redacted].

[620] *See supra*, ¶¶ 324 and 454.

[621] Respondent's Updated Counter-Memorial, ¶ 786.

while some measures continued to be applied, new ones were implemented. In light of these circumstances, the fact that the Claimant adjusted its claim, the valuation and valuation date does not, in and of itself, undermine the valuation put forward.

d. Stated Goals

495. The Respondent also posits that the Claimant's but-for scenario projects exorbitant energy prices, which go against Argentina's regulatory goals when putting in place its legal framework in the 1990s, in particular, protecting the rights of users. According to the Respondent, "[a]fter the severe crisis that broke out in late 2001, the low revenues obtained by large sectors of the population could not afford high rates. Abdala and Spiller ignore this reality and fail to consider that many users could not have afforded the exorbitant rates they are assuming. Accordingly, […] Claimant's experts' approach is totally biased, for it analyzes the measures solely from the electricity generators' perspective, ignoring many other fundamental actors also protected by such Law."[622]

496. The Tribunal does not deny that protecting the rights of users is one of the objectives of the electricity national policy, just as the promotion of competition in the electricity market and the encouragement of investments to ensure long-term supply is. However, the Tribunal notes that, while the actual monomic price decreased in the 1990s (*i.e.,* prior to the crisis), after 2002 it increased just as worldwide crude prices did. As pointed out by the Claimant's expert, the actual costs of generation were higher than the but-for generation costs.[623] The Respondent has not fully explained why these but-for prices, which are lower than the actual prices observed, and which relate to global market conditions (just as the actual prices did), would be unreasonable or inappropriate on account of consumers. The Tribunal does not see the connection between one thing and the other. It would seem that the Respondent is somehow suggesting that but-for prices should be set at the levels

[622] Respondent's Updated Counter-Memorial, ¶ 810.

[623] Abdala Spiller Reply, ¶¶ 43-50.

observed in the 1990's before the crisis for them to be consistent,[624] something that is confusing considering that Argentina's measures progressively departed from that scheme. Nonetheless, in the Tribunal's opinion this would not be factually nor economically accurate since electricity prices cannot be isolated from global conditions or even from Argentina's particular scenario in 2001 and 2002. The but-for scenario must reflect the position in which the Claimant would have been, in all probability, but for Argentina's measures, not simply the best possible scenario before the crisis. In consequence, the Tribunal does not consider that the mere fact that the but-for electricity prices are higher than the ones observed in the 1990s make them *per se* inconsistent with the objectives set forth in the Electricity Law nor inappropriate to place the Claimant in the situation it would be in, in all probability.

497. Lastly, regardless that the protection of user's rights is an objective of the Electricity Law, the Tribunal recalls that many of the Resolutions implemented related to the challenged measures do not refer to users or consumers, and the ones that do, only make a general reference to user's supply and to the market's eventual readaptation to their benefit. In this sense, it is unclear for the Tribunal how the damages that resulted from the application of such measures would be affected by considerations related to consumers when the particular rationale for their implementation does not seem to have been in response or due to an issue of consumers' protection.

e. Whether the Claimant's Valuation Model is Reasonable

498. The Claimant contends that it used a pure "*ex-post*" approach for its valuation. To compute damages arising from the Measures affecting dispatch and

[624] "As explained *supra*, protecting the rights of users (and, accordingly, reducing prices) was one of the primary goals of the privatization process in general and the electricity regulatory framework put in place in the early 1990s in particular. […] AES itself explains that, as the MEM worked 'as contemplated by the Electricity Law' 'energy prices in the MEM fell almost 60%. In fact, prices decreased substantially between 1992 and 2001, and were among the lowest in the region. The decreased generation prices greatly benefited residential consumers.' Therefore, Claimant's flagrant contradiction is evident. On the one hand, it asserts that its but-for scenario purportedly mirrors the regulatory framework in place before December 2001 but, on the other, projects but-for prices that fully contradict said framework and its impact on pricing during the 1990s." Respondent's Updated Counter-Memorial, ¶¶ 806-808.

prices, the Claimant calculated cash flows annually based on the difference "between the gross margins that AES's power plants would have reasonably generated in the absence of such Measures (*i.e.,* the "but for" scenario) and the gross margins that these power plants actually generated (*i.e.,* the "actual" scenario).[625] According to the Claimant "the but-for scenario by definition removes [the effect of the illegal measures] from the computation of AES's plants' margins."[626] In the model, the Claimant's experts assume the following:[627]

- Electricity spot prices would have been uniform, reflecting the variable costs of the marginal unit, *i.e.*, the variable cost of the least efficient dispatched generator;
- Capacity payments would have been set at levels that provide incentives to invest when there is a need to increase capacity of the system; and
- Natural gas prices at the wellhead level would have been determined by supply and demand, with electricity generators being able to procure natural gas freely and directly from producers, and that the level of domestic production would have been consistent with prices that provide an incentive to invest and develop reserves of natural gas.

499. The Claimant's model relies on actual historical data. It incorporates macroeconomic variables (such as Foreign Exchange Rates, inflation, GDP growth and evolution of tax rates), electricity variables (such as dispatch of hydro, nuclear and renewable plants, availability of thermal plants, energy demand curve, electricity exports, price of coal, liquid and nuclear fuels), and natural gas variables (natural gas import prices, unconventional gas production and natural gas demand curve). The Claimant indicates that "Abdala-Spiller […] place themselves at the end of 2020 and calculate AES's but-for margins by removing the impact that Argentina's Measures had in the past."[628]

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[625] Abdala-Spiller Report, ¶ 116. *See also* Claimant's Updated Memorial, ¶¶ 387-392; Claimant's Reply Memorial, ¶¶ 547 and 548.

[626] Abdala-Spiller Reply, ¶ 7.

[627] Abdala-Spiller Report, ¶ 117.

[628] Claimant's PHB, fn. 549.

500. In order to confirm the reliability of the model, the Claimant asked Quantum America to replicate the actual scenario incorporating CAMMESA's inputs. The result was consistent with the actual scenario. In addition to this, the model was compared against other sources and specifically with the Hancevic academic study, which developed a similar counterfactual model to calculate electricity prices in Argentina. The latter resulting in higher prices.[629]

501. The Respondent takes issue with two aspects of Claimant's valuation model in particular. The first, the assumptions or inputs included in the model, and the second, the fact that the result of that model should have been subject to a discount rate or an adjustment for "uncertainty". The Tribunal will first address the inputs or assumptions with which the Respondent takes issue and afterwards the Tribunal will address whether there needs to be a discount or adjustment for "uncertainty".

502. Before addressing the assumptions and inputs of the model, the Tribunal recalls that "once the fact of damage has been established, a claimant should not be required to prove its exact quantification with the same degree of certainty. This is because any future damage is inherently difficult to prove".[630] As stated in *Lemire v. Ukraine*, "for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, *with reasonable confidence*, estimate the extent of the loss".[631] The Tribunal agrees that what should be assessed is whether the model allows it to assess the extent of AES's loss "with reasonable confidence."

The Quantum America Model

503. The Tribunal will address now the Respondent's argument in relation to the Quantum America model that "any compensation the Tribunal may award would be tainted by the violation of the Argentine Republic's right to due process, which would

[629] Claimant's PHB, ¶¶ 202, 203.

[630] *Crystallex International Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **AL RA 125**, ¶ 868.

[631] *Joseph C. Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award, 28 March 2011, **AES Auth. 164**, ¶ 246. (Emphasis added).

also constitute a serious breach of a fundamental procedural rule."[632] The Respondent's expert indicated at the hearing that:

> "I don't have any idea about how Compass Lexecon and Quantum America interacted in this re-running process. That's why I have said, that this is a black box. I wish I would have been able to access the model. I understand that was requested. […] Usually when I do this analysis in other cases, I do offer sensitivities. […] *I haven't been able to do that. You know why? Because I don't have that model. And that's the limitation of my analysis. I have not been given access to a model* under the premise that it's proprietary, and I shouldn't be able to see it. […] The only thing I'm asking is the same privileges that Mr. Abdala got. […] to be treated the same way vis-à-vis Quantum as Dr. Abdala and Professor Spiller were."[633] (Emphasis added)

504. The Respondent's position is that "[t]he request was presented to the benefit of the Tribunal since the Counter-Memorial by Argentina", "[t]hey had it in the Counter-Memorial, and in the Rejoinder, but they refused to share the Quantum model" and "the other party knew there was a request, undoubtedly. The best example, according to the report of Compass Lexecon, they respond to Argentina's request saying it's proprietary."[634] In light of this, the Respondent argues that "[t]hey did not comply with the burden of proof" and "there is a problem with due process".[635]

505. The Tribunal observes at the outset, the Respondent did not raise the issue of not having access to the Quantum model at any time prior to the hearing. In its Counter-Memorial (22 October 2020), the Respondent indicated that the fundamental problem of Quantum America's model were the inputs provided.[636] In other words, the main objection to the valuation was not the model itself. In addition to that, the Respondent also expressed that:

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[632] Respondent's PHB, ¶¶ 242-247.

[633] Day 8 Tr. (Eng), P2433:1-5; P2590:12-14; P2591:1-5; P2603:18-19; P2604:7-9. *Also*: "I did not have access to the model, of the Claimants, meaning the combination of Compass Lexecon and Quantum, so I could not do a precise sensitivity analysis that would take into account all the interactions and the iterative process of that model." (Flores) P2595:5-10.

[634] Day 9 Tr. (Eng), P2837:17-18; P2839:1-3; P2948:17-21 (Respondent's Counsel).

[635] Day 9 Tr. (Eng), P2839:11-12; P2948:10-12 (Respondent's Counsel).

[636] Respondent's Counter-Memorial, ¶ 836.

> "Quantum America *has not provided an expert report* accounting for the calculations, nor has Claimant produced the model used by Quantum to estimate its but-for prices and dispatch. Abdala and Spiller only produced hardcoded spreadsheets that do not allow: (i) understanding the operation of Quantum's model or how the iterative process reaches equilibrium solutions; (ii) replicating and changing Quantum's model; or (iii) running alternative scenarios using more reasonable inputs than Abdala and Spiller's".[637]

506. In its Rejoinder, submitted almost a year later (29 July 2021), when referring to a correction made to the iteration process, the Respondent pointed that such situation "demonstrate[d] the validity of Argentina's concerns in *requesting a report* from Quantum America explaining its calculations and the output of its dispatch model" while also reiterating that "Claimant did not enclose a report from Quantum America or its dispatch model with its Reply […]".[638]

507. Although the Respondent argued at the hearing that it was known to the Claimant that "there was a request, undoubtedly", the language used in the Counter-Memorial indicates Respondent's dissatisfaction that no expert report was provided and that only hardcoded spreadsheets were produced. While the language does reflect a complaint, it does not reflect a specific request to the Claimant, and at no time was a specific request addressed to the Tribunal asking it to order anything in this regard. The Respondent has also referred to the Claimant's expert's indication of the model's proprietary nature as evidence that it was understood that there was a request. However, in the Tribunal's view, the fact that the Claimant's expert explained why the model had not been provided (in response to the Respondent's complaint in its Counter-Memorial) does not translate into such a complaint reflecting in fact a request, nor does such explanation reflect either the Claimant's denial to a formal request.[639]

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[637] Respondent's Counter-Memorial, ¶ 837. (Emphasis added).

[638] Respondent's Rejoinder Memorial, ¶¶ 980, 981.

[639] "The model that Quantum uses is proprietary. In our professional experience, dispatch consulting firms such as Quantum do not share their proprietary models with third-parties because of the sensitivities of losing their intellectual rights over competing consulting firms. The calculations emerging from Quantum's dispatch model, however, can be tested against those derived from other dispatch models available for the Argentine market." Abdala-Spiller Reply Report, ¶ 124.

508. In this sense, the Tribunal observes that on 29 June 2021, a month before submitting its Rejoinder and pursuant to Article 43(a) of the ICSID Convention, the Respondent requested the Tribunal "that the Claimant *be required to submit* certain documentation relevant to this case". The Respondent expressed in that letter that the documents specified therein were "certainly relevant and pertinent to the subject matter of this dispute and, in particular, *necessary to evaluate and respond to the valuation issues* discussed in this case."[640] Those documents had been previously requested to the Claimant through a letter sent on 18 June 2021.[641]

509. Contrary to the documents contained in this letter, which were indeed requested ("*be required to submit*"), the Quantum America Model or the expert report were not. There is a marked difference between the language used in the Counter-Memorial and the one used in the Respondent's 29 June letter. The Tribunal is unaware of other interparty correspondence where the Respondent requested to the Claimant the production of that model. The Tribunal is also puzzled as to why, if access to such model were necessary to respond to the valuation issues in the Rejoinder, the model was not formally requested together with the other documents. Moreover, the Tribunal observes that in its Rejoinder, the Respondent's main objection to the model continued to be the inputs provided and that, as indicated above, instead of a request to submit the model or a report, it complained about the Claimant not enclosing a report by Quantum America or its dispatch model along with the Reply.[642]

510. The Tribunal also notes that, in response to the Claimant's suggestion that the Respondent's expert could have "relied on an alternative dispatch model by any other

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[640] Letter from Respondent to the Tribunal, June 29, 2021, **A RA 558**.

[641] The Tribunal rejected this request. In its decision, the Tribunal considered the timing, the relevance and the materiality. In particular, that it was presented three months after the Claimant's Reply, that the outstanding document request related to matters that were already referred to by the Claimant in its first submission and that the Respondent failed to explain the evidentiary relevance of the financial statements from 1993-2000 of certain AES plants, and of the Excel spreadsheets submitted by the Claimant's experts with their 2003 Damages Valuation, which had been superseded by the 2020 Experts' Report.

[642] Respondent's Rejoinder Memorial, ¶¶ 979-983.

electricity dispatch consulting firm or used CAMMESA's dispatch models",[643] the Respondent's expert stated that "[his] conclusion is that the Measures have not prevented AES from operating a profitable business in Argentina and, therefore, a dispatch model *is needed only to check and rebut* Compass Lexecon's calculations".[644] At the hearing, to an express question as to whether running his own dispatch model would have been useful to know if it was consistent or different from the Compass Lexecon model using Quantum America, the Respondent's expert expressed that "it would have been a waste of resources."[645]

511. In the Tribunal's view, this statement is confusing for the following reasons. *First*, checking and rebutting the Claimant's calculations does not seem to be something merely secondary, but a fundamental issue precisely if the Respondent's position is that there is no damage or that in any case the damage is minor. *Second*, even assuming that access to the proprietary model would have been necessary to be able to respond to the valuation issues (as indicated by the expert), the Tribunal does not understand how this would make it impossible for the Respondent to refute in another way (even if less detailed) the *prima facie* assertion raised by the Claimant of the existence of damages and their magnitude. At the hearing the Respondent's expert indicated that:

> "Q. Did you attempt to check the AES model with any third-party vendor, CAMMESA or otherwise? A. No. I think that could be a futile exercise. What we want to do is to be working off the same premises. We have to have a common set of knowledge that we are drawing from."[646]

512. The Claimant's expert explained at the hearing with regards to the model that:

> "A. It is a proprietary model, but it's a model that *uses the same mathematical algorithms for optimization of dispatch as CAMMESA*. It uses the same series of hydrology based on a model called OSCAR, which are the same used by CAMMESA. And *it uses, actually, the same inputs that CAMMESA* has in terms of transmission constraints, actual hydrology, as it happened, actual

[643] Abdala-Spiller Reply Report, ¶ 124.

[644] Quadrant Economics Second Expert Report, ¶ 319. (Emphasis added).

[645] Day 8 Tr. (Eng), P2609:15-16 (Flores).

[646] Day 8 Tr. (Eng), P2605:11-16 (Flores).

> availability of thermal plants, as it happened. *So all the inputs are taken from CAMMESA's own information as to what actually happened*. […] A. What is proprietary is the simplification that CAMMESA has thousands of nodes that they model on the transmission system; *whereas either Quantum or any other consultancy firm, such as Mercados Energéticos, Synex, Lestard-Franke*, would do a simplified version with less nodes so that the algorithms of optimizations are less demanding in terms of having to solve the optimization problem."[647] (Emphasis added)

513. While the Respondent's expert indicated that it needed to work off the same premises, the existence of other consultancy firms that could provide a similar reasonable analysis was not refuted. In fact, the Respondent's expert also accepted that it had used third-party consulting at least once.[648] The Tribunal observes that, while the dispatch model was not provided, the Claimant did provide: (i) an explanation of the instructions given to Quantum America to prepare the but-for dispatch model with all outputs from the model, (ii) the natural gas model, (iii) their elasticity of demand calculation, and (iv) the model used for calculating total installed capacity.[649] The fact that the inputs to run the model through a third-party had been provided was accepted by the Respondent's expert at the hearing.[650] In this regard, the Respondent's expert had the tools to submit an alternative dispatch model.[651]

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[647] Day 7 Tr. (Eng), P2209:9-20; P2210:2-9 (Abdala).

[648] "Given your experience, you must have used third-party consulting firms to run dispatch runs before; right? A. I did some analysis of that kind of work in a case in Bolivia, but I have not done that very often." Day 8 Tr. (Eng), P2602:19-P2603:2 (Flores).

[649] Simulation of Hydro Plants in the Actual Scenario, **AES Ex. 397**, Simulation of Thermal Plants in the Actual Scenario, **AES Ex. 398**, Simulation of Fuel Consumption in the Actual Scenario, **AES Ex. 399**, Actual O&M Costs **AES Ex. 458**, But-For Dispatch, **AES Ex. 459**, But-For Fuel and O&M Costs, **AES Ex. 460**, But-For Revenues and Generation, **AES Ex. 461**, But-For Spot Price, **AES Ex. 462**, Price Elasticity of Demand Adjustment, **AES Ex. 463**, Spot Price and Average Cost, **AES Ex. 464**, Actual O&M Costs 2019-2020, **AES Ex. 695**, Iterative Process Between the Natural Gas Model and Quantum's Dispatch Model, **AES Ex. 746**, But-For Fuel and O&M Costs, **AES Ex. 759**, But For Revenues and Generation, **AES Ex. 761**, Updated But-For Spot Prices, **AES Ex. 763**, Updated But-For Dispatch, **AES Ex. 765**, Updated Price Elasticity of Demand Adjustment, **AES Ex. 769**.

[650] "You have the Compass Lexecon natural gas model; right? A. Yes. Q. You have their elasticity of demand calculations; correct? A. Yes. Q. You have the model they used for capacity payments? A. Yes. Q. And you have the total capacity that they use in calculating all supply in the wholesale electricity market; right? A. Yes. Q. Okay." Day 8 Tr. (Eng), P2608:2-15.

[651] "Dr. Flores could have relied on an alternative dispatch model by any other electricity dispatch consulting firm or used CAMMESA's dispatch models." Abdala-Spiller Reply, ¶ 124.

514. In light of the above, the Tribunal finds that the Respondent did not request the production of Quantum America's model. In this regard, the Respondent was not denied an opportunity to be heard, to present its evidence or plead its case.

The Assumptions and Inputs

515. The Tribunal turns now to the Respondent's criticism of the inputs of Quantum America's Model. The Tribunal first notes that only the Claimant provided a valuation model.[652] Although the Tribunal recognizes that the Claimant bears the burden of proof with respect to the damages calculation, having recourse to an alternative or comparative model which address the same hypothetical could have given the Tribunal more elements with which to assess, compare and contrast Claimant's valuation.

516. In addition to this, the Tribunal observes that the Respondent's expert did not contest the validity of the model as such. In its first expert report, it criticized the valuation methodology used by the Claimant as well as the inputs used in the but-for scenario, in particular, natural gas prices and exports, demand elasticity, capacity payments and additional generation capacity.[653] However, regarding the Quantum America model, it expressed that:

> "The fundamental problem with Quantum's dispatch model *is that its output depends on the inputs* Compass Lexecon instructed Quantum to use. […] Compass Lexecon's calculations and assumptions regarding natural gas prices, price elasticity of demand, capacity payments […] and the total capacity in the system are flawed and highly speculative. As a result, *the*

[652] To an express question on whether he had done the exercise of providing an alternative valuation in case the Tribunal found a treaty breach and the figure it would result, the Respondent's expert expressed his opinion that: "No. If the Tribunal finds there is a breach of the treaty, then what I would say is, well, there may have been a breach of a treaty, but damages have not been proven. I do not see any evidence that a potential breach of the treaty caused a damage to the Claimant. Q. Right. *But in that case, they would have no alternative model other than the model provided by Compass Lexecon; correct? A. They have the model provided by Compass Lexecon and my evaluation and my opinions on that model and my recommendation that this could be one of those cases where there's liability, but there are no damages*." (Emphasis added) Day 8 Tr. (Eng), P2453:6-20 (Flores).

[653] Quadrant Economics First Expert Report, ¶¶ 55-78, 107-167.

output of Quantum's dispatch model is also flawed and highly speculative." (Emphasis added)[654]

517. In its second expert report, the Respondent's expert continued to contest the valuation approach applied by the Claimant as well as the inputs,[655] but with regards to the Quantum America model, it maintained that the "fundamental problem" was that the output depended on the inputs given by Compass Lexecon.[656] Thus, the Tribunal understands that the Respondent's main objection was to the inputs provided by the Claimant.

518. Below, the Tribunal analyzes these variables.

Natural Gas as Input

519. For the gas model, the Claimant assumes that had Argentina not breached its treaty obligations (intervening the electricity market in the way it did), the natural gas market would have also remained governed by market-based principles to avoid scarcity. The Claimant supports its gas model by arguing that using the actual data would entail incorporating in the model the natural gas scarcity, which in turn would increase the overall cost of electricity for the system, as it resulted in the dispatch of plants that operated with liquid fuels (such as diesel oil turbines) or coal.[657]

520. As indicated by the Respondent, this dispute does not involve measures affecting gas and AES is not an investor in the gas sector. However, it cannot be

[654] Quadrant Economics First Expert Report, ¶ 171.

[655] Quadrant Economics Second Expert Report, ¶¶ 131-145, 220-313.

[656] Quadrant Economics Second Expert Report, ¶¶ 132 and 320.

[657] Abdala-Spiller Report, ¶ 127. "This is because, in such scenario, plants using expensive liquid fuels (diesel, gasoil, fuel-oil) would be determining the marginal cost of the system during a significant amount of time, replacing plants that otherwise would burn less-expensive natural gas. Natural gas shortages in the but for scenario would also create an allocation dilemma as to which thermal plants would have had preferential access to the scarce natural gas available for electricity generation purposes. Such allocation dilemma, unless dealt with by auctioning rights or freely executed bilateral contracts between buyers and sellers, would trigger arbitrary differentiations among generators, which would be contrary to a leveled economic playing field." ¶ 128.

denied that both natural gas prices and availability affect the variable cost of production for combined and other thermal power plants and even spot prices.[658]

521. The Tribunal notes that the Claimant also presented an alternative scenario, in response to the Respondent's critiques, which assumes that intervened natural gas prices (and availability, which includes scarcity, as it occurred in the actual scenario) interact with an un-intervened electricity market, but it leads to higher but-for prices.[659] While the Claimant contends that this is not the scenario it advocates for, it has presented it in order to show that considering the actual figures as they happened would lead to higher prices and thus, a higher liability. The Respondent has stated that such an alternative is "unreasonable" and "speculative" "due to the unrealistic results they produce in the marginal cost-based system devised by Compass Lexecon".[660] However, as indicated above, it is difficult to assess something when the challenge is not against the premises of a model but its result without another model or other parameters to compare it with.

522. The Respondent has criticized certain key inputs used by the Claimant on natural gas production, prices and exports, demand elasticity, capacity payments and additional generation capacity or reserve margin.

Gas Production

523. One of the main criticisms regarding the first input rests on the approach taken by the Claimant. The Claimant's model uses historical data based on government sources such as the Secretariat of Energy's *Prospectivas*. In particular, the SE *Prospectiva 2000* for production forecasts which reflects a long-term forecast

[658] "[…] a large portion of Argentine thermal plants were and still are natural gas-fueled, the price and availability of natural gas are key determinants in the merit order generators' variable cost of production, and thus on the setting of the uniform electricity spot price." "Approximately 95% of all fuel consumed for thermal generation during 2001 was natural gas." Abdala-Spiller Report, ¶ 61 and fn. 64. "This importance derives from the fact that a large portion of Argentina's installed capacity consists of natural gas-fueled thermal plants. Therefore, the Government's actions concerning the natural gas sector in the absence of the Measures would have significantly impacted the evolution of dispatch and spot prices". Abdala-Spiller Reply, ¶ 99.

[659] Claimant's PHB, ¶¶ 225, 226.

[660] Quadrant Economics Second Expert Report, ¶ 257, 258.

before the Measures and the *Prospectiva 2002* for export volumes before export curtailments were implemented.[661] The Tribunal notes that according to a revision made by the Secretariat of Energy in 2003, the production forecasts (while lower than those of *Prospectiva 2000*) were still higher than production in the actual scenario. The Tribunal also observes that for the first years, the actual scenario resembles the *Prospectiva's* forecasts, which start to depart by 2005. The Claimant's expert has explained the decline in proven reserves is due to the depression in basin prices and disincentivized new exploration. [662] The estimates are grounded on documents prepared by the Argentinean government.

524. Furthermore, according to the Claimant's expert, not contested by the Respondent, there was no "other long-term production forecasts of conventional natural gas made just before the Measures envisioning higher volumes than those forecasted by the SE in 2001".[663] The Respondent's expert has expressed its disagreement with the reasonability of those projections and indicated that "[t]he fact that the forecasts related to domestic supply of natural gas in the SE Prospectiva 2000 were close to actual domestic production volumes for 2002-2004 does not prove that they represent an accurate estimate of the domestic volumes that would have prevailed in a but-for scenario for 2005-2020 with any degree of certainty",[664] however, it has not explained why the reserve/production ratio followed by the Claimant's expert to continue the trend is not reasonable. Likewise, while the Respondent's expert explains that the assumptions of the *Prospectiva* are different from those applied by Compass Lexecon, as is the case with other variables, it did not provide an alternative long-term gas production forecast which, as indicated

[661] "We used the ratio of the reserve/production ratio that the Secretary of Energy had forecasted between 2001 to 2010, at the same trend to continue up to 2018. […] The supply that Prospectiva published is the best representation of what was expected under a system where the natural gas crisis were freely set by the demand and supply side. So it's a very important source of information that we had in order to forecast the but-for scenario as of the date when the measures started in January 2002." Day 8 Tr. (Eng), P2353:11-14; P2354:20-P2355:5 (Abdala).

[662] Abdala-Spiller Reply, ¶ 111 and Figure 8.

[663] Abdala-Spiller Reply, ¶ 112.

[664] Quadrant Economics Second Expert Report, ¶ 232.

above, might have been of assistance in assessing the reasonability of Claimant's data.

525. In consequence, the Tribunal finds the data provided by the Claimant to be reasonable.

Gas Prices

526. The Tribunal observes that the but-for natural gas prices are lower than those considered in a 2016 study by economists Hancevic, Cont and Navajas and a 2015 research report by Navajas.[665] Claimant's gas prices are lower than CAMMESA's reference prices for the closest natural gas substitutes (*i.e.*, gas oil, fuel oil, and coal).[666] In comparison with other benchmarks, Claimant's gas prices are overall also lower than natural gas import prices from Bolivia and lower than natural gas export prices from Bolivia to Brazil, the closest regional benchmark to Argentine natural gas.[667] The same occurs when using Arabian Light crude oil prices as parameter at least from 2002 to 2014. The Respondent has criticized each of the parameters presented by the Claimant and compared the scenario of its 2020 report with the methodology used in its 2003 projections.[668] It contends that "using reasonable, alternative projected export volumes eliminates Compass Lexecon's spikes in its projected but-for natural gas prices and reverts them back to the approach it followed in its 2003 analysis".[669] In response to whether he had offered an opinion as to which natural gas price would apply in the but-for scenario if accepted, the Respondent's expert indicated at the hearing that:

> "I have proposed better estimates of natural gas prices in my second report, in which I eliminate these abnormal spikes in gas prices due to the scarcity

[665] The former on subsidies in the energy sector, analyzing the Government's intervention of the natural gas and electricity prices. Abdala-Spiller Reply, ¶¶ 105, 106 and Figure 4. *See also* Hancevic, Pedro, Walter Cont, and Fernando Navajas. 2016. "Energy populism and household welfare." Energy Economics, Vol. 56. May 2016, pp. 468-469, **AES Ex. 658** and Navajas, Fernando. 2015. "Subsidios a la energía, devaluación y precios." *Fundación de Investigaciónes Económical Latinoamericanas*, fn. 9, **AES Ex. 642**.

[666] Abdala-Spiller Reply, ¶ 107 and Figure 5. *See also* Updated CAMMESA Data Compilation, **AES Ex. 740** and Compass Lexecon Updated Natural Gas Model, **AES Ex. 756**.

[667] Claimant's PHB, ¶ 227; Abdala-Spiller Reply, ¶¶ 108-109 and Figure 6.

[668] Quadrant Economics Second Expert Report, ¶¶ 242-255.

[669] Quadrant Economics Second Expert Report, ¶ 131.

> created in the Compass Lexecon model. I think at the very least, the first step would be to remove that artificial scarcity. […] But even if you do that, that still would not be something that I could say to the Tribunal, I'm very confident that that's what would have happened but for all the measures going back two decades […] I think given all the evidence and given the facts of this case, I do not think we can go back and imagine that. The whole--going back and doing with the point estimate that we could offer to the Tribunal in, like, this is what would have happened. We cannot do that."[670]

527. In the Tribunal's view, the Respondent's expert appears to take issue with the Claimant's model whenever the model produces what he calls "abnormal spikes" in gas prices. However, it failed to explain why, in particular the "abnormal spikes" in question in gas prices are incorrect, aside from the fact that they result in high gas prices. In light of this, and considering the evidence of Claimant's experts, the Tribunal concludes that the Claimant's but-for natural gas prices are reasonable.

Gas Exports

528. Regarding gas exports, and as mentioned above, the Claimant's expert has used the Secretariat of Energy's *Prospectiva* 2002 (the latest forecast before export curtailments began in 2004[671]) and extended its forecast by assuming that, upon expiration, the Government would have approved the renewal of at least 50% of the maximum export volume authorized in the original permits. It did not consider new natural gas export permits or additional exports from short-term contracts.[672] The level of exports forecasted by the Secretariat of Energy "was based not only on the permits already granted but was also consistent with the trend of natural gas exports from Argentina since exports began in 1997".[673]

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[670] Day 8 Tr. (Eng), P2583:17-22; P2584:4-7, 16-22 (Flores).

[671] See SE Resolution 265/2004, Article 1, **AES Ex. 235** and Abdala-Spiller Reply, fn. 333.

[672] Abdala-Spiller Reply, ¶¶ 252-256. "When combined with the estimate of natural gas production in the but-for scenario, natural gas exports reach a maximum of 21% of total production in 2011, then drop to 12% by 2020 (given the assumption that renewals involve only 50% of export contracts." "[…] when the SE issued an export permit, it meant that the export contract met the administrative and technical requirements based on projections of the natural gas market and that Argentina had the necessary reserves to sustain domestic supply and export commitments in the long term." ¶ 257.

[673] Abdala-Spiller Reply, ¶ 256. The export permits never reached their maximum volumes. See Quadrant Economics First Expert Report, ¶ 117.

529. According to the Respondent, "it would be far more reasonable to assume" that "Argentina would try to avoid natural gas scarcities domestically and limit the amount of exports to supply the domestic demand, as it did in the actual world, in which the same export permits were in place but never reached their maximum volumes". The basis for this assertion is an excerpt of the Hydrocarbons Law which provides that permit holders and concessionaires would "contemplate the interest of the internal market".[674] The Tribunal does not consider that the excerpt pointed at by the Respondent constitutes enough foundation for the assumption that exports would be limited. In the Tribunal's view, the forecasts presented by the Claimant as well as the trend of exports are reasonable.

Price Elasticity

530. Regarding price elasticity of demand, the Claimant's experts have proposed a price elasticity adjustment of -.20 based on an empirical market analysis by Casarin and Delfino (2011). According to the Claimant, in a 2008 study, evaluating the impact of social tariffs on energy consumption in certain regions of Argentina, economists Cont, Hancevic, and Navajas used a range of -0.23 to -0.24 price elasticity parameters for electricity consumption, in a context measuring price increases,[675] and another study focused on Latin America, concludes that the price elasticity of electricity demand is lower in Latin America than in OECD countries, finding that long-run elasticity estimates for Latin American countries are, on average, -0.25.[676] In the Tribunal's view, the Respondent's objections to these analysis based on a declaration of AES's 2017 bond prospectus do not put into question the seriousness of those examinations which are also specific to Argentina and Latin America. Additionally, and as pointed by the Claimant, "the effect of a price increase in a plant's electricity demand can differ substantially from that of the market".[677]

[674] Quadrant Economics First Expert Report, ¶ 117.

[675] Abdala-Spiller Reply, ¶ 66.

[676] Abdala-Spiller Reply, ¶ 74.

[677] Abdala-Spiller Reply, ¶ 71.

Capacity Payments

531. With regard to capacity payments, the Claimant's experts explain that "[c]apacity payments must provide incentives to invest at the time that the but for system requires expansion to avoid energy shortages".[678] The Tribunal has determined *supra* that generation capacity availability related to the concept of unsupplied energy means that capacity is available at the time needed to avoid shortages in the future, and thus, ensure a long-term supply of electricity.[679] Long-term supply is one of the objectives of the electricity national policy established in the Electricity Law. The Claimant's experts adjusted the AR$12/MWh capacity payment that was in place in 2002 to account for domestic inflation until 2011 and afterwards, they calculated the required level of capacity payments of an average greenfield thermal plant beginning operations in 2013, to ensure that its IRR ("internal rate of return") was at least equal to its WACC.[680] According to the Claimant's experts, a level of capacity payments of US$ 11.4 per MW is required from 2013 onwards, which is close to the US$ 10 per MW capacity payments that were in place prior to the Measures.[681]

532. The Tribunal observes that the Claimant's experts' hypothetical exercise is based on the parameters for the investment required to install a medium size (845 MW) combined cycle natural gas plant like Paraná, which was the newest plant in the system in 2002. Then, it uses Paraná's but for energy spot prices and fuel and variable operation and maintenance costs (O&M) to calculate the IRR of the project.

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[678] Abdala-Spiller Report, ¶ 153.

[679] The Tribunal observes that the ENRE would seem to understand capacity as also future capacity when indicating how the consumer is to be protected: "The legislator refers to the current user and the future user. It is the one who receives a satisfactory service today and the one who must be guaranteed to receive it tomorrow because the corresponding provisions are made in terms of stimulating the supply, the capacity and quality of transport as well as the quality and capacity of distribution." (Unofficial translation). ENRE, El informe eléctrico, cinco años de regulación y control 1993 – Abril – 1998, 1998, **AES Ex. 132**, p. 11.

[680] Abdala-Spiller Report, ¶¶ 154-156. Claimant's experts indicate that in the but-for scenario there would be need for additional thermal capacity by 2013.

[681] Abdala-Spiller Report, ¶ 157.

533. While the Respondent disagrees with the Claimant on the function of capacity payments, its expert agreed that to ensure sufficient supply in the future it is necessary to stimulate electricity supply, investments and "to do that, you need to build new plants or expand existing plants," which in turn means that, "to invest in new capacity, an investor will incur capital costs."[682] Contrary to the Respondent's arguments, the capacity payment proposed by the Claimant has a reasonable basis, in particular, the investment required to install a medium size combined cycle natural gas plant. It is not arbitrary or illogical. The Tribunal also notices that these levels do not differ from the ones established before the Measures.

534. The Respondent also argues that the Argentine legislation does not provide a guaranteed rate of return to electricity generators and that Compass Lexecon had computed different but-for capacity payments in its 2003 report.[683] The Tribunal has already expressed that the foundation of the claims submitted initially has changed and, in consequence, also the valuation presented by the Claimant. The calculation of capacity payments as provided in 2003 cannot be transposed to the circumstances that are at issue here.

535. As to the guaranteed rate of return, the Tribunal agrees that using the methodology applied by the Claimant in a competitive market, "sets the right incentives for efficient new generation capacity investments. It is not, however, equal to setting a guaranteed rate of return for any electricity generator." As the Claimant's expert indicates: "The actual investment recovery of both new and existing plants depends on the type of plant, the level, and the timing of new entrants. It also depends

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[682] "So basically, you agree that it would be fair to say that when you talk about proteger al usuario (In Spanish), protect the user, it's not just about today's user, it's about ensuring that sufficient capacity to protect tomorrow's user. Would you agree with that? A. Generally, yes. Q. Thank you. To protect future users, we need to ensure that there will be sufficient supply in the future; correct? A. Yes. Q. That's done by stimulating electricity supply or generation, stimulating investment in. A. Yes. Q. And to do that, you need to build new plants or expand existing plants; correct? A. Yes. Q. Now, to invest in new capacity, an investor will incur capital costs; correct? A. Yes. Q. And the investment--the investor will usually seek to amortize that investment over a relatively long period of time, up to say, 30 years? A. Yes. It could be more or less than 30 years, but yes, a long period of time." Day 8 Tr. (Eng), 2550:10-2551:13 (Flores).

[683] Quadrant Economics First Expert Report, ¶¶ 147-157. Quadrant Economics Second Expert Report, ¶¶ 286-295.

on the success of the greenfield project subject of the test, *i.e.,* the plant's actual performance, the realization of market expectations, the ability of the investor to undertake the project at an investment cost similar to that considered in the investment test, and other factors such as the plant location in the grid."[684]

536. In addition to this, while the Respondent has made an argument on the Claimant picking provisions from Resolution 246/2002 by calculating capacity payments based on availability rather than dispatch, the Tribunal agrees that linking capacity payments to dispatch could create distortions. The Claimant's expert has also indicated that "the remunerated capacity for the AES plants that had been operating in the domestic market before 2002 […] did not change materially due to this change after 2002".[685]

537. In light of the above, considering the totality of the evidence and in particular the totality of the expert evidence, the Tribunal considers that the capacity payments level calculated by the Claimant's expert is reasonable.

Reserve Margin

538. The Claimant has calculated a 25%-30% reserve margin for additional generation capacity. According to the Claimant, a margin of 20%-30% has been considered as robust and safe, and more importantly, Argentina has used a 20% reserve margin as a target for long-term projections[686] and from 2006-2017 its

[684] Abdala-Spiller Reply, ¶¶ 89-92. "For example, had we considered the investment costs of the FONINVEMEM plants informed by Mr. Gallo Mendoza (US$ 838,727 per each MW installed), instead of the base case assumption of US$ 582,854 per MW installed, the resulting IRR of the greenfield plant would be 5% with the capacity payments in our but-for scenario. To make such a plant obtain an IRR equal to the cost of capital, our but-for capacity payments would need to be US$ 20.9 per MWh from 2011 onwards, or 84% higher." See fn. 125.

[685] "In any case, the remunerated capacity for the AES plants that had been operating in the domestic market before 2002 (i.e., Alicurá, San Nicolás and AES Juramento) did not change materially due to this change after 2002, as it totaled 3,842 GWh in 2001, 3,369 GWh in 2002 and 3,615 GWh in 2003." *See* Abdala-Spiller Reply, fn. 106 and Updated CAMMESA Data Compilation, "Remunerated Capacity" worksheet, **AES Ex. 740**.

[686] "In addition to the entry of the predefined thermal projects, the system requires the incorporation of firm power that ensures a reserve margin of 20%." (Unofficial translation). Ministry of Energy and Mining. "Escenarios Energéticos 2030." December 2017, **AES Ex. 574**, p. 50.

reserve margins have ranged between 24% and 30%.[687] The Respondent has argued that the concept of reserve margin is not related to the investment decision process made by the private sector, that Compass Lexecon seems to assume that the government sets the total capacity in the system to keep a desired reserve margin, that it only projects that new capacity comes from thermal plants and that the margins proposed are arbitrary.[688]

539. At the outset, the Tribunal also agrees that "[t]he system must hold reserve margins capable of handling demand growth and unexpected changes in supply and demand and prevent blackouts, both in the present and future."[689] This is in fact one of the objectives of the national policy established in Article 2 of the Electricity Law: "To promote the competitiveness of electricity production and demand markets and *encourage investments to ensure long-term supply*".[690] The Tribunal also notes that Claimant's model does not consider only thermal plants, but also renewables, hydro and nuclear capacity as it occurred in the actual scenario. More importantly, Argentina's actual reserve margins have ranged between 24% and 30% and the government has indicated a 20% as a target for long-term projections.[691] The Respondent's arguments do not put into question the validity of these data and the Respondent's expert has not pointed this Tribunal to an appropriate reserve margin other than indicating that "[a] scenario in the absence of the Measures should reflect reserve margins that are not lower than the 40% margins observed in the Actual Scenario before the Measures".[692]

540. In light of the above, the Tribunal finds that the proposed margin is reasonable.

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[687] Abdala-Spiller Report, Figure 15.

[688] Quadrant Economics First Expert Report, ¶¶ 160-167. Quadrant Economics Second Expert Report, ¶¶ 304-313.

[689] Abdala-Spiller Reply, ¶95.

[690] Electricity Law, Article 2. Unofficial translation. Emphasis added.

[691] Abdala-Spiller Report, Figure 15 and Ministry of Energy and Mining. "Escenarios Energéticos 2030." December 2017, **AES Ex. 574**, p. 50.

[692] Quadrant Economics Second Expert Report, fn. 514.

541. Overall, on the totality of the evidence, the Tribunal finds that the inputs or assumptions in which the Claimant's valuation model is grounded are reasonable. Next, the Tribunal will assess whether the application of a discount rate to the cash flows or an adjustment for uncertainty is needed.

Application of a Discount Rate or Adjustment for Uncertainty

542. As to the estimated cash flows, the Respondent contends that the application of a discount rate is needed. The Respondent refers to the World Bank Guidelines on the Treatment of Foreign Direct Investment and submits that the determination of the market value of the subject investment will be deemed reasonable if calculated on the basis of the discounted cash flow value (for a going concern with a proven record of profitability). In this sense, it indicates that while in the 2003 valuation the alleged losses were calculated through a variation of the discounted cash flow method, the Claimant now applies the WACC to update differences to the new valuation date, therefore, the Claimant wrongly assumes that the but-for scenario's cash flows (which are conjectural) would have occurred with absolute certainty[693]. "If but-for cash flows are discounted as of 31 December 2001 at a rate equal to AES's WACC […] the nominal amount of damages claimed for energy and capacity decreases by 69% […] Alternatively, Flores proposed applying an uncertainty adjustment to the but-for cash flows: applying just a 1% discount to cash flows, nominal damages for energy and capacity decrease by 41%; similarly, a mere adjustment of 3% reduces the energy and capacity nominal damages to zero".[694]

543. The Claimant indicates that "[a] discount rate, by definition, serves to convert expected future cash flows back to present value as of the date of the valuation", therefore "a discount rate only applies to projected cash flows that post-date the valuation date".[695] In this sense, the Claimant submits that the suggested approach is

[693] *See* Respondent's Updated Counter-Memorial, ¶¶ 793, 794, 863-867; Respondent's Rejoinder Memorial, ¶¶ 910-913.

[694] Respondent's PHB, ¶ 275.

[695] Claimant's Reply Memorial, ¶ 525.

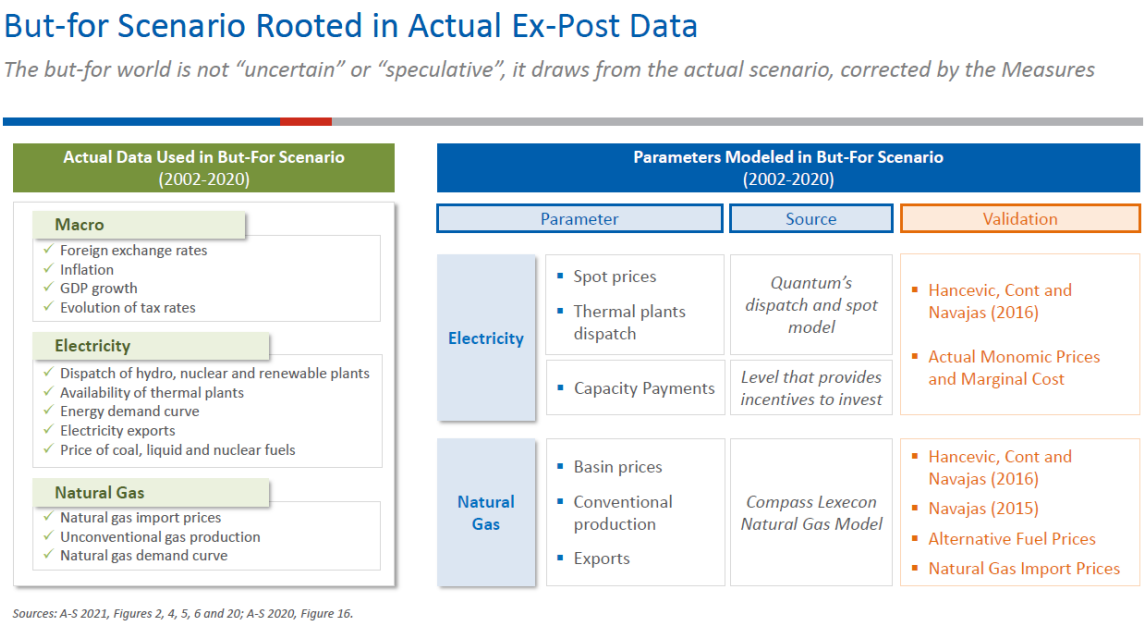
flawed "given that reliance on hindsight necessarily removes the business risks associated with forward-looking projections."[696] In addition to this, it claims that the proposal to discount AES's actual historical cash flows despite the fact that they occurred with 100% certainty is another example of the Respondent's flawed analysis.[697]

544. While it is true that the Claimant's damages valuation is "heavily based on actual historical data and economic variables known as of 2020",[698] the Tribunal observes this is a model which tries to predict the interaction of macro variables (for instance, inflation, GDP growth, evolution of tax rates) with particular variables of the complex electricity sector applicable to this dispute (for instance, spot prices, capacity payments, exports, demand) in relation to a specific and evolving legal regime affecting all areas of the electricity sector and which was applied for a span of almost 20 years.

[696] Claimant's Reply Memorial, ¶ 528.

[697] Claimant's Reply Memorial, ¶ 529. The Claimant indicates that Respondent's proposal to discount the gross margins at the 18.25% WACC rate both for the but-for and the actual scenario defies logic since the actual scenario occurred with a 100% certainty. It also alleges that the alternative uncertainty adjustments to the but-for cash flows are meritless since: i) the 2.17% figure applied to AES's but-for cash flows yield the same result than applying the 18.25% WACC rate discount to AES's but-for margins, ii) the 2.17% figure only back-engineers its 18.25% WACC to produce the same result as the hybrid approach, iii) it is also flawed by applying a discount rate to cash flows that rely on actual data, which would also result in the same elimination of 83% of AES's damages, and iv) there are no authorities supporting such adjustments. Claimant's PHB, ¶¶ 210- 220.

[698] Claimant's PHB, ¶ 211.



Direct Testimony on Quantum Presentation, slide 8.

545. Thus, although as mentioned before, the Claimant's model is grounded on solid data, the Tribunal agrees with the Respondent that the uncertainty inherent in the interaction of so many economic and legal variables over such a long period of time needs to be accounted for.[699]

546. The Respondent proposes two ways to address this. The first is to discount to 31 December 2001, at a WACC of 18.25%, Claimant's nominal estimates of the alleged economic impact of the Measures.[700] That is to apply a WACC of 18.25% to discount the incremental cash flows. To the Tribunal the problem with this approach is that, as the Claimant contends, "a discount rate, by definition, serves to convert

[699] "Nevertheless, other uncertainties in the But For Scenario do not dissipate with the benefit of hindsight, as they are directly related to the assumptions underpinning a hypothetical scenario in the absence of the Measures. These include the economic and social consequences of substantially increasing the electricity prices of an entire country for two decades, among other differences, as noted above. Thus, when Compass Lexecon refers to 'forecasts,' it ignores that the But For Scenario must be adapted to remove the effect of the Measures, thereby divorcing it from actual outcomes. In other words, the cash flows in the But For Scenario are forecasts, predictions or estimations, not outcomes that actually occurred in the past. Thus, it is incorrect to assume that but-for cash flows are known with 100% certainty, especially when evaluating a hypothetical world in which there are significant countrywide changes to a fundamental part of a country's economy spanning a 19-year period." Quadrant Economics Second Expert Report, ¶ 142.

[700] Quadrant Economics First Expert Report, ¶ 66. *See also*, Quadrant Economics Second Expert Report, ¶¶ 151-154 and **QE−83**, Uncertainty Adjustment to CLEX Damages, tab "1 - Incremental CF Approach."

expected 'future cash flows' back to present value as of the date of the valuation,"[701] an exercise that is totally inapposite in the present case. Furthermore, the Tribunal agrees with the Claimant that "to discount at the 18.25% WACC rate the gross margins of *both* the but-for and actual scenarios, even if the actual scenario occurred with 100% certainty […] defies logic".[702] Thus, the Tribunal cannot accept this approach.

547. The other proposal is what the Respondent characterizes as "uncertainty adjustment". According to its expert, under this alternative "instead of discounting the incremental cash flows, one would apply a compounding adjustment factor to the but for cash flows."[703] The Claimant takes issue with this approach and contends that the Respondent's expert simply "back-engineered" the methodology trying to achieve the same result when proposing that a 2.17% adjustment for uncertainty would be equal to using the DCF approach. Moreover, the Claimant also disputes that there is no "single authority" which supports this adjustment.[704]

548. The Tribunal observes that the Claimant's contention is that the adjustment is incorrect because at a certain level (*i.e.* 2.17%) it arrives at the same result as the DCF option. However, the Claimant or its expert does not dispute the arithmetical correctness of this methodology. Furthermore, the fact that there is no authority for its use does not automatically render the adjustment inappropriate or inapplicable. The Tribunal has a duty to issue a ruling of this case on its own merits. As mentioned above, the Tribunal considers that given the unique factual pattern of the model and the particular and complex circumstances of this case, an uncertainty adjustment is warranted.[705] The Tribunal considers that while the amount of this adjustment should

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[701] Claimant's PHB, ¶ 212.

[702] Claimant's PHB, ¶ 212.

[703] Quadrant Economics Second Expert Report**,** ¶ 155.

[704] Claimant's PHB, ¶¶ 217-220.

[705] "…at times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of efficiency or savings of expense .... This will generally be the case if the trial follows quickly after the issue of the patent. But a different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy.

account for the uncertainty, it should not disregard the fact that the inputs and methodology put forward by Claimant are reasonable. For this reason, the Tribunal finds adequate to apply an uncertainty adjustment of 1.25%. The total amount of damages, as of December 31, 2020, for the Measures is US$312.9 million[706].

B. Measures Affecting Withheld Revenues

i. The Claimant's Position

549. The Claimant requests damages resulting from withheld revenues, concerning Argentina's failure to pay US$514 million due to AES Argentina between 2004 and 2017 for electricity produced. The Claimant indicates that the collection of accrued revenues relates to two periods: i) January 2004 to January 2013 (related to the FONINVEMEM programs), and ii) February 2013 to January 2017 (related to Resolution 95/2013 and the concepts of "additional remuneration" and "remuneration for non-recurring maintenance").[707]

550. Claimant's expert calculated the present value of these withholdings (net of repayments) at the WACC rate, which "reflects the minimum return that AES would have requested to willingly participate in an investment project in Argentina's power sector."[708] The damages are updated to the valuation date and any expected future revenues are discounted.[709] AES's promised equity stake is assessed as a contingent

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Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within." *Sinclair Ref. Co. v. Jenkins Petroleum Co., 289 U.S. 689, 698-99,53 S. Ct. 736,77 L. Ed. 1449 (1933)* Cited in **QE−120**, Michael J. Wagner, Michael K. Dunbar, and Roman L. Weil, "Litigation Services Handbook: The Role of the Financial Expert," "*Ex Ante* Versus *Ex Post* Damages Calculations, 4th ed. (John Wiley & Sons, 2007), p. 8.18.

[706] QE−83, Uncertainty Adjustment to CLEX Damages,

[707] Claimant's Updated Memorial, ¶¶ 430, 431.

[708] Claimant's PHB, ¶ 249, Abdala-Spiller Reply, ¶ 134. The Claimant argues that "forcefully withholding AES's revenues, and repaying them at nearly risk-free rates that are lower than Argentina's own cost of borrowing, clearly damaged AES." Claimant's Reply Memorial, ¶ 579. *See also* Compass Lexecon Updated Delayed Payments Model, **AES Ex. 755**.

[709] Claimant's Updated Memorial, ¶ 433. "we discount expected repayments after 2020 to the December 31, 2020 date of valuation using the WACC as of 2020 (9.7%)". *See* Abdala-Spiller Reply, fn. 262 and Compass Lexecon Updated Delayed Payments Model, **AES Ex. 755**.

property right.[710] The total amount of damages, as of December 31, 2020, for withheld revenues calculated by Claimant's experts is US$403 million.[711]

ii. The Respondent's Position

551. The Respondent contends that Claimant's calculation is flawed. In particular, it indicates that repayment commitments have been honored and will continue to be honored; therefore, AES has collected most of the accrued revenues with the interest and return.[712] In the Respondent's view, this is essentially a claim for additional interest and the Claimant has not proved the opportunity cost of the withheld funds.[713]

552. It also argues that the WACC is incorrectly applied to the net cash flows, compounding it over time and that the total cash flows do not include the value of the equity stakes to be received. The Respondent adds that if the Claimant had really considered its stake in the plants to be worthless then it would have left its interests in Argentina, that the plants in which it holds stakes have already reported profits and they have a positive value which should be discounted from any compensation.[714]

iii. The Tribunal's Analysis

553. Claimant's expert has indicated that "[a]s of December 31, 2020, AES has recovered US$ 453 million including interest, which is US$ 61 million less than the US$ 514 million of accrued revenues withheld, even though 16 years have elapsed since the Government began withholding AES's payments."[715] The Tribunal agrees that the Measures affecting withheld revenues "are related to the use of cash that

[710] Claimant's Updated Memorial, ¶ 434; Claimant's Reply Memorial, 580.

[711] Claimant's Reply Memorial, ¶ 12 and Claimant's PHB, ¶ 259.

[712] The Respondent also indicates that the generators that entered into the FONINVEMEM programs agreed to specific interest rates and conditions, which have been applied, thus, there are no damages related to accrued revenues. Respondent's Rejoinder Memorial, ¶ 991.

[713] Respondent's PHB, ¶¶ 286, 287.

[714] Respondent's Updated Counter-Memorial, ¶¶ 842-848; Respondent's Rejoinder Memorial, ¶¶ 984-995; Respondent's PHB, ¶¶ 288, 289.

[715] Abdala-Spiller Reply, ¶ 132.

[AES] did not have, and that it would have had a higher yield if [AES] had had it,"[716] therefore, Respondent's argument that repayment commitments have been honored and will continue to be honored is of no consequence.

554. The Tribunal also agrees that "[b]y repaying generators a low interest under undefined maturity terms, however, the Government obtained forced financing from generators at a rate lower than the Government's borrowing cost. […] [n]early risk-free interest rates were not available in the Argentine market."[717] Therefore, the Tribunal cannot agree that the economic impact only relates to the rate at which the interest was paid since ultimately the nominal amount plus interest will be paid.[718]

555. While the Respondent's expert disagrees with the use of the WACC and has indicated that the Claimant is "creating artificial losses" by incorrectly applying it,[719] the Tribunal observes that he did not indicate what would be the applicable interest rate to compensate for the lack of funds during the period of time they were withheld, other than referring back to the FONINVEMEM programs, nor what would have been the appropriate methodology to account for the time value of money of the revenues withheld.[720] Respondent's silence in this regard fails to contest the reasonability of Claimant's proposed methodology and the core of its argument which is not grounded on ultimately receiving the payments.

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[716] Day 9 Tr. (Eng), P2725:10-12 (Abdala). "Those alleged losses are only about which interest rate should apply." (emphasis omitted) Flores Direct, p. 53. "A. It's a dispute. Compass Lexecon assesses damages only because, they said in the counterfactual, they would have had higher interest rates than they actually had." Day 8 Tr. (Eng), P2683:18-21 (Flores).

[717] Abdala-Spiller Reply, ¶¶ 136, 137 and Figure 10. Also: "the interest paid by CAMMESA on the withholdings was significantly lower than market loan rates and AES's cost of funds in Argentina". ¶ 139.

[718] "AES has collected most of the accrued revenues, including interest. […] Therefore, Compass Lexecon's alleged economic impact related to the collection of accrued revenues is ultimately only about the rate at which interest was paid on the amounts contributed to the FONINVEMEM […] Once repayments start, which include the nominal amounts plus interest, the amounts due to AES shrink. By 2026, the year the third FONINVEMEM program will be fully repaid, the total cash flows to AES are equal to positive US$ 178.5 million. That is, thanks to the interest payments, AES will net US$ 178.5 million on top of all the collected accrued revenues". First Quadrant Economics Expert Report, ¶¶201, 203.

[719] Quadrant Economics First Expert Report, ¶ 204.

[720] "Q. Okay. And you hadn't offered any alternative valuation? A. No. I have not seen any contemporaneous documents. […] Q. I want to make sure you haven't offered any other way for the Tribunal to assign a value to those withheld sums? A. That's correct; I have not seen any basis to calculate interest with anything other than what was reflected in the FONINVEMEM agreements." Day 8 Tr. (Eng), P2684:7-11; P2685:1-6 (Flores).

556. In this sense, the Tribunal agrees that a reasonable approach to calculate the value of the withholdings is AES's opportunity cost of funds in Argentina measured by the WACC.[721] Thus, the Tribunal finds that as of December 31, 2020, the amount of damages from the Measures affecting the collection of accrued revenues is US$403 million.[722]

C. Update Factor for Passage of Time/Interest

i. The Claimant's Position

557. With respect to the Measures, the Claimant posits that it is entitled to an award of interest to be made whole since over two decades have passed since Argentina first breached its Treaty obligations during which time its damages continued to accumulate.[723] In particular, the Claimant submits that the most appropriate interest rate is one that fully considers the opportunity cost to AES of being deprived of the funds owed, *i.e.*, AES's WACC of 11% between 2002 and 2020 and requests interest to be compounded annually.[724] In Claimant's view, the risk-free rate proposed by the Respondent is not appropriate since AES was and continues to be exposed to the commercial and financial risks related to the power generation assets' operation and for years during the historical period, risk-free rates did not cover the rate of inflation of the U.S. dollar.[725]

558. In addition to this, the Claimant alleges that it is entitled to interest during the suspension period. The Claimant argues that the purpose of an award of interest is to account for the delay in receiving compensation, regardless of the reasons for the delay; that AES relied on Argentina's promises and agreed to suspend the arbitration

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[721] "The WACC reflects the minimum return that AES would have requested to willingly participate in an investment project in Argentina's power sector." Abdala-Spiller Reply, ¶ 134.

[722] Abdala-Spiller Reply, ¶ 195. Exhibit AES Ex. 755.

[723] Claimant's PHB, ¶ 253.

[724] The Claimant relies on a "current trend in investment arbitration towards awarding compound interest" and also contends that "the role that Argentine law plays in this dispute is to establish the network of rights and obligations to which AES was subject upon making its investment. Argentine law provisions on interest […] had no bearing on AES's decision to agree to invest in Argentina […] Argentine law is irrelevant in assessing the computation of interest on the Award to which AES is entitled." Claimant's Reply Memorial, ¶¶ 588-590.

[725] Claimant's PHB, ¶ 254; Claimant's Reply Memorial, ¶¶ 591-595, 597.

for 13 years but Argentina never fulfilled those promises; that not granting interest during the suspension would reward Argentina for its bad behavior and that AES made, in good faith, an effort to reach an amicable solution, thus, not granting interest would create a perverse outcome in which parties would be reluctant to pursue negotiations if by so doing they risked losing the opportunity to be made whole if settlement talks fail.[726]

559. Finally, AES requests that the Tribunal awards post-Award interest on the total amount of the Award until the date of satisfaction of the Award, calculated on the same basis as pre-award interest.[727]

ii. The Respondent's Position

560. The Respondent contends that if the Tribunal were to determine that interest should be paid, it should not be computed over the arbitration suspension period. In its view, the Claimant seeks to benefit from the time elapsed since the arbitration was first suspended in 2005 and the award of interest should take into account the particular circumstances of each case and the parties' conduct, in this case, that the suspension was decided by the Claimant.[728] The Respondent argues that this is an abusive claim whereby AES intents to obtain a double benefit, *first*, the benefit obtained from participating in the agreements for more than 10 years (receiving interest) and, *second*, the award of more interest for the suspension, a time in which it decided to take advantage of the benefits offered to it. The Respondent emphasizes also that the Claimant had at all times the possibility to resume the proceeding.[729]

561. In addition to this, the Respondent advocates for a risk-free rate and simple interest. As to the interest, it submits that under international law, the rule is to award simple interest and compound interest may only be awarded in exceptional cases, which have not been alleged in this case. The Respondent also alleges that Argentine

[726] Claimant's PHB, ¶¶ 255-258; Claimant's Reply Memorial, ¶¶ 582-586.

[727] Claimant's Updated Memorial, ¶ 447; Claimant's Reply Memorial, ¶ 587.

[728] Respondent's Updated Counter-Memorial, ¶¶ 868-874.

[729] Respondent's Rejoinder Memorial, ¶¶ 996-1000, 1004; Respondent's PHB, ¶¶ 282-285.

law proscribes compound interest except in extraordinary circumstances that are expressly set forth (pursuant to section 623 of the Argentine Civil Code and section 770 of the Argentine Civil and Commercial Code in force since 1 August 2015), therefore, it submits that according to Article 42(1) of the ICSID Convention, the payment of compound interests should be rejected.[730]

562. Finally, the Respondent argues that WACC is not an interest rate, but one possible variation of the discount rate, not used in financial transactions and not consistent with the notion of "interest at a commercially reasonable rate", and that a potential compensation, if applicable, should be updated at a short-term, risk-free rate, such as the 1-year US Treasury Bills.[731]

iii. The Tribunal's Analysis

563. The Tribunal will address the Parties' arguments on: i) the interest rate applicable, ii) whether interest should be calculated for the period during which the proceeding was suspended and iii) the post award interest.

a. Interest Rate

564. The Parties disagree on the appropriate interest rate to be applied. While the Claimant advocates for a rate that considers the opportunity cost of being deprived of the funds owed, and more specifically, it proposes AES's WACC of 11% between 2002 and 2020, the Respondent posits that a potential compensation should be updated at a short-term, risk-free rate, such as the 1-year US Treasury Bills.

565. The Tribunal begins by stating that the circumstances of every case inevitably influence the analysis that a tribunal must carry out and the determination of interests is no different. The Tribunal recalls that the commentary to Article 38 of the Articles

[730] Respondent's Updated Counter-Memorial, ¶¶ 876-881; Respondent's Rejoinder Memorial, ¶¶ 1005-1009.

[731] Respondent's Updated Counter-Memorial, ¶¶ 882-894; Respondent's PHB, ¶¶ 279-281. The Respondent also argues that "[b]y incorrectly using the WACC or the cost of borrowing for the calculation of interest, the total amount claimed increases exhorbitantly", that "Compass Lexecon experts have supported the use of risk-free rates in other cases" and that "the tribunal hearing the case *Total* […] rejected that the interest rate should reflect the risk arising from the fact that the claimant retains its shareholdings". See in general, Respondent's Rejoinder Memorial, ¶¶ 1010-1026.

on the Responsibility of States for Internationally Wrongful Acts indicates that "[t]he awarding of interest *depends on the circumstances of each case*; in particular, on whether an award of interest is necessary in order to *ensure full reparation*" and "[t]he interest rate and mode of calculation are to be set so as to achieve the result of providing *full reparation* for the injury suffered […]."[732] Therefore, the interest rate applicable should be based on the circumstances of this particular case as well as on achieving full reparation. For example, although the Respondent did not put forward an applicable interest rate specifically for the withheld revenues, the assessment in the case of withheld revenues should be different since the breach related precisely to the fact that funds which should have been received were withheld from it.

566. The Treaty does not specifically address the means of determining compensation for breaches other than for expropriation. Article IV of the Treaty indicates that in cases of expropriation or nationalization, compensation shall include interest at a "commercially reasonable rate". The Treaty does not define what must be understood by "commercially reasonable", yet in its ordinary terms the Tribunal understands it to mean a rate of interest which makes commercial sense, viewed as including the generation of profits, in the typical course of business activity[733] and which is in accordance with reason, not extreme or excessive, fair.[734] In other words, not arbitrary.

567. The Claimant contends that risk-free rates are not "commercial rates". In particular, that "[b]usinesses do not have access to long-term financing at risk-free rates" and "are required to borrow money at much higher costs".[735] As to the first argument, while Article IV is applicable to expropriations, in the Tribunal's view, it

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[732] ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Article 38, Commentary (7) and (10). (Emphasis added).

[733] "[O]ccupied with or engaged in commerce or work intended for commerce; of or relating to commerce; characteristic of commerce; viewed with regard to profit; designed for a large market; emphasizing skills and subjects useful in business […]". [C]ommercial". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/commercially 02 October 2024.

[734] [R]easonable". *Merriam-Webster.com*. 2024. https://www.merriam-webster.com/dictionary/reasonable 02 October 2024.

[735] Abdala- Spiller Reply Report, ¶ 152 and Claimant's Reply Memorial, ¶ 595.

provides a point of reference and context as to how should interest on compensation be. Therefore, this reference should not be automatically disregarded.

568. In relation to the second argument, the Tribunal is not convinced that AES's WACC should be used as an interest rate applicable to the overall damages awarded, particularly when the use of its WACC results in an exponentially increased interest.[736] The Respondent's expert indicates that "from an economic point of view, commercial interest rates can be defined as interest rates that are generally available to investors" and "[t]he difference between yields observed in financial markets relates to risk, with riskier loans carrying higher interest rates than risk-free loans."[737] The Tribunal agrees in general with these statements as well as with Respondent's view that "the function of interest […] is to compensate for the time value of money rather than remunerating the risk".[738] Moreover, in the Tribunal's view, Claimant's argument that businesses are required to borrow money at much higher costs does not on its own necessarily render the U.S Treasury Bills proposed by the Respondent "not commercially reasonable".

569. According to the Claimant, a risk-free rate would not provide full reparation since AES was and still is exposed to commercial and financial risks. The Tribunal considers that while AES was subjected to certain measures that breached Argentina's obligations under the Treaty, the Claimant had the possibility at any point in time to initiate and to resume its arbitration proceedings, yet it chose to suspend the procedure on account of negotiations for a significant period of time. The Tribunal cannot opine on whether those negotiations were leading somewhere from

[736] Quadrant Economics Second Expert Report, Figure 15.

[737] Quadrant Economics First Expert Report, ¶ 180 and Quadrant Economics Second Expert Report, ¶ 189. See also "Since a damages award is not exposed to business or lending risk, the yield of 6-month or 1-year U.S. Treasury bills constitutes a reasonable commercial rate in this context. Interest on compensation ought to be based on a short-term rate that is reset at the end of each term, given that long-term rates include maturity risk and thus are not a risk-free rate. Lenders typically demand higher returns for longer-duration bonds to account for the possibility that the value of the bond itself will fall if interest rates rise because their bonds will have become less attractive than other bonds. Any amounts awarded to a claimant will be fixed even if the interest rates rise, so the claimant will not have been exposed to maturity risk. Therefore, it should not be compensated for the risk it did not bear." Quadrant Economics First Expert Report, ¶ 181.

[738] Respondent's PHB, ¶ 280.

Claimant's perspective during that period, however, they entailed the specific business risk of extending Claimant's harm under the measures. That is the situation that Claimant should have put on a balance when deciding to exercise or not its rights under the Treaty. Therefore, requesting a specific interest rate on account of a specific risk it took when pursuing negotiations, and ultimately extending its situation, would not be reasonable in the Tribunal's view. In addition to this, and as indicated by the Respondent's expert, "[a] damages award is a fixed amount which is not affected by business risks or by the risk of fluctuations in long-term interest rates."[739]

570. In this regard, the Tribunal agrees with the statement in *Total v. Argentina* that:

> "[…] the Tribunal does not share Total's point of view that since Total still owns stakes in these two companies and bears the connected risks, the interest rate on the compensation for damages it has suffered in respect of these investments should reflect this risk. The principal amounts that the Tribunal is awarding to Total, because of the damages it has suffered due to wrongful conduct of Argentina causing losses to Total in respect of its various investments in Argentina, are granted to Total in application of the principle that losses caused by internationally wrongful conduct entails a duty of reparation. *It is immaterial whether Total has maintained those investments after suffering any such loss. Maintaining the investment or divesting it is a business choice of Total which, as such, should not influence the rate of interest that Argentina has to pay on the principal amount of damages determined by the Tribunal* from the date of the loss to the date of payment."[740] (Emphasis added).

571. In that case, the tribunal considered appropriate to grant interests at a risk-free rate and used the one-year U.S Treasury bill average rate.[741] U.S Treasury bills have also been used in other investment cases.[742]

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[739] Quadrant Economics Second Expert Report, ¶ 190.

[740] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Award, November 27, 2013, **AES Auth. 198**. ¶ 256.

[741] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award dated 27 November 2013, **AES Auth. 198**, ¶¶ 258, 268.

[742] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, **AES Auth. 166**, ¶ 102; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award dated 12 May 2005, **AL RA 19**, ¶ 471; *Archer Daniels*

572. The Tribunal observes that the Claimant also argued that during the historical period, risk free rates did not cover inflation. In response, Respondent's expert has put forward that: "[i]n the low-interest rate environment that started in the aftermath of the global financial crisis in 2008, certain commercial rates have been lower than inflation. For instance, in 2020, Dominion Energy – the fourth largest U.S. utility by market capitalization, and one of the constituents of the sample Compass Lexecon uses to estimate the beta parameter of its discount rate – reported a weighted-average interest on its commercial paper of only 0.29%, which is lower than the change in the U.S. CPI, 1.23%, and lower than the yield of 1-year U.S. Treasury bills for the same year, 0.37%."[743] The Claimant did not contest the relevance of Respondent's argument nor did it further explain why the application of risk-free rates would translate into a deterioration of the real value of losses, particularly, on account of the fact that, as already indicated, the Claimant had at any point in time the possibility to resume arbitration proceedings.

573. In light of this, the Tribunal considers, on balance, that a short-term risk-free rate would be appropriate to achieve full reparation and on the basis of the evidence before it, determines to use the 1-year US Treasury Bills rate proposed by the Respondent.

Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5, Award dated 21 November 2007, **AL RA 176**, ¶ 304; *Hochtief A.G v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability issued on 29 December 2014, **AES Auth. 154**, ¶ 334; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017, **AL RA 196**, ¶ 1124; *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, April 15, 2016, **AES Auth. 201**, ¶ 449. Similarly on other risk - free rate and short-term rates, *see*: *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, **AES Auth. 130**, ¶ 440 and *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 February 2007, **AL RA 246**, ¶ 396; *BG Group Plc. v. Argentine Republic*, UNCITRAL Arbitration No. UNC 54 KGA, Award dated 24 December 2007, **AES Auth. 133**, ¶¶ 455-457.

[743] Quadrant Economics Second Expert Report, ¶ 187; **QE−85**, Updated Interest Calculation, tab "7 – CP Interest"; **QE−127**, Dominion Energy Annual Reports, 2002-2020.

b. The Suspension Period[744]

574. Through letters dated 20 December 2005 and 22 December 2005, both the Claimant and the Respondent communicated to the Tribunal the agreement reached between them to suspend the arbitration procedure.[745] The procedure was extended for 13 years. Through letters dated 11 December 2018 and 11 January 2019, the Claimant informed the Tribunal of its intention to resume proceedings and requested the Tribunal to order the continuation of the arbitration. The Claimant argues that it is entitled to interest during this period and submits that "not granting interest would create a perverse outcome in which parties would be reluctant to pursue negotiations if by so doing they risked losing the opportunity to be made whole if settlement talks fail".[746]

575. Negotiations are a tool available to the Parties to amicably resolve a dispute. So much so that Article VII.2 of the Treaty, as many others do, provides that the parties initially attempt to seek a resolution through conciliation or negotiation.

576. There is no evidence on the record which contests that each Party entered and engaged in these negotiations in good faith or evidence that suggests that negotiations had been used for another purpose by one of the Parties, however, the Tribunal considers relevant that the set of measures implemented by Argentina past 2003, in particular the measures related to the investment schemes tethered the Claimant to specific results for a specific period of time. Thus, the Tribunal considers it would not be appropriate to punish the Claimant for entering into negotiations by not being entitled to interest throughout this period. In light of this, the Tribunal rejects Respondent's request in this regard.

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[744] The Tribunal notes that the Respondent did not make arguments regarding the applicability of interest with respect to withheld revenues during the suspension.

[745] Suspension Agreement, **AES Ex. 560**. According to Claimant's letter, "[t]he suspension will be effective as of the filing of this letter until December 31, 2007 at the letter until December 31, 2007 at the latest. The suspension can be extended by mutual agreement of the parties depending on the degree and manner of the Argentine Republic's compliance with its obligations under article 4.1. transcribed herein above." The Tribunal adopted the suspension letter through its order dated 23 January 2006.

[746] Claimant's PHB, ¶ 258.

c. Compound vs. Simple[747]

577. The Respondent has argued that Argentine law proscribes compound interest except in extraordinary circumstances and that pursuant to Article 42(1) of the ICSID Convention, the payment of compound interests should be rejected. The Tribunal recalls that the law applicable to the present dispute includes the BIT, any other relevant rule of international law, as well as Argentine law.

578. The BIT does not contain any provision on whether interest should be compounded or simple. As indicated above, the commentary to Article 38 of the Articles on the Responsibility of States for Internationally Wrongful Acts indicates that "[t]he awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. […] given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation".

579. Both Parties have relied on investment case law to support their view either in favor or against compound interests. In the Tribunal's view this shows that there is no clear rule as to one or another. While some tribunals have considered awarding compound interests as going beyond what is required,[748] others have considered they put the claimant in the position it would have been in but for the breach, thus achieving full reparation.[749]

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[747] The Tribunal notes that the Respondent did not make arguments regarding to the applicability of interest with respect to withheld revenues during the suspension.

[748] *See e.g., Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador,* ICSID Case No. ARB/04/19, Award dated 18 August 2008, **AES Auth. 141**, ¶ 457; *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Award dated 12 May 2005, **AL RA 19**, ¶ 471;*Desert Line Projects LLC v. Republic of Yemen,* ICSID CASE No. ARB/05/17, Award dated 6 February 2008, **AL RA 187**, ¶¶ 295; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Award dated 20 May 1992, **AL RA 186**, ¶ 224; *Papel del Tucumán (in bankruptcy) v. Argentina,* ICC Arbitration 12364/ KGA/CCO/JRF/CA/ASM/JPA, Award of 5 March 2019, **AL RA 178**, ¶ 134.

[749] *See e.g., PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No ARB/02/5, Award, January 19, 2007, **AES Auth. 181**, ¶ 348; *Siemens AG v. Argentine Republic,* ICSID Case No. ARB/02/8, Award dated 6 February 2007, **AES Auth. 190**, ¶¶ 399-401; *Sistem*

580. The Respondent has referred to section 623 of the Argentine Civil Code and section 770 of the Argentine Civil and Commercial Code. Section 623 provides:

> "Interest on interest *shall not be due*, *except under an express agreement* whereby the accumulation thereof to the principal is authorized as periodically as agreed to by the parties *or, upon the judicial liquidation of the debt plus interest thereon by the courts, the court orders that the resulting amount be paid, but the debtor defaults in any such payment*".[750]

581. On the other hand, section 770 of the Argentine Civil and Commercial Code establishes that:

> "Interest on interest *shall not be due, except* where: a) an *express provision* authorizes interest to accumulate with the principal with a periodicity of no less than six months; b) *the obligation is required judicially;* in which case, the accumulation shall occur from the date the lawsuit is notified; c) the obligation is *liquidated judicially*, in which case interest shall be compounded from the moment *the court orders the payment* of the resulting amount and the debtor *defaults in any such payment*; d) other legal provisions set forth such accumulation."[751]

582. The Respondent has indicated that the Argentine Civil and Commercial Code is in force since 1 August 2015. The Tribunal thus understands that this provision is still applicable. From a plain reading of section 770 the Tribunal gathers that, while

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Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1, Award of 9 September 2009, **AL RA 191**, ¶ 194; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Award, November 27, 2013, **AES Auth. 198**. ¶¶ 259-261; *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, April 15, 2016, **AES Auth. 201**, ¶ 447; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, **AES Auth. 204**, ¶¶ 128-129; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, **AES Auth. 172**, ¶ 251; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/16, Award, February 25, 2016, **AES Auth. 170**, ¶¶ 289-293.

[750] Argentine Civil Code, section 623, **Exhibit RA 392**. (Emphasis added) (Unofficial translation). Spanish original: "No se deben intereses de los intereses, sino por convención expresa que autorice su acumulación al capital con la periodicidad que acuerden las partes; o cuando liquidada la deuda judicialmente con los intereses, el juez mandase pagar la suma que resultare y el deudor fuese moroso en hacerlo. Serán válidos los acuerdos de capitalización de intereses que se basen en la evolución periódica de la tasa de interés de plaza".

[751] Argentine Civil and Commercial Code, section 770, **Exhibit RA 393**. (Emphasis added) (Unofficial translation). Spanish original: "Anatocismo. No se deben intereses de los intereses, excepto que: a) una cláusula expresa autorice la acumulación de los intereses al capital con una periodicidad no inferior a seis meses; b) la obligación se demande judicialmente; en este caso, la acumulación opera desde la fecha de la notificación de la demanda; c) la obligación se liquide judicialmente; en este caso, la capitalización se produce desde que el juez manda pagar la suma resultante y el deudor es moroso en hacerlo; d) otras disposiciones legales prevean la acumulación."

there is a general prohibition, there are certain exceptions that make possible charging compound interest. Overall, *when expressly provided* or when *demanded by court* (either required or when the debtor defaults payment on the obligation liquidated).[752] In this case, and as already mentioned, there is no express provision authorizing the accumulation of interest with the principal (subparagraphs a) and d)), nor an express agreement as established in section 623 for that matter.

583. The word "*judicialmente"* ("judicially"), refers to a judicial procedure which in turn relates to a trial or procedure before a court, the administration of justice or the judiciary.[753] The meaning in the English language seems to be the same "of or relating to a judgment, the function of judging, the administration of justice, or the judiciary; belonging to the branch of government that is charged with trying all cases that involve the government and with the administration of justice within its jurisdiction; ordered or enforced by a court; belonging or appropriate to a judge or

[752] Argentina has also argued that "[t]he Supreme Court of Justice of Argentina has invariably held that such prohibition is a public order and that the capitalization of interest is only admissible in a restrictive manner and in the cases expressly set forth in the law". Respondent's Rejoinder Memorial, ¶ 1008. The Tribunal observes that in the cases referred by the Respondent, the following has been expressed: "[t]he federal remedy thus granted must have a favorable response, since the citation of the precedent of V.E. referred to in the previous section is correct, a precedent that forms part of a substantial jurisprudence [...] that has established that the ruling that admitted the capitalization of interest, in violation of an express rule of public order (art. 623 of the Civil Code), without the concurrence of the legal assumptions of exception […] is disqualifiable." (Unofficial translation). Argentina's Supremen Court of Justice, ―Mulleady v. S.A. del Tenis Argentino‖, 25 November 2008, **AL RA 180**, p. 2. "It is worth mentioning that the decision appealed without any supporting reasons ignores the case law of the Supreme Court, which has repeatedly highlighted that the provision in article 623 of the Civil Code is a public order provision and that the capitalization of interest is only admissible in limited circumstances and in expressly admitted assumptions appearing in the regulation, at the risk of generating objectively unfair results by means of applying abstract mathematical formulas which go beyond the limits of moral standards and good practice." Argentina's Supremen Court of Justice, ―Tazzoli, Jorge Alberto v. Fibracentro S.A., 28 February 2006, Fallos: 329:335, **AL RA 181**. In the same sense: Argentina's Supremen Court of Justice, ―Automotores Saavedra v. Fiat Concord S.A.‖, 17 March 2009, Fallos: 332:466, **AL RA 182**; Argentina's Supremen Court of Justice, ―Complaint Appeal No. 1 - Elena Margarita Aranda et al. v. Luis Angel Ferreyra and/or Engineer Combat Battalion 141, Argentine Army, on right to proceed *in forma pauperis* – compensation for damages – pain and suffering – summary proceeding. FTU 716878/1989/1/RH1", 20 December 2016, in Fallos 339:1722 (Legal opinion of the Attorney General to which the Court remits), **AL RA 183**. The Claimant has not contested these legal authorities.

[753] "[J]udicialmente". *Real Academia Española*, 2024. https://dle.rae.es/judicialmente?m=form 03 September 2024.

"[J]udicial". *Real Academia Española*, 2024. https://dle.rae.es/judicial?m=form 03 September 2024.

the judiciary; of, characterized by, or expressing judgment".[754] The nature of such procedure differs from an arbitral proceeding to which an investor and a State (the parties) submit and from an award rendered by a tribunal. The wording is specific.

584. The Claimant has argued that "the role that Argentine law plays in this dispute is to establish the network of rights and obligations to which AES was subject upon making its investment. Argentine law provisions on interest, however, are unrelated to such rights and obligations, and had no bearing on AES's decision to agree to invest in Argentina". Therefore, it indicates that "Argentine law is irrelevant in assessing the computation of interest on the Award".[755] The Tribunal disagrees. The fact that such specific provision was not considered among the reasons to invest does not mean that this excludes it from the application of the law. In view of the foregoing, the Tribunal considers that pursuant to Argentine's law, awarding compound interests would not be appropriate and determines the application of simple interest.

VIII. COSTS

1. The Claimant's Costs Submissions

585. The Claimant requests reimbursement of all costs, fees, and expenses incurred in connection with this Arbitration, which amount to **US$ 21,374,453.10** as of April 30, 2024, with interest from the date of the Award, calculated on the same basis as its post-award interest claim.[756] The Claimant contends that "Argentina's obligation to restore AES to [the financial position in which it would have been today in the absence of Argentina's unlawful acts] requires not only awarding damages arising from Argentina's breaching measures, but also the reimbursement of the fees and costs that AES incurred in connection with this Arbitration".[757] The Claimant indicates that it should be reimbursed the costs incurred during the suspension period,

[754] "[J]udicial". *Merriam-Webster.com.* 2024. https://www.merriam-webster.com/dictionary/judicially 03 September 2024.

[755] Claimant's Reply Memorial, ¶ 590.

[756] Claimant's Submission on Costs, May 2, 2024, ¶ 1.

[757] Claimant's Submission on Costs, May 2, 2024, ¶ 3.

the costs incurred in the jurisdictional phase as well as those related to Argentina's disqualification proposal (in which it prevailed).

586. By email of July 31, 2024, counsel for the Claimant reported a mistake on their records, as follows: "[A]t paragraph 7 of Argentina's Reply Costs Submission, it noted that AES included in its Costs Submission an advance payment of US$50,000 that ICSID requested on December 18, 2023 (*i.e.*, during the Suspension Period), but that such amount, although requested from the Parties, had ultimately not been paid. Upon verification with ICSID, AES has ascertained that such amount was in fact not paid, and that an additional request of US$250,000 was billed but not at that time paid (these invoices were superseded by subsequent invoices that were paid.). Accordingly, Claimant's ICSID Filing Fee and Costs Advances listed in Annex A of Claimant's Costs Submission must be reduced by US$300,000 to US$1,078,000. Likewise, ICSID's Cost Advances listed in Annex A(i) (i.e., covering costs during the Suspension Period) must be reduced from US$80,000 to US$30,000."

587. On February 7, 2025, Claimant paid an additional advance payment of US$150,000 requested by the Centre on January 23, 2025. On May 9, 2025, Claimant paid an additional amount of US$25,000, as partial payment of Argentina's outstanding share of the advance requested by the Centre on January 23, 2025.

588. As a result, Claimant's total claimed costs, fees and expenses incurred in the arbitration amount to **US$21,249,453.10** (*i.e.,* US$1,253,000 paid to ICSID in Lodging Fee and requested Advance Payments, plus US$19,996,453.10 in Legal Fees and Expenses). Claimant's claimed costs associated to the suspension period amount to **US$266,509** (US$236,509 in Legal Fees and US$30,000 in advance payments).

589. The Claimant submits that its costs are reasonable on account of the duration, the complexity of the case, the volume of the record and the amount of damages

resulting from Argentina's breaches.[758] Finally, it alleges that its costs are reasonable since they are commensurate with those of claimants in comparable investment arbitrations (in particular *Total v. Argentina* and *Orazul v. Argentina*) and they are conservative.[759]

2. The Respondent's Costs Submissions

590. The Respondent contends that the lack of merits of AES's claims should lead the Tribunal to order the Claimant to pay "all reasonable costs incurred by Argentina in its defense" and that in the event the Tribunal were to accept any of Claimant's pleadings, it should not impose Claimant's share of the costs of the proceedings on Argentina,[760] requesting in that case for AES to bear its share of the costs.[761]

591. The Respondent argues that the *Orazul* case reflects the lack of merit of AES's claims and that it would not be proportionate for Argentina to bear AES's share of the costs of a litigation that Argentina believed had been settled and thus stayed.[762] Over this last point, the Respondent indicates that during the suspension period, AES obtained higher than expected returns, consented to the measures and resumed the proceedings with the aim of obtaining an additional windfall. In its view, this was a strategy of dragging out litigation for 20 years in order to obtain extraordinary profits on a case that was radically modified once proceedings were resumed and which imposed additional burdens and expenses on Argentina.[763]

592. The Respondent also refers to AES's indemnity claim being speculative and abusive, to AES's failure to present important witnesses, which "prevented Argentina

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[758] Claimant's Submission on Costs, May 2, 2024, ¶¶ 8, 9; Claimant's Reply Submission on Costs, May 20, 2024, ¶ 5.

[759] The Claimant indicates that the costs are not adjusted for inflation and certain costs (AES's internal costs and expenses as well as certain old fees and expenses for which original invoices are no longer available) have been excluded. Claimant's Submission on Costs, May 2, 2024, ¶ 10. See also Claimant's Reply Submission on Costs, May 20, 2024, ¶ 7.

[760] Submission on Costs of the Argentine Republic, 2 May 2024, ¶ 3.

[761] Submission on Costs of the Argentine Republic, 2 May 2024, ¶ 13.

[762] Submission on Costs of the Argentine Republic, 2 May 2024, ¶¶ 4, 5.

[763] Submission on Costs of the Argentine Republic, 2 May 2024, ¶¶ 6-9.

from effectively exercising its right of defense",[764] and finally, to the number of hours and hourly fees of the three firms retained by the Claimant for its representation. The Respondent states that it has incurred a total of **US$ 3,457,190**.[765] In its Reply on Costs, the Respondent highlights the disproportionality of the Parties' costs and the unreasonableness of the Claimant's costs.[766]

3. The Tribunal's Decision on Costs

593. Article 61(2) of the ICSID Convention provides the following:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

594. Pursuant to this provision, tribunals have discretion to determine the allocation of costs. The Tribunal recalls also that the assessment made by tribunals rests on "costs reasonably incurred" and submitted by each party in accordance with Arbitration Rule 28(2). Both Parties have referred to this important caveat in their submissions.[767]

595. As indicated by the Parties, tribunals have considered as factors: the outcome of the case, the conduct of the parties, the amount claimed,[768] as well as the

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[764] Submission on Costs of the Argentine Republic, 2 May 2024, ¶¶ 10, 11.

[765] Annex to the Submission on Costs of the Argentine Republic, 2 May 2024.

[766] Reply on Costs of the Argentina Republic, 20 May 2024, ¶¶ 1-3.

[767] Claimant's Submission on Costs, May 2, 2024, ¶ 7 and Submission on Costs of the Argentine Republic, 2 May 2024, ¶ 2.

[768] *See, e.g., Rusoro v. Venezuela*, Award, 22 August 2016, **AL RA 141**, ¶ 868; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Award, 24 September 2021, **AL RA 273**, ¶ 341; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italy*, ICSID Case No. ARB/16/5, Award, 14 September 2020, **AL RA 272**, ¶ 943; *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, **AL RA 217**, ¶ 797; *Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, **AL RA 276**, ¶¶ 1073, 1074; *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, **AL RA 277**, ¶¶ 434, 435; *Triodos v. Spain*, Award, 24 October 2022, **AES Auth. 294**, ¶¶ 821-823.

reasonableness of the costs and, in this regard, the length of the procedure and its complexity.[769] Other tribunals have also expressed that the circumstances of the case must be part of the analysis.[770] In the Tribunal's view, while certain factors may bear a specific weight in certain cases, the circumstances may tilt the balance on another direction in other cases. In particular, the Tribunal is mindful that "tribunals have followed two approaches to costs. In the first approach, ICSID costs are apportioned in equal shares and each party bears its own costs, whereas in the second approach, the principle 'costs follow the event' implies that the losing party bears the costs of the proceedings, including those of the other party, or that the parties bear the costs proportionately to their success or failure".[771]

596. In terms of the outcome of the case, the Claimant largely prevailed with regards to the Respondent's defenses, the merits and the damages. Regarding the conduct of the Parties, in general, the Tribunal considers that the Parties and their counsel have conducted themselves in a competent, professional and efficient manner. The Claimant refers in its submission to Respondent's campaign to postpone the November 2021 virtual hearing and the Disqualification proposal of the three members of the Tribunal submitted 5 days before the already scheduled hearing.

597. Mechanisms such as the disqualification of arbitrators are in place for specific reasons, yet, should not be abused by the Parties for procedural reasons. In this case, while the submission of such proposal on a date so close to the hearing posed

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[769] *See*, *e.g.*, *Gemplus v. Mexico,* Award, 16 June 2010, **AL RA 158**, ¶ 17-21; *ConocoPhillips v.* Venezuela, Award, 8 March 2019, **AES Auth. 223**, ¶¶ 982; *Hochtief v. Argentina*, Decision on Liability, 29 December 2014, **AES Auth. 154**, ¶ 331; *Rusoro v. Venezuela*, Award, 22 August 2016, **AL RA 141**, ¶ 872; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italy*, ICSID Case No. ARB/16/5, Award, 14 September 2020, **AL RA 272**, ¶ 944; *Pey Casado v. Chile,* Award, 8 May 2008, **AES Auth. 296**, ¶ 729.

[770] *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, **QE-65**, ¶ 620; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Award, 24 September 2021, **AL RA 273**, ¶ 345.

[771] *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Award of 18 May 2022, **AL RA 275**, ¶ 1119.

difficulties for the proper development of this arbitration, the Tribunal does not consider that such request was motivated by bad faith.

598. With regards to the reasonableness of the costs, the Claimant's alleged expenses amount to **US$ 21,249,453.10**, this is six times the costs claimed by Argentina. The Tribunal agrees that the disproportionality between costs has also been a factor considered by certain tribunals, however, there have been cases where large sums have been awarded such as pointed in *ADC v. Hungary*.[772] Moreover, the Tribunal does not lose sight that this case was particularly complex due to the measures applied and the timeframe in which those measures were applied. The fact that the Claimant largely prevailed in its claims is an indicator of the significant burdens it had to overcome in order to vindicate its rights and the Tribunal does not consider it would be appropriate to disregard the costs that it incurred in order to successfully prove its case. In addition to this, the Tribunal bears in mind the principle of full reparation and considers that to properly place the Claimant in the circumstances that it would have been, in all probability, but for the measures, the Claimant is entitled to the reimbursement of the fees and costs it reasonably incurred in.[773]

599. Finally, the Claimant requests that the Tribunal award it the costs that it incurred during the suspension period. The Tribunal cannot endorse this request. The suspension was the product of a mutually agreed decision between the Parties taken in good faith. It cannot be denied that the Claimant had at all moments the right to resume proceedings.

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[772] *ADC v. Hungary*, Award, 2 October 2006, **AES Auth. 126**, ¶ 531. In this case the tribunal awarded US$7,623,693. *See also Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, **AL RA 276**, ¶¶ 1076, 1079; *Tethyan v. Pakistan*, ICSID Case No. ARB/12/1, Award of 12 July 2019, **AL RA 285,** ¶ 1855.

[773] While the Claimant argues that its costs are reasonable since they are commensurate with the costs incurred by the claimants in two cases against Argentina, *i.e., Total v. Argentina* and *Orazul v. Argentina*. The Tribunal considers this argument to be inapposite since ultimately the circumstances of each case will inform each tribunals' decision.

600. The costs of the arbitration, including fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount, as of May 31, 2025, to US**$ 2,372,687.61**). The above costs have been paid out of the advances made by the parties. The Claimant advanced payments for a total of **US$1,246,000**. Argentina advanced payments for a total of **US$1,071,000**.

601. Accordingly, in view of the fact that the Claimant did prevail largely in the case, that the Tribunal has determined for compensation purposes that the full reparation principle applies, and taking into account the complexity and volume of the record, the Tribunal considers appropriate for the Respondent Party to bear all the costs of the arbitration, plus 80% of Claimant's legal costs (with the exclusion of those incurred in the suspension period), which the Tribunal considers to be reasonable, *i.e.,* **US$ 15,807,955.3**.

IX. AWARD

602. For the reasons stated in the Award, the Tribunal decides as follows:

i. Dismisses the Respondent's allegations on the inadmissibility of the claim due to the Claimant's alleged waivers, consent to the agreements and schemes, the principle of estoppel and the doctrine of abuse of rights.

ii. Dismisses the Respondent's defense under Article XI of the Treaty.

iii. Determines that Argentina breached its obligations to accord FET under Article II.2.a) of the Treaty through the measures affecting spot price formation and dispatch (*i.e.,* establishing a spot price cap and excluding fuels other than natural gas to determine the spot price); capacity payments; withholding of receivables and investment programs (*i.e.*, FONINVEMEM I, FONINVEMEM II and III); as well as the cost-plus system and PPAs prohibition.

iv. Dismisses Claimant's allegation on FPS under Article II.2.a) of the Treaty.

v. Exercises judicial economy on Claimant's allegation of minimum standard of treatment under customary international law.

vi. Determines that Argentina breached its obligations not to impair the management and operation of Claimant's investment under Article II.2.b) of the Treaty through the implementation of its measures affecting spot price formation and dispatch; the cumulative effect of the measures affecting capacity payments and spot price formation; and the cost-plus system and PPAs prohibition.

vii. Determines that Argentina breached its obligations not to impair the management, operation, maintenance, use and enjoyment of Claimant's investments under Article II.2.b) of the Treaty through the withholding of revenues and the implementation of FONINVEMEM I, II and III.

viii. Dismisses Argentina's defense under Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts.

ix. As a result of Respondent's breaches, Argentina shall pay to the Claimant damages as of 31 December 2020 amounting to: **US$715.9 million**

- Measures affecting Dispatch and Prices: US$312.9 million
- Measures Affecting Withheld Revenues: US$403 million

x. The Respondent shall bear all the arbitration costs.[774] Additionally, the Respondent shall pay 80% of the legal fees and expenses incurred by the Claimant (US$19,996,453.10), with the exclusion of those incurred during the suspension period (US$236,509), in the amount of **US$15,807,955.3**.

xi. The Respondent shall pay to the Claimant simple interest on the damages and all other costs, including during the suspension period, at a 1-year US Treasury Bills rate. Such interest shall run from 31 December 2020 through the date of payment.

[774] The total amount of costs disbursed in the proceeding up to May 30, 2025, amounts to **US$2,372,687.61**, of which Claimant paid **US$1,273,176.52**. ICSID will provide the parties with a detailed Final Financial Statement of the case account, as soon as all outstanding pending payments have been made.

Stephen L. Drymer
Árbitro

Date:

Domingo Bello Janeiro
Árbitro
(Subject to the attached dissenting opinion)
Date:

[*Signed*]

Ricardo Ramirez Hernández
President of the Tribunal
Date: May 26, 2025

[*Signed*]

Stephen L. Drymer
Árbitro

Date: May 15, 2025

Domingo Bello Janeiro
Árbitro
(Subject to the attached dissenting opinion)
Date:

Ricardo Ramirez Hernández
President of the Tribunal
Date:

[*Signed*]

Stephen L. Drymer
Árbitro

Date:

Domingo Bello Janeiro
Árbitro
(Subject to the attached dissenting opinion)
Date: May 15, 2025

Ricardo Ramirez Hernández
President of the Tribunal
Date: