

Agreement between Italy and Argentine Republic for the Promotion and Protection of Investment (1990) [English translation] (excerpts)

Excerpts from Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/07/17)

Award (21 June, 2011) Paragraph 12

Concurring and Dissenting Opinion of Professor Brigitte Stern (21 June, 2011) Paragraph 73

ARTICLE 1

Definitions

For the purposes of this Agreement:

1. "Investment" means, in accordance with the host country laws and irrespective of the selected legal form or any other related laws, any kind of asset invested or reinvested by an individual or a legal entity of one Contracting Party in the territory of the other Party, in conformity with the laws and regulations of the latter.

Within this general framework, it includes, in particular though not exclusively:

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(b) shares of stock, interests or any other form of participation, including minority or indirect interest, in a company established in the territory of each Contracting Party;

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ARTICLE 2

Promotion and Protection of Investments

1. Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall accept such investments in accordance with its laws.

2. Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment. Neither Party shall impair by arbitrary or discriminatory measures the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other Contracting Party's investors.

ARTICLE 3

National Treatment and Most-Favored Nation Provisions

1. Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries.

2. The provisions set forth in paragraph 1 of this Article shall not apply to advantages and privileges accorded by either Contracting Party to any third country by virtue of that Party's binding obligations that derive from its membership in a customs or economic union, common market, or free trade area, or as a result of regional or subregional agreements, multilateral international agreements or double taxation agreements, or any other tax-related arrangements or agreements to facilitate cross border trade.

ARTICLE 4

Damages

Investors of one Contracting Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, a state of national emergency, or other similar political economic events shall be accorded, by such other Party in whose territory the investment was made, treatment no less favorable than that accorded to its own nationals or legal entities or to investors of any third country as regards damages.

ARTICLE 5

Nationalization or Expropriation

1. (a) Neither Contracting Party may adopt any measure that restricts, whether for a definite or

indefinite period of time, the right to property, possession, control or enjoyment in relation to the investments made by investors of the other Contracting Party, except upon specific provisions laid down by law, judgments, or decisions rendered by a competent court and other general non-discriminatory provisions intended to regulate economic activities.

(b) Investments by investors of one of the Contracting Parties shall not be nationalized, expropriated, seized or otherwise appropriated, either directly or indirectly, through measures having an equivalent effect in the territory of the other Party, unless the following conditions are complied with:

- the measures are for a public purpose, of national interest or security;
- they are taken in accordance with due process of law;
- they are non-discriminatory or contrary to the commitments undertaken;
- they are accompanied by provisions for the payment of prompt, adequate and effective compensation.

(c) The compensation shall be equivalent to the actual market value of the investment immediately before the expropriation or nationalization decision was announced or became public and shall be determined in accordance with internationally accepted technical standards. Where the market value cannot be readily ascertained, the compensation shall be determined based on a fair assessment of the constituent and distinctive elements of the company as well as the components and results of the business activities involved.

The compensation shall include interest accrued until the date of payment at a normal commercial rate of interest. In the event an agreement is not reached between the investor and the Contracting Party that has taken such measure, the compensation shall be determined in accordance with the dispute settlement procedures set out in Article 8 hereof. Once it is investment was made or in a freely convertible currency accepted by the investor, and its repatriation shall be authorized.

2. The provisions laid out in paragraph 1 hereof shall also apply to the returns from an investment as well as, in the event of liquidation, the proceeds thereof.

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ARTICLE 8

Settlement of Disputes between Investors and Contracting Parties

1. Any dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, arising out of or relating to this Agreement, shall, to the extent possible, be settled through friendly consultation between the parties to the dispute.

2. If the dispute cannot be settled amicably, it may be submitted to the competent judicial or administrative courts of the Party in whose territory the investment is made.

3. Where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration.

4. From the time arbitration proceedings are commenced, each party to the dispute shall take any such measures as may be necessary to dismiss any pending court proceedings.

5. Where the dispute is submitted to international arbitration, the investor may choose to refer the dispute either to:

- a) The International Centre for the Settlement of Investment Disputes (ICSID) established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on March 18, 1985, provided that each Party to this Agreement is a signatory State to such Convention. Where such condition is not met, each Contracting Party hereby consents to submit the dispute to arbitration in accordance with the ICSID Additional Facility Rules regarding conciliation and arbitration, or
- b) An *ad hoc* arbitration tribunal is established for each particular case. The arbitration shall be conducted in accordance with the Arbitration Rules of the United Nations Commission on

International Trade Law (UNCITRAL) contained in Resolution No. 31/98 adopted by the United Nations General Assembly on December 15, 1976. The panel shall consist of three arbitrators. If the arbitrators are not nationals of the Contracting Parties, they shall be nationals of States having diplomatic relations with them.

6. Neither Contracting Party shall, at any stage of the arbitral proceedings or the enforcement of the arbitral award, assert, as a defense, counterclaim, right of set-off or otherwise, that the investor concerned has received, pursuant to an insurance policy or guarantee contract as indicated in Article 7 hereof, indemnification or compensation for all or part of any alleged loss.

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

8. The arbitral award shall be final and binding on the parties to the dispute. Each Party undertakes to comply with any such award in accordance with its domestic laws and the relevant international conventions in force for both Contracting Parties.

9. The Contracting Parties shall refrain from pursuing, through diplomatic channels, any matter related to any pending court proceedings or the arbitration until the relevant proceedings have been concluded, unless either party to the dispute has failed to comply with the arbitral award or court decision, in accordance with the terms of compliance set forth in such award or decision.

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ARTICLE 10

Application of other Rules

1. Where a particular matter is governed by this Agreement as well as by another International Agreement between both Contracting Parties or by International Law, such provisions or rules shall, to the extent they are more favorable, prevail over this Agreement.

2. If, under any law, regulation, provision, or specific contract, either Contracting Party has adopted rules entitling investors of the other Contracting Party to a more favorable treatment than that provided for by this Agreement, such rules shall prevail over the provisions of this Agreement.

ARTICLE 11

Investments made before the Effective Date of this Agreement

This Agreement shall also apply to investments made before the effective date of this Agreement by investors of one Contracting Party in the territory of the other Party and recorded by the latter as a foreign investment in accordance with its statutory provisions. In any case, it shall not apply to disputes pending or settled before it came into force or to any claims pending or arising before such date.

ARTICLE 12

Effective Date

This Agreement shall enter into force on the date on which the Contracting Parties shall have notified each other that their respective constitutional requirements for the execution of this Agreement have been fulfilled.