International Centre for Settlement of Investment Disputes
Washington, D.C.

Total S.A.

v.

Argentine Republic

(ICSID Case No. ARB/04/1)

Decision on Liability

Members of the Tribunal

Professor Giorgio Sacerdoti, President

Mr. Henri C. Alvarez, Arbitrator

Dr. Luis Herrera Marcano, Arbitrator

Secretary of the Tribunal

Ms. Natalí Sequeira

Representing Total S.A.:

Mr. Jan Paulsson, Mr. Nigel Blackaby,
Mr. Georgios Petrochilos, Mr. Noah Rubins,
Ms. Sylvia Noury, Mr. Craig Chiasson,
Mr. Moto Maeda, Ms. Caroline Richard
Freshfields Bruckhaus Deringer LLP
Paris, France

Mr. Alexander Yanos and Mr. Giorgio Mandelli
Freshfields Bruckhaus Deringer LLP
New York, NY, Unites States of America

Mr. Luis A. Erize and Mr. Sergio M. Porteiro
Abeledo Gottheil Abogados SC
Buenos Aires, Argentina

Representing the Argentine Republic:

Dr. Joaquín Pedro da Rocha
Procurador del Tesoro de la Nación Argentina
Procuración del Tesoro de la Nación Argentina
Buenos Aires, Argentina

Date of Dispatch to the Parties: December 27, 2010

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Part I - Introduction

1. Procedural Background

1. On October 12, 2003, Total S.A. ("Total" or the "Claimant") submitted before the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") a Request for Arbitration against the Argentine Republic ("Argentina" or the "Respondent"), pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention") and the Treaty between France and Argentina concerning the Reciprocal Promotion and Protection of Investment of July 3, 1991 ("BIT").

2. In accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"), the Centre acknowledged receipt of the Request for Arbitration on November 3, 2003. On November 4, 2003, the Centre transmitted a copy of the Request for Arbitration to the Argentine Republic and to the Argentine Embassy in Washington, D.C. On January 22, 2004 the Secretary-General registered Total's Request for Arbitration and gave notice thereof to the parties, pursuant to Article 36(3) of the ICSID Convention. Pursuant to Rule 7(d) of the Institution Rules, the Secretary-General also invited the parties to proceed as soon as possible to constitute an Arbitral Tribunal in accordance with Articles 37 to 40 of the ICSID Convention.

3. On March 29, 2004, the Claimant appointed Mr. Henri C. Alvarez, a Canadian national, as arbitrator. On April 14, 2004, the Argentine Republic appointed Dr. Luis Herrera Marcano, a national of Venezuela, as arbitrator. On August 20, 2004, in accordance with Rule 4 of the Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), the Chairman of the Administrative Council of ICSID appointed Professor Giorgio Sacerdoti, a national of Italy, as President of the Tribunal. On August 24, 2004, the Deputy Secretary-General of ICSID informed the parties that all members of the Tribunal had accepted their appointments and that, in accordance with Arbitration Rule 6(1), the Tribunal was deemed to have been constituted on that same day.

4. The first session of the Arbitral Tribunal was held on November 15, 2004. During the session, the parties confirmed that the Tribunal had been properly constituted pursuant to the ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect.

5. During the course of the first session, the parties agreed on a number of procedural matters as reflected in the written minutes of the session which were signed by the President and the Secretary of the Tribunal. Among other matters, it was agreed that, in accordance with Arbitration Rule 22, the languages of the proceedings would be English and Spanish. It was confirmed that the Claimant would file its pleadings in English and Argentina would file its pleadings in Spanish, without a subsequent translation of the written pleadings into the other party's chosen procedural language. After hearing the parties, the Tribunal decided by Procedural Order No. 1 that the Claimant would file its Memorial on the merits within five months of the date of the first session. The Tribunal also decided that, if the Respondent wished to raise any objections to jurisdiction, it should do so within 45 days of the receipt of the Claimant's Memorial on the merits. In the event of an objection to jurisdiction, the Claimant would file its Counter-Memorial on jurisdiction within 45 days of the receipt of the Respondent's Memorial on jurisdiction. In the same Procedural Order, the Tribunal further decided that: if the Respondent did not raise any objections to jurisdiction, it would file its Counter-Memorial on the merits within five months of receipt of the Claimant's Memorial on the merits; the Claimant would then file its Reply on the merits within 60 days of receipt of the Respondent's Counter-Memorial on the merits; and the Respondent would file its Rejoinder on the merits within 60 days of receipt of the Claimant's Reply on the merits.

6. The Claimant filed its Memorial on the merits ("CMM") on April 11, 2005; Argentina filed its "*Memorial sobre objeciones a la jurisdicción del Centro y a la competencia del Tribunal*" on June 3, 2005. In accordance with Arbitration Rule 41(3), the proceeding on the merits was thereby suspended. In conformity with Procedural Order No.1, the Claimant then submitted its Counter-Memorial on jurisdiction on August 1, 2005.

7. The hearing on jurisdiction was held in Washington D.C. on September 5, 2005. Ms. Cintia Yaryura, Ms. María Victoria Vitali and Mr. Ariel Martins addressed the

Tribunal on behalf of Argentina. Mr. Nigel Blackaby, Mr. Georgios Petrochilos and Mr. Luis A. Erize addressed the Tribunal on behalf of the Claimant. During the course of the hearing, the Tribunal posed questions to the parties, as provided for in Arbitration Rule 32(3).

8. The Tribunal issued its Decision on Objections to Jurisdiction ("Decision on Jurisdiction") on August 25, 2006, rejecting Argentina's objections to jurisdiction and deciding that the parties' dispute was within the jurisdiction of ICSID and the competence of the Tribunal.[1] In the Decision on Jurisdiction, the Tribunal stated that the matter of costs relating to the jurisdictional phase of the proceeding would be considered as part of the merits phase.

9. On the same date, the Tribunal confirmed that pursuant to Procedural Order No. 1, the Respondent would submit its Counter-Memorial on the merits within five months of the date of the Decision on Jurisdiction *i.e.*, by January 26, 2007. The Claimant would thereafter file its Reply on the merits within 60 days of receipt of the Respondent's Counter-Memorial on the merits and the Respondent would file its Rejoinder on the merits 60 days of receipt of the Claimant's Reply on the merits. According to the schedule, Argentina filed its Counter-Memorial on the merits on January 26, 2007.

10. On February 9, 2007, the Claimant proposed a revised schedule for the submission of the Claimant's Reply and the Respondent's Rejoinder. By letter of February 16, 2007, Argentina indicated that it did not oppose the Claimant's proposal to modify the schedule. Taking into consideration the parties' views in this respect, the Tribunal decided to modify the deadlines established in Procedural Order No. 1, which had been issued on August 25, 2006. Accordingly, the Tribunal ordered the Claimant to file its Reply on the merits by May 15, 2007 and the Respondent to file its Rejoinder on the merits within 102 days of receipt of the Claimant's Reply.

11. By letter of March 16, 2007, the Respondent requested a one-month extension for the submission of both the Claimant's Reply and the Respondent's Rejoinder. On March 16, 2007, the Claimant submitted its observations on the Respondent's extension request. By letter of April 9, 2007, the Tribunal decided to grant the one month

[1] The Decision is available at http://ita.law.uvic.ca/documents/TotalSAv.Argentina_002.pdf

extension requested by Argentina. The Tribunal decided that the Claimant's Reply on the merits should be filed by June 15, 2007 and the Respondent's Rejoinder on the merits within 102 days of receipt of the Claimant's Reply on the merits.

12. By letters of May 9 and 18, 2007, the Claimant informed the Tribunal that it would submit its Reply on May 18, 2007, and that it expected Argentina's Rejoinder to be submitted around August 28, 2007. By letter of May 14, 2007, Argentina requested the Tribunal to maintain the one-month extension that it had requested and to order the submission of its Rejoinder by October 1, 2007. As indicated by the Claimant, the Reply on the merits was submitted on May 18, 2007.

13. By letter of May 22, 2007, the Tribunal stated that the Respondent was entitled to rely on the one-month extension granted by the Tribunal. The Tribunal also confirmed that the Claimant was free to file its Reply before the deadline established by the Tribunal in its letter of April 9, 2007. Accordingly, the Tribunal ordered that the Secretariat should not forward the Claimant's Reply to the Respondent until June 15, 2007, and that the Respondent should file its Rejoinder within 102 days of receipt of the Reply.

14. By letter of September 25, 2007, the Respondent filed a request for production of documents and requested a 15-day extension for the filing of its Rejoinder on the merits. By letter of September 30, 2007, the Claimant submitted its observations on the Respondent's letter of September 25, 2007. By letter of October 3, 2007, the Tribunal granted the extension requested by the Respondent and ordered the submission of the Rejoinder of the merits by October 15, 2007.

15. By letter of October 9, 2007, the Respondent requested the deadline to be moved to October 16, 2007, as October 15, 2007 was an official holiday in Argentina. By letter of October 10, 2007, the Tribunal granted the Respondent until October 16, 2007 to submit its Rejoinder on the merits. The Tribunal also indicated that it would fix a deadline for the Respondent to file comments on certain financial valuation issues as the Respondent had not yet received some documents that the Claimant had been ordered to produce. The Respondent filed its Rejoinder on the merits on October 16, 2007. The parties exchanged a number of communications regarding the production of documents dealing with financial valuation matters. Having considered the parties'

positions in this respect, the Tribunal, by letter of November 5, 2007, ordered the Respondent to submit its report on quantum by November 20, 2007. The Respondent filed its expert report on damages on the date ordered by the Tribunal.

16. On December 10, 2007, the Tribunal held a pre-hearing conference call with the parties and, on December 13, 2007, it issued procedural directions for the organisation of the hearing on the merits.

17. The Tribunal held a hearing on the merits at the seat of the Centre in Washington D.C. from January 7 through January 18, 2008. Present at the hearing were:

Members of the Tribunal:

Prof. Giorgio Sacerdoti, President

Mr. Henri C. Alvarez, Arbitrator

Prof. Luis Herrera Marcano, Arbitrator

ICSID Secretariat:

Ms. Eloïse Obadia, Senior Counsel

Ms. Natalí Sequeira, Counsel

Secretaries to the Tribunal

For the Claimant:

Mr. Jan Paulsson (Freshfields Bruckhaus Deringer, LLP)

Mr. Nigel Blackaby (Freshfields Bruckhaus Deringer, LLP)

Mr. Georgios Petrochilos (Freshfields Bruckhaus Deringer, LLP)

Mr. Alex Yanos (Freshfields Bruckhaus Deringer, LLP)

Mr. Noah Rubins (Freshfields Bruckhaus Deringer, LLP)

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Mr. Craig Chiasson (Freshfields Bruckhaus Deringer, LLP)

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Ms. Caroline Richard (Freshfields Bruckhaus Deringer, LLP)

Ms. Kadesha Bagwell (Freshfields Bruckhaus Deringer, LLP)

Mr. Francisco Abriani (Freshfields Bruckhaus Deringer, LLP)

Mr. Jean-Paul Dechamps (Freshfields Bruckhaus Deringer, LLP)

Mr. Martin Tavaut (Freshfields Bruckhaus Deringer, LLP)

Sr. Luis Alberto Erize (Abeledo Gottheil Abogados SC)

Sr. Sergio Porteiro (Abeledo Gottheil Abogados SC)

Mr. Stephen Douglas (Representative for Total S.A.)

Mr. Jean-André Diaz (Representative for Total S.A.)

Mr. Arturo Pera (Representative for Total Austral S.A.)

Mr. Diego Bondorevsky (Representative for LECG)

Ms. Carla Chavich (Representative for LECG)

Mr. Pablo Lopez Zadicoff (Representative for LECG)

Ms. Maria Luisa Mitchelstein (Representative for LECG)

For the Respondent:

Dr. Osvaldo César Guglielmino (Procurador del Tesoro de la Nación Argentina)

Dr. Adolfo Gustavo Scrinzi (Procuración del Tesoro de la Nación Argentina)

Lic. Fabián Rosales Markaida (Procuración del Tesoro de la Nación Argentina)

Dr. Gabriel Bottini (Procuración del Tesoro de la Nación Argentina)

Dr. Ignacio Torterola (Procuración del Tesoro de la Nación Argentina)

Dr. Félix Helou (Procuración del Tesoro de la Nación Argentina)

Dr. Roberto Hermida (Procuración del Tesoro de la Nación Argentina)

Dr. Florencio Travieso (Procuración del Tesoro de la Nación Argentina)

Dra. Gisela Ingrid Makowski (Procuración del Tesoro de la Nación Argentina)

Lic. Nicolás Stern (Procuración del Tesoro de la Nación Argentina)

Dra. Viviana Kluger (Procuración del Tesoro de la Nación Argentina)

Dr. Luciano Lombardi (Procuración del Tesoro de la Nación Argentina)

Dr. Rodrigo Nicolás Ruiz Esquide (Procuración del Tesoro de la Nación Argentina)

Dr. Tomás Braceras (Procuración del Tesoro de la Nación Argentina)

Dra. Verónica Lavista (Procuración del Tesoro de la Nación Argentina)

Sr. Nicolás Duhalde (Procuración del Tesoro de la Nación Argentina)

18. The following witnesses and experts appeared before the Arbitral Tribunal for the Claimant: Mr. Pablo Spiller, Mr. Manuel Abdala, Mr. Benoît Charpentier, Mr. Hugues Montmayeur, Mr. François Faurès, Mr. Jacques Chambert-Loir, Mr. Yves Grosjean and Mr. Michel Contie; and, for the Respondent, Mr. Gerardo Sanchis Muñoz, Ms. Alicia Caballero, Mr. Diego Guichón, Mr. Alejandro Sruoga, Mr. Alejandro Gallino, Prof. Nouriel Roubini, Mr. Mario Damill, Mr. Roberto Frenkel, Mr. Cristian Folgar (by video) and Mr. Augusto Belluscio.

19. On April 11, 2008, the parties filed their post-hearing briefs.[2] On May 26, 2008, the parties filed their submissions on costs. In its submission, Argentina claimed that the cost incurred by Argentina amounted to US$1,215,222.99. In its submission on costs the Claimant:

[2] As of the hearing on the merits Total and Argentina had filed 690 and 274 exhibits, respectively. This is without considering legal authorities, witness statements and expert reports.

"request[ed] that the Tribunal:

(i) ORDER Argentina to reimburse to Total an amount of US$431,500, which is the present total of the costs-advances made by Total, with interest at a rate to be determined by the Tribunal from the date of the Award until final payment; and

(ii) ORDER Argentina to pay Total an amount of € 10,264,735.62 and US$4,368,881.87, which is the present total of "the costs reasonably incurred" by the Claimant in this arbitration, with interest at a rate to be determined by the Tribunal from the date of the Award until final payment."[3]

20. On May 9, 2008, the Respondent requested the Tribunal's authorisation to produce certain documents. On May 15, 2008, the Claimant filed observations on the Respondent's request. By letter dated May 21, 2008, Ms. Natalí Sequeira, Secretary of the Tribunal, informed the parties that the Tribunal had determined that the new exhibit RA-299, which Argentina sought to place on the record of the case, as well as exhibits RA 294-297 already introduced by the Respondent as annexes to its post-hearing brief, were inadmissible. By the same letter, the parties were informed that, as a matter of due process and in view of the stage of the proceedings, the Tribunal had decided not to take into consideration new evidence and arguments submitted subsequent to the post-hearing briefs.

21. On February 20, 2009, the Claimant requested the Tribunal's authorisation to produce a number of documents concerning developments involving certain Argentine authorities that had affected TGN. On March 20, 2009, the Respondent filed observations on the Claimant's request and requested authorisation to produce documents on the same issue concerning TGN. On April 9, 2009, the Tribunal issued a further decision on production of documents. Recalling its previous decision of May 21, 2008, the Tribunal restated that it would not take into consideration new evidence and arguments submitted subsequent to the post-hearing briefs and that it would rely solely on the evidence and the parties' submissions already on the record of the case.

22. On October 23, 2009, Argentina wrote to the Centre in order to inform the Tribunal about facts related to a labour dispute between Total and one of its former employees. According to Argentina's letter, the facts on which the aforementioned labour dispute are based are of particular relevance to these arbitration proceedings.

[3] See Total's Costs Submission, para. 29.

The Tribunal expresses its doubts that the facts outlined by the Respondent in its letter are relevant to the ongoing arbitration proceedings. The Tribunal notes that the Respondent is seeking to place new documents and arguments on the record of the case, contrary to the previous decisions taken by the Tribunal relating to the production of documents. The Respondent's request was absolutely out of time in view of the stage of the proceedings. The Tribunal determines, therefore, that it cannot either admit these documents as evidence or take into consideration the legal arguments based thereon.

2. General Overview of the Subject Matter of the Dispute and of Total's Claims and Request for Relief

23. The Tribunal considers it useful to sum up briefly at the outset the subject-matter of the dispute, in fact and in law, as presented by the Claimant in its "Request for Arbitration" and subsequently particularised.

24. In its Request for Arbitration, Total submits that it is a company incorporated in accordance with the laws of France, having its registered office in France and, therefore, that it qualifies as a French "investor" within the meaning of Article 1.2(b) of the BIT. Total has made a number of investments in Argentina in the gas transportation, hydrocarbons exploration and production and power generation industries. According to Total, its investments in Argentina include majority and minority shareholding interests in companies operating in the gas transportation, exploration and production and power generation sectors, as well as various licences, rights, concessions and loans, each of which qualifies as an "investment" in accordance with the meaning of this term in Article 1.1 of the BIT.

25. Total maintains that it made its investments in each of the various areas on the basis of the representations and promises made by the Argentine government about the legal and regulatory framework for privatised gas transmission companies, the oil and gas exploration and production industry and the power generation industry. Total alleges that a number of measures taken by the Argentine government, most of which derived from or followed Law 25.561/02 (the "Emergency Law"), together with the Emergency Law itself, breached or revoked the commitments made to attract

investment and upon which Total relied in making its investments. More specifically, Total indicates that these measures include:

- the forced conversion of dollar-denominated public service tariffs into pesos (or "pesification") at a rate of one to one;

- the abolition of the adjustment of public service tariffs based on the US Producer Price Index ("PPI") and other international indices;

- the "pesification" of dollar-denominated private contracts at a rate of one to one;

- the freezing of the gas consumer tariff (which is the sum of the: (a) well-head price of gas; (b) gas transportation tariff; and (c) gas distribution tariff);

- the imposition of: (a) export withholding taxes on the sale of hydrocarbons; and (b) restrictions on the export of such hydrocarbons;

- the abandonment of the uniform marginal price mechanism in the power generation market by price caps and other regulatory measures;

- the pesification, at a one to one rate, of all other payments to which power generators are entitled; and

- the refusal to pay power generators their dues, even at the dramatically reduced values resulting from the Measures.

26. The Claimant claims that the measures adopted by Argentina have resulted in several breaches of the BIT. As to Total's gas transmission assets, Total argues that the Measures: expropriated Total's investment in TGN in breach of Article 5(2) of the BIT; resulted in unfair and inequitable treatment of Total's investment in TGN in breach of Article 3 of the BIT; discriminated against Total's investment in TGN in

breach of Articles 3 and 4 of the BIT; and are in breach of Argentina's obligation to respect specific undertakings contrary to Article 10 of the BIT.

27. As to Total's investments in the exploration and production of crude oil and natural gas, Total claims that the Measures: revoked Total's right freely to dispose of its hydrocarbons in breach of the duty of fair and equitable treatment pursuant to Article 3 of the BIT; affected Total's hydrocarbon production in an arbitrary and discriminatory manner contrary to Articles 3 and 4 of the BIT by benefiting domestic, industrial, commercial or residential consumers to the detriment of Total; and restricted Total's export of hydrocarbons in further breach of the duty to accord fair and equitable treatment pursuant to Article 3 of the BIT.

28. In relation to Total's investments in the power generation sector, Total claims that Argentina, through the Measures: failed to observe its obligation to refrain from taking measures equivalent to expropriation without prompt, adequate and effective compensation in breach of Article 5(2) of the BIT; breached the duty of fair and equitable treatment in Article 3 of the BIT; and discriminated against Total's investments in Central Puerto and HPDA in breach of Article 4 of the BIT.

29. Based on the above, the Claimant asks the Tribunal to declare that Argentina, by its various acts and the conduct specified in Claimant's Request for Arbitration and Memorials, breached the above mentioned Articles of the BIT. In its Request for Arbitration, the Claimant seeks compensation for the alleged damages caused to its investment by Argentina's violations of the BIT "in an amount to be assessed and which is provisionally assessed to be no less than US$ 940 million", in addition to interest, additional reparation to be further specified and payment by Argentina of all arbitration costs and expenses.

30. To support its request for damages, during the arbitral proceedings, Total filed three reports by its experts Mr. Spiller and Mr. Adbala (LECG, LLC). Based on the data contained in these Reports[4], in its Post-Hearing Brief, Total claimed damages in the aggregate amount, as of 31 December 2006 of US$1,292,100,000, divided as

[4] The reports by Mr. Abdala and Mr. Spiller are as follows: "Assessment of Argentina's Recent Regulatory Conduct in Electricity Generation" (hereinafter LECG Report on Electricity), dated May 16, 2007; "Damage Valuation for Total's Investments in Argentina" (hereinafter LECG Report on Damages), dated May 18, 2007; and "Corrections and Updates to "Damage Valuation for Total's Investments in Argentina" (hereinafter LECG Addendum on Damages), dated December 27, 2007.

between each of its various claims of breach of the BIT by Argentina as set forth below .[5]

31. In its Post-Hearing Brief, Total submitted the following Request for Relief to the Tribunal:

> "On the basis of the foregoing and the Claimant's prior written pleadings, the Claimant respectfully requests that the Tribunal, dismissing all contrary requests and submissions by Argentina:
> (i) DECLARE that Argentina has breached Article 5(2) of the Treaty by taking measures which deprived the Claimant's investment in TGN of substantially all of its value without provision for the payment of the prompt and adequate compensation required under Article 5(2) of the Treaty;
> (ii) DECLARE that Argentina has breached Article 3 of the Treaty by failing to accord fair and equitable treatment to the Claimant and its investments in TGN, the hydrocarbons exploration and production sector and the Claimant's equity participations in Central Puerto and HPDA;
> (iii) DECLARE that Argentina has breached Article 5(1) of the Treaty by failing to "fully and completely protect[ ] and safeguard[ ]" the Claimant's investments in TGN, in the hydrocarbons exploration and production sector, and as an equity investor in Central Puerto and HPDA;
> (iv) DECLARE that Argentina has breached Article 4 of the Treaty by taking discriminatory measures to the detriment of the Claimant in respect of its investments in TGN, in the hydrocarbons exploration and production sector, and in respect of its equity participations in Central Puerto and HPDA;
> (v) ORDER Argentina to compensate the Claimant for the foregoing breaches of the Treaty and international law, in the aggregate amount as of 31 December 2006 of US$1,292,100,000;
> (vi) ORDER Argentina to pay compound pre-judgment interest on all amounts awarded under (v) above, accruing from 1 January 2007 until the date of the Award, at a rate of:
> i. 13.5% per annum for damages with respect to TGN;
> ii. 12.18% per annum for damages with respect to Total Austral; and
> iii. the current six-month US Treasury bond rate for damages with respect to HPDA and Central Puerto;
> (vii) ORDER Argentina to pay compound interest, from the date of the Tribunal's Award to the date of Argentina's final payment to the Claimant, at the six-month US Treasury bond rate on any and all amounts of compensation ordered by the Tribunal;
> (viii) ORDER Argentina to pay all of the costs and expenses of this arbitration, including the fees and expenses of the Tribunal, the fees and expenses of any experts appointed by the Tribunal and the Claimant, the fees and expenses of the Claimant's legal representation in respect of this arbitration, and any other costs of this arbitration, to be specified in the Claimant's costs submissions, to follow, plus interest; and
> (ix) AWARD such other relief as the Tribunal considers appropriate."[6]

[5] See Total's Post-Hearing Brief, para 1161. The Tribunal notes that in Total's Annual Management Report of the Board of Directors for the year 2002, which was submitted at the hearing on the merits, the following statement appears at p. 34: "Non-recurring items in 2002, comprised mainly of impairments in Argentina related to gas and power assets and the LPG marketing activity, had a negative impact on operating income of 659 M€."
[6] See Total's Post-Hearing Brief, para. 1161.

32. On the basis of the facts and legal arguments set forth in its briefs, as well as the statements and reports made and documents submitted by its witnesses and experts, Argentina asks the Arbitral Tribunal to dismiss each and every one of Total's claims and to order the Claimant to pay all of the expenses and legal costs deriving from this arbitration,[7] including Argentina's own costs amounting to US$1,215,222.99.

3. Applicable Law

33. The Parties agree that Article 8(4) of the BIT provides the sources of law to be applied in this arbitration. However, they disagree as to the hierarchy or order of application of these sources of law. Article 8(4) of the BIT provides:

> The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law.

34. Total submits that international law and Argentina's law apply to distinct aspects of the dispute and at different analytical stages.[8] Total sets its analysis out in the following way:

> (a) At the first stage, the tribunal must decide whether particular assets or rights constituting the putative investment exist. In this context, the law of the host state is naturally relevant, because the bundle of rights that constitute an investment is a creature of domestic law;
> (b) At the second stage, the Tribunal must determine whether or not those rights constitute an investment protected by the applicable Treaty. This issue has been already resolved by the Tribunal in the Decision on Jurisdiction, and is therefore not in question here;
> (c) Finally, at the third stage, the conduct of the host state must be examined on the basis of the substantive standards set out in the applicable Treaty, which must be complemented by the "relevant principles of international law". These standards are the basis on which the liability of the state must be assessed.[9]

35. Total submits that Argentine law is only relevant as factual evidence of Total's investments, but that international law is relevant to the question of whether and how

[7] See Argentina's Post-Hearing Brief, para. 664.
[8] See Total's Post-Hearing Brief, para. 152.
[9] See Total's Post-Hearing Brief, para. 152, footnotes omitted.

Total's investments are protected under the BIT and that Argentina's compliance with its duties of protection under the BIT must be analyzed exclusively under the BIT and relevant principles of international law. Total says its position is consistent with fundamental principles of international law, including Article 27 of the 1969 Vienna Convention on the Law of Treaties ("VCLT") and the International Law Committee Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles").[10] Total maintains that Argentina cannot use its domestic law to avoid liability at international law and, in any event, that Argentine law is consistent with the BIT.[11]

36. Argentina submits that, pursuant to Article 8(4) of the BIT, Argentine law is not only relevant as factual evidence of Total's investments but is also a source of law, as are the BIT and the relevant principles of international law.[12] According to Argentina, this implies that:

> "in order to determine the scope and/or the violation of the international parameters and of the investor protection standards contemplated, it is essential to analyze the application of the internal law under consideration to the controverted issue, specially emphasizing the circumstances of each case, which is a universal law criterion."[13]

37. Argentina suggests that Total's position that Argentina's Measures are incompatible with both Argentine law and international law contradicts Total's assertion that Argentine law is only relevant to determining questions of fact. Finally, Argentina submits that, because Argentine law is applicable to the merits of the dispute before the Tribunal, it could invoke a so-called emergency principle that exists in Argentina's legal system.[14] Under this emergency principle, the Argentine Congress is empowered to enact emergency rules affecting property rights where a serious economic situation so requires. Argentina's legal system permits the application of such emergency rules to situations that it considers to be sufficiently serious (such as the economic emergency of 2001-2002).[15] According to Argentina, this emergency

[10] See Total's Post-Hearing Brief, para. 155 and the sources cited there.
[11] See Total's Post-Hearing Brief, paras. 159 – 175 and 389.
[12] See Argentina's Post-Hearing Brief, para. 497, 499.
[13] See Argentina's Post-Hearing Brief, para. 501.
[14] See Argentina's Post-Hearing Brief, para. 502 ff.
[15] See Argentina's Post-Hearing Brief, para. 507 ff. referring to the case-law of the Supreme Court of the Argentine Republic according to which emergency rules (such as the Emergency Law of 2002), enacted to cope with economic crises that are so serious as to justify their adoption, are compatible with Argentina's Constitution.

principle, as developed and acknowledged by the Supreme Court of the Argentine Republic since 1920, is relevant to the Tribunal's determination of whether the BIT has been breached.[16] In conclusion, Argentina submits that since this emergency doctrine is firmly established in Argentina's legal system, Total could not (and should not) have ignored it.[17] In Argentina's words:

> "Total knew that under certain emergency conditions, the Argentine courts could legitimate the exceptional measures taken by the Argentine Congress to mitigate the circumstances. Therefore, it should have considered its legitimate expectations at the time of investing, based on the fact that the Argentine law acknowledges the validity of the emergency law provided that, of course, there is a situation serious enough so as to justify the adoption of that kind of measures."[18]

38. The Tribunal notes that the Argentina-France BIT sets forth directives to arbitral tribunals established under the BIT about the law applicable to disputes relating to investments made under the treaty, without providing for an order of application of these sources of law. Taking into account these arguments of the parties, the Tribunal considers it appropriate to distinguish two different questions.

39. The first question concerns the role of Argentina's domestic law in determining the content and the extent of Total's economic rights as they exist in Argentina's legal system. In this regard the Tribunal believes that Argentine law has a broader role than that of just determining factual matters. The content and the scope of Total's economic rights (in Total's words, "Argentina's commitments to Total")[19] must be determined by the Tribunal in light of Argentina's legal principles and provisions. Moreover, the extensive reliance by the Claimant on Argentina's acts of a legislative and administrative nature governing the gas, electricity and hydrocarbons sectors, as well as the extensive discussion between the parties regarding the content and extent of Total's rights in respect of the operation of its investments, is a recognition that Argentina's domestic law plays a prominent role.[20] Thus, the Tribunal shall

[16] See Argentina's Post-Hearing Brief, para. 504.
[17] See Argentina's Post-Hearing Brief, para. 511.
[18] See Argentina's Post-Hearing Brief, para. 505.
[19] See also Total's Post-Hearing Brief, para. 154.
[20] The Tribunal also notes here that a number of legal authorities to which Total refers in its post-hearing brief supports the role of domestic law as not limited to determining factual questions. See Total's Post-Hearing Brief, para. 153 referring to the opinion of Prof. Schreuer according to which "investment relationships typically involve domestic law as well as international law…." See also *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras 206-207. The above award is quoted by Total in relation to

determine the precise content and extent of Total's economic rights under Argentina's legal system in respect of Total's claims under the BIT, wherever necessary in order to ascertain whether a breach of the BIT has occurred.

40. The second question regards the relevance that Argentina claims the emergency doctrine under Argentine law to have in determining whether a breach of the BIT has taken place. In this regard the Tribunal makes the following observations. First, since Total complains of breaches of the BIT, the Tribunal must apply principally the BIT, as interpreted under international law, to resolve any matter raised. This means that the Tribunal must assess Argentina's responsibility under the BIT by applying the treaty itself and the relevant rules of customary international law. The Tribunal cannot accept Argentina's position that, by invoking the emergency principle as it exists under Argentine law, Argentina can avoid international responsibility for violation of the treaty. This would contradict the fundamental principle of international law according to which "a party may not invoke its internal law as a justification for its failure to perform a treaty" (Article 27 of the Vienna Convention on the Law of the Treaties).[21] Secondly, the Tribunal notes that any complaint by Total that Argentina's measures are in breach of domestic law is not raised *per se* but is used by Total to support Total's claims under the BIT. Therefore the fact that any domestic measure challenged by Total might be legitimate in Argentina's legal system thanks to the emergency doctrine would not relieve the Tribunal from examining whether Argentina has nevertheless thereby breached the BIT.

Part II -Total's Claim in Relation to its Investment in TGN

1. Total's Investment in the Gas Sector

41. As to Total's investment in the gas transportation industry, Total explains in its Request for Arbitration that it owned an indirect 19.23% stake in Transportadora de Gas del Norte S.A. ("TGN"). "Of this 19.23 per cent stake, 19.19 per cent is

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the question of the compatibility of Argentina's measures affecting the gas sector with Argentina's Constitution. See Total's Post-Hearing Brief, paras. 175 ff.

[21] This principle reflects the general principle of customary international law according to which, for the purpose of State responsibility for the commission of an internationally wrongful act, the characterization of an act as lawful under the State's internal law is irrelevant. This principle has been restated at Article 3 of the Articles on Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission and annexed to General Assembly Resolution A/RES/56/83.

indirectly held through Gasinvest, which currently holds a 70.44 per cent stake in TGN and in which Total has a stake of 27.24 per cent; the other 0.038 per cent is directly held by the Total group."[22] TGN is one of two gas transportation companies established when the Republic of Argentina privatized Gas del Estado in 1992, which had been a "Sociedad del Estado", up to then. At that time TGN was granted a licence "for the rendering of the public gas transportation utilities"[23] in northern and central Argentina for a term of 35 years, extendable at TGN's option for a further ten years, subject to compliance by TGN with the terms and obligations contained in the licence.[24]

42. In May 1992, Argentina enacted Law 24.076 (the "Gas Law") and Decree 1738/92 (the "Gas Decree"),[25] which established the post-privatization legal framework of the gas sector. After an international bidding process, accompanied by an Information Memorandum of September 1992 prepared by Argentina's financial advisers,[26] the government of Argentina sold a 70% share in TGN to Gasinvest (a Consortium of investors[27]) on December 28, 1992.[28] The government of Argentina retained a 25% share in TGN until July 1995 when a second public bidding process took place on the basis of an Offering Memorandum prepared, on request of the government of Argentina, by its financial advisers.[29] After having successfully participated in this second bidding process, CMS Gas Transmission Argentina (an Argentinean Company controlled by CMS Energy, a US company) acquired the remaining 25% stake in TGN from the government of Argentina on 26 July, 1995.[30]

[22] See Total's Memorial, footnote 76 at p. 27 (Exhibit C-275).
[23] See Decree 2.457/92 (TGN Licence) Article 1 (Exhibit C-53(1)).
[24] See Article 3.1. and 3.2. Basic Rules of the TGN License attached to Decree 2.457/92 (Exhibit C-53). .
[25] Exhibits C-31 and C-48, respectively.
[26] See Information Memorandum, Privatization of Gas del Estado S.E. dated September 1992 (Exhibit C-50).
[27] The original members of the Gasinvest consortium are listed in Total's Request for Arbitration at footnote 95, p. 41.
[28] See Total's Request for Arbitration, para. 98 at p. 41; Total's Post-Hearing Brief, paras 271-271.
[29] See "The Offering Memorandum" of July 1995 (Exhibit A RA 97), presented by Argentina for the cross-examination of Mr. Charpentier. See also *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 58.
[30] It is worth noting that on July 12, 2001, CMS Gas Transmission Company notified its consent to ICSID arbitration and the dispute regarding the freezing of US PPI tariffs adjustment of the gas tariffs, as of January 1, 2000, by Argentine Government under the Argentina-US BIT. On 26 July, 2001, the Centre received CMS's Request for Arbitration against Argentina.

43. In March 2000, one of the investors in the Gasinvest consortium, the TransCanada Group (which had merged with the Nova Group, another Gasinvest shareholder, in June 1998), decided to sell its share and Total made a non binding offer to buy it.

44. As to the history of Total's investment in the Argentine gas transportation sector, according to Total's own description:

> "Several years after the privatization by Argentina of its Gas sector, Total decided to invest in Argentine gas transportation assets to complement its already significant investments in gas production. In reliance upon the (by then tried and tested) regulatory framework provided by Argentina for gas transportation, on 30 May 2000, Total agreed to purchase a 19.23 per cent stake in TGN from the TransCanada Group (TCPL) for an amount of US$230 million. This transaction was completed, and the shares in TGN were transferred to Total, on 23 January 2001."[31]

45. Finally, after TGN's debt restructuring in 2006, Total's stake in TGN decreased from 19.23% to 15.35%.[32]

2. Relevant Features of the Gas Regulatory System Invoked by Total

46. Total's position is that the general legislation and the specific regulations and provisions in force in Argentina when Total bought its stake in TGN resulted in a legal framework (the "Gas Regulatory Framework") that included various types of "promises" or "commitments" on which Total had relied when making its investment and on which it was entitled to rely.

47. Total explains:

> "[…] Total's decision to make an investment of US$230 million in TGN was based on a careful study of the specific and explicit commitments contained in the Gas Regulatory Framework and in particular:
> (a) the promise that the tariff would be sufficient to cover all reasonable costs of providing the service, taxes, amortisations and a reasonable rate of return, known as the "economic equilibrium". This economic equilibrium would be preserved by the regulator, ENARGAS, through the following mechanisms:
>
> (i) the tariff would be reviewed by ENARGAS every five years in accordance with certain pre-established criteria, ensuring the maintenance of TGN's economic equilibrium over the period of the Licence (the Five-Year Tariff Review);

[31] See Total's Post-Hearing Brief para. 273, where a diagram explains the corporate structure of Gasinvest and TGN (see also Total's Memorial para. 53).
[32] See Total's Post-Hearing Brief para. 582.

(ii) tariffs could be subject to a non-recurrent review by ENARGAS on "objective and justified" grounds (such as to reflect costs variations) or if those tariffs became "inadequate, unduly discriminatory or preferential", always ensuring a continued reasonable rate of return for TGN (the Extraordinary Tariff Review). This could be triggered by the Licensee or consumers;

(iii) the tariff would be calculated in dollars and converted into pesos for billing purposes only, and would be adjusted every six months in accordance with variations in the US Producer Price Index (the US PPI);

(b) the tariff would not be frozen or subject to regulation or price control without full compensation from the Government and the basic rules of the TGN Licence (which included the tariff regime) would not be changed without TGN's consent."[33]

48. All of Argentina's commitments listed by Total in its submissions are set forth in the Gas Law, the Gas Decree and an administrative act containing the TGN Licence, Decree 2.457/92 dated 18 December 1992 (the "TGN Licence"). Total claims that the changes, which Argentina unilaterally made to that legal framework, were in breach of those commitments and resulted at the same time in a violation of various BIT provisions to Total's prejudice.

49. The Tribunal has examined all of the legislation and the regulations referred to by Total. The Gas Law regulates the gas transportation and distribution activities which, pursuant to Article 1, are considered to be a "national public service". The Law establishes in Article 2 a series of paramount principles that govern the gas regime and ENARGAS ("*Ente Nacional Regulador del Gas*", the Regulatory Body in the Gas sector) enforcement activity. The protection of consumer rights is the first objective of the Law (Article 2(a)), followed by that of fostering investments for the purpose of guaranteeing the gas supply in the long term (Article 2(b)). The Law also states the principle that gas transportation and distribution activities are to be regulated to ensure just and reasonable tariffs (Article 2(d)) and to "[c]ause the natural gas supply price to the industry be equal to the international price in force in countries with similar resources and conditions." (Article 2(g))

50. The Gas Law establishes at Article 38(a) the principle of guaranteeing to efficient Licensees sufficient revenue to cover all reasonable operational costs of the service, taxes, amortisations, and a reasonable rate of return according to the criteria of Article 39. More specifically, according to Article 38(a), "[s]ervices rendered as to

[33] See Total's Post-Hearing Brief, para. 274 [footnotes omitted].

transportation and distribution will be offered at tariffs adjusted to the following principles: a) To provide transportation and distribution companies operating in an economical and prudent way with the chance to obtain sufficient revenue to cover all reasonable costs, including, taxes, amortization and a reasonable rate of return as set forth in the following Article; […].” Article 39 provides that: “In order to provide a reasonable rate of return to such efficient companies, the tariffs applied to transportation and distribution companies must entail: a) such revenue to be similar to the revenue of other activities with similar or comparable risk; b) a relationship between the efficiency and the satisfactory rendering of services.”

51. The Gas Law provides for two mechanisms according to which ENARGAS has to review tariffs. Article 42 of the Gas Law provides for a periodic Five-Year Tariff Review (to be carried out by ENARGAS according to the principles of Articles 38 and 39), which will set out new maximum tariffs according to the rules contained in Article 39. Precisely, [e]very FIVE (5) years, the ENARGAS shall review the tariff adjustment system. Such review must be performed in accordance with the provisions of Articles 38 and 39 and will set new maximum tariffs as per Article 39 hereof.”

52. Articles 46 and 47 enable both Licensees and consumers to require ENARGAS to carry out an Extraordinary Review of tariffs, of “charges, maximum prices, classifications or services set forth in the terms of the authorization to operate”, provided that their modifications are reasonably required by specific unforeseeable circumstances of an extraordinary character (Articles 46(2) and 47 of the Gas Law). According to Article 46(1), “[t]ransportation and distribution companies, as well as users, may request the ENARGAS to modify the tariffs, charges, maximum prices, classifications, or services set forth in accordance with terms of the authorization to operate, considered necessary if the request is based on objective and justified circumstances.”[34] Furthermore, Article 46 of the Gas Decree specifies the nature of the “objective and justified circumstances” that shall support a request by consumers or Public utilities to modify tariffs under the Extraordinary Tariff Review. According to the Gas Decree (Article 46), “the modifications provided for in Article 46 of the

[34] Article 46(2) of the Gas Law provides that: “Once the request for modification is received, ENARGAS must adopt a resolution within the term of SIXTY (60) days prior to the calling for Public Hearing which must be held no later than FIFTEEN (15) days after reception of said request.”

Law must be based on specific circumstances not provided for previously and cannot be recurrent. Such modifications do not include the readjustment set forth in Article 42 of the Law." According to Article 47 of the Gas Law: "When ENARGAS deems, as a consequence of proceedings initiated ex officio or by private action, that there are reasons to consider a tariff, charge, classification or service of a transportation or distribution company is inadequate, unduly discriminatory or preferential, it shall notify such circumstance to the transportation or distribution company and it shall make it public by calling a Public Hearing for such purpose no later than FIFTEEN (15) days after such notice." According to the last sentence of Article 47: "Once such hearing takes place, it shall decide within the term stated in Article 46 above."

53. As to the calculation of the tariffs in dollars of the United States of America. ("US$" or "US dollars"), Article 41(2) of the Gas Decree provides that: "Tariffs for transportation and distribution shall be calculated in United States dollars. The resulting tariff chart shall be expressed in pesos to be converted according to Law No. 23.928, taking into account, for their reconversion to pesos, the parity set in Article 3 of Decree No. 2.128/91." The TGN Licence also contains a number of rules regarding the tariffs and their calculation. Section 9.2 of the TGN Licence provides that: "Annex III of the Decree approving these Basic Rules contains the tariff to be perceived by the Licensee. Said tariff shall only be modified according to the provisions of this Law, the Regulatory Decree, these Basic Rules and the provisions of the tariff itself." Furthermore, "[t]he tariff has been calculated in United States dollars. The adjustments of 9.3 shall be calculated in United States dollars." More precisely, "[t]he resulting or recalculated Tariff Chart shall be expressed, at the time of its application for billing in pesos at the rate of convertibility set in Article 3 of Decree 2.128/91, implementing Law No. 23.928, and its eventual modifications." Annex III contains the Basic Rules regarding the TGN Licence and establishes that: "Tariffs are expressed in pesos to be converted according to Law No. 23928."

54. As to the periodic adjustment of the US dollar tariffs, the first paragraph of Article 41 of the Gas Law does not provide any specific mechanism such as the US PPI adjustment on a semi-annual basis. Instead it provides in more general terms that: "During the authorization to operate, tariffs shall be adjusted in accordance with a methodology based on international market indicators reflecting changes in assets

and services value representing suppliers' activities. Such indicators shall be adjusted, in turn, in more or less, by a factor meant to stimulate efficiency and installations constructions, operation and maintenance investments at the same time. Such methodology shall reflect any tax variations on tariffs." According to Article 41(3) of the Gas Decree, "The methodology to adjust the transportation and distribution companies' tariffs based on international markets indicators set in Article 41 hereof shall be included in the corresponding authorizations to operate. The ENARGAS shall determine the necessary information requirements to monitor the adequate application of the mechanism set forth in the terms of the authorization to operate, within the term and periods set forth therein. The ENARGAS shall not be able to suspend, limit or reject such tariff adjustments except in cases of error in calculation and/or applied proceedings." The reference to US PPI is found instead in Section 9.4.1.1 of the TGN Licence. This section provides that: "Transportation tariffs shall be adjusted semi-annually in accordance with PPI variations."

55. As to the Gas Regulatory Framework described above, Total distinguishes between 'core commitments' and 'additional commitments'. As to the 'core commitments', in Total's words:

> "[…] The overarching promise of the Gas Regulatory Framework was that TGN's economic equilibrium would be maintained throughout the 35 to 45 years of its Licence. That is to say that Argentina promised that TGN's regulated tariff, which represented 98% of its revenue, was and would continue to be regulated so as to provide TGN with sufficient revenue to cover all reasonable costs, including taxes, amortizations and capital costs, and make a "reasonable rate of return" similar to activities of comparable risk."[35]

56. Total submits further that:

> "The Gas Regulatory Framework contained two additional commitments which supported the promise of economic equilibrium. It provided that TGN's tariffs could be automatically adjusted to ensure that its revenue would always be sufficient to cover its mainly dollar denominated costs:
>
> (c) First, Argentina promised that TGN's tariffs were and would be calculated in dollars, and converted to Argentine pesos for billing purposes only.
> (d) Secondly, Argentina provided that TGN's dollar tariffs would be automatically adjusted every six months in accordance with variations in the US

[35] See Total's Post-Hearing Brief, para. 20 [footnotes omitted].

> Producer Price Index (the US PPI), thereby preserving its dollar revenue in real dollar terms."[36]
>
> Total further points out that: "[…] the Gas Regulatory Framework provided two mechanisms designed to allow the regulator, ENARGAS, to set and restore TGN's economic equilibrium on both a recurrent and non-recurrent (extraordinary) basis. The Gas Regulatory Framework provided that:
>
> (a) tariffs would be reviewed by ENARGAS every five years in order to set the tariffs for the next five-year period, taking into account TGN's planned investments and potential efficiencies, always ensuring sufficient revenue to cover all reasonable costs, including taxes, amortisations and capital costs, and a "reasonable rate of return" (the Five-Year Tariff Review);
>
> (b) if TGN's economic equilibrium was disrupted, tariffs could be subject to a non-recurrent review by ENARGAS on "objective and justified" grounds (such as to reflect costs variations) or if the tariffs became "inadequate, unduly discriminatory or preferential", always ensuring sufficient revenue to cover all reasonable costs, including taxes, amortisations and capital costs, and a "reasonable rate of return" for TGN (the Extraordinary Tariff Review); Argentina further bolstered its promise of stable and sufficient revenues with several stabilisation clauses. Argentina promised that tariffs would not be frozen or subject to regulation or price control without full compensation from the Government, and that the basic rules of the TGN Licence (which included the tariff regime) would not be changed without TGN's consent."[37]

57. Total also points to the terms of TGN's Licence and to the Bidding Rules[38] enacted by Argentina in 1992, regulating the participation of interested parties in the international bidding process that was aimed at selling the privatized companies, notwithstanding that Total did not participate in this process.

58. Total considers that three rules in the TGN Licence should be qualified as "stabilisation clauses".[39] First, Section 9.8 establishes under the heading '*Inaplicabilidad de Controles de Precios'* that: "The Licensee tariff regime shall not be subject to freezing, management and/or price control orders. If, in spite of this provision, the Licensee is obliged to adapt to a tariff control regime establishing a lower level than that resulting from the Tariff, the Licensee shall be entitled to receive equal compensation payable by the Grantor." Secondly, Section 9.1 provides that: "The Service Rules may be periodically modified, after the effective date, by the Regulating Authority, to adapt it to the evolution and improvement of the Licensed Service. When such modifications are not due to the Licensee's initiative, it must be consulted previously. Said modifications cannot alter these Basic Rules and, should

[36] See Total's Post-Hearing Brief, para. 21 [footnotes omitted].
[37] See Total's Post-Hearing Brief, paras. 22-23 [footnotes omitted].
[38] *Pliego de bases y condiciones para el llamado a licitación pública internacional para la privatización de Gas del Estado* No. 33-0150 (Exhibit C-49).
[39] See above para. 56, quoting Total's Post-Hearing Brief, para. 22-23.

they alter the economic-financial equilibrium of the License, a tariff review shall be carried out as determined by the Regulating Authority." Finally, Section 18.2 provides that: "The Grantor shall not modify these Basic Rules, in whole or in part, except by prior written consent expressed by the Licensee and prior recommendation of the Regulating Authority. Those provisions modifying the Service Rules and the Tariff adopted by the Regulating Authority shall not be deemed modifications to the Licence in force, notwithstanding the right of the Licensee to require the corresponding Tariff readjustment if the net effect of such modification alters, in a favourable or unfavourable sense, the economic-financial equilibrium existing prior to such modification."

59. Total has also invoked the violation by Argentina of TGN Bidding Rules (Annex F). These Bidding Rules had been prepared by Argentina in 1992 for the international bidding process aimed at selling TGN stocks that occurred in November-December 1992. As also explained by the Information Memorandum on Privatization of Gas del Estado S.E., the Bidding Rules of 1992, which were approved by the Ministry of Economy and Public Works and Services (Ministerial Decree No. 874/92), prescribed "the qualification, bidding and award process and the requirements which must be satisfied in order to submit a bid for one or more of the new companies" and deadlines for interested parties to make their offer for the new companies.[40] These Rules were, therefore, addressed to the parties who participated in the award process in November-December 1992.

3. The Suspension of the PPI Tariff Adjustment in 2000

60. Having described the legal regime for the gas transportation sector in place since 1992 on which Total relies, the Tribunal recalls that Argentina has pointed to two developments it considers to be relevant because they had taken place shortly before or while Total was proceeding to acquire the TGN shares. Argentina is of the view that these developments weakened the Gas Regulatory Framework and that Total should have considered this when it made its investment.

[40] See Information Memorandum, Privatization of Gas del Estado S.E., *supra* note 26 at p. 10 and the timetable for the bidding and award process at p. 12.

61. First, Argentina points to Law No. 25.344 enacted on October 19, 2000 that had declared "the emergency of the economic and financial situation and of the contracts by the Argentine public sector". This Law, "[…] specifically triggered extraordinary prerogatives in relation to administrative contracts, suspended all lawsuits against the Argentine Government and consolidated its debt (deferment of payments)."[41] Although Argentina recognizes that this law was not applicable to public service sectors, Argentina contends that the issuance of that law was a legal recognition that an "economic and financial emergency" was already in place in 2001, when Total made its investments in both the gas transportation and the electricity generation sectors, a fact that Total should have taken into account in evaluating the macroeconomic and regulatory risk involved.[42]

62. Secondly, Argentina points with repeated emphasis to a development that was specific to the gas sector. On January 6, 2000 (therefore before Total's offer to TransCanada Group dated 30 May, 2000 for the 19.23% stake in TGN) ENARGAS and the gas licensees (including TGN) concluded the first agreement to exceptionally (and just once) suspend the US PPI Adjustment of gas tariffs from January 1, 2000 to June 30, 2000, and to defer its application up to June 30, 2000 (Article 1 *Acta Acuerdo*).[43] At the same time, Article 1 of the *Acta Acuerdo* provided for a full recovery by the Licensees of the suspended adjustments between July 1, 2000 and April 30, 2001. The *Acta Acuerdo*'s reasons and its legal basis are stated in its Preamble and are connected with the severe recession taking place in Argentina's economy. The Preamble recalls that the *Secretaría de Energía del Ministerio de Economía* (the "SoE") had taken the initiative to ask Licensees to consider a temporary suspension of the US PPI adjustment in accordance with the objectives stated in Article 2 of the Gas Law and its implementing regulations.[44] The Preamble mentions also that the SoE "has expressed its concern as regards the current economic situation [*i.e.* the ongoing deep recession and deflation] and the need to

[41] See Argentina's Post-Hearing Brief, paras. 68-69 (as to this law in general, paras. 70-73).
[42] See Argentina's Post-Hearing Brief, para. 68. In this connection, the Tribunal notes that Argentina had pointed to Law 25.344 for the first time at the Hearings on the Merits when witness Belluscio mentioned it.
[43] See Exhibit C-119.
[44] As to the objectives of the Gas Law, see above para. 49. Taking into account the aim of the *Acta Acuerdo* to mitigate the negative effect of Argentina's economic recession and deflation on the general population, the Tribunal considers that the protection of consumer rights established in Article 2(a) Gas Law is particularly relevant here. This conclusion is expressly supported by Decree 669/00 containing the Second *Acta Acuerdo* (see Decree's Preamble eighth and ninth sentences).

provide solutions in accordance with the economic plan designed from time to time by the National Authorities, not affecting the compliance with the legislation of the regulatory framework in force." As to the Licensees' position, the Preamble stated that, on the one hand, the Licensees were "conscious of the social needs which have arisen as a consequence of the general economic situation sustained by the country"; on the other, they "want to remark that such situation is not isolated from the economic integrity and its results, therefore, the full force of the public policies of privatization are essential." (fourth sentence).

63. As to this development concerning the Gas Regulatory Framework, Total has not denied that, while deciding to make its investments in TGN, it was aware of the above-mentioned *Acta Acuerdo*. Rather, Total contends that "Given that this agreement was made on an "exceptional and only once" basis, as a favour to a new regime [*i.e.* Fernando De la Rúa's new administration], and that the deferred US PPI was to be recovered six months later with interest, Total did not take the deferral into account in its valuation of TGN nor in the offer it made to TCPL."[45]

64. On August 4, 2000, after the Total/TransCanada Group Share Purchase Agreement dated 30 May, 2000 (but prior to the completion of the sale), Argentina enacted Decree No. 669/00 ("The application of the adjustment on the corresponding tariffs in 9.4.1.1 and 9.4.1.4 of the Basic Rules of the Gas Transportation and Distribution License in order to mitigate the economic impact caused by the application of international market indicators, affecting the general population and the industrial sector. Application of the adjustment related to the Producer Price Index, Industrial Commodities (PPI). Agreement signed by the Government and the Licensees.")[46] This decree of July 2000 approved the second agreement (*Acta Acuerdo*) between the government and the gas licensees (in this case including TGN) to further defer and suspend the US PPI adjustment of gas tariffs until June 30, 2002. The second *Acta Acuerdo* was premised on the existence of a "deep crisis" that made it necessary to mitigate the impact of the reference to international prices. The Decree's Preamble (eleventh sentence) stated that "in order to understand in full the depth of this crisis, it is necessary that the State and the gas Licensees, with the sole and specific purpose of mitigating the impact on the economy generated by the application of international

[45] See Total's Memorial, para. 77.
[46] Exhibit C-54.

market indicators in tariffs to users of natural gas adopt measures to avoid a severely negative economic effect for the general population and the industry as well." Thus, the Decree contradicted the solemn statement in the first *Acta Acuerdo* that the first suspension would be exceptional and non-recurrent. The Tribunal notes that the Decree's Preamble included a significant reference to Argentina's commitments under its investment treaties: "that the privatization process and the investments resulting from it find the legal protection of the rules in force, and, specifically, also in the Bilateral Investment Treaties entered into by the ARGENTINE REPUBLIC and ratified by several laws." (fourth sentence). In addition, the Decree's Preamble went on to state that "[…] said adjustment system constitutes a basic statement, condition of the bids and offers awarded as a consequence of them, therefore, it entails a legitimately acquired right by the succeeding Licensees in each License." (fifth sentence)

65. A few days later (on August 18, 2000), on request of the '*Defensor del Pueblo de la Nación*' (the Ombudsman), Judge Clara María do Pico issued an injunction suspending the application of Decree 669/00.[47] The Ombudsman disputed as contrary to the rights and interests of consumers the subsequent recovery in full of the US PPI adjustment with 8.2% interest after the period of suspension (after June 30, 2002), provided for in Decree 669/00 through the creation of a specific fund (el *Fondo de Estabilización del PPI*). According to the Ombudsman, this mechanism for recovering the deferred US PPI adjustment did not consider the prejudice to consumer interests and the radical change in the economic circumstances as of 1999. The Ombudsman referred to the deep recession taking place in Argentina's economy and the deflation experienced by Argentina since 1999 on the one hand, and to the unusual increase in prices in the United States of America ("US") on the other hand. The judge accepted this argument and found that the full recovery of the deferred US PPI adjustment provided for in the Decree was in contrast with the core principle that tariffs shall be just and reasonable not only for Licensees but also for consumers (Art. 9.1, Annex B, Decree 2255/92 *Reglamento del Servicio y Tarifas*). Moreover, according to the judge, these new economic circumstances could be qualified as "justified objective circumstances", thereby calling for an Extraordinary Tariff Review by ENARGAS and requiring the taking into account of consumer interests.

[47] See Exhibit C-122.

According to the judge, the government and ENARGAS acted improperly and beyond the Gas Regulatory Framework by providing for the US PPI adjustment through Decree 669/00 without the intervention of consumers in public tariff review proceedings (such as the Extraordinary Tariff Review according to Article 47 of the Gas Law).

66. Promptly thereafter, on August 28, 2000, considering that this judicial suspension of Decree 669/00 breached the US-Argentina BIT, CMS Gas Transmission, a shareholder in TGN, sent a letter to the President of the Argentine Republic to start the 6-month period of negotiation required under the Argentina-US BIT prior to commencing ICSID arbitration. On September 22, 2000, ENARGAS, the Ministry of Economy and the Attorney General appealed this injunction but ultimately were without success.[48] On January 23, 2001, Total closed the acquisition of TGN's 19.23% stake. As to these events, which occurred while Total was making its investment in TGN and were deemed by another foreign (US) shareholder to be a potential breach of the US-Argentina BIT, Total contends that: "Given the government's own appeal against the decision, and the weak legal grounds on which it perceived the decision was based, TGN was confident that it would soon be overturned. As a result, this development did not impact the completion of the sale to Total."[49]

67. To the contrary, Argentina contends that Law No. 25.344 was part of a chronology of emergency events, which started with the two Agreements (*Actas Acuerdo*) and were followed by the preliminary injunction suspending the inflation adjustment to account for the US PPI in the gas transportation sector. Moreover, Argentina points out that "All these events are prior to the investment made by TOTAL in the gas and electricity generation sector."[50] Given all of the above facts, and in contrast with Total's description in its Opening Statement at the Hearings, Argentina has described the context in which Total made its investments in both the gas transportation sector and the electricity generation sector in the following terms:

[48] See Exhibit C-125. The Government's appeal was rejected by the Buenos Aires Court of Appeals on October 5, 2001. TGN and the other Licensees also appealed the injunction.
[49] See Total's Memorial, para. 81 (as these events generally para. 80).
[50] See Argentina's Post-Hearing Brief, para. 75 [italics in original].

"[...] (a) instead of "a conscious policy of the Argentine Government to attract foreign investments," there existed a desperate policy to save the economy; (b) instead of a State Reform Law implementing a "massive privatization program," there was an Economic Emergency Law authorizing the intervention of administrative contracts; (c) instead of the recent signature of 39 BITs, there were two Agreements and a preliminary injunction with effects with respect to natural gas transportation and distribution licenses, and an investor (CMS) who resorted to the ICSID; and (d) instead of a recent currency pegged to the US dollar pursuant to the Convertibility Law as a measure against hyperinflation, there was a currency heading for a mega-devaluation, and an economic and social situation that was described in an emergency law as a "deep depression process."[51]

4. The Measures Challenged by Total: the Emergency Law

68. Having reviewed the different legal provisions that the parties consider relevant to Total's investment, the Tribunal now turns to Argentina's Measures challenged by Total as having "completely destroyed" that framework in breach of the protection conferred by the BIT.

69. According to Total, the Measures enacted by Argentina that breached its commitments towards Total are all contained in or took place pursuant to the Emergency Law of January 6, 2002. More specifically, in Total's words,[52] "[…] each and every one of the core commitments upon which Total relied on making its investment has been abrogated, as shown in the chart below:

Promise	Abolition of the promise
Economic equilibrium: tariffs sufficient to cover costs and earn a reasonable rate of return *(Articles 38(a) & 39 Gas Law; Article 2(4) Gas Decree)*	Economic equilibrium shattered, pesified tariffs reduced to one third of their previous dollar value while dollar denominated obligations and duties under the Licence remained the same *(Emergency Law: Article 8, 9 and 10)*
Tariff reviews to be conducted every five years and extraordinary tariff reviews to be conducted to restore the economic equilibrium when altered by unforeseen circumstances *(Article 42, 46, 47 Gas Law; Articles 42, 46, 47 Gas Decree; Sections 9.4.1 and 9.5 TGN Licence)*	ENARGAS prohibited from reviewing tariffs; imposition of a mandatory renegotiation process *(Article 9 Emergency Law & MoE Resolution 38/200)*

[51] See Argentina's Post-Hearing Brief, para. 79.
[52] See Total's Post-Hearing Brief, para. 37.

Dollar calculated tariffs *(Article 41 Gas Decree; Section 9.2 TGN Licence; Article 7.1 Annex F Bidding Rules)*	Pesification of tariffs at an artificial rate of US$1 to 1 peso *(Article 8 Emergency Law)*
Tariffs adjusted semi-annually by the US PPI *(Article 41 Gas Law; Article 41 Gas Decree; Section 9.4.1.1 TGN Licence; Section 7.5 Annex F Bidding Rules)*	Adjustment of tariffs in accordance with the US PPI prohibited *(Article 8 Emergency Law)*
No freezing of tariffs without full compensation; no modification of the terms of the Licence without the licensee's consent*(Article 4(5), 41 Gas Decree; Section 9.1, 9.8, 11.5 18.2 TGN Licence)*	Unilateral modification of TGN's Licence and imposition of a mandatory renegotiation process which disregards the terms of the original Licence *(Articles 8-10 Emergency Law; MoE Resolution 38/2002; Article 2 Law 25,790)*

70. Before examining in detail the provisions challenged by Total and their effect on the legal framework on which Total relies, the Tribunal considers it appropriate to recall the economic, social and political evolution of Argentina that led to the Emergency Law and to the major policy and legal initiatives taken by the authorities to cope with the crisis. This evolution and the emergency legislation are relevant also to the Tribunal's examination of the other issues raised by Total in this arbitration.

4.1 Argentina's Economic Evolution Leading to the 2001/02 Emergency

71. The Emergency Law, which Total challenges, was enacted by Argentina during the well-known economic, political and social crisis experienced by the country during 2001-2002, in response to that crisis and as an attempt to control and overcome it. This crisis has been defined both as one of the worst economic crises in its history and "among the most severe of recent economic crises" worldwide.[53]

72. Argentina's crisis of 2001-2002 occurred after three years of deep recession and deflation. Nevertheless, Argentina's means to cope with this deep recession were

[53] See IMF Occasional Paper N° 236, *Lessons from the Crisis in Argentina* (2005) (hereinafter IMF, *Lessons from the Crisis*) (Exhibit C-454); IMF, *The IMF and Argentina 1991-2001*, IMF, Independent Evaluation Office, 2004 (hereinafter IMF *Evaluation Report*), 8. As stated in the Preface to the Report, the Independent Evaluation Office of the IMF (IEO), which authored the Report, "was created in 2001 to provide objective and independent evaluations on issues relevant to the IMF. It operates independently of IMF management and at arm's length from the IMF Executive Board". IMF *Evaluation Report* "evaluates the role of the IMF in Argentina during 1991-2001, focusing particularly on the period of crisis management from 2000 to early 2002", *ibid* 11. In its description of the crisis, the Tribunal relies on *Lessons from the Crisis*, the *Evaluation Report*, as well as on the summaries in previous ICSID awards dealing with the effects of Argentina's crisis, such as *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, available at **http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf**

constrained by the fact that the convertibility of pesos at par with the US dollar under its currency board system prevented recourse to devaluation.[54]

73. At the end of 2000 and in the course of 2001, Argentina passed several laws aimed at implementing or preserving the structural reforms that the IMF had asked Argentina to undertake in accordance with the conditions of the Stand-by Arrangement with the IMF of March 2000, while maintaining the convertibility regime.[55] This was a fundamental element of the policy of stability pursued by the IMF in agreement with Argentina. From December 2000 to September 2001, the IMF provided exceptional financial support to Argentina amounting to US$ 17 billion. This IMF financial support continued until August-September 2001, "[D]espite concerns about the lack of political support for the measures that would be needed to achieve the zero-deficit target…"[56] Notwithstanding the fiscal program for 2000 carried out to implement the Fiscal Responsibility Law approved by the Argentine Congress in September 1999 and aimed at reducing the public deficit, at the beginning of March 2001, the economic crisis worsened due to a further decline in economic activity that resulted in a major deterioration in fiscal performance and, consequently, a significant deterioration in the federal government's finances.

74. To cope with the worsening crisis, at the end of March 2001, the government recalled Mr. Domingo Cavallo (the author of the Convertibility plan in 1991) as Minister of Economy and Congress granted him emergency powers. Shortly thereafter (on May 1), the new Minister publicly reaffirmed that Argentina would preserve the convertibility regime.

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[54] The IMF in hindsight attributes the origin of the crisis to a number of factors hitting Argentina in the second half of 1998. Among the external factors, IMF *Evaluation Report* (see *supra* note 53) identifies the appreciation of the US dollar and the devaluation of the Brazilian real. More specifically, the Report outlines that "*The convertibility regime ruled out nominal depreciation when a depreciation of the real exchange rate was warranted by, among other things, the sustained appreciation of the US dollar and the devaluation of the Brazilian real in early 1999. Deflation and output contraction set in, while Argentina faced increasingly tighter financing constraints amid investor concerns over fiscal solvency.*" After having criticized the IMF for supporting the country's weak policies too long –"*even after it had become evident in the late 1990s that the political ability to deliver the necessary fiscal discipline and structural reforms was lacking*"- the Report went on to affirm at p. 3 that: "*By the time the crisis hit Argentina in late 2000, there were grave concerns about the country's exchange rate and debt sustainability, but there was no easy solution. Given the extensive dollarization of the economy, the costs of exiting the convertibility regime were already very large.*"

[55] The Convertibility Law, adopted by Argentina in 1991, sought to counteract the hyperinflation that existed at the beginning of the 1990s, by pegging the peso to the US dollar at par and was part of a broader plan (the so-called Convertibility Plan) that reformed Argentina's economy. See below para. 137 ff.

[56] See IMF *Evaluation Report*, *supra* note 53, 9.

75. Others measures adopted by Argentina at the end of 2000, and during the course of 2001, included: the introduction of a financial transaction tax, together with more flexibility in the external pegging of the peso (through the addition in the Convertibility Law of the euro as a peg besides the US dollar); labour market reform and social security reform (both planned but not completed due to the widespread social opposition); a package of trade and tax measures aimed at improving the competitiveness of enterprises (the so-called competitiveness plan) in June 2001; the Zero Deficit Law of July 2001; a voluntary exchange of external government bonds of a face value of US$29.5 billion for longer-term instruments (the so-called mega-swap); and the "Intangibility Law" of September 24, 2001 (declaring all deposits in pesos or in foreign currency "intangible"). In October 2001, after the rating agencies had downgraded Argentina's debt twice, Minister Cavallo announced that he would launch a further voluntary restructuring of all government debt (Decree 1387 of November 1, 2001).

76. The further development of the crisis was described by the ICSID Tribunal in the case *Continental Casuality Company v. Argentina*, based on the official IMF documents, in the following terms:

> "Withdrawal of deposits from the banks developed however at a growing pace and capital flight increased. While there had been a sustained inflow of foreign direct investment into Argentina in the years from 1997 to 2000, with a peak in 1999, the flow almost halted in 2001. The fall in official reserves continued downwards to a level barely enough to cover domestic currency in circulation. In the meantime the dollarization of the economy amplified even more, since the public sought refuge in dollar denominated deposits, savings and financial assets. The spread between "on-shore dollar" and peso interest rate, which was no more than 1½ to 2 percentage points on average prior to 2001 jumped to 40 points in the first part of 2001 while the sovereign debt spread skyrocketed.[57]
>
> 123. The general economic situation deteriorated notwithstanding the IMF's assistance: actual GDP declined 4.5% in 2001 while the IMF program had forecasted an increase; unemployment rate grew at 18.3%. By the end of 2001 "both the economy and the public finances were in deep crisis." The GDP would have dropped 4.5%; the primary and overall fiscal position ended up 3% weaker than anticipated in September; the debt-to-GDP ratio rose above 60%.
>
> 124. On November 6, 2001, S&P lowered Argentina's long-term sovereign debt from CC to SD (Selective Default), thereby implying that the Government was already not in the condition to meet some of its financial obligations. A growing number of commentators outside Argentina, notably in the international financial

[57] Data taken from the tables in IMF, *Lessons from the Crisis*, *supra* note 53, 25.

> press, hinted at the impossibility for Argentina to maintain the convertibility regime. At the end of this month the peso started to devalue in the free market of Montevideo. Facing a substantial run on deposits, on December 1, 2001 the Government enacted Decree 1570 (Corralito), freezing deposits in the banking system (only pesos 250 withdrawals per week were admitted) and prohibiting transfers out of the country."[58]

77. In early December 2001, the IMF announced "that the pending review under the Stand-by Arrangement could not be completed under the circumstances", thus withdrawing its financial support to Argentina.[59]

78. 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.

79. 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. 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. 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.

[58] *Continental Casualty Company v. Argentina*, *supra* note 53, paras. 122-124 [footnotes omitted].
[59] See IMF *Evaluation Report*, *supra* note 53, 5.

4.2 Basic Features of the Emergency Law

80. It was in this context that Argentina passed the Emergency Law on January 6, 2002. The Emergency Law and Measures adopted thereunder provided for the official abolition of the convertibility regime and of the connected pegging of the peso at par with the US dollar, as well as the forced conversion into pesos of all dollar denominated financial instruments, indebtedness, contracts and all public utilities tariffs ("pesification") subject to Argentina's law.

81. The Emergency Law, having declared a "public emergency in social, economic, administrative, financial and exchange matters", directed the government at Article 1 to "1. Proceed with the reorganization of the financial, banking and exchange market systems. 2. Reactivate the operation of the economy and improve employment and income distribution levels, with emphasis laid on a regional economies' development programme. 3. Create conditions for a sustainable economic growth, compatible with public debt restructuring. 4. Regulate the restructuring of continuing obligations, affected by the new exchange system implemented on article 2", according to the rules specified in the following articles. According to Article 8, "[a]s from the passing of this Law, all contracts executed by the Public Administration under the rules of public law, amongst them, those related to public works and services, dollar or other currencies adjustment clauses and indexatory clauses based upon price ratios from other countries and any other type of indexation system ceased to be effective, providing that prices and rates resulting from such clauses would be expressed in pesos at an exchange rate of one peso ($ 1) = one US dollar (USD 1)."[60] Article 9 authorised the government to "renegotiate contracts mentioned in Article 8. In the case of contracts having as their purpose the rendering of utilities, the following criteria must be considered: 1) impact of rates on the competitiveness of the economy and income distribution; 2) the quality of services and investment plans, whenever they are contractually provided for; 3) interest of users and the possibility of gaining access to such services; 4) safety of systems involved; and 5) company's profitability." According to Article 10, "[t]he provisions of Articles 8 and 9 hereof shall under no circumstances authorize the contracting companies or companies

[60] Besides the pesification and renegotiation of the tariffs in the public service sectors, the Emergency Law provides for the pesification of contracts subject to private law and at the same time for their renegotiation between the parties (Article 11). The measure is not at stake as to Total's claim in relation to TGN.

rendering public services, to suspend or alter the fulfilment of their obligations." While providing for the pesification of public services tariffs and blocking the application of "adjustment clauses pegged to US dollars or any other foreign currency and index clauses based on price indexes from other countries, as well as any other index mechanism", Article 9 of the Emergency Law provided for a renegotiation of the licences of providers of public services and fixed the criteria according to which the renegotiation process should be dealt with. Among these criteria, were "the interest of users and utility accessibility" and "companies' revenue."

82. The Tribunal notes that the above principles set forth in the Emergency Law did not derogate from but rather reflected and restated the fundamental criteria established by the Gas Law and the principal objectives of the Gas Regulatory Framework. These objectives and principles are enshrined in the Gas Law in the following terms: to guarantee prudent and efficient Licensees the ability to cover their costs and receive a reasonable rate of return (Article 38(a) Gas Law) and the protection of consumer rights (Article 2(a) Gas Law), taking into account that gas transportation and distribution activities are a "national public service" (Article 1). Finally, the Tribunal notes that neither the Emergency Law nor the subsequent implementing decree officially abolished, replaced or amended the text of the Gas Law and the Gas Decree. Both of these legal instruments have remained in force.

4.3 The Tariff Renegotiation Process Taking Place Pursuant to and Following the Emergency Law

83. The Emergency Law of January 2002 limited itself to establishing a renegotiation process with the Licensees and the general criteria of that renegotiation. The Emergency Law did not indicate whether this renegotiation mechanism would be different than the one provided for in the Gas Regime. More generally, the Emergency Law did not establish whether the renegotiation process would consist of the various reviews and adjustment mechanisms specifically provided for in Argentina's legal system for each public utility sector or rather whether these mechanisms would be replaced by one or more new types of proceedings.

84. In any case, on February 12, 2002 Argentina, through Decree 293/02,[61] created a single Commission tasked with renegotiating all of the concessions and licences having as their object "to make public works and provide public services" in accordance with Article 8 of the Emergency Law and the criteria in Article 9 of that law. Decree 293/02 established the renegotiation process for all public utilities' concessions and licences and stipulated that the process would last 120 days starting on March 1, 2002. By a subsequent Decree (Decree 370/02) enacted on February 22, 2002, the "*Comisión de la Renegociación de Contratos de Obras y Servicios Públicos*" was placed under the control of the Ministry of Economy. On March 18, 2002, the Ministry of Economy with Resolution 20/02[62] articulated rules regulating the renegotiation process and listed in Annex II all the Concessionaires and the Licensees involved in the process (including TGN). According to the Ministry of Economy (hereinafter "MoE") Resolution 20/02 (section 2.1.2.), "…the NATIONAL EXECUTIVE, by way of the Commission created under the MINISTRY OF ECONOMY by Decree No. 293 dated 12 February 2002 and integration determined by Decree No. 370 dated 22 February 2002, shall proceed to renegotiate the Contracts for the Concession of Works and Public Utilities in execution, affected by the emergency and the new exchange regime, to the extent of such impact, with the scope set forth in Article 9 of the Emergency Law." As to the renegotiation's objectives, the Resolution stated at section 2.1.3.: "Constitutes a primary objective of this process, to seek, as long as possible and with a criterion of shared sacrifice, to adapt by mutual consent the concession or licence contracts during the emergency period and as long as the situation can be overcome, without applying structural changes, in order to preserve the contract term and the original conditions with a view of future recovery." Section 2.1.4 went on to state that: "The period covering the emergency shall require short term adjustment in order to adapt the execution of contracts to the economy, hoping that in a sustained recovery scenario within the next TWO (2) years – which is the duration of the emergency as set forth in Article 1 of Law No. 25.561- it is possible for the parties to assume medium and long term commitments." Finally, it concluded that: "The tariff review process schedules currently applicable must be reorganized in parallel, where applicable. The short-

[61] See Exhibit C-19.
[62] See Exhibit C-57.

term scenario features may demand periodic reviews of the parameters taken into account to readjust the contracting conditions during the emergency situation."

85. MoE Resolution 20/02 (section 2.2.1.) also provided for a generally applicable timetable for the renegotiation process: on the one hand, the Resolution restated the deadline of 120 days (as of March 1, 2002) set out in Decree 293/02; on the other, emphasizing that the renegotiation process involved several contracts, it gave warning that "the commencement and ending terms for each phase may differ from case to case."

86. To enable the Commission at the Ministry of Economy to pursue the renegotiation process, on April 9, 2002, MoE Resolution 38/02[63] blocked all public service tariff reviews that were pending at that moment pursuant to the legal regime for each sector. More specifically, the Resolution noted that "the regulating organisms of the corresponding public services are developing their activities in accordance with their governing rules, among them, tariff reviews and other decisions affecting directly or indirectly utilities prices and tariffs." Taking account of this, the Resolution explained that "it is convenient to avoid such decisions to materialize during the renegotiation process provided for in Law No. 25.561." Accordingly, the Ministry of Economy prevented regulators in the various public service sectors from adopting any decision or action directly or indirectly affecting service prices or tariffs and from carrying on any ongoing tariff review (Article 1 and 2). On June 26, 2002, Argentina enacted Executive Decree 1.090.[64] On the one hand, this decree restated the Licensees' general obligation to maintain the quality of the public services that they provided according to their Licences (Article 2). On the other, it provided that the public utilities' new claims had to be included in the renegotiation process, eventually forming part of the *acuerdo* concluded with the Renegotiation Commission (Article 1 paragraph 1). As a consequence, public service providers submitting new claims against the government outside of the renegotiation process would be excluded from participating therein (Article 1 paragraph 2).[65]

[63] See Exhibit C-25.
[64] See Exhibit C-23.
[65] See Total's Post-Hearing Brief, para. 479.

87. As to the specific impact of the above provisions on TGN and the renegotiation process, according to Total:

> "So as to prevent any recomposition of pesified tariffs whilst the "renegotiation" was scheduled to take place, the Government adopted MoE Resolution 38/2002 prohibiting regulators, including ENARGAS, from undertaking any review of the tariff [see MoE Resolution 38/2002, dated 10 April 2002]. As a result, TGN's second Five-Year Tariff Review – which had already made significant progress with the calculation of the WACC in November 2001 – was aborted. In October 2002, with no sign of progress in the renegotiation process, TGN requested an Extraordinary Tariff Review on the basis of objective and justified circumstances (under Article 46 of the Gas Law). ENARGAS requested permission from the Ministry of Economy to carry out the tariff review [...]."[66]

88. As requested by ENARGAS, on October 17, 2002 the Ministry of Economy issued MoE Resolution 487/02.[67] The resolution specifically noted that gas tariff reviews had become necessary "in order to facilitate the preservation of the rendering of public services," and exempted ENARGAS from MoE Resolution 38/02. Consequently, ENARGAS began the Extraordinary Tariff Review by calling a public hearing. On November 14, 2002, however, the Hearing—namely, the first step in the Extraordinary Review in accordance with Article 46 of the Gas Law—was suspended by the injunction issued by Judge Rodríguez Vidal in the case *Unión de Usuarios y Consumidores y Otros v. EN-Mº Economía y Infraestructura*.[68] Finally, on February 3, 2003, by MoE Resolution 62/03,[69]Argentina extended the renegotiation process deadline of 60 days.

89. At the end of May 2003, Mr. Néstor Kirchner was elected President of Argentina in the general election. At this point the new government decided to establish a new mechanism to carry out the renegotiation process both outside of the Gas Regulatory Framework and separate to the Renegotiation Commission established in February 2002 by the previous Duhalde government. Following the re-organization and renaming of the *Ministerio de Economía* and the *Ministerio de la Producción* (now called *Ministerio de Economía y Producción and Ministerio De Planificación*

[66] See Total's Post-Hearing Brief, paras. 477-478.
[67] See Exhibit C-58.
[68] See Total's Post-Hearing Brief, para. 478.
[69] See Exhibit C-21.

Federal, Inversión Pública y Servicios, respectively), Decree 311 of 4 July 2003[70] created the *Unidad de Renegociación y Análisis de Contratos de Servicios Públicos* ("UNIREN"), placed under the control of both Ministries. The UNIREN replaced the Renegotiation Commission in undertaking the task of carrying out the renegotiation process. Moreover, according to the Preamble of the Decree, the UNIREN was charged with a broader task. This was "the joint preparation of a project of the General Regulatory Framework for the public services corresponding to national jurisdiction." As is highlighted hereunder at paragraph 171 ff., the renegotiation process for the adjustment of TGN tariffs under the UNIREN mechanism lasted several years without producing any significant results. Finally, on April 17, 2007, the UNIREN proposed a Final Draft Agreement Act ("*Acta Acuerdo*") to TGN that TGN considered unacceptable.[71]

5. The Parties' Arguments

90. Total invokes principally the fair and equitable treatment obligation under Article 3 of the BIT in order to maintain its claim against Argentina.[72] More specifically, Total claims that Argentina has violated Article 3 by breaching Total's legitimate expectations with respect to the stability of the Gas Regulatory Framework which were based on various commitments that Argentina had given to attract foreign investors in this sector upon privatization in 1992, and that Total reasonably relied on such stability when it made its investment in TGN. Total emphasizes that this domestic legal framework was "fundamentally altered" by the Measures, in breach of Argentina's own law, so that its legitimate expectations had been frustrated by those Measures.[73]

91. The thrust of Total's argument is that the fair and equitable treatment standard includes the protection of the "legitimate expectations" of a foreign investor regarding the stability of the legal regime. These expectations are legitimate and deserve protection under the BIT standard according to Total in as far as (i) such

[70] See Exhibit C-22.
[71] On Total's position on the renegotiation process see Claimant's Post-Hearing Brief, paras 489-515.
[72] Total claims that the same measures that it alleges to be in breach of Article 3 of the BIT also constitute an indirect expropriation in breach of Article 5.2. Although Total addressed its claim under Article 5(2) before that under Article 3, the Tribunal considers it more appropriate to examine the latter first since Total argued its claim under Article 3 much more extensively.
[73] See Total's Post-Hearing Brief, para. 222 ff.

stability has been "promised " (to the foreign investor), and (ii) the foreign investor has "relied" upon such promises in making its investment.

92. Total points to different promises of varying specificity. From the broadest to the more specific, Total refers to the "core commitments" or "overarching promise" of the Gas Regulatory Framework "that TGN's economic equilibrium would be maintained throughout the 35 to 45 years of its Licence" so that the regulated tariff of TGN, which represented 98% of its revenue, was and would continue to be regulated so as to provide TGN with sufficient revenue to cover all reasonable costs, including taxes, amortisations and capital costs, and to make a "reasonable rate of return" similar to activities of comparable risk."[74] As to the legal basis of these promises, Total refers to the Gas Law itself (art. 38(a) and 39) and to the Gas Decree (Article 2.4) of 1992.

93. Total points to two additional, more specific, commitments "which supported the promise of economic equilibrium"[75], namely:

(i) the "promise" that TGN's tariffs were and would be calculated in US dollars and converted to Argentine pesos for billing purposes only", in Article 41.2 of the Gas decree, Section 9.2 of TGN Licence, both of 1992;

(ii) the automatic adjustment of the dollar tariffs every six months in accordance with the US Producer Price Index (US PPI) "thereby preserving its [TGN] dollar revenue in real dollar terms", as provided in Article 41 of the Gas Law, Article 41.3 Gas Decree, Section 9.4.1.1 of the TGN licence, all of 1992.

94. As recalled before, Total points to two further mechanisms that were designed to allow the regulator, ENARGAS, to set and restore TGN's economic equilibrium on both a recurrent and non-recurrent (extraordinary) basis, namely: (i) the Five-Year Tariff Review provided for in Article 41 of the Gas Law, Article 41.3 of the Gas Decree and Section 9.4.1.1 of the TGN Licence; and (ii) the Extraordinary Tariff Review provided for in Article 42 of the Gas Law, Article 42 of the Gas Decree and Section 9.5.1 of the Licence, which was intended to be a non-recurrent review that

[74] See Total's Post-Hearing Brief, para. 20.
[75] See Total's Post-Hearing Brief, para. 21.

was available on objective and justified grounds or if the tariffs became inadequate, unduly discriminatory or preferential.

95. Finally, as already mentioned, Total points to Argentina's promises in the TGN Licence that tariffs would not be frozen or subject to regulation or price control without full compensation from the government, and that the basic rules of the TGN licence (which included the tariff regime) would not be changed without TGN's consent (found in Section 9.8 and respectively Sections 9.1 and 18.2 of the TGN Licence).

96. While agreeing generally on the content of the instruments and of the specific provisions that Total invokes, Argentina objects to the legal significance that Total attributes to them. On the one hand, Argentina does not dispute that the most important principle in the Gas Law ("the most important provision of the regulatory framework for the natural gas distribution utility") is that "tariffs must be *fair and reasonable*."[76] Argentina specifically acknowledges that the "governing principle" of the Gas Law is that "the tariff must cover operating costs, taxes and amortization, must allow a reasonable rate of return, assuring users the minimum cost compatible with supply security."[77] Argentina, however, disputes the construction of the various provisions on which Total relies as being "promises" made to Total, and stresses that Argentina never "induced" Total to invest in TGN when Total did so nine years after the privatization "under a totally private transaction."[78] Argentina stresses that the terms "promise", "guarantee" or synonyms thereof do not appear in any of the Gas Law or, the Decree or the Licence. According to Argentina, Total has been unable to submit any instrument containing a promise or guarantee in respect of the currency and the automatic adjustment of the tariffs.[79]

97. According to Argentina, the instruments on which Total relies are "of different legal hierarchy".[80] Even if they were labelled as "guarantees", Argentina believes that they are neither immune from changes in the case of events that threaten its stability nor can they result in wider rights than those enjoyed by the rest of the population when

[76] See Argentina's Post-Hearing Brief, para 255. Emphasis in the original.
[77] See Argentina's Post-Hearing Brief, para. 263.
[78] See Argentina's Post-Hearing Brief, paras 251-253.
[79] See Argentina's Rejoinder, paras 58-59.
[80] See Argentina's Counter-Memorial, para. 264.

the common welfare of society is at stake, such as during the crisis of early 2002.[81] On the contrary, Argentina's legislative and executive authorities have the right to exercise their powers in amending these instruments whenever public interest so dictates.[82] This was indeed the case for the Emergency Law enacted within the framework of the dramatic crisis of late 2001 that affected all of the Argentine economy.[83] Specifically, Argentina points out that the calculation of tariffs in US dollars is provided for by the Gas Decree and not by the Gas Law. Argentina submits that the main tariff parameter—that the tariff must be at all times fair and reasonable—would have been breached if the tariff calculation in US dollars had been maintained after the maxi-devaluation of the peso.[84] Contrary to Total's view, Argentina submits that the reference to the calculation of tariffs in US dollars was linked to the Convertibility Law.[85] Since the abandonment of the Convertibility regime at par was, according to Argentina, legitimate and necessary in the circumstances of the crisis at the end of 2001, the pesification of the tariffs as part of the pesification of all contracts, "did not amount to an arbitrarily unjust treatment", being part of "a universal remedy that was applicable to all dollar-denominated legal relationships."[86]

98. As to the Licence, Argentina stresses that the Licence is subject to Argentina's law (Section 16.1). Argentina draws a distinction between the limitations on the power of Argentina's Executive to amend the Licence without the Licensee's consent and the right of Argentina's Congress to lawfully modify the Licence.[87] Argentina concludes

[81] See Argentina's Counter-Memorial, paras 319-320.

[82] In order to support this argument Argentina refers to Section 18.3 of the TGN Licence which provides that [NTD: Translate.] "Si alguna disposición de esta Licencia fuera declarada inválida o inexigible por sentecia firme del tribunal competente [*i.e.* los tribunales en lo Contencioso Administrativo Federal de la Capital Federal under Section 16.1], la validez y exigibilidad de las restantes disposiciones de esta Licencia non serán afectadas. Cada estipulación de la Licencia será valida y exigible en la mayor medida permitida por la ley aplicable [*i.e.* Argentina's Law under Section 16.2]." Argentina contends that this provision expressly covers Argentina's Measures (specifically the Emergency Law) and includes both judicial decisions and legislative acts. Consequently, according to Argentina, Section 18.3 allows Argentina to modify by law the TGN Licence, specifically as to the US PPI tariffs adjustment (see Argentina's Post-Hearing Brief, paras 188-193). Therefore, Argentina concludes at para. 193 that "the Emergency Law in no manner could violate the BIT as applied to the Licence [...] because the legitimate expectations of any investor included the possibility that a law passed by the Congress may, lawfully, modify the Licence (even though this could not be done through an Argentine Executive's act)."

[83] See Argentina's Counter-Memorial, para. 293.

[84] See Argentina's Post-Hearing Brief, para. 266.

[85] See Argentina's Post-Hearing Brief, para. 267.

[86] See Argentina's Counter-Memorial, para. 306.

[87] In this regard Argentina points out to Sect. 18.3 *in fine* of the Licence: "Each provision of the Licence shall be valid and enforceable to the greatest extent permitted by applicable law." See Argentina's Post-Hearing Brief, para. 193 and Argentina's Rejoinder, para. 188.

that, under its own terms, the Licence, namely, the "contractual instrument allegedly violated"[88] that is subject to Argentina's law, could be modified by a Law passed by the Argentine Congress, such that Total had to account for this possibility as part of its legitimate expectations.[89]

6. Legal Evaluation by the Tribunal of Total's Claims

99. The first issue for the Tribunal is to determine whether the legislation, regulation and provisions invoked by Total constitute a set of promises and commitments towards Total whose unilateral modifications entail a breach of the legitimate expectations of Total and, as a consequence, are in breach of the fair and equitable treatment standard in the BIT. The opposite view held by Argentina is that Argentina has not breached any promise or guarantee made to Total because "[T]he Argentine State did not execute any contract with Total"[90] nor did it induce Total to invest in TGN.[91] The provisions invoked by Total as "guarantees" are in Argentina's view nothing other than the totality of the regulatory framework effective from time to time.[92]

100. It is undisputed that Total did not enter into a contractual relationship with Argentina's authorities in 2000-2001 when it acquired an indirect share in TGN by buying a share of Gasinvest from TransCanada, one of the various foreign shareholders of TransCanada. All of the laws and regulations, which Total invokes as a source of the promises that it relies upon (the Gas Law and the Gas Decree of 1992), are instruments of general application, enacted by the Congress or the Executive branch of Argentina pursuant to the powers vested in these bodies under the Constitution of Argentina. Further, Total does not submit that it had participated in any way in the privatization of the gas transportation utilities of Argentina in 1991-1992 through which the first private investors in TGN had become its shareholders.

101. As concerns Total's reliance on TGN's Licence as a contractual commitment undertaken by Argentina, it is clear that this instrument establishes the rights and obligations of the parties (namely TGN and Argentina's authorities) to that licence.

[88] See Argentina's Post-Hearing Brief, para. 200.
[89] See Argentina's Post-Hearing Brief, para. 193.
[90] See Argentina's Counter-Memorial, para. 311.
[91] See Argentina's Post-Hearing Brief, para. 253.
[92] See Argentina's Counter-Memorial, para. 81.

Specifically, the TGN Licence sets forth the obligations of the Argentine authorities *vis-à-vis* the concessionaire. These obligations encompass details of how those authorities may (and should) exercise, with respect to the concessionaire, the regulatory powers granted to them by the Gas Law and Gas Decree in order to preserve the general interest underlying the performance of the public service. Since Total is not a party to the concession, a more accurate description of the situation would be that Total has invested in a public utility (namely TGN) which operated a public service activity regulated by a defined legal regime set forth (also) in the concession. Therefore TGN Licence cannot be regarded as a source of contractual legal obligations of a specific character assumed directly by Argentina towards Total. Accordingly, it is not correct to qualify and treat the TGN Licence provisions as stabilisation clauses agreed between Total and Argentina. Stabilisation clauses are clauses, which are inserted in state contracts concluded between foreign investors and host states with the intended effect of freezing a specific host State's legal framework at a certain date, such that the adoption of any changes in the legal regulatory framework of the investment concerned (even by law of general application and without any discriminatory intent by the host State) would be illegal. For the reasons stated above, this characterization does not fit the relationship between Total and Argentina as to Total's investment in TGN.

102. Total submits that legitimate expectations with respect to the stability of the legal framework under which a foreign company makes an investment may derive not only from contractual undertakings, but also from legislation and regulation that was precisely meant to attract foreign investment. Total points out that the gas regulatory framework was devised and enacted in order to attract long term private foreign investments in utilities, which until then had been run by the State, that were badly in need of modernization through massive investment by competent operators and others, especially in view of the past record of high inflation in Argentina. This regime was based on a sound economic underpinning, an integral part of which was the overarching commitment to reasonable and fair tariffs for the operators and specifically the US dollar peg.

103. Subjectively, Total submits that the existence of such a framework, which had been in place for almost nine years when it decided to become a shareholder of TGN, was a major consideration in carrying out such an investment.

104. To the contrary, Argentina points to the agreed suspensions of the PPI, which were in place when Total made its acquisition of the shareholding in TGN from TransCanada, that should have put Total on notice that the Gas Regulatory Framework was being undermined. Argentina also submits that Total was careless in making its investment in that it did not carry out the due diligence analysis that is commonly undertaken before making such a large direct investment abroad. Had Total carried out proper due diligence, it would have been aware of the looming economic difficulties of Argentina and of their possible impact on the future stability of the Gas Regulatory Framework.

105. The legal issue for the Tribunal is thus to determine whether the fair and equitable treatment standard of Article 3 of the BIT, in particular as far as it includes the "protection of legitimate expectations" of the foreign investor, has been breached by the unilateral changes of legislation and regulation effected by Argentina and challenged by Total.

6.1 Applicable Standard: the Fair and Equitable Treatment Standard in General

106. The undertaking of the host country to provide fair and equitable treatment to the investors of the other party and their investments is a standard feature in BITs, although the exact language of such undertakings is not uniform. The generality of the fair and equitable treatment standard distinguishes it from specific obligations undertaken by the parties to a BIT in respect of typical aspects of foreign investment operations such as those concerning monetary transfers, visas, etc. At the same time, the fair and equitable treatment standard can be distinguished from other general standards included in BITs, namely the national and the most favoured nation treatment standards, which guarantee a variable protection that is contingent upon the treatment given by the host State to its own nationals or to the nationals of the best treated third state.

107. The fair and equitable treatment standard is, by contrast, an autonomous standard, although its exact content is not predefined, except in cases where a treaty provides additional specifications, which is not the case for the France-Argentina BIT.[93] Since this standard is inherently flexible, it is difficult, if not impossible, "to anticipate in the abstract the range of possible types of infringements upon the investor's legal position".[94] Its application in a given case must take into account relevant State practice and judicial or arbitral case law as well as the text of the BIT and other sources of customary or general international law.[95]

108. The meaning of various fair and equitable treatment clauses has been tested in several investment disputes and the issue has been dealt with by a number of academic writings, including by the most prominent scholars in the field of international investment law. Some tribunals have started from the ordinary meaning of the term, in accordance with Article 31(1) of the Vienna Convention of the Law of Treaties ("VCLT"), recalling the dictionary definitions of just, even-handed, unbiased, legitimate.[96] On the other hand, one cannot but agree with Judge Higgins' observation in the *Oil Platforms* case, that "the key terms "fair and equitable treatment to nationals and companies"… are legal terms of art well known in the field of overseas investment protection".[97]

109. On the premise that a "judgement of what is fair and equitable cannot be reached in the abstract; it must depend on the fact of the particular case" and that "the standard is to some extent a flexible one which must be adapted to the circumstances of each case"[98], tribunals have endeavoured to pinpoint some typical obligations that may be included in the standard, as well as types of conduct that would breach the standard, in order to be guided in their analysis of the issue before them.

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[93] For instances of more specific content see the NAFTA Free Trade Commission Note of Interpretation of 31 July 2001 available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en and the US Model BIT of 2004 available at http://www.state.gov/documents/organization/117601.pdf

[94] C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Trade,(2005/3), 357, 365.

[95] *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, para. 184.

[96] See *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 290.

[97] See *Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, at p. 858 (Separate Opinion).

[98] See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 118, and *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, para. 99, respectively.

110. A breach of the fair and equitable treatment standard has been found in respect of conduct characterized by "arbitrariness"[99] and of "acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[100] It has been also held that the standard requires "treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment",[101] thereby condemning conduct that is arbitrary, grossly unfair, unjust or idiosyncratic or that "involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in administrative process."[102] Awards have found a breach in cases of discrimination against foreigners and "improper and discreditable" or "unreasonable" conduct.[103] This does not mean that bad faith is necessarily required in order to find a breach: "A State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[104]

111. In determining the scope of a right or obligation, Tribunals have often looked as a benchmark to international or comparative standards.[105] Indeed, as is often the case for general standards applicable in any legal system (such as "due process"), a comparative analysis of what is considered generally fair or unfair conduct by domestic public authorities in respect of private firms and investors in domestic law may also be relevant to identify the legal standards under BITs.[106] Such an approach is justified because, factually, the situations and conduct to be evaluated under a BIT occur within the legal system and social, economic and business environment of the host State. Moreover, legally, the fair and equitable treatment standard is derived

[99] See *ElettronicaSicula S.P.A.* (ELSI), Judgment, I.C.J. Reports 1989, p. 15, para. 128 where an "arbitrary action" was defined as "as a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial property."
[100] *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367.
[101] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, *supra* note 96, para. 113.
[102] *Waste Management, Inc. v. United Mexican States*, *supra* note 98, para. 98 (as to infringement of "the minimum standard of treatment of fair and equitable treatment").
[103] *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 309.
[104] *Mondev International Ltd. v. United States of America*, *supra* note 98, para. 116. See also *Siemens v Argentina*, *supra* note 96, para. 299, reviewing precedents.
[105] *S.D. Myers, Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000, paras. 263-264; *Genin and others v. Estonia*, Award, 25 June 2001, para. 367 ff.
[106] There is a substantial body of authority to this effect. See *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras 177-178 stating that a legal proceeding that exists in virtually all legal systems, such as bankruptcy proceedings, cannot be regarded as arbitrary.

from the requirement of good faith which is undoubtedly a general principle of law under Article 38(1) of the Statute of the International Court of Justice.

112. UNCTAD has followed such an approach in its publication on the topic, besides referring to arbitral practice, in order:

> "to identify certain forms of behaviour that appear to be contrary to fairness and equity in most legal systems and to extrapolate from this the type of State action that may be inconsistent with fair and equitable treatment, using the plain meaning approach. Thus, for instance, if a State acts fraudulently or in bad faith, or capriciously and wilfully discriminates against a foreign investor, or deprives an investor of acquired rights in a manner that leads to the unjust enrichment of the State, then there is at least a *prima facie* case for arguing that the fair and equitable standard has been breached".[107]

6.2. The Notion of Legitimate Expectations of Foreign Investors

113. We turn now to the more specific concept, which Total asserts forms part of the fair and equitable treatment standard, of the protection of "legitimate expectations" on the part of an investor concerning the stability of the legal framework under which it has made its investment.

114. Tribunals have often referred to the principle of the protection of the investor's legitimate expectations, especially with reference to the "stability" of the legal framework of the host country applicable to the investment, as being included within the fair and equitable treatment standard. However, case law is not uniform as to the preconditions for an investor to claim that its expectations were "legitimate" concerning the stability of a given legal framework that was applicable to its investment when it was made. On the one hand, stability, predictability and consistency of legislation and regulation are important for investors in order to plan their investments, especially if their business plans extend over a number of years. Competent authorities of States entering into BITs in order to promote foreign investment in their economy should be aware of the importance for the investors that

[107] UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Investment Agreements, 1999 UN Doc. UNCTAD/ITE/IIT/11, Vol. III, at 12.

a legal environment favourable to the carrying out of their business activities be maintained.[108]

115. On the other hand, signatories of such treaties do not thereby relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties. Such limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed.[109] In fact, even in those BITs where stability of the legal framework for investment is explicitly mentioned, such as in the BIT between the United States and Argentina of 1991 (in accordance with the U.S. Model BIT of the time) such a reference appears only in the preamble.[110]

116. In various disputes between U.S. investors and Argentina under that BIT, tribunals have relied on the explicit mention in its preamble of the desirability of maintaining a stable framework for investments in order to attract foreign investment as a basis for finding that the lack of such stability and related predictability, on which the investor had relied, had resulted in a breach of the fair and equitable treatment standard.[111] This reference is justified because, although such a statement in a preamble does not create independent legal obligations, it is a tool for the interpretation of the treaty since it sheds light on its purpose.[112] However, the BIT between France and Argentina does not contain any such reference, following the

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[108] See M. Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 *American Journal of International Law* (2007) 711, 750, according to whom the fair and equitable standard as developed in the case law protects "legitimate commercial expectations" and requires that "governmental acts need to conform to international standards of transparency, non arbitrariness, due process and proportionality to the policy aims involved."

[109] In applying the fair and equitable standard under Article 1105 (1) NAFTA the Tribunal in *S.D. Myers, Inc. v. Canada, supra* note 105, para. 263 considered that a determination of breach "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own border", taking also into account any specific rule of international law.

[110] See *Continental Casualty Company v. Argentina*, *supra* note 53, para. 258, with reference to the U.S.-Argentina BIT of 1991 which includes the following preambular language, following the U.S. Model BIT of the time: "Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources…".

[111] See *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras 124-125 citing similar findings by other tribunals "in light of the same or similar language"; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 259. The Tribunal notes that the U.K.-Argentina BIT does not include any reference to such stability. See *National Grid plc v. Argentina*, UNCITRAL, Award, 3 November 2008, paras. 168 ff. and in particular para. 170.

[112] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 relies explicitly on the language of the preamble in order to hold that "the stability of the legal and business framework is thus an essential element of fair and equitable treatment."

French BIT model.[113] This absence indicates, at a minimum, that stability of the legal domestic framework was not envisaged as a specific element of the domestic legal regime that the Contracting Parties undertook to grant to their respective investors.[114] The operative provisions of the France-Argentina BIT must in any case be read taking into account, within the object and purpose of the treaty, the reference in the Preamble to the desire of the Parties to create favourable conditions for the investments covered.[115]

117. In the absence of some "promise" by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a "guarantee" of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor. The expectation of the investor is undoubtedly "legitimate", and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.[116]

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[113] The BIT at issue here includes the obligation of each Party to extend "full protection and security" to covered investments of nationals of the other Party in its territory, "in accordance with the principle of just and equitable treatment in Article 3 of this Agreement" (Article 5(1) of the BIT). As to the scope of this kind of clause, some awards (see *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408; *National Grid plc v. Argentina*, *supra* note 111, para. 187) have considered that this protection is not limited to physical assets and that it encompasses the stability of the legal framework and legal security of the investment. Other awards have instead stuck to the original limitation of physical security (*BG Group Plc v. Argentina*, UNCITRAL, Award, 24 December 2007, para. 326).

[114] Total has pointed out, however, the official statement made by the representative of the Government of Argentina to Congress in relation to the ratification of the BIT by Argentina: "*Bearing in mind that the main purpose of this type of agreements is to bolster genuine and productive investment, in consequence, certain situations or measures which may affect negatively the value or product of the investment are foreseen. Hence, by way of this agreement, the States agree to maintain the status, during the term of such, of certain rules concerning the treatment of investments and enshrines among the signatory States the commitment not to contravene rules which, being part of this subject, belong to the group of principles common to all nations… This way, a stable and satisfactory environment is created which mitigates the concerns of foreign investors related to non-commercial risks –called political risks- and promotes the international capital flow within in compliance with the laws of the host State*." (Exhibit C-89, *Mensaje del Poder Ejecutivo al Congreso de la Nación* for Law 24.100/92, 10 June 1992). The Tribunal notes that this statement does not include a reference to stability, such as the one found in the corresponding message relating to the 1992 BIT of Argentina with the U.K. : "*By way of such [agreements], States accord to maintain during its term certain rules concerning investment treatment, in order to establish an environment of stability and trust to attract investments.*" (Exhibit C-87)

[115] Connected with this statement is the general obligation of Article 2 of the BIT, according to which each Contracting Party shall admit and promote investments made by investors of the other Party, however "within the frame of its legislation and provisions hereof."

[116] See *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 611 concerning interference with contractual rights by a regulatory authority; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154 relating to the replacement of an unlimited licence by one of limited duration for the operation of a landfill**.** See also *Waste*

118. The situation is similar when public authorities of the host country have made the private investor believe that such an obligation existed through conduct or by a declaration.[117] Authorities may also have announced officially their intent to pursue a certain conduct in the future, on which, in turn, the investor relied in making investments or incurring costs.[118] As stated within the NAFTA framework "the concept of "legitimate expectations" relates […] to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages."[119]

119. In fact, when relying on the concept of legitimate expectations, arbitral tribunals have often stressed that "specific commitments" limit the right of the host State to adapt the legal framework to changing circumstances.[120] Representations made by the host State are enforceable and justify the investor's reliance only when they are specifically addressed to a particular investor.[121] "Where a host State which seeks foreign investment acts intentionally, so as to create expectations in potential investors with respect to particular treatment or comportment, the host state should,

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Management, Inc. v. United Mexican States, *supra* note 98, where the claim of the investor under Article 1105(1) NAFTA was rejected. In particular the Tribunal considered at para. 98 that the fair and equitable standard would be violated by the "breach of representations made by the host State which were reasonably relied upon by the claimant."

[117] See the case of assurances provided by senior government officials to an investor in *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award on Merits, 8 December 2000, paras. 59 ff.

[118] For a review of such instances see M. Reisman and M.H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 *ICSID Review-Foreign Investment Law Journal* 328 (2004).

[119] See *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL, Arbitral Award, 26 January 2006, para. 147. This is defined as "detrimental reliance" by T.J. Grierson-Weiler and I.I. Laird, *Standards of Treatment*, Chapter 8 of P. Muchlinski, F. Ortino and C. Schreuer (Eds.), *The Oxford Handbook of International Investment Law*, Oxford, 2008, 275.

[120] See *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 27, holding that when general measures are challenged: "A direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments."

[121] See *International Thunderbird Gaming Corporation v. Mexico*, *supra* note 119, para. 147. On the facts of the various cases some tribunals have, however, concluded that the legal order of the host State as it stood at the time when the investor acquired the investment grounded the legitimate expectations of the investor with respect to the stability of the relevant regulations: *Gami Investments, Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, para. 93; *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award on Merits, 16 December 2002, para. 128.

we suggest, be bound by the commitments and the investor is entitled to rely upon them in instances of decision".[122]

120. In other words, an investor's legitimate expectations may be based "on any undertaking and representations made explicitly or implicitly by the host State. A reversal of assurances by the host State which have led to legitimate expectations will violate the principle of fair and equitable treatment. At the same time, it is clear that this principle is not absolute and does not amount to a requirement for the host State to freeze its legal system for the investor's benefit. A general stabilization requirement would go beyond what the investor can legitimately expect."[123]

121. The balance between these competing requirements and hence the limits of the proper invocation of "legitimate expectations" in the face of legislative or regulatory changes (assuming that they are not contrary to a contractual, bilateral or similar undertaking, binding in its own right) has been based on a weighing of various elements pointing in opposite directions. On the one hand, the form and specific content of the undertaking of stability invoked are crucial. No less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future. Similarly, the more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith. Hence, this accounts for the emphasis in many awards on the government having given 'assurances', made 'promises', undertaken 'commitments', offered specific conditions, to a foreign investor, to the point of having solicited or induced that investor to make a given investment. Total itself described the acts of Argentina on which it relies in this way. As a result of such conduct by the host authorities, the expectation of the foreign investor may "rise to the level of legitimacy and reasonableness in light of the circumstances."[124] When those features are not present, a cautious approach is warranted based on a case specific contextual analysis of all relevant facts.

[122] Conclusions by M. Reisman and M.H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, *supra* note 118, 342.
[123] See C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, *supra* note 94, 374.
[124] See *Saluka Investments BV v. The Czech Republic*, *supra* note 103, para. 304.

122. Indeed, the most difficult case is (as in part in the present dispute) when the basis of an investor's invocation of entitlement to stability under a fair and equitable treatment clause relies on legislation or regulation of a unilateral and general character. In such instances, investor's expectations are rooted in regulation of a normative and administrative nature that is not specifically addressed to the relevant investor. This type of regulation is not shielded from subsequent changes under the applicable law. This notwithstanding, a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations. This is the case for regimes, which are applicable to long-term investments and operations, and/or providing for "fall backs" or contingent rights in case the relevant framework would be changed in unforeseen circumstances or in case certain listed events materialize. In such cases, reference to commonly recognized and applied financial and economic principles to be followed for the regular operation of investments of that type (be they domestic or foreign) may provide a yardstick. This is the case for capital intensive and long term investments and operation of utilities under a license, natural resources exploration and exploitation, project financing or Build Operate and Transfer schemes. The concept of "regulatory fairness" or "regulatory certainty" has been used in this respect.[125] In the light of these criteria when a State is empowered to fix the tariffs of a public utility it must do so in such a way that the concessionaire is able to recover its operations costs, amortize its investments and make a reasonable return over time, as indeed Argentina's gas regime provided.

123. On the other hand, the host State's right to regulate domestic matters in the public interest has to be taken into consideration as well.[126] The circumstances and reasons (importance and urgency of the public need pursued) for carrying out a change impacting negatively on a foreign investor's operations on the one hand, and the seriousness of the prejudice caused on the other hand, compared in the light of a standard of reasonableness and proportionality are relevant. The determination of a breach of the standard requires, therefore, "a weighing of the Claimant's reasonable and legitimate expectations on the one hand and the Respondent's legitimate

[125] See T.J. Grierson-Weiler and I.I. Laird, *Standards of Treatment*, *supra* note 119, 277.

[126] See *Saluka Investments BV v. The Czech Republic*, *supra* note 103, paras 305-306. See also *Feldman v. Mexico*, *supra* note 121, para. 112: "[G]overnments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue."

regulatory interest on the other."[127] Thus an evaluation of the fairness of the conduct of the host country towards an investor cannot be made in isolation, considering only their bilateral relations. The context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account.[128] Additional criteria for the evaluation of the fairness of national measures of general application as to services are those found in the WTO General Agreement on Trade of Services (GATS). The Tribunal recalls that Article VI of the GATS of 1994 on "Domestic regulation" provides that "In sectors where specific commitments are undertaken, each member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner" (emphasis added). This reference concerning services (as undoubtedly Total's operations in the gas transportation and electricity were) in a multilateral treaty to which both Argentina and France are parties offers useful guidance as to the requirements that a domestic regulation must contain in order to be considered fair and equitable. The Tribunal refers to the requirements found in Article VI GATS just as "guidance" because it has not been submitted that the GATS is directly applicable here. This would require that Argentina had admitted Total's investment in the electricity sector on the basis of a specific commitment in respect of the opening of electricity generation to investors from other WTO Members.

124. Besides such an objective comparison of the competing interests in context, the conduct of the investor in relation to any undertaking of stability is also, so to speak "subjectively", relevant. Tribunals have evaluated the investor's conduct in this respect, highlighting that BITs "are not insurance policies against bad business

[127] See *Saluka Investments BV v. The Czech Republic*, *ibid*. See also D. Carreau, P. Juillard, *Droit international économique*, 2ième édition, 2005, 442, para. 1265 according to whom the "equitable" requirement of the standard implies that a satisfactory equilibrium be ensured between the interests of the investor, of its nationality State and of the host State.

[128] For instance, see *Genin and others v. Estonia*, *supra* note 105, para. 348, where the Tribunal states that in considering the revocation of a banking license to a financial institution (Estonian Innovation Bank) in which a U.S. investor made its investments "... the Tribunal considers it imperative to recall the particular context in which the dispute arose, namely, that of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown. This is the context in which Claimants knowingly chose to invest in an Estonian financial institution, EIB."

judgments" and that the investor has its own duty to investigate the host State's applicable law.[129]

6.3 The Content of Article 3 of the Argentina-France BIT

125. The commitment to fair and equitable treatment in Article 3 of the BIT relates to a treatment that must be in conformity with the principles of international law ("*conforme a los principios de Derecho International / en conformité des principes du droit international")*. The parties have discussed whether this reference is to a minimum standard, as suggested by Argentina,[130] or whether it sets forth an autonomous standard, as submitted by Total.[131] For the reasons stated hereunder the Tribunal is of the opinion that the phrase "fair and equitable in conformity with the principles of international law" cannot be read as "treatment required by the minimum standard of treatment of aliens/investors under international law."[132] This is irrespective of the issue of whether today there really is a difference between this traditional minimum standard and what international law generally requires as to treatment of foreign investors and their investments.[133]

126. In order to elucidate the content of the treatment required by Article 3 in conformity with international law, a tribunal is directed to look not just to the BIT in isolation or the case law of other arbitral tribunals in investment disputes interpreting and applying similarly worded investment protection treaties, but rather to the content of international law more generally.

127. The Tribunal will, therefore, proceed to further interpret the "fair and equitable treatment" standard looking also at general principles and public international law in

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[129] See *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award on the Merits, 13 November 2000, para. 64. See also *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, *supra* note 96, para. 178.

[130] According to Argentina (Opening Statement, Hearing Day 2, 443:19-444-1) the minimum standard would not include the obligation to maintain a stable legal environment and protect legitimate expectations of the investor.

[131] See Total's Post-Hearing Brief, 210 ff.

[132] See to this effect the analysis of UNCTAD, *Fair and Equitable Treatment*, *supra* note 107, 40. A detailed review of different opinions and statements on the issue is found in OECD, *International Investment Law, A Changing Landscape*, 2005, at 81-96.

[133] Several arbitral tribunals dealing with investment disputes have held that the law of the international protection of foreign investors (of which the fair and equitable treatment standard is part) has considerably evolved since the *Neer* decision of 1926 that was considered to restate the minimum treatment standard existing at that time (see *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 257; *Mondev International Ltd. v. United States of America*, *supra* note 98, paras 116-117). See also R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2008, 128-130.

a non-BIT context. This approach is consistent with the interpretation of Article 3 of the France-Argentina BIT by the "*Vivendi II*" tribunal which has expressed the view we have developed above, namely, that: "The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment … the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard".[134] The views expressed by commentators on the French model BIT, from which the phrase derives, are consistent with these conclusions.[135]

6.4 Comparative Analysis

128. Since the concept of legitimate expectations is based on the requirement of good faith, one of the general principles referred to in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law, the Tribunal believes that a comparative analysis of the protection of legitimate expectations in domestic jurisdictions is justified at this point. While the scope and legal basis of the principle varies, it has been recognized lately both in civil law and in common law jurisdictions within well defined limits.[136]

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[134] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (hereinafter also "*Vivendi II*"), paras. 7.4.6-7. referred to by Total in its Post Hearing Brief, para. 213.

[135] See D. Carreau, P. Juillard, *Droit international économique*, 2ième édition, *supra* note 127, para. 1286 at p. 456. We do not read otherwise the *Introductory Note* of H. Goldsong to the France-U.S.S.R. BIT of 1989, 29 ILM 317 (1990) on which Argentina relies, where the author expresses the view that the reference to international law "qualifies" the scope of the undertaking of fair and equitable treatment. This qualification rather directs the interpreter to take fully into account the protection afforded by international law, without going beyond that in the context of the BIT, but also without reducing it below that level. As stated by Carreau, Juillard, *Droit international économique*, 2ième éd., *supra* note 127, para. 1266 at p. 442: "the treatment granted to the investment by national law could not breach the treatment required by the totality of the combined sources of international law."

[136] The concept is considered to have originated in German law where it is extensively used, CF Forsyth, *The Provenance and Protection of Legitimate Expectations*, Cambridge L.J. 47, 241 (1988). As to civil law, see Argentina *Industria Madera Lanin*, Corte Suprema 1977, Fallos 298:223. The State was required there to compensate for the breach of *la expectativa razonable* of an enterprise to which a forest concession had been initially promised, but was thereafter revoked. In English law (leading case: *Schmidt v Secretary of State for the Home Affairs* [1969] 2 Ch 149, *per* Lord Denning) the House of Lords has stated that "the doctrine of legitimate expectations is rooted in fairness", *R. v Inland Revenue Commissioners ex p. Preston* [1985] 2 All E.R. 327, para. 835 *per* Lord Bingham. See also *R. v North and East Devon Health Authority ex p. Coughlan* [1999] LGR 703, para. 57, holding that where "a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power". Generally, as to the notion in administrative law of Common Law countries, see W. Wade and CF Forsyth, *Administrative Law*, OUP Oxford 2004, 372-376.

129. In domestic legal systems the doctrine of legitimate expectations supports "the entitlement of an individual to legal protection from harm caused by a public authority retreating from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation".[137] This doctrine, which reflects the importance of the principle of legal certainty (or rule of law), appears to be applicable mostly in respect of administrative acts and protects an individual from an incoherent exercise of administrative discretion, or excess or abuse of administrative powers.[138] The reasons and features for changes (sudden character, fundamental change, retroactive effects) and the public interest involved are thus to be taken into account in order to evaluate whether an individual who incurred financial obligations on the basis of the decisions and representations of public authorities that were later revoked should be entitled to a form of redress. However it appears that only exceptionally has the concept of legitimate expectations been the basis of redress when legislative action by a State was at stake. Rather a breach of the fundamental right of property as recognized under domestic law has been the basis, for instance, for the European Court of Human Rights to find a violation of the First Protocol to the European Convention on Human Rights protecting the peaceful enjoyment of property.[139]

130. From a comparative law perspective, the tenets of the legal system of the European Community (now European Union), reflecting the legal traditions of twenty-seven European countries, both civil and common law (including France, the home country of the Claimant) are of relevance, especially since the recognition of the principle of legitimate expectations there has been explicitly based on the

[137] C. Brown, *The Protection of Legitimate Expectations as A "General Principle of Law": Some Preliminary Thoughts*, Transnational Dispute Management, www.transnational-dispute-management.com, March 2009. See also J. Temple Lang, *Legal Certainty and Legitimate Expectations as General Principles of Law*, U. Bernitz, J. Nergelius (Eds.), *General Principles in European Community Law*, Kluwer, 2000, 163-184.

[138] See C. McLachlan, *Investment Treaties and General International Law*, 57 Int'l & Comp. L.Q. 361 (2008), at p. 377 with reference to the holding of the Annulment Committee in *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 67-71; *Gami Investments, Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004, 44 ILM 545, 560 (2005).

[139] See generally the review by the former president of the ECHR, L. Wildhaber, *The Protection of Legitimate Expectations in European Human Rights Law*, M. Monti, N. Liechtenstein, B. Vesterdorf, L. Wildhaber, *Economic Law and Justice in Times of Globalisation*, Festschrift Baudenbacher, 2007, 253, at 263: "the concept appears to have no meaningful autonomous existence as far as its applicability is concerned. Where the applicants can point to a possession, however, and to interference with their peaceful enjoyment of same, it is arguably the legitimacy of their claim more than their subjective expectations that will weight in the balance". In a case involving the legitimate expectations of beneficiaries to future social benefits provided by legislation, the European Court of Human Rights found a breach of Article 1 of the Protocol in the later withdrawing of such benefits by governmental action, *Doldeanu v. Moldova*, Application 17211/03, Decision 13 November 2007.

international law principle of good faith.[140] Based on this premise, the Tribunal of the European Union has upheld the legitimate expectations of importers that the Community would respect public international law.[141] According to the Court of Justice of the European Union ("ECJ") private parties cannot normally invoke legitimate expectations against the exercise of normative powers by the Community's institutions, except under the most restrictive conditions (which the Court has never found in any case submitted to it).[142]

6.5 Public International Law

131. Under international law, unilateral acts, statements and conduct by States may be the source of legal obligations which the intended beneficiaries or addressees, or possibly any member of the international community, can invoke. The legal basis of that binding character appears to be only in part related to the concept of legitimate expectations—being rather akin to the principle of "estoppel". Both concepts may lead to the same result, namely, that of rendering the content of a unilateral declaration binding on the State that is issuing it.[143] According to the International Court of Justice, only unilateral acts that are unconditional, definitive and "very specific" have binding force, which derives from the principle of good faith. This fundamental principle requires a State to abide by its unilateral acts of such a

[140] See *Opel Austria GmbH (formerly General Motors Austria GmbH) v. Council of the European Union*, Case T-115/94, Judgment, 22 January 1997 stating that "The principle of protection of legitimate expectations which according to the case law, forms part of the Community legal order, is the corollary of the principle of good faith in public international law."

[141] In the case mentioned in the previous footnote, contrary to Article 18 of the VCLT (according to which signatories to a treaty not yet in force may not adopt measures that would defeat the treaty's object and purpose), the Community had increased a customs duty contrary to the treaty of accession of Austria to the EC due to enter into force shortly.

[142] Under ECJ case law, a competent businessman cannot invoke legitimate expectations in respect of the stability of a regulation that the Commission has wide discretion to modify (see *Di Lenardo Adriano Srl, Dilexport Srl and Ministero del Commercio con l'Estero,* Case C-37/02 and C-38/02, Judgment, 15 July 2004, para. 63, 82). The liability of the EC for a legitimate normative act requires in principle, besides damage and causation, that the damage be "unusual and special". This is so if a particular category of economic operators are affected in a disproportionate manner in comparison with others ("unusual damage"), and if the damage ("special damage") goes beyond the inherent risk of a given economic activity, without the legislative measure that gave rise to the alleged damage being justified by a general economic interest. See *Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Commission of the European Communities*, Case T-184/95, Judgment, 28 April 1998, para. 80, affirmed by the EC Court of Justice, Case C-237/98 P, Judgment, 15 June 2000.

[143] See D.W. Bowett, *"Estoppel" Before International Tribunals and its Relation to Acquiescence*, 33 *B.Y.I.L.* 176 (1957): "It is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of act, or as a necessary assumption of the risk of another party acting upon the statement" referred to by M. Reisman and M.H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, *supra* note 118, 340.

character and to follow a line of conduct coherent with the legal obligations so created.[144]

132. The recent "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations"[145] ("the Guidelines"), which were formulated by the International Law Commission in 2006 as a restatement of international (inter-state) case law in the subject matter, are of interest here. We are aware that the Guidelines deal with the legal effects of unilateral acts of States addressed to other subjects of international law, and not with domestic normative acts relied upon by a foreign private investor. Still, we believe that the conditions required for unilateral declarations of a State to give rise to international obligations are of relevance here since the issue before the Tribunal has to be resolved by application of international law.[146]

133. Relevant provisions for our analysis are found in Article 7 of the Guidelines:

> "A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligation, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."
>
> Also of relevance is the final article of the Guidelines. Article 10 on revocation provides that:
>
> "[a] unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: (i) Any specific terms of the declaration relating to revocation; (ii) The extent to which those to whom the obligations are owed have relied on such obligations; (iii) The extent to which there has been a fundamental change of circumstances".

134. International law on the binding nature of unilateral commitments, as evidenced by the Guidelines, relies on concepts found in investment arbitral practice and in

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[144] See *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, para. 46 at p. 472 and W. Fiedler, "Unilateral Acts in International Law", *IV Encyclopedia of Public International Law* 1018 (2000).

[145] Adopted by the International Law Commission at its 58th session in 2006 together with commentaries thereto (ILC Report, A/61/10, 2006, Chapter IX), based on the analysis of the jurisprudence of the ICJ and pertinent State practice summarized in the eighth report of the Special Rapporteur (A/CN.4/557).

[146] The preamble to the Guidelines states that "it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law" (4th sentence).

comparative law concepts, such as the importance of factual circumstances, the relevance of content and intent, non-arbitrariness in case of revocation and the restrictive interpretation of unilateral acts invoked as a source of commitments for the issuing party.[147] The cautious approach that emerges appears to be consistent, *mutatis mutandis*, with that of domestic legal systems, European Union legal system and the European Court of Human Rights case law.

7. Application of the Fair and Equitable Treatment Standard

135. We turn now to apply the legal principles that we have highlighted to the facts of the case so as to evaluate Total's various claims of breach by Argentina. In this respect we find it appropriate to distinguish and sub-divide the three distinct claims made by Total, as follows:

- the elimination of the calculation of the tariffs in US dollars;
- the elimination of the automatic adjustments of the US dollar tariffs every six months in accordance with the US PPI, distinguishing in this respect the 6-month automatic adjustment in itself from its pegging to the US dollar based PPI;
- the non-application or elimination of the promises of economic equilibrium and a reasonable rate of return through the ongoing suspension of the Five-Year and Extraordinary Reviews, thus freezing the tariffs since 2002.

7.1 The Elimination of the Calculation of Gas Tariffs in US Dollars

136. The Tribunal recalls that the calculation of the gas transportation tariffs in US dollars was provided for by Article 41 of the Gas Decree as an element of the "normal and periodic adjustment of the tariffs authorized by the body" [ENARGAS]. The provision established further that the tariffs ("*el cuadro tarifario*") would be expressed in convertible pesos in conformity with Law 23.928, that is, Argentina's convertibility law of March 1991 (the "Convertibility Law"), with the reconversion

[147] See Guidelines, Commentary to Article 7, *supra* note 145.

to pesos to be made in accordance with the parity established in Article 3 of Decree 2.198/91.[148]

137. Under the Convertibility Law and generally the Currency Board system that Argentina had adopted in 1991, the peso was pegged to the US dollar at par and there was free convertibility between the peso and the US dollar. As described by the IMF:

> "The Convertibility Law, which pegged the Argentine currency to the U.S. dollar in April 1991, was a response to Argentina's dire economic situation at the beginning of the 1990s. Following more than a decade of high inflation and economic stagnation, and after several failed attempts to stabilize the economy, in late 1989 Argentina had fallen into hyperinflation and a virtual economic collapse […]. The new exchange rate regime, which operated like a currency board, was designated to stabilize the economy by establishing a hard nominal peg with credible assurances of non reversibility. The new peso (set equal to 10,000 australes) was fixed at par with the U.S. dollar and autonomous money creation by the central bank was severely constrained, though less rigidly than in a classical currency board. The exchange rate arrangement was part of a larger Convertibility Plan, which included a broader agenda of market-oriented structural reforms to promote efficiency and productivity in the economy. Various service sectors were deregulated, trade was liberalized, and anti-competitive price-fixing schemes were removed; privatization proceeded vigorously, notably in oil, power, and telecommunications, yielding large capital revenues."[149]

138. As described by another ICSID Tribunal:

> "In more precise legal terms, the convertibility regime entailed that the national currency (the peso that replaced the Austral at one peso for each 10,000 Australes on January 1, 1992) was freely convertible with the U.S. dollar at 1:1, and the external value of the peso being pegged to the dollar under a currency board type arrangement. Transactions in convertible currencies were permitted. Authorized banks could open accounts in pesos or foreign currencies so that Argentines and foreigners in Argentina were allowed to hold and use any currency. This possibility led in time to the "dollarization" of Argentina's economy to a notable degree: contracts, especially medium and long term contracts such as rents, loans, supply contracts were expressed in dollars, rather than in pesos, and bank deposits were opened and maintained in dollars. Specifically, a large proportion of the banking system's assets and liabilities were denominated in dollars. The level of dollarization, which had been growing steadily since 1991, increased substantially in the second half of 2000: more than 70% of the private sectors deposits and almost 70% of the banking system credit to private sector were denominated in dollars by the end of 2000."[150]

[148] The same rules were included in Article 9.2 of TGN Licence (*Reglas Básicas)* which was subject to the Gas Regulatory Framework as provided in Article 1 of the Presidential Decree 2.457/92 granting the Licence to which the Licence was annexed.
[149] See IMF *Evaluation Report*, *supra* note 53, 11 [footnotes omitted].
[150] See *Continental Casualty Company v. Argentina*, *supra* note 53, para. 105 [footnotes omitted].

139. However, as reported officially by the IMF, in legal terms "the currency of Argentina is the Argentine peso," and only the peso. "Transactions in convertible currencies are permitted, and contracts in these currencies are legally enforceable, although the currencies are not legal tender."[151]

140. As outlined by the Tribunal above at paragraph 81, all calculation of public utility tariffs in US dollars, as well as their indexation to foreign currencies, was rendered ineffective by the Emergency Law. According to Article 8, all of those tariffs would be fixed in pesos at the conversion rate of 1:1. Other provisions of the same law abolished the convertibility at par of the peso with the US dollar provided for under the Convertibility Law, and provided that all private dollar-denominated contracts would be converted to pesos at 1:1, with the possibility of renegotiation of the indebtedness between the parties concerned. Through the various provisions of the Emergency Law, Argentina de-linked its currency and its economy from the US dollar. For the conversion, the law established generally the existing parity of 1:1,[152] so that the existing nominal value of all monetary values would go on expressing those values in pesos, although the peso had ceased to be convertible at par to the US dollar.[153]

141. The pesification of the gas tariffs, as well as the tariffs of all other utilities and public contracts, and the cessation of their adjustment according to foreign indices, was carried out via the Emergency Law as an integral part of the complete de-linking in legal terms of the peso from the US dollar (and, as a consequence, marked the end of the pegging at par that had been in force since 1991 under Argentina's currency board system) taking place after the run on Argentina's reserves and the massive devaluation of the peso in the international market.

142. Total submits that it is not challenging the pesification of Argentina's economy as effected by the Emergency Law. Total objects only to the pesification of the gas

[151] IMF Argentina, Status Under IMF Articles of Agreements: Article VIII, Position as of January 31, 1999 at p. 32; IMF Argentina, Status Under IMF Articles of Agreements: Article VIII, Position as of December 31, 1999, at p. 33; IMF Argentina, Status Under IMF Articles of Agreements: Article VIII, Position as of December 31, 2000, at p. 34.
[152] The Tribunal recalls that at the beginning of 2002 the exchange rate depreciated to 1.8 pesos per dollar. On June 25, 2002 the market value of the peso against the US dollar had jumped to almost 1 to 4. Later, the exchange rate stabilized around three pesos for one U.S. dollar.
[153] A major exception was that dollar denominated deposits and credits with banks were converted at 1:1.4 (Decree 471 of March 8, 2002) thus giving a limited protection to depositors, the cost for the banks being covered by Argentina's treasury.

tariffs (and the connected abandonment of the PPI adjustment). Total claims that the pegging of the gas tariffs to the US dollar was neither connected with nor part of the convertibility system, and, accordingly, should not have been abolished as part of such pesification in view of the promises and assurances given by Argentina under the Gas Regulatory Framework about the stability of the tariff denomination in US dollars.[154] According to Total, the calculation of the gas tariffs in US dollars and the automatic adjustment of the tariffs according to the US PPI were specific promises given by Argentina in order to maintain TGN's gas tariffs in real dollar terms.[155] In other terms, these two "additional commitments" were stabilisation clauses exactly designed to operate in the event of a devaluation. On this premise, according to Total, even in the case of a massive devaluation (entailing a radical change in the Convertibility regime):

> "the onus would be on the regulator to call an Extraordinary Tariff Review in order to reduce the dollar-calculated tariff to reflect the reduction in peso-based costs and restore the licensee's equilibrium. Therein lies the principal benefit of the dollar tariff: it protects the licensee whilst this review is carried out; whereas with a peso tariff, the licensee is exposed to a devaluation and there is no immediate incentive for the regulator to carry out a review promptly. However, in either case, the principal commitment in the Gas Regulatory Framework is that the licensee's economic equilibrium is maintained through an Extraordinary Tariff Review."[156]

143. Argentina points out that, in terms of devalued post-2001 pesos, this would have meant an increase in tariffs of about 200-300%. In response, Total states that it would have been feasible to maintain those tariffs in US dollars through an Extraordinary Tariff review, notwithstanding that the rest of the economy had been pesified.[157] According to Total, had Argentina not pesified the tariffs and had ENARGAS carried out the Extraordinary Review *sua sponte* on the consumers' request according to Articles 46 and 47 of the Gas Law, by taking into account the reduced value in US dollar terms of those components of the tariff that were incurred in (devalued) pesos, the tariff in US dollar terms would have decreased by almost 25% (equivalent in peso terms to a 130% tariff increase).[158] More specifically, after the Extraordinary Review

[154] See Total's Post-Hearing Brief, para. 25 ff.
[155] See Total's Post-Hearing Brief, para. 32.
[156] See Total's Post-Hearing Brief, para. 30.
[157] See Total's Post-Hearing Brief, para. 337.
[158] See Total's Post-Hearing Brief, para. 44 relying on the LECG Report on Damages, paras. 142-144.

the tariffs of US$11 would have been equivalent to AR$33 (after the devaluation) and would have amounted to US$8.33 (equivalent to AR$25).[159]

144. Recalling its previous legal analysis of the applicable principles regarding government promises and undertakings made to foreign investors, *i.e.* the requirement of specificity and the freedom that States generally have to amend their laws, particularly when a fundamental change of factual circumstances occurs, the Tribunal is not convinced by Total's arguments for the following reasons.

7.2 No "Promise" of Dollar Denominated Tariffs and Their Adjustment was Made to Total

145. The Tribunal considers that the provisions according to which the gas tariffs were to be calculated in US dollars and adjusted in line with the US PPI cannot properly be construed as "promises" upon which Total could rely, since they were not addressed directly or indirectly to Total. They were provided for in the Gas Decree and in TGN's license as a means of implementing the core principle of the Gas Law, namely, that of guaranteeing to efficient Licensees sufficient revenue to cover all reasonable operating costs and ensuring a reasonable rate of return (Articles 38 and 39), in accordance with the dollar-based convertibility system then in force in Argentina. Total contends that, under the Gas Regulatory Framework, dollar tariffs were not linked to the Convertibility Law and invokes section 9.2 of TGN's Licence, Article 41 of the Gas Decree and section 7.1, Annex F of the Bidding Rules of 1992.[160] The Tribunal notes, however, that section 9.2 of TGN's Licence and Article 41 of the Gas Decree expressly refer to the Convertibility Law. This reference thus supports the opposite conclusion, namely, that the dollar denomination of the tariffs was closely linked to the Convertibility Law. In addition, another linkage is shown by the fact that the Convertibility Law prohibited indexation in pesos,[161] in order to

[159] See Total's Post-Hearing Brief, para. 339 and the chart at p. 138.
[160] See Total's Post-Hearing Brief, para. 321.
[161] As part of this design the convertibility law, in strict adherence with the nominalistic principle, expressly prohibited any indexation mechanism for debts, including in cases of delayed payment by the debtor *(mora del deudor)*. Article 7 of the Convertibility Law 23.928 of March 1991 provides that a debtor of a given amount in pesos satisfies his obligation by remitting at the date due that nominal quantity. See also *Continental Casualty Company v. Argentina*, *supra* note 53, para. 106 and footnote 123.

reinforce the stabilisation aim of the Convertibility regime,[162] while indexation of dollar values through reference to foreign prices was instead not prohibited.[163]

146. Total claims that the denomination of the tariff in US dollars was meant to protect the distributors in case of devaluation. Total supports this argument by reference to the TGN Offering Memorandum of 1995 pursuant to which the shares still belonging to the government were offered for sale in the market. According to Total, the warnings to investors contained therein concerning the consequences of a peso devaluation on TGN's operation did not include a warning that the US dollar tariffs might be pesified.[164] The Tribunal is, however, of the opinion that this document rather points in the contrary direction. The 1995 Offering Memorandum drafted for the sale of the 25% stake held by the government warned potential investors of the risk of a great devaluation under the heading "Convertibility and risks of the exchange rate." More precisely, according to the Memorandum:

> "Since the coming into force of the Convertibility Law in April, 1991, the peso/dollar exchange rate has suffered strict variations. The Central Bank, which in accordance with this Law is obliged to sell dollars to a price which does not exceed a peso per unit, has adopted the policy to buy dollars also at the rate of 1 peso per dollar. The persistence of the free convertibility of pesos into dollars cannot be ensured. In the event a great devaluation of the peso against the dollar takes place, the financial position and results of operations of the Company might be negatively affected, as well as its capacity to make payments in foreign currency (including cancellation of debt denominated in foreign currency) and dividend distribution in dollars at acceptable levels."

In the light of this text, the Tribunal is of the view that the Memorandum, besides warning potential investors of the general commercial risk of TGN's default and of decreasing demand for TGN caused by a devaluation of peso, also warned potential investors in TGN that a great devaluation of the peso and/or an abandonment of convertibility would affect the calculation of the tariffs in US dollar terms resulting in prejudice to "the financial position and results of operations of the Company."

[162] In the IMF's words: "The Convertibility regime was a stabilization device to deal with the hyperinflation that existed at the beginning of the 1990s, and in this was very successful." (see IMF *Evaluation Report*, *supra* note 53, 3)

[163] This situation is not belied by Decree 669/00 Annex I (the act containing the Second *Acta Acuerdo*) where it stated that: "the parties recognize that the application of the PPI does not entail an indexation within the terms of Convertibility Law No. 23.928 but it results from the adjustment following the international evolution of value changes for assets and services representing the activity, all this in accordance with Articles 95 and 96 of Law No. 24.076 determining public order for the Natural Gas Public Service."

[164] See Total's Post-Hearing Brief, para. 343.

This reflected the fact that, as Total points out, TGN's regulated tariffs represented 98% of its revenue.

147. Finally, Total supports its argument that the US dollar tariffs and the PPI adjustment were "commitments" on which it could legally rely, invoking section 7.1, Annex F, Bidding Rules. We recall that with a view to obtaining foreign participation in the privatization of the various Argentine state-owned utilities, the government made specific commitments towards such interested foreign parties for the purposes of inducing them to participate in the bidding process and to bring additional capital, technical and other know-how to modernize and efficiently run those utilities. More specifically, Total refers to section 7.1 of the Bidding Rules. Under the heading "*Ajuste Futuro de Tarifas*" (Annex F section 7), section 7.1. provided that "Tariffs are expressed in pesos, convertible as per Law No. 23.928 at par 1=1 with the United States dollar. … tariffs would be adjusted immediately and automatically in the event of a modification of the exchange rate. To all effects, the amount of Argentine currency necessary to buy one US dollar in the New York market shall be considered."[165] Moreover, the Bidding Rules at section 7.5. went on to indicate that: "The Distribution tariff … shall be adjusted semi-annually, from the Taking of Possession, in accordance with the variation operated in the wholesale price index of industrial commodities of the US, taken by the Board of Governors of the Federal Reserve system, within the second month prior to the beginning of each semester after the Taking of Possession, as established in the corresponding licence and the remaining requirements established in the Tariff Rules and General Conditions of Service. The Regulating Authority shall determine the mechanism for adjustment."

148. The Tribunal does not need to analyse the import of those provisions because Total did not take part in the bidding process in December 1992. Therefore, on the basis of the legal principles highlighted above, Total cannot invoke the Bidding Rules as a promise on which it could have relied when it invested in the gas sector in 2001. The situation of Total is, therefore, different from that of foreign investors who

[165] According to the Bidding Rules, Annex F, section 7.2, "Variations of the gas price shall be applied to tariffs so as not to produce benefits nor losses to the Distribution or Transportation companies, as per Article 38 (c) of Law No. 24.076 and reglamentary provisions. Initial tariffs have been calculated on the basis of a gas price of $ 0,035 per m3 at 9.300 kilocalories or 38,93 megajoules, at a temperature of 15º C and 1 bar pressure. In the case of propane/butane gas distributed by network, the initial tariffs have been calculated on the basis of a price of $ 142,50 per ton at separation plant exit. The Regulating Authority shall determine information requirements and necessary mechanisms to adjust tariffs according to variations in the gas price."

had participated in the privatization and, consequently, invoked their reliance on the bidding rules in other disputes.

149. No assurance about such stability—that is the maintenance of the tariffs in US dollars and the associated US PPI adjustment, irrespective of the Convertibility Law being in force—had been given by Argentina's authorities to Total when Total was considering the investment or was carrying out the transaction. Moreover, such assurances had not been sought by Total.[166] In making its investment Total properly considered (or should have considered) the totality of the relevant legal regime as it existed in 2001 (including the suspension of the US PPI adjustment). Within this framework, the Gas Decree and TGN's Licence (to which Total was not party) incorporated as a matter of law and regulation the US dollar and US PPI pegs.

150. Summing up, the Tribunal concludes that the denomination of the tariffs in US dollars was not the object of a promise or a commitment to Total but rather was an integral element of the Gas Regulatory Framework in place in Argentina when Total made its investment. The automatic adjustment of the tariffs to the US PPI was part of this framework and was closely linked to and reflected the denomination and calculation in US dollars of those tariffs, which in turn was correlated to the convertibility monetary system in force in Argentina since 1991.

7.3 Relevance of the PPI Adjustment Suspension Being in Place when Total Invested in TGN

151. The Tribunal now must examine the conduct of Total with respect to its alleged reliance on the stability of the operation of the gas regime in US dollars as was the case when Total made its investment, taking into account the suspension(s) of the US PPI adjustments that were in place at that time.

152. The Tribunal recalls that Total agreed to buy the shares of TransCanada Group in May 2000 and that it closed the deal in January 2001. Thus, on this second date, Total became a French foreign investor in Argentina whose investment in TGN was protected by the BIT. As recalled above at paragraphs 62 ff., at that time the PPI

[166] The Tribunal further notes that Total has not claimed that it had decided to invest in the gas distribution sector in Argentina, rather than hypothetically in some other country, in view of the fact that these tariffs were set in US dollars and adjusted to the US PPI.

adjustments had been suspended twice by agreement between the ENARGAS (and the government) and the Licensees: first, in January 2000, for six months and subsequently, on August 4, 2000, for two years. Moreover, on August 18, 2000, a judge had suspended the application of the second adjustment and the subsequent recovery of the increases due to accrue during the suspension.[167]

153. Argentina submits that Total could not have legitimate expectations about the stability of the tariff regime as laid down in the Gas Regulatory Framework since it had been undermined by those suspensions. Argentina suggests that, in analysing the Gas Regulatory Framework, Total had not exercised the diligence that it should have done as a foreign investor intending to make a long-term investment in a country such as Argentina.[168] In this regard, Total explained in its submissions that Total's management, even if aware of this development, "… did not consider that TGN's right to the adjustment of its tariffs in accordance with the US PPI to be in jeopardy."[169]

154. The Tribunal notes that Total's management considered the first *Acta Acuerdo* as a "favour" to Fernando De la Rúa's new administration; the second suspension for two years as immaterial because of the subsequent recovery provided for by Decree, and the suspension of the Decree by injunction as irrelevant because Total believed the injunction was based on weak legal grounds (the injunction had been challenged by the government), notwithstanding, however, the admission of Mr. François Faurès (one of Total's managers in Argentina and a witness called by Total) that "there are always doubts in a legal dispute, since it depends on an independent power."[170]

155. The Tribunal notes that while all of these developments affecting the tariff adjustment based on the US PPI were considered as irrelevant by Total's management in making its investment in TGN, another foreign company (CMS Gas Transmission Company) that had already invested in TGN considered them relevant enough to start a dispute against Argentina under the U.S.-Argentina BIT based on

[167] For more details see para 65 above.
[168] See Argentina's Post-Hearing Brief, paras. 201 ff.
[169] See Total's Post-Hearing Brief, para. 361.
[170] See Cross-examination of François Faurès, Transcript of the Hearing in the merits (Spanish) Day 3, 796:2-11.This is also in connection with the provision of Section 18.3 contained in the TGN Licence. See *supra* note 84.

the opposite conclusion that TGN's right to adjust its tariffs in accordance with the US PPI was in jeopardy.

156. The Tribunal is of the view that, although the various *Actas Acuerdo* and judicial acts at the time were temporary, they affected the future existence of the PPI adjustment mechanism. From a business point of view, an experienced international investor such as Total could not have considered these developments as irrelevant to the future stability of the PPI-adjusted US dollar gas tariffs. An objective risk analysis of the situation should have alerted Total that the stability of the gas regime was being undermined in practice from various directions. This was happening at the very moment when, for the first time, the PPI would have provided greater protection to the utilities than if a peso-based adjustment had been in place. Expecting that, after a 2-year suspension, the government would have been willing and able to impose on the users (*usuarios*) an obligation to pay the PPI increase retroactively for that period appears contrary to common sense or experience. This is especially the case since a judge, at the request of the Ombudsman, issued an injunction in the interest of those users.

157. Total also claims that it did not weigh these negative developments because it was focusing on a long term perspective in making its investment, as stated by one of its managers in oral testimony. This is quite possible, but then Total contradicts itself when it complains that its legitimate expectations based on the stability of this very regime have been frustrated.

158. In conclusion, therefore, the Tribunal is of the view that Total's alleged full reliance on the mechanism for adjusting tariffs based on the US PPI was misplaced, especially in light of the growing difficulties experienced by Argentina's economy that were at the root of the US PPI tariff adjustment suspension.

7.4 Reasons for Argentina's Abandonment of US Dollar Tariffs and Their Adjustment According to US PPI

159. The Tribunal has already highlighted above that the reasons for, and modalities and context of, a change to a national legal system (specifically, in this case, the change affecting the Gas Regulatory Framework) are also relevant and important in

light of the requirement that a host State act in good faith , which underpins the fair and equitable treatment standard.

160. In this respect the Tribunal considers that Argentina's emergency at the end of 2001, taking into account its political and social fall-out, justified Argentina's abandonment of the convertibility regime, including the pesification of tariffs. Leaving utilities tariffs in US dollars, while the rest of the economy had been de-dollarized, would have lacked any reasonable basis and would have entailed a form of reverse discrimination or a privilege for the beneficiaries. This is particularly true taking into account that TGN's gas transportation activity is not an ordinary business operation but is qualified by law as a "national public service" (Article 1, Gas Law). The principle that the gas transportation and distribution activities are to be regulated so as to ensure that just and reasonable tariffs are applied (Article 2(d), Gas Law), which Total has specifically emphasized, cannot justify any one-sided interpretation in favour of public service providers. Rather, the Tribunal considers that a more balanced interpretation is called for, taking into account that consumer protection is one of the primary objectives of the Gas Law, which provides that the tariffs shall be just and reasonable for consumers and at the same time that ensure that utilities can earn a reasonable rate of return. Total suggests that while maintaining the tariffs in US dollars, an Extraordinary Review could have reduced the tariff to reflect the pesification of the local components of the costs. However, this would have transferred most of the impact of the peso devaluation to Argentina's consumers and only the gas tariffs would have remained in dollars, while the rest of the economy had been pesified.

161. In the case of a "normal" devaluation of the peso, the de-dollarisation of the gas tariffs would not have been economically justified nor socially necessary, and might thus be objectionable under the fair and equitable treatment clause of the BIT (Article 3). In contrast, the "bankruptcy" of Argentina in 2001-2002, the forced abrupt abandonment of the US dollar parity and the devaluation of the peso by more than 300%, support the conclusion that the pesification of the tariffs and their de-linkage from the US PPI were not unfair or inequitable.

162. The balancing test recalled above, requires an assessment of the existence of a breach of the fair and equitable treatment standard taking into account the purposes,

nature and objectives of the measures challenged, and an evaluation of whether they are proportional, reasonable and not discriminatory. In other terms, the changes to the Gas Regulatory Framework brought about by the Measures have to be judged in the context of the severe economic emergency that Argentina was facing in 2001-2002.

163. The pesification was a measure of general application to all sectors of Argentina's economy and to all legal obligations expressed in monetary terms within the country. It was a devaluation and redenomination of the national currency within the monetary sovereignty of the State. Moreover, this measure was taken in good faith in a situation of recognized economic emergency of an exceptional, even catastrophic, nature. In this context, a series of harsh measures was imposed on the population (such as blocking withdrawals from banks – the *corralito*) to avoid a general collapse of the economy, and hence of the State and society, and to foster a progressive recovery. The complete reversal of Argentina's monetary policies and system was made inevitable by the impossibility for the country to maintain the exchange rate after having lost almost all of its reserves, leading to the massive, rapid devaluation of the peso on the free exchange markets, while the IMF had withdrawn its support.[171] In this context, the pesification of the economy—the elimination of the fixed link to the US dollar—necessarily also entailed the de-dollarisation of the public utilities' tariff regimes on the same terms, so that all tariff related dollar-denominated debt as well as future prices were converted into pesos at the previously fixed and official exchange rate of 1:1. Utilities were treated the same as all other holders of contractual rights, salary holders, etc. in Argentina.[172] The 1:1 rate reflected the impossibility for holders of debt in US dollars to pay the market rate for the US dollar when all of their claims, income, etc., had been converted forcibly and inevitably at the official rate. The de-dollarisation of the tariffs was thus a non-discriminatory measure of general application, parallel to those applied to other sectors of the economy and to all inhabitants of Argentina. The mechanism for tariff adjustment in accordance with the US PPI was also a part of the tariff dollarisation scheme connected with convertibility at par; accordingly, it was an exception to the prohibition of indexation of any peso-denominated obligations under the

[171] See above para. 72 ff.

[172] Except that depositors obtained a preferential rate of 1:1,4, with the burden thereby imposed on banks refinanced by Argentina's treasury (a differential treatment challenged by Total under its claim that Argentina breached the national treatment provision in Article 4 of the BIT, see below para. 204).

convertibility, reflecting the pegging of the tariffs to the US dollar rather than to the evolution of prices in Argentina. The US PPI adjustment was not abolished by cutting this link in isolation, but as part of the delinkage of the Argentine monetary system from the US dollar that was effected by the general pesification via the Emergency Law in the exercise of Argentina's monetary sovereignty.[173]

164. The Tribunal finds that this measure and its application cannot be considered unfair in the circumstances, considering the inherent flexibility of the fair and equitable standard. Unfairness must be evaluated in respect of the measures challenged, both in the light of their objective effects but also in the light of the reasons that led to their adoption (subjective good faith, proportionality to the aims and legitimacy of the latter according to general practice). It is therefore not possible to share Total's view, developed especially in the LECG Report on Damages, that the pesification breached Total's treaty rights and that its effects must be included in the calculation of damages suffered by Total for which it claims compensation under the BIT.[174] Such changes to general legislation, in the absence of specific stabilization promises to the foreign investor, reflect a legitimate exercise of the host State's governmental powers that are not prevented by a BIT's fair and equitable treatment standard and are not in breach of the same.[175] The untouchability ("intangibilidad") of those foreign currency peg provisions invoked by Total cannot be the object of

[173] The Tribunal notes that other international tribunals and authoritative scholarly works have also denied that in most instances of devaluation a breach of international standards of treatment and/or protection of private property is present, except in extreme situations of improper conduct by the State. This is the consistent jurisprudence of the ECHR under Protocol 1 to the ECHR protecting private property (see L. Wildhaber, *The Protection of Legitimate Expectations in European Human Rights Law*, *supra* note 139, p. 253 ff.). See, for the absence of any duty under international law as to obligations in domestic currency subject to the nominalistic principle, F. Mann, *The Legal Aspect of Money*, Fifth Edition, 1992, Oxford, 465 ff.; G. Burdeau, *L'exercice des compétences monétaires par les Etats*, RC 1988-V, 261 (except for "des conditions totalement arbitraires"). See also I. Brownlie, *Principles of Public International Law*, Seventh Edition, 2008, at p. 532, according to whom "State measures, *prima facie* a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licences and quotas, or measures of devaluation." [italics in original]

[174] Total complains that TGN was unable to meet its obligations in dollars undertaken outside Argentina. As a consequence, TGN defaulted on these obligations and had to negotiate a restructuring of such debt with its foreign creditors (thus transferring to them a share of the burden). The Tribunal is of the view that this was but a consequence of the devaluation of TGN's assets and revenues as a consequence of the monetary crisis in Argentina. The Tribunal further notes that TGN found itself in the same position as any other local company that had financed itself in hard currency outside Argentina - without entering into the debate between the parties whether TGN had not been prudent in so doing as ENARGAS had pre-warned TGN (in this regard see ENARGAS's Note 1906/99 and ENARGAS's Note 3735/99, Exhibits A RA 207 and A RA 208, respectively).

[175] According to the award of the *LG&E* Tribunal, this was the case of the obligations that were made by Argentina to foreign investors under the Gas Law and its implementing regulations because they were the basis on which the original investors relied during the privatization process to make investments in the gas sector. See *LG&E v. Argentina*, cit. *supra* note 111, para. 175.

legal expectation in a case of monetary and economic crisis such as that experienced by Argentina in 2001-2002.[176]

165. The general character, the good faith and absence of discrimination by Argentina, as well as the exceptional circumstance that "forced" Argentina to adopt the measures at issue, viewed objectively, preclude the Tribunal from finding that Argentina breached the fair and equitable obligations of treatment under the BIT with respect to the dollar denomination of the tariff and the six-month US PPI adjustment.

7.5 The Freezing of Tariffs Since 2002

166. Having examined the measures taken by Argentina to address the crisis by enacting the Emergency Law (*i.e.*, the pesification of the tariffs and abolition of adjustments based on the variations of the US PPI), the Tribunal now addresses the *de facto* freezing of tariffs since 2002, which was caused by the failure of the renegotiation mechanisms proposed by Argentina after the enactment the Emergency Law.

167. We recall that the Tribunal has concluded above that pesification of the utility tariffs was reasonable in the circumstances due to the crisis in Argentina and the general de-dollarisation of Argentina's economy. No expectations could reasonably be maintained (even less "legitimately") that only the tariffs would be excepted from such a pesification, especially as Total was not a beneficiary of any specific promise. The situation is, however, different concerning the absence of any readjustment of the gas tariffs since 2002. We recall that the principle that tariffs of privatized gas utilities should be sufficient to cover their reasonable costs and a reasonable rate of return was enshrined in the Gas Regulatory Framework. As a means to ensure this "economic equilibrium", a variety of adjustments over time were provided for by the Gas Regulatory Framework. These included the 6-month US PPI adjustment, the 5-year Tariff Review and the Extraordinary Review. This framework is consistent with sound management of utilities in a market economy, where private entrepreneurs

[176] While it can be said that the fair and equitable treatment standard should be understood as a pro-active standard that "is conducive to fostering the promotion of foreign investment" (*MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, cit. *supra* note 96, para. 113), we do not believe that a BIT may (and is meant to) insulate a foreign investor either from a major crisis such as the one at issue here or from the impact of general non-discriminatory measures taken by a host country to cope with such a crisis.

must be able to cover their costs and make a reasonable return in order to operate and to raise capital to provide an efficient service, especially considering that investments in such utilities are based on long term planning. The gas transportation tariffs were accordingly to be determined and adjusted in a way reflecting those criteria. The expectation of foreign investors in the gas sector about the long term maintenance of the above-mentioned principle was reinforced by the existence of Argentina's BITs. Irrespective of their specific wording, undoubtedly these treaties are meant to promote foreign direct investment and reflect the signatories' commitments to a hospitable investment climate.[177] Imposing conditions that make an investment unprofitable for a long term investor (for instance, compelling a foreign investor to operate at a loss) is surely not compatible with the underlying assumptions and purpose of the BIT regime (*i.e.*, "… to create favourable conditions for French investments …" in accordance with the Preamble to the Argentina-France BIT).[178]

168. An operator-investor such as Total was entitled, therefore, to expect that the gas regime would respect certain basic features. This did not mean that Total could rely on BIT protection to ensure the stability of the gas law regime without any possibility of change to that regime by Argentina in the light of the dramatic developments. The basic principles of economic equilibrium and business viability enshrined in the Gas Law were protected from a forward looking perspective by the mechanisms of readjustment, namely the ordinary and extraordinary reviews whose benefits were not restricted to the participants in the initial privatisation.

169. The Tribunal notes that these principles and mechanisms were restated forcefully in the Emergency Law and in the subsequent decrees of early 2002 that were based on that law, which established a single commission for all renegotiations of utilities contracts and set short deadlines to complete these processes.[179]

[177] See *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, paras 115-116; *Saluka Investments BV v. The Czech Republic*, *supra* note 103, para. 293.
[178] The Tribunal recalls that Article 10 of the Emergency Law prevented public service providers from suspending or modifying their obligation to provide the service.
[179] The Tribunal notes that under well-established principles of Argentina's law – which the Tribunal is empowered to apply as law under Article 8.4 BIT – rights deriving from a concession are "acquired rights" protected under the Constitution, see the leading *Bordieu* decision of the Supreme Court of Argentina (1925) referred to by Total (see Total's Post-Hearing Brief, para. 167). See also Section 9.8 TGN Licence which provides for the licensee's right to compensation in case of "freezing, administration and/or price control." (Section 9.8 TGN Licence).

170. Moreover, since this process was moving slower than anticipated, the Ministry of Economy authorised ENARGAS to proceed with an Extraordinary Review that had been blocked by the Emergency Law.[180] Thus, while pesifying the tariffs and suppressing the US PPI adjustment, the Emergency Law restated the principle that tariffs could be readjusted, a future undertaking that gained special importance after the devaluation and the complete overturn of the US dollar basis of the gas regulatory regime. We note moreover that the Gas Law enshrining the fundamental principles mentioned above was not amended and is still in force.

171. However, the Extraordinary Review, as well as a 7% tariff increase proposed by Argentina's Executive in December 2002 and January 2003 (Decrees 2.437/02, 146/03, and 120/03),[181] were blocked by a judicial intervention.[182] When 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.[183] The failure of the renegotiation process in 2002 to lead to re-adjustments, notwithstanding the legal provisions enacted for that purpose, might be understandable in view of the political and economic emergency of that period.[184]

172. This is not true after President Kirchner's election and the creation through UNIREN of a general mechanism to carry out tariff re-adjustments. It is generally recognized that Argentina's economy quickly recovered from the crisis—by the end of 2003 and the beginning of 2004. Moreover, in February 2004 a 450% increase in the gas price was imposed on industrial users. This increase did not go, however, to the benefit of TGN, but rather financed the trust fund for new investments in the gas

[180] See above para. 88.
[181] See Exhibits C-59, C-60 and C-61 and Total's Memorial, para. 91.
[182] As to the blocking of ENARGAS's Extraordinary Tariff Review see above para. 88. The other injunctions that blocked the above-mentioned proposed 7% tariff increase are at Exhibits C-163, C-164 and C-179. See also Total's Memorial, footnote 144 at p. 42.
[183] See *inter alia, Continental Casualty Company v. Argentina*, *supra* note 53, paras 157-158 and references listed there. See also Total's Reply, para. 620 ff.
[184] The judicial injunction of 14 November 2002 mentioned above blocking ENARGAS's extraordinary review and the other injunctions blocking the 7% tariff increase enacted by the Government are evidence of the difficulty during that period for the competent administrative authorities to carry out the process entrusted to them in an orderly way.

transportation network.[185] Total has also submitted that the government treated the gas sector differently than other sectors in this respect.

173. The Tribunal recalls here that UNIREN was required to conclude the renegotiation process by 31 December, 2004, this being the new term set out after the ineffective expiration of the latest term fixed by MoE Resolution No. 62/03.[186] However, this did not happen. Negotiations with utilities had been dragging. As late as April 2007, UNIREN proposed to TGN a Final *Acta Acuerdo* entailing a 15% staggered tariff increase, that would not have remedied the lack of readjustments in the past. Moreover, Article 17 of the proposal imposed on TGN, as a precondition for the agreement to come into force, the obligation to obtain from its shareholders: i) an immediate suspension of any claim against Argentina; and ii) their agreement to entirely withdraw those claims after the full tariff review was held and the new tariffs published. As outlined by Total, under Article 17, TGN needed to secure the relevant undertakings from 99.9% of its shareholders (including CMS and Total). Without the above-mentioned suspensions and withdrawals, the *Acta Acuerdo* would be terminated and thus TGN would not receive tariff increase, the Licence could be revoked and TGN would be obliged to indemnify the government for any damages payable as a result of a claim brought by a TGN minority shareholder. Total submits that these conditions represent an additional breach of the fair and equitable treatment required under Article 3 of the BIT.

174. In sum, from the passage of Emergency Law onwards, Argentina's public authorities repeatedly established new deadlines, causing protracted delays in the renegotiation of concessions and licences (the tariff regime included) in the public utility sector for almost six years. At the same time, any automatic semi-annual adjustment (such as the one originally provided linked to the US PPI) had been discontinued.

[185] Total pinpoints this 450% increase in the gas tariffs for the industrial users to underline that Argentina has treated TGN in an unfair and inequitable manner. As to the terms of the Government's offer after many years of renegotiation, Total points out that the offer included a "paltry temporary tariff increase of 15% in peso terms to be applied from 1 January to 1 November 2008. This increase is dwarfed in comparison with 450% surcharges on TGN's pesified tariffs imposed on TGN's industrial customers to remunerate the Government-established trust fund for the expansions to TGN's network …" (see Total' Post-Hearing Brief, para. 41).

[186] Law 25.790 of 2003 setting out the criteria for renegotiation by UNIREN (Exhibit C-261).

175. As mentioned above, the failure to promptly readjust the tariffs when the Emergency Law was enacted and during the height of the crisis could have been justified, provided that Argentina subsequently had pursued successful renegotiations to re-establish the equilibrium of the tariffs as provided by law. This, however, has not happened due to the inconclusive results of the renegotiation process entrusted by Argentina to UNIREN. Therefore, the Tribunal cannot but conclude that, in this respect, Argentina is in breach of its BIT obligation to grant fair and equitable treatment to Total under Article 3 in respect of Total's investment in TGN.

7.6 Analysis of Previous Arbitral Decisions

176. At this point, before concluding on this claim, the Tribunal considers it appropriate to recall previous arbitral decisions that have dealt with the impact of the Emergency Law and related measures on Argentina's legal framework governing generally the public utilities sectors and, more specifically, the gas sector. The Tribunal shares the opinion that judicial consistency in the field of international investment law is as far as possible desirable, notwithstanding the absence of a rule of precedent.[187]

177. The Tribunal notes that, among the disputes against Argentina raised by foreign investors in Argentina's public utilities sectors, those involving Enron (a U.S.

[187] The Tribunal notes that settlement of investment disputes under BITs is not a centralized system, even within the context of ICSID, so that uniformity of solutions (even in cases presenting similarities and connections) may not necessarily be attained. Each Tribunal has to decide each case independently based on the assessment of the arbitrators operating to the best of their ability and guided by the specific BIT at issue. As a consequence, an arbitral tribunal applying a specific BIT may well reach decisions different from those of other tribunals in similar cases under similar BITs in light of the different factual contexts and the variable factual circumstances of, and the tribunal's consideration of the legal arguments submitted by the parties in, each case. The same position as to the role of precedents has been taken by other ICSID Tribunals. In this regard see *AES Corp. v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, April 26, 2005, paras. 23-25, where the Tribunal noted at para. 25 that "… striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts, as it may be the case, in particular, for the determination of "investments" or for the precise definition of rights and obligations for each party."; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/06, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, para. 97; *Enron v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), August 2, 2004, para. 25. For a different approach to the role of precedents in investment treaty case-law, see *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67 stating that: "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law." [footnotes omitted]

investor in TGS, one of the two gas transportation companies subject to the privatization process of 1991-1992), British Gas (a U.K. investor in MetroGAS, one of the eight gas distribution companies subject to the privatization process of 1991-1992) and National Grid Transco plc (a U.K. investor in Transener, an electricity transmission company subject to the privatization process of 1992-1993) concerned investors who had been original participants in the privatization process.[188] By finding that the enactment of the Emergency Law breached the relevant fair and equitable treatment clause by Argentina, these tribunals emphasize the Bidding Rules that regulated participation in the privatization of the various public utilities concerned (as well as the various related Information Memoranda prepared by Argentina's financial advisers for this purpose). In order to find that Argentina had breached the relevant BIT, these tribunals have referred explicitly to these rules as specific commitments of Argentina towards foreign investors and as specific promises made to them on which they had relied on in making their investment. According to these tribunals, Argentina (through the pesification of gas tariffs and the removal of the US PPI tariff adjustment mechanism as a consequence of the Emergency Law) frustrated the expectations of those investors who legitimately relied upon the provisions of the Bidding Rules and breached the fair and equitable treatment obligation of the relevant BIT.

178. The Tribunal recalls that the position of Total is different from that of the claimants in the above-mentioned cases who took part in the privatization process, as Total invested in Argentina's gas sector in 2001, almost ten years after the privatization process took place. We have explained above why this Tribunal believes that this different factual situation warrants different legal conclusions as to the presence or lack of "specific commitments" by Argentina and as to the issue of "legitimate expectations" based thereon.

179. On the other hand, the Tribunals in *Sempra*, *LG&E* and *CMS*,[189] have found breaches of the fair and equitable treatment standard because of the pesification of tariffs (and the connected abolition of tariff adjustments to the US PPI), where the

[188] See *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 47 ff.; *BG Group Plc v. Argentina*, *supra* note 113, para. 24 ff.; *National Grid plc v. Argentina*, *supra* note 111, para. 56 ff, respectively.
[189] See *LG&E v. Argentina*, *supra* note 111, para. 52 ff.; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 88 ff.; *CMS Gas Transmission Company v. Argentina*, *supra* note 29.

investors involved had invested after the original privatization process. As Total did here, these investors had subsequently acquired their interests in the gas distribution and transmission utilities from Argentina itself,[190] or from other investors. According to these tribunals, the US dollar denomination of gas tariffs and their automatic adjustment to the US PPI variations should have remained unaffected by the general pesification adopted by Argentina through the Emergency Law pursuant to the fair and equitable treatment standard protection under the relevant BITs. This Tribunal has explained above the basis upon which it reached the partly different conclusion that neither the pesification of gas tariffs nor the abolition of their linkage to the US PPI variations are in breach of the fair and equitable clause of the Argentina-France BIT. The Tribunal believes that its conclusions are firmly rooted in relevant international law, as reviewed above, taking into account the features of the Argentina-France BIT and the specific circumstances of Total's investment, and in the light of the exceptional nature of Argentina's crisis.

180. As explained above, in following this different approach, this Tribunal has distinguished the abandonment of the US dollar denomination of tariffs and their linkage to the US PPI (found not to be in breach of the BIT in view of their connection to the Convertibility Law and the exceptional crisis of Argentina that led to the pesification)[191] from the subsequent failure to readjust the tariffs. The Tribunal

[190] This is the case of CMS which acquired its shares in TGN directly from Argentina pursuant to the second public bidding process of July 1995 by which Argentina sold its remaining 25% share in TGN. See above para. 42.

[191] The Tribunal notes that the *CMS* Tribunal has concluded that the measures complained of (which were the same ones at issue in the present case, namely pesification of the tariffs, suspension of the PPI and suppression of periodic reviews of the tariffs, since CMS was a shareholder of TGN like Total) "did in fact entirely transform and alter the legal and business environment under which the investment was decided and made." (*CMS Gas Transmission Company v. Argentina*, *supra* note 29, para. 275) As a premise of its reasoning and conclusion, having stated that "[t]here can be no doubt… that a stable legal and business environment is an essential element of fair and equitable treatment", the same Tribunal considered the fair and equitable treatment standard as an "objective requirement" and, therefore, unrelated to the reasons for the challenged measures. See *CMS Gas Transmission Company v. Argentina*, *supra* note 29, paras 274 and 280, respectively. To the contrary, for the reasons given above, we have concluded that the requirement of "fairness", and specifically the evaluation of whether "legitimate expectations" on which the investor was entitled to rely and did in fact rely, had illegally been affected by legislative changes to the legal framework made by the host state, cannot ignore the reasons for those changes and their modalities. This is consistent with the flexible nature of this standard and the need to apply it on a case-by-case approach, as stated by academic commentary and other international case law (see above paras 106 ff.). We recall that the Annulment Committee in the *CMS* case severely criticised the *CMS* Award's application of Article XI of the BIT (the non-precluding measures clause in the Argentina-US BIT), without distinguishing its scope, nature and conditions of applicability from those of the state of necessity under customary international law. (see *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Annulment Decision, 25 September 2007, para. 128 ff.) In addition, the Annulment Committee annulled the *CMS* Award for failure to state reasons where the Tribunal found a breach of Article II(c)(2), that is the so-called umbrella clause. (see *ibidem*, para. 96 ff.).

has found that this latter conduct by Argentina constitutes a breach of the fair and equitable treatment standard, also because it is contrary to the very principles spelled out by Argentina's law and authorities, both before and after the Emergency Law. This Tribunal thus shares the view of previous Tribunals that have found Argentina to be in breach of the fair and equitable treatment standard because of the persistent lack of any tariff readjustment.

181. Finally, the Tribunal notes that many of the previous awards dealing with the same matter, while following a different approach, mitigated the impact of their holdings that Argentina acted in breach of the fair and equitable treatment standard, by giving weight, on different bases, to the emergency situation of Argentina that brought about the pesification of public service tariffs. In this respect, such tribunals have relied on the defence of necessity under customary international law,[192] or on specific provisions in the relevant BITs,[193] and have considered that Argentina's breach of the fair and equitable treatment standard did not occur when the measures challenged were taken through the Emergency Law on January 6, 2002, but rather at a later date (such as June 2002), recognizing that the BIT protection could not have insulated an investor completely from the emergency situation of Argentina in 2001-2002.[194]

8. Consequences of the Tribunal's Findings for Total's Damages Claim

182. The Tribunal thus only partially upholds Total's claim concerning TGN under Article 3 of the BIT. The Tribunal has found that some of Argentina's measures challenged by Total were not in breach of Article 3 of the BIT (pesification and suppression of the US dollar link for the semi-annual automatic adjustments), while other measures or aspects thereof are in breach of Argentina's obligations under Article 3 of the BIT (lack of readjustment). Therefore, the Tribunal cannot determine

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The Tribunal further notes that the arbitral awards in *Sempra v. Argentina* and *Enron v. Argentina* have been annulled in 2010 for not having properly examined the applicability of Art. XI of the Argentina-U.S. BIT on non-precluded measures (*Sempra Energy International v. Argentina,* ICSID Case No. ARB/02/16, Annulment Decision, 19 June 2010, paras. 194 ff.) and for not having dealt adequately with the plea of necessity under customary international law raised by Argentina (*Enron Corporation and Ponderosa Assets, L.P v. Argentina,* ICSID Case No. ARB/01/3, Annulment Decision, 30 July 2010, paras. 367-395).

[192] See *LG&E v. Argentina*, *supra* note 111, para. 226 ff.

[193] As the non-precluding measures clause of Article XI US-Argentina BIT, see *Continental Casualty Company v. Argentina*, *supra* note 53, para. 160 ff.

[194] See *National Grid plc v. Argentina*, *supra* note 111, para. 180.

the damages suffered by Total, since the calculations submitted by Total regarding quantum are based on different premises for Argentina's liability. Accordingly, the Tribunal has decided to postpone the quantification of damages to a separate quantum phase.

183. The Tribunal considers it appropriate at this point to give some general indications concerning the criteria, based on the above findings on liability, according to which those damages should be calculated in the quantum phase, both as to the time period to be considered, and the basis of the calculation. Based on the analysis conducted above the Tribunal considers that the freezing of the tariffs was in breach of the fair and equitable treatment clause as of 1 July, 2002 (*i.e.*, the first 120-day deadline established by Res. 20/2002 for the completion of the renegotiation process).[195] Since Argentina has not remedied this block by any of the renegotiation mechanisms that it introduced after the Emergency Law or by operation of the previous mechanisms that nominally remained in force, the Tribunal believes that a six-month periodic readjustment of the tariff, as provided for in the Gas Regime but based on the evolution of local prices, would be appropriate to calculate the damages caused to Total.[196] The calculation of these damages should take into account the difference between the revenues actually received by TGN (*pro-rata* according to Total's share) and those which TGN would have obtained if the tariffs in pesos in force on 1 July, 2002 had been readjusted on a semi-annual basis to reflect the variation of prices in Argentina.[197]

8.1 The Tribunal's Conclusions About Total's Claims Concerning its Investment in TGN under Article 3 of the BIT

184. On Total's claims concerning its investment in TGN under Article 3 of the BIT, the Tribunal, based on the above reasoning and findings,

[195] See the detailed description of the various Decrees at paras 84-89.

[196] At this stage the Tribunal is of the opinion that by calculating Total's damages on this basis, the damages suffered by Total by the lack of reviews both ordinary and extraordinary (excluding the effects of the pesification) will also be made good. The parties may however submit further evidence in this respect in the quantum phase, which the Tribunal will then take into account.

[197] As mentioned in para. 203 below, Total has pointed to a 95.5% increase from January 2002 to March 2007 of the consumer price index (IPC) and to an increase of 189% of the wholesale price index (IPIM) for the same period.

(i) concludes that Argentina breached its obligation under Article 3 of the BIT to grant fair and equitable treatment to Total by not periodically readjusting TGN's domestic tariffs in force in pesos in January 2002 from 1 July, 2002 onwards;

(ii) concludes that the damages thereby suffered by Total must be compensated by Argentina;

(iii) rejects all other claims by Total related to its investment in TGN; and

(iv) defers the determination of the above damages to the quantum phase.

9. Total's Claim that Argentina has Breached Article 5(2) BIT With Respect to its Investment in TGN (Total's Claim of Indirect Expropriation)

9.1 Parties' Arguments

185. In its claim under Article 5(2) of the BIT, Total complains that it has suffered an indirect expropriation without compensation in breach of the said provision.[198] More specifically, Total claims that the same measures amounting to a breach of the fair and equitable treatment obligation of Article 3 of the BIT, alternatively "constitute an indirect expropriation as they substantially deprive Total of the value and economic benefit of its investment in TGN, contrary to Article 5(2) of the Treaty. TGN has lost approximately 86% of its value as a direct result of Argentina's Measures – this goes beyond a 'substantial deprivation' as it amounts to a virtual obliteration of the value of Total's investment in TGN."[199] Total submits that this loss of value of its investment in TGN (for which Total paid US$ 230 million in 2000) was due to the Measures in their totality (*i.e.*, the pesification and freezing the gas tariffs as well as the creation of the trust fund system to expand TGN's network).[200]

186. Besides the substantial deprivation of the value of its investment, Total complains that the establishment of the trust fund, financed by the surcharge on the tariffs paid by industrial users not to TGN but to the fund, is a form of partial expropriation. This is because the fund will finance the upgrading of TGN's network thus becoming a

[198] Article 5(2) of the BIT states that: "The Contracting Parties shall not take, directly or indirectly, any expropriation or nationalization measures or any other equivalent measures having a similar effect of dispossession, expect for reasons of public necessity and on condition that the measures are not discriminatory or contrary to a specific undertaking."
[199] See Total's Post-Hearing Brief, para. 57.
[200] See LECG Report on Damages, para. 157.

kind of co-owner of assets that were supposed to be owned only by TGN. Total complains that, besides the substantial loss of value, the trust Fund mechanism has impaired its control of TGN.

187. Summing up, Total explains its claim that Argentina has breached Article 5(2) in the following terms:

> "It is a well-established principle that a substantial deprivation of the value and economic benefit of an investment constitutes expropriation. Thus the Measures go beyond a 'substantial deprivation'; they constitute an obliteration of the value of Total's investment in TGN. By focusing on the effect of the Measures, Article 5(2) of the Treaty codifies the position under general international law that an expropriation need not involve the loss of control or use of an asset. However, even on the basis of this criteria, Total would succeed in its claim for expropriation considering the extent to which the Measures have emasculated TGN's role as a manager and investor in the gas transportation network. Between 1993 and 2001, TGN invested more than US$1 billion dollars in expanding and upgrading the gas transportation network. With the pesification and freeze of its tariffs, TGN is unable to fund investments in the network. With the creation of the trust-fund system to conduct expansions of the network, the Government has usurped TGN's role in making investment decisions – decisions overseen and steered by Total as the "Technical Operator" of TGN – relegating it instead to the role of a mere operator."[201]

188. Argentina opposes Total's claim under Article 5(2) of the BIT. Relying on the *Pope & Talbot* case,[202] as well as cases such as *Feldman*,[203] *CMS*,[204] *Methanex*,[205] *Azurix*,[206] *LG&E*,[207] *Enron*[208] and *Sempra*,[209] Argentina suggests that the Tribunal has to apply the (loss of) control of the investment criterion in order to judge whether the interference with Total's property rights brought about by the Measures, is substantial enough to constitute an indirect expropriation. Because Total (together with the other shareholders) is still in full control of TGN and continues to manage its investment, Argentina argues that the alleged interference, not being substantial, cannot be regarded as an indirect expropriation.[210] Furthermore, relying on the *Saluka* award,[211] Argentina points to "the principle according to which bona fide

[201] See Total's Post-Hearing Brief, para. 584-585 [footnotes omitted].
[202] See *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, para. 100.
[203] See *Feldman v. Mexico*, *supra* note 121, paras 142, 152.
[204] *CMS Gas Transmission Company v. Argentina*, *supra* note 29, paras 263-264.
[205] *Methanex av. United States*, UNCITRAL, Final Award, 3 August 2005, part IV.D para. 16.
[206] *Azurix v. Argentina*, *supra* note 113, para. 322.
[207] *LG&E v. Argentina*, *supra* note 111, para. 188.
[208] *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, paras 245-246.
[209] *Sempra Energy International v. Argentina*, *supra* note 189, para. 284.
[210] See Argentina's Rejoinder, para. 544.
[211] See *Saluka Investments BV v. The Czech Republic*, *supra* note 103, para. 255.

non-discriminatory regulatory measures within the police power of the State do not require any compensation."[212] In accordance with this principle, the negative effects on the value of foreign investments caused by the changes introduced by the Emergency Law (even if they had led to a significant devaluation of foreign assets) are not compensable under either customary law or the BIT. Therefore, Argentina's measures, being regulatory measures of general application enacted to face the 2001-2002 emergency, cannot be regarded as effecting a compensable expropriation.[213]

189. Total opposes Argentina's reasoning with the following arguments. In the first place, Total maintains that a loss of control of the management and enjoyment of an investment is not required or decisive in order to find an indirect expropriation under international law and in light of the specific wording of the Argentina-France BIT. Total's view is that Article 5(2) of the Argentina-France BIT covers a wider range of measures than those "having effect equivalent to nationalisation or expropriation" (Article 5 of the Argentina-U.K. BIT) or "tantamount to expropriation or nationalisation" (Article IV(1) of the Argentina-U.S. BIT).[214] More specifically, Total contends that "[T]he words 'similar effect' encompass a wider range of measures than "tantamount to" and the non-technical term "dispossession" covers the loss of value of an asset, in addition to the loss of the title, control or use."[215] Hence it is Total's position that the above measures implemented by Argentina have an effect similar to dispossession and constitute an indirect expropriation under the specific wording of Article 5(2) of the BIT, irrespective of whether they are equivalent to an expropriation or nationalisation.

190. In the second place, Total submits that, even if Argentina was correct that the severe loss of value was caused by a regulation of general application without any intent or even effect of dispossession, this would not prevent a finding of indirect expropriation (regulatory taking). On the one hand, Total submits that: "[I]n any event, even on a valid invocation of police powers, Argentina would not be exempted from the obligation to provide Total with prompt, adequate and effective

[212] See Argentina's Rejoinder, para. 545.
[213] See Argentina's Rejoinder, para. 547 ff.
[214] See Total's Post-Hearing Brief, paras 193-195 (see also Total's Reply paras 439-441). These provisions have been applied in the *BG* and *National Grid* cases (the Argentina-UK BIT) and in *CMS* and *Enron* cases as well as in other such as *Sempra* and *Azurix* (the Argentina-US BIT). In all of these cases, arbitral tribunals rejected investors' claims of indirect expropriation.
[215] See Total's Post-Hearing Brief, para. 195.

compensation."[216] On the other, Total points out that Argentina's Measures, even if regarded as regulatory or police power measures, constitutes an expropriation because they contradict the specific undertakings Argentina gave to Total and are therefore in breach of Article 5(2) of the BIT, last sentence. These specific undertakings or assurances are identified by the Claimant as:

> "(a) the commitment to preserve TGN's economic equilibrium through recurrent and extraordinary tariff reviews with the aim of ensuring that tariffs remained sufficient to cover costs and earn a reasonable rate of return; and, in support of this commitment (b) the promise to calculate tariffs in dollars and adjust them in accordance with the US PPI; …"[217]

9.2 Tribunal's Conclusions

191. Before discussing the legal issues, the Tribunal considers it appropriate to recall the evidence concerning Total's position as a major shareholder of TGN and its role as "Technical Operator". On the basis of the evidence and the arguments of the parties in their Post-Hearing Briefs it is uncontested that Total is in full control of its investment in TGN. Conversely, TGN operates under the management of its shareholders and carries on its daily activities. It is listed on the Buenos Aires Stock Exchange. The government's decision in 2004 to establish a trust fund system in order to finance expansions of the network by imposing surcharges on the tariffs paid by industrial users does not entail either loss of control by Total over its investments nor TGN's loss of control over its business operations. The trust fund finances the expansion of the network (which TGN is unable to do due to the lack of adequate revenues caused by freezing the tariffs), while TGN operates the network as licensee,[218] besides managing the expansion projects.[219] Total has not shown that the trust fund interferes with the ability of TGN shareholders to manage TGN. Based on the evidence, the Tribunal considers that Total has not been precluded in any way from exercising its rights as a shareholder in TGN, as it was able to go on managing TGN's business together with the other shareholders in TGN. The Tribunal

[216] See Total's Post-Hearing Brief, para. 586.
[217] See Total's Post-Hearing Brief, para. 587.
[218] See Argentina Rejoinder, paras 452-457 and Total's Post-Hearing Brief, para. 519. The parties agree that a small part of the expansion was financed by TGN and that the cooperation between the trust fund and TGN is governed by agreement between them.
[219] See Total's Post-Hearing Brief, para. 519.

concludes that Total "is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment", as the ICSID Tribunal dealing with *CMS* claim – another foreign investor in TGN - found in May 2005.[220]

192. The Tribunal will first examine Article 5(2) of the BIT, interpreting it in accordance with Article 31 of the Vienna Convention on the Law of the Treaties.[221] As mentioned above, Article 5(2) states that:

> "The Contracting Parties shall not take, directly or indirectly, any expropriation or nationalization measures or any other equivalent measures having a similar effect of dispossession, except for reasons of public necessity and on condition that the measures are not discriminatory or contrary to a specific undertaking."[222]

193. The key expression as to indirect expropriation is the protection from "any expropriation or nationalisation measures or any other equivalent measures having a similar effect of dispossession." Therefore, besides expropriations and nationalisations, Article 5(2) covers measures which are "equivalent" to expropriation and nationalisation, as far as they have a "similar effect of dispossession."[223] Contrary to Total's position, the term "dispossession" is not a "non-technical term." The term "dispossession" refers to a precise legal concept under civil law systems to which both France and Argentina belong. Possession is a factual relation between a thing, object or asset and a person who exercises factual control over it. Possession in Roman and civil law is independent in part from legal property.[224] While a lawful owner or acquirer is entitled to obtain and exercise

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[220] See *CMS Gas Transmission Company v. Argentina*, *supra* note 29, para. 263.

[221] Article 31 VCLT states that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[222] In the French original: "Les Parties contractantes ne prennent pas, directement ou indirectement, de mesures d'expropriation ou de nationalisation, ni tout autre mesure équivalente ayant un effet similaire de dépossession, si ce n'est pour cause d'utilité publique et à condition que ces mesures ne soient ni discriminatoires, ni contraires à un engagement particulier." In the Spanish original: "Las Partes Contratantes se abstendrán de adoptar, de manera directa o indirecta, medidas de expropiación o de nacionalización o cualquier otra medida equivalente que tenga un efecto similar de desposesión, salvo por causa de utilidad pública y con la condición que estas medidas no sean discriminatorias ni contrarias a un compromiso particular."

[223] See Argentina's Rejoinder, para. 542 where Argentina points out that: "…,the Argentina-France BIT also makes reference to measures equivalent to expropriation, as the Argentina-US BIT and the NAFTA, which the Claimant fails to mention…."

[224] See G. Cornu, *Vocabulaire Juridique*, Presses Universitaires de France, 2000, p. 651, according to whom 'possession' is a "*pouvoir de fait exercé sur une chose avec l'intention de s'en affirmer le maître (animus domini), même si – le sachant ou non – on ne l'est pas*;" and the term "*possesio rei*" "*signifiant «possession d'une chose»*

possession, possession, as a factual matter, may exist without or irrespective of a title. Indeed, property may derive from protracted undisturbed possession over a thing by a non-owner. The term "dispossession" therefore refers necessarily to the loss of the control which is characteristic of "possession".

194. The use of the terms "*dépossession*" or "*mesures dont l'effet est de déposséder*" to characterise indirect expropriation is typical of French BITs. As stressed by two authoritative French commentators "*dans son acception habituelle, la mesure de dépossession est celle qui prive l'investisseur de ses droit essentiels sur l'investissement au profit de l'autorité publique, quelles que soient les modalités de cette dépossession.*"[225] Contrary to Total's position, in requiring a loss of material control over the investment, the term "dispossession" in Article 5(2) appears somehow to be more restrictive than the parallel provisions in the Argentina-U.S. ("tantamount to expropriation") and the Argentina-UK BIT which refer only to "equivalent to nationalisation or expropriation". Since Total has not been dispossessed of its TGN holding nor of the management of its business, the Tribunal concludes that the requirement of dispossession under Article 5(2) has not been met.

195. In any case, the Tribunal will also address Total's argument that it is well-established that a substantial deprivation of the value of an investment constitutes indirect expropriation. Hence, Total requests the Tribunal to find *in casu* that Argentina's measures, having caused such a loss, are in breach of Article 5(2) of the BIT. Looking beyond the specific wording of Article 5(2), the Tribunal considers that under international law a measure which does not have all the features of a formal expropriation could be equivalent to an expropriation if an effective deprivation of the investment is thereby caused. An effective deprivation requires, however, a total loss of value of the property such as when the property affected is rendered worthless by the measure, as in case of direct expropriation, even if formal title continues to be

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servant aujourd'hui à désigner la possession qui correspond au droit de propriété." See also, *ibid.* p. 278 where the term '*dépossession'* is defined as "[*p]erte de la possession, soit par violence ou voie de fait, soit à un titre juridique (gage, antichrèse, séquestre*); privation effective de la détention matérielle d'une chose. " As to this notion under Argentina's legal system see the entry '*poseer'* in Ana María Cabanellas de las Cuevas, Diccionario Jurídico Universitario, Editorial Heliasta, 1ra Edición, 2000, Tomo II: poseer is defined as "*tener materialmente una cosa en nuestro poder. Encontrarse en situación de disponer y disfrutar directamente de ella…"*

[225] See D. Carreau, P. Juillard, *Droit international économique*, 1ere édition, 2003, para 1376, at p. 508. The two authors, discussing the use of term "*dépossession*" in the French model BIT, go on to state that "*[m]ais d'autres instruments, notamment le modèle américain et…l'ALENA, utilisent l'expression, qui parait mieux appropriée, de mesures équivalant à une mesure d'expropriation ou de nationalisation.*" (see para. 1377 at p. 509)

held.[226] This is supported by the general direction of the case law under BITs,[227] other international jurisprudence[228] and scholarly legal opinions.[229]

196. In light of the above legal principles, the Tribunal turns to examine the merits of Total's claim that it is the victim of an indirect expropriation. The Tribunal considers that Total has not shown that the negative economic negative impact of the Measures has been such as to deprive its investment of all or substantially all its value. Therefore the Tribunal rejects Total's claim of indirect expropriation in breach of Article 5(2) of the BIT. We note that this conclusion is consistent with all of the previous arbitral precedents dealing with indirect expropriation claims brought by foreign investors in the utility sector under various BITs in respect of the same or similar measures of Argentina in 2001-2002. According to this uniform arbitral case law, Argentina's Measures have been considered to not give rise to an indirect expropriation under various BITs,[230] in the absence of an effective deprivation of the value of the foreign investment in the above-mentioned meaning (*i.e.*, total deprivation of the investment's value or total loss of control by the investor of its investment, both of a permanent nature).

197. Before concluding on this claim, the Tribunal recalls that the Claimant challenged a number of distinct measures under Article 5(2) of the BIT: the

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[226] Thus, an expropriation could be found even where control remains in the hands of the foreign investor provided that economic profitability of the investment has been totally destroyed in some other way.

[227] See *Sempra Energy International v. Argentina*, *supra* note 189, para. 285 where the Tribunal stated that "a finding of indirect expropriation would require more than adverse effect. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated." As to Argentina's Measures see also *LG&E v. Argentina*, *supra* note 111, para. 191 where it is stated that "[i]nterference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation"; *BG Group Plc v. Argentina*, *supra* note 113, paras 258-266 and *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 245. See also *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, *supra* note 116, para. 115; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 604; *Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award (Embodying the Parties' Settlement Agreement), 10 February 1999, para. 124.

[228] See for example *Starrett Housing Corp. v. Iran*, Award, 14 August 1987, 4 Iran-US C.T.R. 122, at pp. 154-157; *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award, 29 June 1984, 6 Iran-US C.T.R. 219, p. 255.

[229] See C. Leben, *La liberté normative de l'État et la question de l'expropriation indirecte*, C. Leben (dir.), *Le contentieux arbitral transnational relative à l'investissement*, Anthemis, 2006, 163 ff. at p. 173-175; R. Dolzer, C. Schreuer, *supra* note 133, at p. 96-101.

[230] See *LG&E v. Argentina*, *supra* note 111, para. 200 where the Tribunal stated that: "the effect of the Argentine State's actions has not been permanent on the value of the Claimants' share, and Claimants' investment has not ceased to exist. Without a permanent, severe deprivation of LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E's investment, the Tribunal concludes that these circumstances do not constitute expropriation." See also *BG Group Plc v. Argentina*, *supra* note 113, para. 268-270; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 246.

pesification and the freezing the gas tariffs and the creation of the trust-fund system to expand TGN's network. The Tribunal recalls here that, by analysing the pesification under Total's claim of breach of Article 3, it has already judged the said measure as a *bona fide* regulatory measure of general application, which was reasonable in light of Argentina's economic and monetary emergency and proportionate to the aim of facing such an emergency. Therefore, the Tribunal has concluded that in the absence of specific stabilization promises to the Claimant, the pesification does not amount to a breach of Article 3 of the BIT.[231] For the same reasons, it is the Tribunal's view that the pesification also does not amount to a measure equivalent to expropriation or nationalisation,[232] that is an indirect expropriation entailing Argentina's obligation to compensate Total. Moreover, contrary to Total's submissions, the pesification was not contrary to any specific undertaking given by Argentina to Total. In this regard the Tribunal recalls its finding under Total's claim of breach of Article 3 of the BIT that the provision according to which the gas tariffs were calculated in US dollars and adjusted in accordance with US PPI variations cannot be properly construed as "promises" or "specific undertakings" given by Argentina to Total since they were not addressed directly or indirectly to Total.[233]

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[231] See above paras. 159 ff.

[232] The Tribunal is aware of the current international debate on the issue of whether, by judging changes in national legal systems introduced by legislative measures under bilateral investment treaties "… one should only take into account the effects produced by the measure or if one should consider also the context within which a measure was adopted and the host State's purpose" (*LG&E v. Argentina*, *supra* note 111, para. 194). When foreign investors complain of State regulatory actions under a BIT, in order to decide whether the measures also amount to an indirect expropriation (a so-called regulatory taking) a tribunal must take into account their features and object so as to assess their proportionality and reasonableness in respect of the purpose which is legitimately pursued by the host State. These regulatory measures, when judged as legitimate, proportionate, reasonable and non-discriminatory, do not give rise to compensation in favour of foreign investors. The Tribunal shares the dominant approach followed by international tribunals, that is to take into account also the purpose and the causes of the measures taken by a State (together with their adverse effects on the foreign investment). In this regard see R. Dolzer, C. Schreuer, *supra* note 133, at p. 104, referring to the opinion of *Fortier* (Fortier, Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID Review-Foreign Investment Law Journal 293 (2004)), *the Oscar Chinn Case* and *Sea-Land Service Inc. v. Iran*, 6 Iran-US Cl. Trib. Rep. 149, 166 (1984).

[233] See above paras 145 ff. The Tribunal recalls that Article 5(2) of the BIT prohibits measures "contrary to a specific undertaking." The Tribunal notes that the BIT contains a further reference to "specific undertaking" in Article 10: "Investments which have been the subject of a specific undertaking by one Contracting Party vis-à-vis investors of the other Contracting Party shall be governed, without prejudice to the provisions of this Agreement, by the terms of that undertaking, in so far as its provisions are more favourable than those laid down by this Agreement." Based on Article 5(2), Total submits that the Measures enacted by Argentina, even if considered legitimate as an exercise of its police powers, give rise to an obligation to compensate Total, because Argentina has made specific undertakings to Total. However, Total has not invoked a breach of Article 10, although it has argued that the "core commitments" of the Gas Regulatory Framework should be qualified as "specific undertakings" under Article 5(2) of the BIT.

198. Finally, the Tribunal is unable to sustain Total's claim that the failure to readjust the tariffs would constitute also an indirect expropriation in breach of Article 5(2) of the BIT. This is because this *de facto* freezing of the gas tariffs implied neither a deprivation of the investment nor a total loss of its value. The Tribunal further notes that damages under the heading of indirect expropriation would not be different from damages due to breach of the fair and equitable treatment standard. In no case could the Tribunal award double recovery for the same damages to the same assets hypothetically caused by the breach of two different BIT provisions.[234]

199. For the reasons above, the Tribunal concludes that Argentina has not indirectly expropriated Total's investment in TGN in breach of Article 5(2) of the BIT.

10. Total's claim that Argentina has breached Article 4 of the BIT (Non-discrimination)

10.1 Total's Position

200. Total contends that Argentina's Measures (*i.e.*, the pesification and freezing of gas transportation tariffs) discriminated against Total's investment, transferring wealth from TGN and other energy companies predominantly owned by foreign interests to industry, commerce and agriculture predominantly owned by domestic investors. Accordingly, since the Measures entail discriminatory treatment against the energy sector as a whole and TGN in particular, they are not only in breach of Article 3 of the BIT but also in breach of Article 4 "which obliges Argentina to treat Total's investment on a basis no less favourable than that accorded in like situations to investments of its own nationals".[235]

201. It is Total's position that this discriminatory treatment against the energy sector and TGN:

> "not only constitutes further evidence of Argentina's unfair and inequitable treatment of Total in breach of Article 3 of the Treaty, it also amounts to a further

[234] This would be so even if the methods of calculation were different under the two Articles of the BIT.

[235] See Total's Memorial, para. 369. Article 4 of the BIT reads as follows: "Each Contracting Party shall accord in its territory and maritime zone to investors of the other Party, in respect of their investments and activities in connection with such investments, treatment that is no less favourable than that accorded to its own investors or the treatment accorded to investors of the most-favoured nation, if the latter is more advantageous…"

> breach of the national treatment provision in Article 4 of the Treaty, for which Total should receive full compensation."[236]

According to Total, Argentina's duty to guarantee to French investors treatment no less favourable than that accorded to national investors does not operate only within the confines of the same sector. A breach of the national treatment clause in the Treaty could be found by the Tribunal comparing investors in different sectors. As a consequence, Total submits that:

> "Under the test of Article 4, therefore, measures of general application can be discriminatory where they have practically resulted in different treatment being accorded to investors in different sectors or of different nationality. The relevant criterion here is whether a sector has been singled out for differential treatment in order to grant an advantage to other sectors."[237]

202. Total develops two legal arguments to support its claim of breach of Article 4 of the BIT. First, Total points out that Article 4 does not textually include any reference to the "in like circumstances" criterion found in national treatment provisions in other investment treaties (for example, the NAFTA or the U.S.-Egypt BIT). Accordingly, Article 4 of the Treaty would not require comparison between investors "in like circumstances". Secondly, Total relies on *Occidental v. Ecuador* at paragraph 173, where the tribunal states that, because the purpose of national treatment is to protect investors as compared to local producers, "… this cannot be done by addressing exclusively the sector in which that particular activity is undertaken."[238]

203. As to the alleged discriminatory conduct of Argentina, Total contends that by having maintained gas tariffs basically unchanged since 2002, while allowing prices in all other sectors to increase, Argentina's Executive provided:

> "a cross-subsidy to producers who have benefits from exceptionally low energy tariffs while being able to export their goods in dollars, or to charge inflation-adjusted prices in the domestic market."[239]

[236] See Total's Memorial, para. 371.
[237] See Total's Post-Hearing Brief, paras 257 (referring to *Occidental Exploration and Production Company v. The Republic of Ecuador), supra note* 112 and 259.
[238] See Total's Post-Hearing Brief, para. 255-258.
[239] See Total's Memorial, para. 368.

In this respect, Total points out that, on the one hand, prices for most sectors of the economy have increased significantly in accordance with the balance between supply and demand (from January 2002 to March 2007, the consumer price index (IPC) and the wholesale price index (IPIM) increased by 95.5% and by 189%, respectively); on the other hand, Argentina has accorded preferential treatment to domestic investors in some other cases or sectors either by guaranteeing tariff increases in line with inflation by law or decree or by providing subsidies.[240] More specifically, Total has complained that certain public service companies have been authorised to keep all or some of their tariffs denominated in US dollars or pegged to the US dollar. This authorisation was granted by Argentina in the case of airport-dues tariffs for international flights, port tariffs and fees, and toll charges for the use of the Parana River Waterway for international transportation.[241] The Tribunal notes here that Total has not denied that this "preferential treatment" (*i.e.*, to maintain their tariffs in US dollar terms) also concerned gas transportation tariffs for export customers (including those of TGN).[242]

204. Furthermore, Total points out the following forms of relief/compensation that Argentina accorded to several other sectors predominantly owned by national interests – but not the energy sector predominantly owned by foreign interests: (i) the government subsidies to train and underground transportation companies in order to compensate for the loss caused by the pesification; (ii) the issuance of government bonds to compensate banks for the loss resulting from the asymmetric pesification (*i.e.*, the pesification of private individuals' bank deposits in US dollars at the rate of 1.4 pesos per US dollar, plus inflation adjustment from February 2002 in accordance with CER variations); (iii) the review of tariffs and prices for public-works construction contracts in order to reflect cost increases in line with inflation; and (iv)

[240] See Total's Reply, para. 22 ff.
[241] See Total's Reply, para. 23(v).
[242] See Total's Reply, footnote 25 at p. 11. At the very beginning, the Emergency Law did not distinguish as to the 'pesification' of tariffs between Argentina's consumers and those concerning gas exports supplied to foreign customers. As a result, the pesification also concerned the tariffs payable by customers located abroad from January to May 2002. As outlined by Total itself, "*However, following an outcry from TGN and other public utilities, in May 2002, tariffs charged to foreign customers were exempted from the pesification by Decree 689/2002. As a result, these tariffs (representing about 20% of TGN's revenue prior to the Measures) continue to be calculated in dollars and adjusted by the US PPI in accordance with the Gas Regulatory Framework …*" (see Total's Post-Hearing Brief, para. 470-471 [footnotes omitted])

the increase of local salaries and employers' contributions in both public and private sector.[243]

205. According to Total, all of these measures, together with the freezing of energy tariffs at the 2001 level, were part of a deliberate policy of Argentina's government to help domestic industry and agriculture and to favour domestic interests by a supply of abnormally low-priced gas and electricity.[244] More specifically, according to Total:

> "Although the text of the Emergency Law and the subsequent Measures adopted by Argentina are nationality-neutral on their face, their effects and their implementation by the Argentine authorities were unmistakably favourable to domestic interests in the industrial and export sectors, at the expense of foreign investors in the energy sector. This policy of transferring resources from one sector [sic] another was acknowledged by Chief of Cabinet Alberto Fernandez and Minister De Vido at a press conference in 2003 [sic]:"…we have achieved the use of a redistributive criteria [in connection with the tariff increase] Those who consume more have been benefited all this time by an increase in their revenues. This was is no way counterbalanced, to express it somehow, by the increase in tariffs. … During all this time, [exporters] have been able to export their products in dollars and continued with a very low gas and electricity tariff in pesos. I understand that they have had enough profit during all this time….""[245]

206. Finally, Total suggests that the process of renegotiating public service tariffs has favoured those public service companies, which are predominantly owned by domestic interests, that do not have significant sunk investments. Moreover, in carrying out the renegotiation process with energy companies, Argentina further intends to promote the "re-Argentinisation" of the energy sector.[246] In this respect, Total has complained that Argentina accorded a preferential treatment in the renegotiation process to two energy companies with domestic ownership, Transener and Transba. According to Total, the World Bank has also noted the discrimination against companies owned by foreign interests and in favour of national ones.

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[243] See Total's Reply, para. 22-23.

[244] See Total's Reply, para. 10.

[245] See Total's Post-Hearing Brief, para. 60 and Transcript of Press Conference of the Chief of Cabinet Alberto Fernández, the Minister of the General Planning, Public Investment and Services Julio de Vido and the Secretary of Energy Daniel Cameron held in the Government Office, dated 13 February 2004, at Exhibit C-195.

[246] See Total's Post-Hearing Brief, paras. 13-16. Total has referred to two public speeches by President Kirchner and one speech by the Minister of the General Planning, Public Investment and Services, Julio de Vido to evidence Argentina's policy to promote the "re-Argentinisation" of the energy sector (that is to push foreign investors in the energy sector to sell their investments at depressed prices to Argentine interests). These are at Exhibits C-453, C-626 and C-670, respectively.

> "(...) this was the conclusion of a draft report issued by a World Bank delegation that went to Argentina in 2003 to study the renegotiation process and provide technical assistance: '… the tariff adjustment and renegotiations have proceeded more quickly in railroads, inter-urban roads, dredging, mail and airports which coincides with an ownership, debt and asset ownership pattern that is noteworthy (see Table 1)'."[247]

Total has produced an extract of "Table 1", to which the World Bank delegation referred in the excerpt above,:[248]

Public service	**Ownership**	**Status of negotiation**
Electricity transport	Foreign	Marginal increase (on hold)
Electricity distribution	Foreign	Marginal increase (on hold)
Gas transport	Foreign	Marginal increase (on hold)
Gas distribution	Foreign	Marginal increase (on hold)
Railroads	Domestic	Incr. Subsidy approved
Inter-urban roads	Domestic	Incr. Subsidy approved
Dredging	Domestic & Foreign	Redollarised

207. Summing up, Total points out that:

> "the renegotiation process has also operated more swiftly for companies with domestic ownership: (a) This is the case for railroad and inter-urban road companies, who, as shown in the table below, have benefited from Government subsidies. This has also been the case for public transportation companies that have benefited from subsidies of up to AR2$ billion per year. (b) Other locally owned companies have seen their pesified tariffs redollarised. This has been the case for dredging companies, as shown in the table above, as well as for airports. (c) It is noteworthy that the remaining two companies (out of the twelve mentioned above) with approved renegotiated agreements – the electricity transportation companies Transener and Transba – concluded those agreements shortly after foreign shareholders sold their stakes to a local investor, Marcelo Mindlin, widely known to be close to the Government. Incidentally, both electricity companies received unusually generous one-off tariff increases of 31 and 25%, significantly higher than the 15% increase over twelve months that is

[247] See Total's Post-Hearing Brief, para. 495 and World Bank Draft Aide Mémoire, Technical Assistance on the Renegotiation of Infrastructure and Public Service Concessions, dated 17-23 February 2003 at Exhibit C-438 (see also para. 253).
[248] See Total's Post-Hearing Brief, paras 254 and 496.

> on offer to TGN. Marcelo Mindlin's purchase of Electricité de France's 65% stake in electricity distribution company Edenor also coincided with the swift conclusion of its renegotiation process and implementation of a 15% tariff increase retroactive to November 2005 …"[249]

10.2 Argentina's Position

208. Argentina opposes Total's allegation as to the discriminatory character of the Measures relying on the following arguments. First, the Measures were addressed to the population in general, not discriminating between nationals and foreigners, and were of general application. Accordingly, Argentina alleges that:

> "The acts challenged are of general nature and apply to Argentine economy or to the power generation, production, hydrocarbon exploitation and gas transportation sectors as a whole, irrespective of the nationality of the parties affected by them. There is no regulation limiting its effect to foreign or national subjects or pursuing discriminatory purposes."[250]

All sectors of Argentina's economy were affected by the Measures. Moreover, Argentina contends that:

> "TOTAL was not treated different from any other company in a significantly similar situation. Unequal treatment is only discriminatory among parties under similar circumstances within the same business or economic sector."[251]

As to Total's argument that by maintaining gas tariffs unchanged since 2001 Argentina provided a cross-subsidy to the industry, commerce, agriculture and banking sectors predominantly owned by local investors, Argentina presents two arguments. In the first place:

> "the difference in treatment which might have existed between the electricity sector and the sectors with which the Claimant makes the comparison cannot give rise to discrimination, because it implies that investors compared are not in an arms length situation, since they belong to different economic sectors… In that regard, since differences among the different sectors which were affected are quite significant, it is not surprising that different solutions were tried or are being tried for each of them."[252]

[249] See Total's Post-Hearing Brief, para. 500.
[250] See Argentina's Post-Hearing Brief, para. 479.
[251] See Argentina's Post-Hearing Brief, para. 481.
[252] See Argentina's Post-Hearing Brief, para. 484, where Argentina refers to the *Enron* and *Sempra* cases. Both Tribunals rejected the investors' claim of discrimination. In this regard, the *Enron* Tribunal stated at para. 282 that: "There are quite naturally important differences between the various sectors that have been affected, so it is not surprising either that different solutions might have been or are being sought for each, but it could not be said that

In the second place, Argentina contends that, on the one hand:

> "it is not true that foreign investors in the energy sector had been larger than in manufacturing, commercial or banking sectors…foreign direct investment in the industrial, commercial and banking sectors between 1992 and 2002 was not much smaller than in the energy sector."[253]

On the other hand, Argentina points out that one of the main TGN shareholders is TECHINT, an Argentine company.[254] Moreover, Argentina outlines that:

> "[M]any companies of the TOTAL group, such as Hutchinson Argentina, TMP (*terminales marítimas patagónica*), among others, belong to the industrial sector that TOTAL affirmed that received benefits because it was a sector of companies mainly belonging to local capitals. Moreover, TOTAL Austral Sucursal Argentina holds 99.99% of a company called TOTAL GAZ, engaged in the commercialization of liquified gas or "bottle gas", which sector allegedly received benefits from the Argentine Government."[255]

209. Finally, according to Argentina, even if the Tribunal finds that Argentina accorded Total differential treatment as compared to that granted to other entities or sectors:

> "the alleged differentiation in treatment given to the Claimant would not be capricious, irrational or absurd. The measures challenged by TOTAL were addressed to solve a serious economic, political, social and institutional crisis. Such measures were reasonable and proportionate to their purpose. Consequently, they cannot be considered discriminatory."[256]

Therefore, Argentina concludes that:

> "there existed no discrimination against TOTAL since the measures challenged were all general measures and no differential treatment was given in view of its nationality, nor a treatment less favourable that the one given to any other company in a relatively similar situation."[257]

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any such sector has been singled out, in particular either to apply to it measures harsher than in respect of others, or conversely to provide a more beneficial remedy to one sector to the detriment of another. The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors." (*Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 282). See also with almost the same wording *Sempra Energy International v. Argentina*, *supra* note 189, para. 319.

[253] See Argentina Rejoinder para. 655 and Argentina's Post-Hearing Brief para. 486.

[254] See Argentina's Post-Hearing Brief, para. 487.

[255] See Argentina's Post-Hearing Brief, para. 488.

[256] See Argentina's Post-Hearing Brief, para. 490.

[257] See Argentina's Post-Hearing Brief, para. 492.

10.3 Tribunal's conclusions

210. In order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation. In economic matters the criterion of "like situation" or "similarly-situated" is widely followed because it requires the existence of some competitive relation between those situations compared that should not be distorted by the State's intervention against the protected foreigner.[258] This is inherent in the very definition of the term "discrimination" under general international law that:

> "Mere differences of treatment do not necessarily constitute discrimination…discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way."[259]

The elements that are at the basis of likeness vary depending on the legal context in which the notion has to be applied and the specific circumstances of any individual case.

211. Under international investment agreements, both national treatment and most-favoured-nation treatment require such a comparative analysis. Moreover, the national treatment obligation does not preclude all differential treatment that could affect a protected investment but is aimed at protecting foreign investors from *de iure* or *de facto* discrimination based on nationality.

212. Therefore a claimant complaining of a breach by the host State of the BIT's national treatment clause: (i) has to identify the local subject for comparison; (ii) has to prove that the claimant-investor is in like circumstances with the identified

[258] This is but an application of the fundamental, traditional principle that a finding of discrimination (*i.e.*, of an inferior treatment applied in respect of a relevant regulation) presupposes a comparison between persons, things or activities that are "eiusdem generis" (of the same species), See International Law Commission, *Draft Articles on Most-Favoured-Nation Clauses with Commentaries*, Y.B. ILC 1978, Vol. II(2), 8-72. There is no reason why this precondition should not apply equally in investment protection as in trade matters, where the requirement of "likeness" is spelled out as to products in Article I.1 and II.2 of GATT and in Article II.1 and XVII of GATS as to services. (that include direct investments in the service sectors under Article I.2 (c) GATS)

[259] See R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (Longman, 1992), Vol. I, p. 378. Argentina refers also to the definition of discrimination developed by the European Court of Human Rights: "Discrimination … is treating differently, without an objective and reasonable justification, persons in 'relevantly' similar situations. For a claim of [discrimination] to succeed, it has therefore to be established, inter alia, that the situation of the alleged victim can be considered similar to that of persons who have been better treated." (see *Fredin v. Sweden* (No.1), 1991 Eur. Ct. H.R. 2, para. 60)

preferred national comparator(s); and (iii) must demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators.

213. In view of the above, the Tribunal concludes that the absence of the term "like" in Article 4 of the BIT is not decisive since this element is inherent in an evaluation of discrimination.[260] To succeed in its national treatment claim Total therefore has to prove that Argentina accorded it less favourable treatment, in respect of its investments, than that accorded to national investors in like circumstances or situations to Total. The Tribunal cannot accept Total's statement that, under Article 4 of the BIT, measures of general application that have practically resulted in different treatment being accorded to investors in different sectors and irrespective of their different nationality can be considered *per se* discriminatory without any "in like circumstances" analysis. Moreover, different treatment between foreign and national investors who are similarly situated or in like circumstances must be nationality-driven. Accordingly, a foreign investor who is challenging measures of general application as *de facto* discriminatory under Article 4 of the BIT has to show a *prima facie* case of nationality-based discrimination. The Tribunal believes that the allegations brought by Total have evidenced neither that the sectors are comparable nor that the differential treatment is motivated by nationality or results in a worse treatment for foreigners.

214. For the above-stated reasons, to find a breach of the national treatment obligation the relevant criterion is not just whether a sector has been treated differently, that is worse, than some other. Maintaining low energy prices by a hydrocarbon producing nation in order to bolster other sectors of its economy seems to be a widely practiced economic policy. It cannot be labelled by itself as discriminatory even if foreign investors are more heavily engaged in that natural resources sector. On the contrary, it is generally recognized that governments have considerable discretion in deciding how to treat and regulate different sectors of the economy in view of political and

[260] The same conclusion was reached by the Tribunal in the *Parkerings-Companiet* case in interpreting a Most-favoured-nation clause that does not include any reference to the "in like circumstances" requirement. See *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 369 where the Tribunal states that: "The essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation. Therefore, a comparison is necessary with an investor in like circumstances."

economic expediency. A finding of *de facto* discrimination in such a context would require that the claimant present a *prima facie* case of nationality-based discrimination without the host State proving that such different and less favourable treatment is not unreasonable.

215. It is the Tribunal's view that Total has failed to present a *prima facie* case of discrimination in various respects. First, as to pesification, this measure was applicable and hit all sectors of Argentina without distinction.[261] The allegations made and examples given by Total in support of its national treatment claim do not lend themselves to consideration as like sectors or situations. As to the differential treatment of different sectors of Argentina's economy (even if an inter-sector comparison would be admissible), Total failed to prove that such differential treatment was nationality-based. In this respect, the Tribunal notes that a national investor such as TECHINT (an investor in TGN like Total) was accorded the same treatment by Argentina in respect of its investment in TGN, as Total was accorded.

216. Furthermore, the Tribunal notes that the measures which Total complained of under Article 4 are also alleged by Total as a breach of Article 3. The Tribunal recalls the conclusion reached above that Argentina is in breach of Article 3 by not having made any adjustment to TGN's tariffs since July 1, 2002, and having failed to conclude the renegotiation process with TGN positively after more than seven years. Even if such conduct had been discriminatory, this would not add an additional element of illegality to conduct already found by the Tribunal to be unreasonable and in breach of the BIT, nor would this additional finding be relevant for the determination of damages.

217. For the reasons stated above, the Tribunal concludes that Argentina has not breached Article 4 of the BIT.

218. Having so concluded, the Tribunal considers that the various acts referred to by Total as evidencing discriminatory conduct by Argentina in keeping the gas tariffs at non-remunerative levels while other sectors were not so constrained reinforce the Tribunal's conclusion that Argentina acted unfairly and unreasonably, in breach of

[261] The preferential treatment of depositors (see *supra* note 153) was applicable to all depositors. Also TGN benefits from the maintenance of dollar tariffs for supplies to foreign clients. In this regard see *supra* note 243.

Article 3. They may even cast doubt on whether Argentina's authorities acted in good faith in not affirmatively concluding renegotiation through UNIREN since 2004.

11. Argentina's Defences

219. Before concluding, the Tribunal must address Argentina's defences with respect to any findings by the Tribunal Argentina breached the BIT in respect of Total's investment in TGN. These are (i) the plea of Argentina based on "state of necessity" under customary international law;[262] and (ii) Argentina's defence based on Article 5(3) of the BIT.[263]

11.1 Argentina's Defence of Necessity under Customary International Law

220. The Tribunal recalls that customary international law imposes strict conditions in order for a State to successfully avail itself of the defence of necessity. Article 25 of the ILC Articles on State Responsibility is generally considered as having codified customary international law in the matter, as also accepted by both parties in this case.[264] Article 25 recognizes necessity as a "ground for precluding the wrongfulness of an act not in conformity with an international obligation" and sums up the fundamental conditions of applicability of necessity as follows:

> "Article 25-Necessity
> 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."

[262] See Argentina's Counter-Memorial, para. 876 ff.
[263] See Argentina's Counter-Memorial, para. 675 ff.
[264] See Argentina's Counter-Memorial, para. 887 ff.; Total's Reply, para. 547 ff. *CMS Gas Transmission Company v. Argentina*, Annulment Decision, *supra* note 191, para. 129; *Continental Casualty Company v. Argentina*, *supra* note 53, footnote 238 at p. 72; *Sempra Energy International v. Argentina*, Annulment Decision,, *supra* note 191, para. 111; *Enron Corporation and Ponderosa Assets, L.P v. Argentina*, Annulment Decision, *supra* note 191, para. 356.

221. 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. As a positive defence, it is for the party that raises necessity as a justification for its non-compliance, here Argentina, to prove that the elements required under Article 25 are met. In respect of Total's claim concerning its investments in TGN, the Tribunal has found that the pesification of the gas tariffs and their de-linking from variations in the US PPI not to be in breach of the BIT. Conversely, the Tribunal has found that the *de facto* freezing of the gas tariffs, and the lack of any readjustment thereof since July 1, 2002, breach Article 3 of the BIT. More specifically, the Tribunal has concluded that since Argentina has not remedied the blockage of the tariffs by any of the renegotiation mechanisms that it introduced after the Emergency Law or by operation of the previous mechanisms that nominally remained in force, a six-month periodic readjustment of the tariff, as provided for in the Gas Regime but based on the evolution of local prices, would be appropriate to calculate the damages caused to Total.[265] Therefore the Tribunal has to evaluate the applicability of the defence of necessity under customary international law only in respect of the failure by Argentina to readjust the gas tariffs as specified above. More specifically, this entails, first, ascertaining whether the protracted freezing of the gas distribution tariff as of 2002 in breach of the BIT was necessary to safeguard Argentina's essential interests in preserving its people and their security in face of the economic and social emergency of 2001.[266] Second, the Tribunal must determine whether such freezing, if necessary, was the only way to safeguard such alleged essential interest.

222. The Tribunal recalled in the previous paragraphs that the principle of readjustment of the tariffs to ensure that public service providers could make a reasonable return and provide the service, is enshrined in the Gas Law and that this principle is still in force. Moreover, the Tribunal underlines that this fundamental principle has not been abrogated nor suspended during the crisis. To the contrary, it was restated by Argentina at the peak of the economic emergency of 2001/2002.

[265] See para. 183 above.

[266] See ILC Commentaries to Art. 25, para. 14. In this regard, the Tribunal considers that a State can invoke necessity also to protect the security and safety of its people in face of a severe economic emergency. See ILC Report on the work of its thirty-second session, Yearbook of the ILC, 1980, II, 2, p. 35 stating that necessity may consist "a grave danger to existence of the State itself, to its political and economic survival"; see also *LG&E v. Argentina*, cit. *supra* note 111, paras. 246, 251; *Continental Casualty Company v. Argentina*, *supra* note 53, para. 175 and sources cited there.

Article 9 of the Emergency Law provided for the renegotiation of the pesified tariffs taking account of various criteria, of which the "interest of users and the possibility of gaining access to such services" was just one. This legislative enactment undermines Argentina's position that the protracted freezing of the gas distribution tariffs at issue here was necessary to safeguard Argentina's essential interests in preserving "its own existence and that of its population" against an imminent and grave peril.[267] The Tribunal notes that on October 17, 2002, pursuant to a request by ENARGAS, the Ministry of Economy by MoE Resolution 487/02 exempted ENARGAS from its previous Resolution 38/02 of April 10, 2002, which had prohibited regulators, including ENARGAS, from undertaking any review of tariffs.[268] Contrary to the position advanced here by Argentina, Resolution 487/02 specifically noted that gas tariff reviews had become necessary "in order to facilitate the continuance of public services." Resolution 487/02 reflects the fact that in the second part of 2002 Argentina was emerging from its crisis.[269]

223. Argentina has not shown that the economic security of the gas users would have been imminently and gravely threatened if the gas tariffs would have been adjusted in mid-2002 as Argentina's own legislation provided for.[270] Even if such would have been the case, Argentina has not shown that the freezing of the tariffs would have been "the only way for the State to safeguard" such an essential interest against a grave and imminent peril. In this regard, the Tribunal notes that Argentina discussed the lack of any reasonable alternatives to the emergency measures actually taken by Argentina to cope with the crisis principally in respect of the pesification of the economy that the Tribunal has found not in breach of the BIT. According to Argentina, the pesification was the only way for Argentina to safeguard its own economic and political survival as well as that of its people, also as a means to ensure

[267] This is how Argentina has characterized its essential interests in its Counter-Memorial, para. 917. Similarly, Argentina suggests that its essential interests were "the preservation of economic, political, social and institutional life of the Argentine Government" and that the general measures enacted were necessary to safeguard its essential security interests in "maintaining social stability and preserving the access to the essential services, which were vital for the health and welfare of the population." (Argentina's Post-Hearing Brief, paras. 543 and 545, respectively)

[268] See para. 88 above.

[269] See above at footnote 53.

[270] It appears moreover factually unlikely that the relative limited re-adjustment of the tariffs to the variation of prices in Argentina (see para. 183 above) could have impaired "an essential interest" of Argentina "against a grave and imminent peril". This has, in any case, not been proved by Argentina.

"fair and reasonable rates" of public utilities.[271] Argentina has not discussed nor did it provide evidence, as it was its burden, that there were no reasonable alternatives to the freezing of the tariffs. Not only did Argentina fail to submit any evidence to support its position that its measures were necessary, it also failed to respond to Total's submission to the contrary. For example, Total referred to the introduction of subsidies to low-income households (as Argentina did in other utilities and public services) and reducing tax burden on the utility bills for low-income households.[272]

224. Thus Argentina has failed to prove the defence of necessity under customary international law as concerns the measures adopted in relation to Total's investments in TGN found to be in breach of the BIT. It is therefore unnecessary for the Tribunal to examine whether the further conditions required under customary international law for Argentina to avail itself of the defence of necessity have been fulfilled. Nor does the Tribunal have to analyse Total's counter-arguments in respect of those conditions. The Tribunal concludes that Argentina's defence based on the state of necessity under customary international law is groundless.

11.2 Argentina's Defence based on Article 5(3) of the BIT

225. Article 5(3) of the BIT provides that:

> "Investors of either Contracting Party whose investments have suffered losses as a result of war or any other armed conflict, revolution, state of national emergency or uprising in the territory or maritime zone of the other Contracting Party shall be accorded by the latter Party treatment which is no less favourable than that accorded to its own investors or to investors of the most-favoured nation."

226. It is Argentina's position that "there are not doubts that Article 5(3) of the Treaty is a rule that establishes an escape clause for an emergency case, and this rule prevails over the rest of the Treaty. […]"[273]

Moreover, according to Argentina, Article 5(3) covers emergency cases, including economic emergencies.[274] Argentina contends that:

[271] See Argentina's Counter-Memorial, paras. 899-913 and Argentina's Post-Hearing Brief, paras. 553-557
[272] See Total's Post-hearing Brief, paras. 1047 ff..
[273] See Argentina's Post-Hearing Brief, para. 519.

> "[T]he BIT expressly provides for the adoption of emergency measures by a State that may provoke losses to the investments of the other contracting party. It does not only provide for such possibility, but it also legitimizes the actions of the Government provided the following requirements are complied with: a) that investors suffer losses in the territory or maritime zone of the other contracting party due to a national emergency situation, among other circumstances; b) that they receive from the authorities of the contracting State, in whose territory such events happened, a not less favourable treatment than the one afforded to its own investors or to nationals from other States, as regards measures adopted concerning such circumstance."[275]

In addition, Argentina argues that the provision grants the State such a broad discretion to determine what constitutes a state of national emergency that the Tribunal is limited to considering only whether Argentina acted in good faith in applying this BIT clause.[276]

227. Total strongly opposes Argentina's defence. More specifically, according to Total:

> "… Article 5(3) cannot excuse Argentina's liability under the Treaty, for the following reasons: (a) The Purpose of Article 5(3) is to create an entitlement to compensation where none would otherwise exist under the general rules of international law. (b) In any event, Argentina's focus on the word "emergency" in Article 5(3) is misplaced. The terms preceding and following it make it clear that Article 5(3) as a whole applies only in circumstances of physical strife and destruction ("war", "armed conflict", "uprising" etc). It is not concerned with economic "emergencies". (c) Article 5(3) is relevant only to the losses suffered as a direct result of war, armed conflict, etc. Total's losses were caused not as a result of economic "crisis" but by Argentina's own Measures."[277]

228. Having summarized the position of the Parties on Argentina's defence based on Article 5(3) in the above paragraphs, the Tribunal will deal with the interpretation of Article 5(3) of the BIT in accordance with Article 31 VCLT. In this respect, the plain reading of Article 5(3) clearly indicates that each Party shall grant to investors of the other Party a treatment not less favourable than that accorded to its investors or to investors of the most-favoured nation in case of losses affecting investments made in

[274] See Argentina's Post-Hearing Brief, para. 522.
[275] See Argentina's Counter-Memorial, para. 677. [emphasis original]
[276] See Argentina's Rejoinder, para. 702.
[277] See Total's Post-Hearing Brief, para. 984 and more extensively Total's Reply, para. 519 ff.

its territory by the other Party's investors "as a result of war or any other armed conflict, revolution, state of national emergency or uprising".

229. Contrary to Argentina's position, the ordinary meaning of the terms used in Article 5(3) do not support the conclusion that this clause is an escape clause for emergency cases. This is not a so-called "non precluded measures" clause contained in other Bilateral Investment Treaties concluded by Argentina with other States (for instance Article XI of Argentina-US BIT). Article 5(3) envisages and regulates the situation of losses suffered by investments made in the territory of one Party by investors belonging to the other Party in case of "war or any other armed conflict, revolution, state of national emergency or uprising" and is thus more properly classified to a "war and civil disturbance" clause, or a "losses due to war" clause.[278] Contrary to Argentina's arguments, Article 5(3) is not applicable to an economic emergency, unless the economic emergency, which hits one of the Parties, has led to a "national emergency" where losses have occurred such as those that are a result of war, uprising or any other kind of civil disturbance. The Tribunal can find no basis on which to uphold Argentina's argument that the provision legitimizes the government of the host country taking measures that in time of national economic emergency inflict losses on foreign investors. The losses suffered by Total were not "a result of … national emergency" but, rather, a result of regulatory measures passed by Argentina. In any case, the provision operates only when compensation of losses has been granted by a Party to its own investors or to a third Party's investors. In such an event, Article 5(3) imposes the duty to treat investors protected by the BIT no less favourably than other investors. The provision is thus inapplicable from all points of view in the context at issue.

230. In view of the above, by invoking this clause Argentina could not be exonerated from liability for having breached the BIT. Moreover, the Tribunal notes that this clause has an opposite purpose to that of an exculpatory clause. In fact, this clause is aimed at granting to the investments made in the territory of one Party by the investors of the other Party an additional guarantee in respect of situations in which the host State, even if not internationally obliged to do so, has provided for

[278] UNCTAD Survey, *Bilateral Investment Treaties in the Mid-1990s* (1998) at 73, referred to in Total's Reply, para. 534, Exhibit CL-129.

compensation for the losses suffered due to certain events to its own nationals or investors of third States

231. For all the above reasons, the Tribunal concludes that Argentina's defence based on Article 5(3) of the BIT is groundless.

Part III - Total's Claim as to its Investments in Power Generation

1. Total's investments

232. In the power generation sector, Total invested in two major power generation companies, Central Puerto S.A. ("Central Puerto") and Hidroeléctrica Piedra de Aguila S.A. ("HPDA").

233. Central Puerto is a large dual-fuel electricity generator, having the capacity to produce 2,165 megawatts, which represents 9.5% of Argentina's total installed capacity. Central Puerto was created in 1992 as part of the privatization of Servicios Eléctricos del Gran Buenos Aires S.E. ("SEGBA"), a state-owned enterprise, whose power generation business was split into four thermal power generation companies. At the time of privatization, approximately 63.93% of the total stock of Central Puerto was acquired by three Chilean companies. Eventually, one of these companies, Compañía Chilena de Generación Eléctrica (later renamed "Gener") acquired the interest of the other two companies. In July 2001, Total acquired all of the shares in Central Puerto held by Gener (which had been acquired in 2000 by AES Corporation). Total says it paid approximately US $255 million and subscribed to US $120 million of debt to acquire the shares of Central Puerto.[279]

234. HPDA is said to be the largest private hydroelectric generation company in Argentina. It was created in 1993, as part of the privatization of Hidroeléctrica Norpatagónica S.A., the state-owned hydroelectric generation company which was split into five separate business units for the purposes of privatization. At the time of privatization in 1993, a number of foreign investors created an Argentine company, Hidroneuquén S.A., for the purposes of bidding for and acquiring 59% of HPDA's shareholding. Hidroneuquén S.A. remains the owner of the shares. In September 2001, Total, through Total Austral, acquired 70.03% of Hidroneuquén from Gener for the payment of US $72.5 million plus the acquisition of approximately US$57 (or 50.42)[280] million of subordinated debt in the form of bonds. As a result, Total

[279] See Exhibit C-70 for a diagram of Total's shareholdings in Central Puerto and Exhibit C-44 for a copy of an extract from Central Puerto's share register.
[280] See Total's Post-Hearing Brief, footnote 87 at pages 44-45.

indirectly owned a 41.3% shareholding in HPDA.[281] After privatization, HPDA expended significant sums to acquire equipment and services (US $161.7 million) and has assumed existing debt (US $405 million). According to Total, HPDA's hydroelectric plant currently comprises four units with an aggregate installed capacity of 1,400 megawatts. These units entered into service in 1993-1994 and represent 6.13% of Argentina's installed electricity capacity.

235. In 2001, Total spent a total of US$327.45 million to acquire Central Puerto's and HPDA's shares.[282]

236. In November 2006, while the arbitration was pending, Total sold its investments in Argentina's power generation sector and received US$35.0 million for its 63.79% equity stake in Central Puerto and US$145.0 million for its 41.22% equity stake in HPDA.[283]

2. Relevant features of the electricity regime in Argentina when Total made its investment

237. In parallel with the Convertibility regime, Argentina also pursued a liberal economic policy with respect to the electricity sector, through privatisation of state-owned companies that had been operating in the sector. The reform of the electricity sector was carried out by opening the sector to private investors and deregulation. The Electricity Law of 1992,[284] which has remained continuously in force since enacted, and reflected this new approach, "was a clean break with the past."[285]

238. In its Request for Arbitration, Total has explained the general functioning of the system in economic terms (as existing until the end of 2001) from the perspective of the generators as follows:

> "166. In summary, the income of power generators consists of three principal types of payments, all of which were set by the Procedures, directly or indirectly, in US dollars until 2002. These are payments for electricity dispatched in the spot

[281] See Request for Arbitration, paras 158-160 and Exhibits C-72, a diagram showing Total's participation in HPDA, and Exhibit C-44, a copy of HPDA's share register.
[282] Total's Post-Hearing Brief, para. 98.
[283] See LECG Report on Damages, para. 133 at p. 66.
[284] Law 24.065 entered into force on January 16, 1992 (Exhibit C-84).
[285] Total's Post-Hearing Brief, para. 104.

market, "capacity" payments, and payments reflecting the "cost of unsupplied energy".

167. These three revenue streams will be briefly outlined below.…[…]

(b) The uniform price mechanism in the spot market

170. Under SoE Resolution 61/1992, the price of electricity in the spot market was to be determined in accordance with the "economic cost" of production of electricity. Such price was to be uniform and calculated, as is explained below, in a way that rewards the most efficient (ie, most economical) power generators in terms of variable production cost.

171. In accordance with the Electricity Law and the Procedures, both thermal and hydroelectric generators declare to Cammesa their variable cost of production of electricity in US dollars, twice a year. The Procedures provide that this variable cost must be "expressed as equivalent fuel units ('US$/fuel-unit')", which means that it is a function of, principally, the fuel cost of each unit multiplied by its efficiency in generating electricity by utilising that fuel.

172. As already explained, it was -and still is -the cost of gas, the principal fuel used by thermal generators in Argentina, that on the whole determines the variable cost declared not only by thermal units (which overwhelmingly use gas to produce electricity), but also by hydroelectric units (which have to declare costs after thermal units, and seek to remain competitive vis-à-vis the thermal units, in the way described at paragraph 61 above).”

173. Cammesa, in turn, determines the price of electricity in the spot market on an hourly basis, calculating the demand and supply of electricity based on the relevant data, which is being provided by generators. Cammesa then calls upon generators to dispatch electricity until demand is met, in an ascending order of the variable cost declared by each generator. As a result, a generator who is able to declare low variable cost should be able to sell all of the electricity that it can make available.

174. In this mechanism, the uniform price of electricity is equal to the cost of the unit of electricity that is required to meet the next unit of demand. Each generator is to be remunerated for its dispatches on the basis of this uniform price, making a margin out of the difference between the uniform price and its own declared variable cost, in order to cover its fixed costs and make a return. This is illustrated in the diagram below.

(c) The concepts of "capacity" and "unsupplied energy" payments

175. The Electricity Law and the Procedures provided (until 2002) that electricity generators are also to receive a "capacity" payment at the amount of US$1O/MWh. This is a payment for electricity not actually dispatched in the spot market but available to be dispatched at times of high demand. It was calculated on the basis of a certain amount of MWh dispatched by each generator in the spot market within a defined period of every month.

176. The economic purpose behind the capacity payment is to encourage investment in "peaking" units that are called to dispatch electricity only at "peak" times of high demand: these units are the safety valves of the generation network, and ensure that no power cuts should occur.

177. The rate of the capacity payment described above was always fixed in US dollars: the SoE has consistently expressed the capacity payment as a US dollar value and Resolution 137/1992 deliberately fixed its amount per MWh in US dollars.

178. Allied to the remuneration for capacity outlined above is the amount referred to as the "cost of unsupplied energy", ie a price that applies in hours of unsupplied demand to signal the value of electricity to its demand in the market. This price was fixed at US$1,500/MWh in the Procedures, and remained at this level until 2002. Under the same rules, this US dollar amount is to be determined by the SoE based on a study of the social and economic value of the demand for energy that cannot be satisfied."[286]

239. Before examining the merits of Total's claim in relation to the aforementioned investments, the Tribunal considers it useful to give a detailed overview of the legal regime governing Argentina's power generation sector, as understood from the parties' submissions in this arbitration. In order to give this overview, the Tribunal has relied extensively on the reports prepared by the parties' experts (Mr. Abdala and Mr. Spiller for the Claimant and Mr. Gallino and Mr. Sruoga for the Respondent), as well as on the parties' submissions.

240. The Electricity Law establishes the general framework governing Argentina's electricity sector, assigning to specialized authorities (mainly, the SoE) the task of putting it into effect through highly technical regulations. The Tribunal will deal first with the relevant provisions of the Electricity Law and the Decree which implemented it (mainly, Decree 1.398/92).[287]

241. The Electricity Law provides for a regulator, namely the *Ente Nacional Regulador de la Electricidad* (hereinafter also "ENRE"), established within the SoE "which shall implement all the necessary measures to comply with the objectives established in Article 2 hereof" (Article 54). The objectives of ENRE are spelled out in Article 2.1 of the Electricity Law. These objectives are as follows: "a) To adequately protect the rights of users; b) To promote competition in the electricity production and demand markets, and to foster investments for the purpose of guaranteeing the gas supply in the long term; c) To promote the operation, reliability, equality, free access, non discrimination and widespread use of services and

[286] Total's Request for Arbitration, paras. 166-178, footnotes omitted. In its further briefs Total appears to have modified various points of this description.
[287] Exhibit C-35.

installation of electricity transportation and distribution; d) to regulate the electricity transmission ensuring that the tariffs applicable to the services are fair and reasonable; e) To encourage supply, transportation, distribution and efficient use by setting appropriate rate methodologies; f) To encourage private investments in production, transportation and distribution, thus ensuring market competitiveness where possible". Furthermore, ENRE "shall be subject to the principles and provisions hereof, and shall control conformity of the electric sector activity to such principles and provisions" (Article 2.2). Article 4 of the Electricity Law identifies as players in the electricity market: "a) Power plants or producers; b) Transportation companies; c) Distribution companies; d) Large users."

242. In implementing reform of the sector, the electricity activity was divided into three different sectors, namely generation, transmission and distribution. Under the Electricity Law these three sectors are classified differently. While the Electricity Law defines electricity transmission and distribution activities as "*public service*" (Article 1.1), power generation activity is regarded as "*service of 'general interest.'*"

243. More precisely, Article 1.2 of the Electricity Law states that: "The generation activities, in any of its modalities, which are totally or partially devoted to the supply of energy for the service are declared to be of "general interest", the activities of which are deemed affected to such public service and are governed by the legal rules and regulations which allow for its normal operation."[288] Annex I, Article 1.3 of Decree 1.398/92 clarifies that: "As the electric power generation activity is related to the free relationship between supply and demand, it should be regulated only in those aspects and circumstances affecting the general interest." Accordingly, "[t]he electric power generation activity of a thermal origin does not require prior authorization of the National Executive for its exercise; however, the one of hydroelectric origin shall be subject to an exploitation concession, … ." (Decree 1.398/92, Annex I, Article 5).[289]

[288] See also Decree 1.398/92 at Article 1; ENRE, *Informe Annual 1993/1994*, point 3.1.b at Exhibit C-316.

[289] See also Article 14 point a) Law 15.336, as amended by the Electricity Law (Article 89), which lists hydroelectric power generation, among the activities requiring a concession from the Executive. Under the Procedures, thermal plants may instead operate in the WEM upon authorisation by the Authority. In this regard see below at para. 276.

244. As to the power generation sector, the Electricity Law lays down the following. The SoE[290] "shall determine the rules applicable to the DNDC [*Despacho Nacional de Cargas*] for the performance of its duties, which shall guarantee the transparency and fairness of decisions, according to the following principles: a) To allow the execution of contracts freely agreed upon by the parties thereto, which parties shall be power plants […], large users and distribution companies (forward market); b) To dispatch the demand required, based on the acknowledgment of prices of energy and power set forth in the following section, to which market agents shall expressly commit, in order to be entitled to supply or receive electricity not freely agreed upon by the parties […]" (Article 35.2 of the Electricity Law) . According to Article 35.1, the DNDC is the body entrusted with managing the Wholesale Electricity Market (hereinafter also "WEM" or in Spanish, the *Mercado Eléctrico Mayorista* or "MEM"), composed of both the term (Article 35.2 a)) and spot markets (Article 35.2 b)). The DNDC had to be organised as a corporation ("*sociedad anónima*") in accordance with the same article. To this end, Decree 1.192/92 established the *Compañía Administradora del Mercado Eléctrico Mayorista S.A.* (hereinafter also "CAMMESA"), a not-for-profit company in which the main actors of the Wholesale Electricity Market participate together with the State.

245. The Electricity Law provides that generators may sell the power they produce in two ways. First of all, they may participate in the "term electricity market" in accordance with Article 35.2 a) of the Electricity Law by concluding contracts with other generators, distribution companies and large-scale consumers. To this end, the same law provides that "generators can enter into supply contracts directly with distributors and large users. Said contracts shall be freely negotiated between the parties" (Article 6). Secondly, Article 35.2 b) provides that by participating in the spot electricity market, generators may sell the power they produce "based on the acknowledgment of prices of energy and power set forth in the following section" (*i.e.*, Article 36.1 of the Electricity Law).

246. As to the regulation of the spot market, Article 36.1 of the Electricity Law states that: "The Secretary of Energy shall pass a resolution on the economic dispatch rules for energy and power transactions provided for [in Article 35.2 b)] to be applied by

[290] The SoE has the authority to implement the Law by enacting Resolutions.

DNDC." The same Article goes on to state that: Such resolution shall provide that generators receive for the power sold a uniform rate for all en each delivery location established by the DNDC, based on the economic cost of the system. In order to determine such rate, the cost that the unsupplied energy represents for the community must be taken into account." [emphasis added]. This is the key provision of the Electricity Law upon which Total relies.

247. Furthermore, according to Article 36.2 of the Electricity Law, the SoE shall also: "… determine that those who demand electricity (distribution companies) pay a uniform rate, stabilized every ninety (90) days, and measured at the receipt points. Such rate shall include the amounts received by power plants for the items indicated in the paragraph above, and the transportation costs between the supply and receipt points."

248. By referring to these provisions, Total stresses the difference between transportation and distribution, which are qualified as public services and regulated as tariff-based sectors, and generation, which is organized as a free market with minimal regulation. Based on the aforementioned legal provisions, as well as on other documents,[291] Total contends that:

> "power generation was henceforth to be an open and free market. The state was to sell its power plants, and more plants would be built and run in accordance with the free-market rules of supply and demand."[292]

Total submits that power generation was thus organized as a free market "trusting that competition among efficient private companies would drive costs down"[293] and "the philosophy of the Electricity Law was that end-user tariffs were to be determined according to the economic cost of producing electricity."[294] As a consequence, under the Electricity Law and Decree 1.398/92, the State has a limited role as to the regulation of power generation activities.

[291] More specifically, Total refers at para. 864 of its Post-Hearing Brief to a document prepared by ENRE (*Informe Annual 1993/1994*, Exhibit C-316, at Point 3.1.b, *supra* note 280) and a conference paper by Mr. Legisa (former President of ENRE) presented at a conference on Regulation in Infrastructure Services, New Delhi 2000, Exhibit C-369. See also Total's Post Hearing Brief, para. 865.

[292] Electricity transportation and distribution were also privatized. The concessionaires were, however, remunerated by tariffs, as in the gas-transportation sector. See Total's Post Hearing Brief, para. 104.

[293] According to Total "the cost of power generation fell drastically immediately after the 1992 reforms and by 2001 had decreased by 40%." See Total's Post-Hearing Brief, para. 104.

[294] See Total's Post-Hearing Brief, para. 105.

249. More precisely, it is Total's position that:

> "[I]n the power-generation sector, the discretionary powers of the SoE are expressly limited. By contrast with highly regulated sectors such as electricity transportation and distribution (which are tariff-based sectors), according to Decree 1,398/1992, the power generation sector is organized as a free market and therefore it should be minimally regulated."[295]

According to Total:

> "[T]here is therefore a fundamental difference between a public-service sector (like electricity transportation and distribution) and a public-interest sector (like power generation). This difference was described by ENRE in its 1993/1994 Annual Report: "Power Generation is declared as a single "general interest" service, while the rest retain the attributes of a single "public service", on the consideration that power generation can operate in a competitive market."[296]

Based on the considerations above, Total concludes that:

> "[T]he limits to the scope of the SoE's authority result from the explicit will of the legislator, who wanted the regulations to be essentially limited to technical aspects and the administration of the system. Principally, the system would be governed by free-market rules. The role of the SoE is limited to the implementation of the rules and objectives set forth in the Electricity Law."[297]

250. Argentina opposes Total's arguments. Moreover, Argentina suggests that, under the Electricity Law, the SoE has a right to modify and adapt the regulation of generators in order "to search a more efficient or competitive market, enabling the continuity of the public services."[298] According to Argentina:

> "the above-mentioned regulations establish that the government intervention is mandatory through measures aimed at ensuring the normal operation of electric power services and protecting the general interests."[299]

Therefore, Argentina says that the SoE has the right to modify the regulations applying to generators on grounds of general interest because generators mainly

[295] See Total's Post-Hearing Brief, para. 863. In order to support this argument Total refers to Decree 1.398/92, Article 1.3, already quoted by the Tribunal at para. 243.
[296] See Total's Post-Hearing Brief, para. 864.
[297] See Total's Post-Hearing Brief, para. 866.
[298] See Argentina's Rejoinder, para. 402.
[299] See Argentina's Counter-Memorial, para 168 where, besides Article 1.2 of the Electricity Law and Article 1.3 of Decree 1.398/92, Argentina also refers to Law 15.336, Article 3, Part 2.

supply energy to public utilities.[300] Argentina argues that this right of the SoE comes from the wide powers to adjust the rules of operation of the MEM reserved to it by the Electricity Law (Articles 35 and 36 of the Electricity Law).[301] According to Argentina, two further elements support its position. First, these broad powers are demonstrated by the SoE's practice, which modified the functioning of the MEM over 130 times from 1992 to 2001, before Total's investments in the sector took place.[302] Second, everyone was aware of the extent of the SoE's powers, as it has been the object of much criticism. In this regard, Argentina stresses that:

> "[A]s from the academic and regulatory point of view, some people criticized the extension of such powers. That was the position adopted, among others, by Spiller, already in 1996, before TOTAL made investments in electricity. At the hearing, Abdala pointed out that he shared such Spiller's statements. In their book published in 1999, Spiller and Abdala stated that: "[a]t the SE level, the Argentine Government has reserved the greatest portion of discretional power." At the hearing, Abdala acknowledged that the Secretary of Energy "had reserved an important discretional power for setting rules of the game in this sector.""[303]

Based on these arguments, Argentina concludes that:

> "[A]ny sophisticated investor includes (or should include) in its legitimate expectations the wide powers of the Secretary of Energy to adjust the rules of operations of the WEM. In the present context of the current case, TOTAL suggests that the legitimate participation of the Secretary of Energy entailed violating the core principles of the WEM. Thus, Total disregards the powers of the Department of Energy both in the design of sector regulatory policies as well as in the exercise of its powers in CAMMESA."[304]

Total agrees that there was a need for technical regulation of generators, but submits that the ability to regulate did not extend to subverting the fundamental principle established by the Electricity Law.[305]

251. The Tribunal notes here that, on the one hand, the Parties agree that the SoE must respect the Electricity Law (especially Article 36) and Argentine Constitutional

[300] See generally Argentina's Counter-Memorial, paras 164-174 and in particular para 169.
[301] See Argentina's Rejoinder, paras 399-400.
[302] See below footnote 311.
[303] See Argentina's Post-Hearing Brief, paras 344-345.
[304] See Argentina's Rejoinder, para. 403 and Argentina's Post-Hearing Brief, para. 346 where Argentina restated this argument in similar terms: "…, any sophisticated investor, such as Total, would include (or should include) in its legitimate expectations the extensive powers of the Secretary of Energy to adjust the regulations governing the MEM operation."
[305] Total's Reply Memorial, paras. 348-360.

Law,[306] when it exercises its regulatory powers; on the other hand, the Parties infer from the aforementioned rules different conclusions as to the extent of SoE's discretionary powers under Argentina's law. The Parties qualify differently the provisions contained in Article 36. According to Total, Article 36 contains "pricing rules" which should be regarded as promises made by Argentina to all generators.[307] On the contrary, Argentina qualifies the provisions of Article 36 as "general guidelines"[308] which the SoE has the authority to implement within its broad discretionary powers.[309]

252. The SoE has implemented the provisions of the Electricity Law (Article 36.1 included) by Resolution No. 61/1992 of 29 April 1992.[310] This Resolution has been amended many times by subsequent Resolutions before Total's investments in the sector.[311] All of these Resolutions are known in their consolidated form as the "Procedures" (in Spanish, "*Los Procedimientos"*), which contain the overall regulation of the MEM.[312] The Procedures also establish the mechanism according to which CAMMESA, which is in charge of the administration of the wholesale market (as the Tribunal has outlined above at paragraph 244), determines spot prices.

[306] See Argentina's Post-Hearing Brief, footnote 320 at p. 79 and Total's Post-Hearing Brief, paras 861-862.

[307] See Total's Post-Hearing Brief, para. 854. The Tribunal notes here that Total also qualified these provisions, such as "explicit mandatory principles" which "the SoE does not have authority to trump", "price-determination rules" (Total's Post-Hearing Brief paras 861 and 826, respectively), "criteria for determination of prices" (Total's Post-Hearing Brief para 859) and "ground rules" at the hearings on the merits (see Transcript (English), Monday, January 7, 2008, 174:6).

[308] See Argentina's Post-Hearing Brief, footnote 320 at 79.

[309] In this regard, Total points out that the terms of HPDA's concession (see below at paras. 277-278) do not support Argentina's classification of the content of Article 36 of the Electricity Law as providing general guidelines. According to Total, HPDA's concession provides for a right to terminate the concession in case of a significant alteration of the "criteria for the determination of prices contained in the Electricity Law" (Article 56.1.4). Consequently, it is Total's view that "[t]he operative word is "criteria" – not "guidelines" or "general principles."" (see Total Post-Hearing Brief, footnote 96 at p. 46)

[310] See Resolution 61/92 of 29 April 1992, *Organización del Sistema Físico del Mercado Eléctrico Mayorista. Agentes Reconocidos. Organización. Procedimientos para la Programación de la Operación, el Despacho de Cargas y el Cálculo de Precios. Sanciones por Falta de Pago. Disposiciones Transitorias. Ámbito de aplicación y vigencia* (Exhibits C-36). See also Extracts From The Procedures at Exhibit C-37.

[311] Many changes in the Procedures had been introduced by the SoE as of 1992. For example, Total refers to Resolution 137/92 of 30 November 1992 (Exhibit C-74), by which the SoE improved the Procedures in order to adjust it to the "criterios de regulación de la actividad de transporte de energía eléctrica y de Generación hidroeléctrica" (see Request for Arbitration, para. 175 and footnote 150). There were also the modifications - in favour of generators - to the price setting mechanism (established by Resolution 62/92) introduced by Resolution 105/95 (in this regard see LECG Report on Electricity, para. 27 and footnote 13 at p. 17; Argentina's Counter-Memorial, para. 144; Gallino Report on Electricity, paras 180-184; and Argentina's Rejoinder, para 404 ff). As to these changes, Argentina points out that, "In late 2001, with the outbreak of the crisis, the Procedures had already been modified by the Department of Energy on 131 occasions." (see Argentina's Rejoinder, para. 404)

[312] See Updated Version of the Procedures with relevant Annexes (Exhibit C-278).

253. In describing this complex mechanism and its operation below, the Tribunal will refer to those aspects of the Procedures which are undisputed between the Parties and their experts.

254. Under the Procedures, electricity prices in the spot market are set by CAMMESA "on an hourly basis set by the economic cost of production, represented by the Short Term Marginal Cost measured in the Load Center of the System." (Article 9(b) SoE Resolution 61/92). Every power generator has to inform CAMMESA of its variable cost of production twice a year to allow CAMMESA to make these price determinations. The variable costs declared by generators are mainly determined by the cost of the fuels used for generation in the MEM. The Procedures (Annex 13, Section 1) apply to the following fuels "… gas, coal, fuel oil, gas oil and nuclear … ."

255. Each generator was required to calculate its variable cost in accordance with the formulas provided for by Resolution 61/1992, depending on the type of fuel used for production of electricity and the type of generation unit. More specifically, thermal units (such as Central Puerto) have to calculate their variable costs according to a formula which was a function of, principally, the fuel cost of each unit (to be used in the following six months) multiplied by its efficiency.[313] Annex 13, Section 2, of the Procedures provides that: "The Variable Cost of Production (VCP) of a thermal, conventional or nuclear unit is the variable cost anticipated by the Generator for the production of power throughout a given period, and it includes the cost of fuels, the cost related to machine consumption, the cost of different variable inputs of the fuels, the start-up and halt costs for state-of-the-art and sub-base machines, and any other required variables." The same section goes on to state that: "This cost is expressed per machined type installed in the unit, and there are four possible kinds (steam-turbine, gas-turbine or engines, combined-cycle and nuclear), and for each type of fuel that the machine may consume, considering those established for the determination of fuel reference prices as type of fuels. The values defining the variable cost of production are expressed in equivalent fuel units for consumption in order to produce power (USD/fuel unit). The number of values defining the variable

[313] See also Total's Memorial, para. 190.

cost of production of a thermal unit, therefore, depends on the number of machines installed in the unit and the amount of different fuels that may be consumed […]."

256. Under the Procedures, the variable cost declarations by thermal units were subject to price ceilings (the so-called "*Valores Máximos Reconocidos*").[314] According to Annex 13, Section 3 of the Procedures, the reference prices of the various relevant fuels are also defined and regulated and seasonal and monthly reference prices are distinguished.[315] As to the reference prices of fuels (the so-called *Precios de Referencia de combustibles*), Annex 13, Section 1 of the Procedures provides for the following definition: "The fuel Reference Price shall be the price provided in the Wholesale Electric Market (WEM) for said fuel, which is calculated for each type of existing fuel with the methodology established herein."[316] According to the same section, the reference price of gas "is calculated with the prices in the local market" and the reference price of the other fuels "is calculated: a) for the gas, with the methodology indicated in point 5.3 herein; b) for coal and nuclear fuel, with the fuel reference price."

257. As to the reference price of gas, Annex 13, Section 5.3 of the Procedure refers to the tariff set by ENARGAS in respect of the large-scale gas users. More specifically, Section 5.3 states that: "The Gas Seasonal Reference price in the units is determined by the corresponding existing rates for a six-month period for the gas Transport and Distribution licensee who informs the ENARGAS for the interruptible supply (I) in the charts called "Large Users – Charges per m3 consumed, ID or IT regime". For each unit, the Reference Price shall be determined for the kind of relationship between the gas network, whether direct or indirect, with the Transportation (T) or Distribution (D) company. The Gas Reference price in the reference point is determined by the rate corresponding to the Capital. If a Generator submits an interruptible gas contract, the rate corresponding to the interruptible supply shall be applicable." Section 5.3 concludes that: "Gas rates have a six-month duration, as from May and as from November. Therefore, the gas reference price per month shall

[314] In this regard, see also Total's Memorial, para 191 where the Claimant refers to Annex 13, Section 3 and Section 5.3 of the Procedures as to the gas reference price. As to the reference prices of the other fuel costs, see Annex 13, Section 5.2 of the Procedures.
[315] More specifically see Section 5.1 of the Procedures.
[316] As to the various types of fuels considered by the Procedures see above para. 254.

be equal to the seasonal reference price for the Seasonal Period to which that month pertains."

258. In respect of the other fuels, Section 5.2, item 1, of the Procedures (under the Heading '*Combustibles Líquidos'*) provides that: "Liquid fuel reference prices are calculated considering the fuel price in the international Market, the registered prices and the future prices, plus: a) for imported fuel, the import cost of the product up to La Plata; b) for national origin fuel, a surcharge of the FOB value representing the commercialization costs." As to these fuels, Section 5.2.1. specifies the following:

> "The reference price for each liquid fuel is calculated considering past prices registered in the International Market, the future tendency of the International Market and the transport up to La Plata, the reference point.
> The prices corresponding to the specific characteristics of fuels and to an international commercialization port, defined as New York shall be used. […]."

Summing up, the reference prices of these fuels are generally based on their international prices in New York. Nevertheless, the Procedures reserve to the SoE the power to modify the method of calculation when extraordinary circumstances occur relating to the international prices of these fuels. According to Section 5.2, item 2 of the Procedures, "[i]n extraordinary situations in which the conditions in the fuel markets are very far away from normal conditions, the calculation of liquid fuel reference prices may be modified by the *SECRETARY OF ENERGY of the MINISTRY OF ECONOMY AND PUBLIC WORKS AND SERVICES. The SECRETARY OF ENERGY of the MINISTRY OF ECONOMY AND PUBLIC WORKS AND SERVICES shall notify the DISPATCH BODY (OED) of said modification before the date on which Generators are to be informed of the reference prices.*"

259. As to the variable costs declared by hydroelectric units (such as HPDA), Total and its experts, Mr. Abdala and Mr. Spiller, explain that the variable cost of generation for hydroelectric generators is given by the value of water, which corresponds to the opportunity cost of water.[317] This opportunity cost is based on the value of the water in alternative uses (such as tourism activities or irrigation) and also taking into account the management of reservoirs in relation to other economic

[317] See Chapter II, Sections 2.3.1.2.2., 2.3.1.2.3, 2.3.1.3., 2.3.2. of the Procedures and Annex 22.

activities. For the purpose of calculating the opportunity cost of water, the Procedures provide for two standard models called OSCAR (*Optimizador Secuencial de Cuencas Argentinas*)[318] and MARGO.[319] In this regard, Total's experts point out that,

> "for run-of the river units this opportunity cost is almost zero. For the other kind of hydro units this opportunity cost is given by the expected future replacement cost of water, which in turn is given by the cost of thermal generation that may replace the use of water for electricity purposes. Thus, the allowed variable costs of hydroelectric plants are linked to the allowed variable costs of thermal generators."[320]

260. Turning back to the spot price formation mechanism, 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.[321] 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.[322] 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.[323]

261. It is undisputed between the Parties that the price of natural gas is the key element determining electricity prices in Argentina.[324] 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.

262. As to the place of hydro units and HPDA in the merit order, Total points out the following. Historically, hydro units were not the marginal units. Hydroelectric units

[318] See LECG Report on Electricity, footnote 48 at p. 29.
[319] See Section 2.2 of the Procedures at p. 9.
[320] See Request for Arbitration, para. 61 and LECG Report on Electricity, para. 26.
[321] Until the enactment of Resolution 105/95, the marginal unit was the last one called upon by CAMMESA for dispatch, as explained above at footnote 311.
[322] See LECG Report on Electricity, paras 25 and 27; Argentina's Rejoinder, para. 421.
[323] See Total's Post-Hearing Brief, para 810 point (h).
[324] See Total's Request for Arbitration para. 172; LECG Report on Electricity, para. 29; and Argentina's Counter-Memorial, paras 188-189.

were (and are) generally able to declare to CAMMESA low variable costs and, as a consequence, to dispatch large quantities of electricity in the spot market so as to have significant cash flows and repay sunk costs.[325] In this respect, the Tribunal notes that even after the enactment of the measures challenged by Total, hydroelectric units declare variable costs lower than the "AR$120/MWh spot price cap" introduced by SoE Resolution 2/02.[326]

263. Total submitted, in the course of its opening statement at the hearings on the merits that:

> "[T]his [that is hydroelectric units being the price setters] is not the typical situation, but it can happen at times of low hydrolicity when the opportunity cost of water is more expensive, more dear, than the cost of gas, and this applies in particular to plants which are very expensive to build; like Piedra del Aguila, about which you will hear more later, that can store energy. So they're not run-of-the-river plants, but they can store energy for months, weeks, or even a season and then sell it at times when there is a lot of demand and there is not a lot of hydropower in the market." [see Transcript (English), Monday, January 7, 2008, 180:11-21].

Summing up, while being able to declare low variable costs, hydro units require an amount of upfront investment for their construction three times larger than that required by an average thermal unit with the same installed capacity.[327] According to Total, this is particularly true for HPDA. On the one hand, HPDA is a seasonal plant which can store electricity; on the other "… it is a classic baseload plant, a plant that requires large margins"[328] because it is very expensive to build.

264. Furthermore, in order to understand the functioning of the system, other activities of CAMMESA as administrator of the MEM are worthy of note. CAMMESA collects the payments made by distributors and large users for electricity acquired in the spot market and pays the spot-price revenues due to generators for the electricity

[325] See Request for Arbitration para. 62 and Total's Post-Hearing Brief, para 810 point (i) where Total states that "for technological reasons, more efficient generators have much higher sunk costs than less efficient generators: the most efficient technology (*i.e.*, hydroelectric and combined-cycle plants) requires greater amounts to be invested upfront." In this regard, Mr. Petrochilos, one of Total's lawyers, stated in his Opening Statement at the Hearings on the Merits that: "… when you have a hydro plant, it will be dispatching large amounts of the electricity because it is a baseload and efficient plant …" (see Transcript (English), Monday, January 7, 2008, 177:21-22 and 178:1-2).
[326] LEGG Report on Electricity, Graph IX at p. 55.
[327] See Request for Arbitration, para. 62.
[328] See the Opening Statement by Mr. Petrochilos on behalf of Total at the Hearings on the Merits, Transcript (English), Monday, January 7, 2008, 190: 16-19.

sold in the spot market. 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 SoE fixes every six months.[329] The "seasonal tariff" is, therefore, the price to be paid by distributors during a six-month period[330] and is calculated by CAMMESA on the basis of various factors. Among these different factors are the variable costs and the demand for electricity projected by generators and distributors, respectively, and the market data for the first three months of the relevant season. In fact, CAMMESA must review the seasonal tariff after the first three months of the seasonal period has elapsed.[331] This quarterly review is carried out by CAMMESA (under the control of the SoE) in order to adjust the seasonal tariff, particularly taking into account the variations between the actual demand by distributors in the first three months of the seasonal period and their projected demand. In fact, the demand for electricity by distributors is one of the main factors which contributes to the determination of electricity prices.[332]

265. Summing up, the "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." (see Article 9 point c) below). More specifically, according to Article 9 of Resolution 61/92, "The Wholesale Electric Market is composed of: a) a Term contract market, […]. b) A Spot Market, with prices determined on an hourly basis based on the economic cost of production, represented by the Short-Term Marginal Cost measured in the Load Center of the System. c) A quarterly stabilization system of the prices for the Spot Market, intended for the purchase from distributors."

266. To finance and cover any difference between the spot prices and the seasonal tariff, the Procedures establish the so-called "Stabilization Fund", managed by

[329] See Chapter II, Section 2.12 of the Procedures.
[330] See Chapter II, Section 2.4.6.3 of the Procedures.
[331] This review is called "QUARTERLY RESCHEDULE."
[332] On this aspect see Chapter II, Section 2.11.1 of the Procedures.

CAMMESA.[333] Under the Heading "*PRICE STABILIZATION SYSTEM*" the Procedures at section 5.7 provide that:

> "The difference arising from the amounts to be paid by debtors, considering that 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. Furthermore, this fund shall provide the necessary financial resources to complete the credit amount of the sellers in those months when the results are different. 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.*, Dispatch Body, that is, 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 […]."

267. Both the parties and their experts agree that "the economic cost of the system", upon which the uniform rate due to generators shall be based in accordance with Article 36 of the Electricity Law, has two elements.[334] Moreover, they agree that the spot price formation mechanism based on the marginal costs (hourly determined) reflects only one of these elements, that is, the short-term economic cost of production of electricity.[335] Accordingly, both parties have outlined that, in order to reflect also the cost of non-supplied energy for the community as required by Article 36 of the Electricity Law, the mechanism includes other components. In addition to the spot price, the Procedures provided for two additional payments due to generators which reflect the cost of non-supplied energy for the community (which in turn reflects the long-term costs of production of electricity). These two additional payments are the capacity payment (technically termed "remuneration of available capacity") and "*el sobreprecio por riesgo de falla* (SPRF)" (the so-called "risk of failure" price). The Tribunal will deal first with capacity payments and then with the "risk of failure" price.

268. Capacity payments are revenues paid by CAMMESA to generators (in addition to spot price revenues) in order to remunerate generators for their (proven) generation

[333] See Total's Post-Hearing Brief, footnote 1074 at p. 352 and Total's Memorial, footnote 323 at p. 90.
[334] See LECG Report on Electricity, para 23; Gallino and Srouga Supplementary Report on Electricity, para 5.
[335] See LECG Report on Electricity, para 23-24; Gallino and Srouga Supplementary Report on Electricity, para 6.

capacity. Spot price payments and capacity payments (as well as other ancillary sources of revenue) constitute what industry practitioners in Argentina call the "monomic price", that is, the average remuneration per MWh received by generators.[336]

269. More specifically, the capacity payment due to each generator is calculated by CAMMESA on the basis of the capacity dispatched by each generator in the past six months.[337] According to Section 2.4.2.1 of SoE Resolution 137/92, the capacity payment was established by the SoE in an amount equivalent to US$5/MW, increasing to US$10/MW in 1994.[338]

270. The Parties have extensively disputed the functions of capacity payments in the price determination system described above.[339] In this regard, the Parties seem to agree that the capacity payment is set by the SoE so as to be an incentive to new investments in the MEM when available capacity is not meeting demand (or, conversely, to be a signal to halt investments in the opposite situation).[340] However, the parties have not pointed to any specific parameter or criterion on the basis of which the rate of the capacity payment had been set at US$10/MW.

271. Furthermore, Total and its experts emphasize that capacity payments are also aimed at recovering the investment costs of generators.[341] On the contrary, Argentina and its experts strongly oppose Total's position on this further function of capacity payments. More specifically, Mr. Gallino and Mr. Srouga in their Supplementary Report suggest that "there is no rule supporting the assertion that the purpose of capacity payments is mainly the coverage of capital costs or investment recovery."[342] In order to support this statement, Argentina's experts point out that capacity payments were (and are) to be determined by the SoE on the basis of the actual capacity dispatched by each generator in the spot market during the previous six

[336] See Total's Reply, para. 277 and LECG Report on Electricity, para. 38, where it is stated that "the monomic price, then, consists simply of the overall industry revenues from spot and capacity sales (as well as ancillary sources of revenues for generators) divided by total spot sales (in MWh)".
[337] See Total's Post-Hearing Brief, para. 816 and footnote 941 at p. 308 (the sources listed therein); and Gallino and Srouga Supplementary Report on Electricity, para. 62 ff.
[338] See Total's Post-Hearing Brief, para 817.
[339] See Total's Post-Hearing Brief, paras 818 ff. and Argentina's Post-Hearing Brief, paras 513 ff.
[340] See LECG Report on Electricity, para. 3.b at p. 30 and Gallino and Srouga Supplementary Report on Electricity, paras 5, 7 and 64 ff. See also Total's Reply, para. 297.
[341] See LECG Report on Electricity, para. 36.
[342] See Gallino and Srouga Supplementary Report on Electricity, para. 71.

months. Accordingly, "if the intention had been to remunerate the invested capital, it would have been logic [sic] to pay per capacity regardless of dispatch."[343] Summing up, Argentina suggests that,

> "[C]apacity payments were not created as a guaranty [sic] to cover capital or recovery [sic] costs of the investments, and such circumstance was acknowledged by Abdala at the hearing: "In addition, capacity payments of $4 are a significant departure from the commitments that the investors would have an opportunity to recover their investments. An opportunity is not a guarantee, but an opportunity." Such relationship is not made in the provisions."[344]

272. The Tribunal now turns to the second additional payment, namely the 'risk of failure' price determined by the SoE to reflect the cost of unsupplied energy. The range of this price varies depending on the risk of blackout projected by CAMMESA at a given time. The range was fixed by the SoE from US$120/MWh at times of lowest risk (up to 1.6% risk) to US$1,500/MWh at highest-risk times (greater than 10% risk).[345] These prices operate in the system "as maximum prices applicable at times of risk of blackout"[346] and, as stressed by both Parties, are quite common in countries with systems similar to those in Argentina (such as the U.K. and Chile).[347]

273. As to this 'risk of failure' price, the Tribunal notes that it is not clear from Total's submissions exactly how this price operates in the spot market. In its Memorial, Total explains that:

> "Allied to the concept of the capacity payment is the payment referred to as the "cost of unsupplied energy." This is the spot price of electricity paid to all generators at times when Cammesa determines that the available capacity in the market is not sufficient to meet demand fully. In such periods of time the marginal cost of electricity is no longer defined by the marginal cost of supply (ie, the declared variable cost of the least efficient unit) but by the cost that would be necessary to meet the demand that cannot be met on the capacity currently available…"[348]

Argentina's experts also contend that this 'risk of failure' price, which has different ranges depending on the risk of outage anticipated by CAMMESA, operates

[343] See Gallino and Srouga Supplementary Report on Electricity, para. 73.
[344] See Argentina's Post-Hearing Brief, para 358.
[345] See Chapter II, Section 2.4.3.3.2 of the Procedures.
[346] See Total's Memorial, para. 194 and Total's Post-Hearing Brief, paras. 822 ff.
[347] See Total's Post-Hearing Brief, footnotes 952 at p. 311 and Argentina's Post-Hearing Brief, para. 369.
[348] See Total's Memorial, para. 194 and also Total's Reply, para. 295.

as a cap on spot prices.[349] On the contrary, in their report Total's experts explain that the 'economic cost of the system',

> "…, must include a component that remunerates generators for providing system reliability, that is, to maintain enough reserves to avoid the extreme costs of outages. Such remuneration component for the provision of reliability, in Argentina was thought of as a margin over the short-run marginal cost of the system whenever there were risks of outages; plus a "capacity payment" (technically termed "remuneration for available capacity"), regardless of the level of the presence of outage risks…"[350]

In this regard, Total's experts refer to Article 2.7.2 of Annex II in SoE Resolution 38/1991.[351] This Article states that: "The overall capacity remuneration will be computed based on the seasonal planning considering in the period: a) the overvaluation of energy in case of outage risks, based on the expected value of energy deficit and the pre set cost of non delivery energy; b) the remuneration for capacity made available in the absence of outage risks."[352]

274. While Total repeatedly refers to these prices as "maximum prices applicable at times of risk of blackout" in its Post-Hearing Brief,[353] at the hearings on the merits, Mr. Abdala, one of Total's experts, rather describes the risk of failure price as a surcharge to the spot price.[354] More precisely, Mr. Abdala testified at the hearing as follows:

> "This price [the "risk of failure" price] is accommodated through two ways. First is the one that we already described as capacity payments, $10 per megawatt that we had before, the $4 that we have today. The second one, which is equally important is that it is what is called a surcharge to the spot price. Whenever Cammesa anticipates that there is a risk of deficit, then it will tell, look, you know what, generators? You are going to get a surcharge, and this surcharge will be a function of the risk that we have of outages and what is called the cost of unsupplied energy, which is a price that is set also by the Secretary of Energy which, for 10 years, was between $120 to $1,500 per megawatt. … Cammesa will determine, say, there's a 10 percent risk of deficit [of supply], well, the cost of unsupplied energy is said to be $1,500 per megawatt hour, and that [i]s the reference that Cammesa will use to pay a surcharge to the generators that are producing under this risk situation."[355]

[349] See Gallino and Sruoga Supplementary Report on Electricity, paras 59 ff.
[350] See LECG Report on Electricity, para. 23.
[351] See Exhibit C-297.
[352] See LECG Report on Electricity, footnote 4 at p. 15.
[353] See Total's Post-Hearing Brief, para 822.
[354] See also Total's Post-Hearing Brief, para 823.
[355] See Direct Examination of Mr. Abdala, Transcript of the Hearing on the Merits (English), Day 5, 1342:17-1343:18.

275. It is worth noting here that Resolution 38/91, to which Total's experts refer to in their report, preceded both the Electricity Law and the Procedures.[356] The Electricity Law and its implementing regulations (*i.e.*, in particular the Procedures) were enacted by Argentina in 1992 and replaced previous regulations (Resolution 38/91 included). Moreover, the Tribunal notes that the Electricity Law and the Procedures constituted the legal regime in force when Total made its investments in Central Puerto and HPDA in 2001. For this reason, the Tribunal accepts both Parties' description of the risk of failure price as maximum price, which was set based on the risk of blackout anticipated by CAMMESA.

276. Under Argentina's law, while thermal generators may operate in the MEM with an authorisation, hydroelectric generators, such as HPDA, may operate in the MEM only on the basis of a concession agreement with Argentina's government. Total refers to the provisions of HPDA's concession agreement as further elements supporting the legal basis of its claim,[357] that is Argentina's promise to maintain a stable pricing system in accordance with Article 36 of the Electricity Law.[358] The Tribunal will accordingly review here the relevant provisions of HPDA's concession in order to complete its analysis.

277. Article 9.1 of HPDA's concession states that:

> "General modifications to regulations and procedures related to the generation of electric power, the WEM operation and Environmental Protection shall not entitle the CONCESSIONAIRE to Claim any indemnification or compensation for damages, except with regard to substantial modifications of the price determination criteria when said modifications are arbitrary and cause compliance with the agreement extremely burdensome for the Concessionaire according to the provisions under Article 1198 of the Civil Code. In this last case of exception Chapter XV of the Contract shall apply."

Accordingly, Article 56 of the concession provides for as follows:

> "Article 56.1. The Concessionaire will be entitled, subject to the procedures established in subsection 56.2 below, to terminate the Agreement due to the Concession Grantor's fault whenever the latter:
>
> …

[356] This is also admitted by Total in its Reply, footnote 378 at p. 116.
[357] See HPDA Concession Agreement at Exhibit C-710.
[358] See Total's Post-Hearing Brief, paras. 855-859.

> 56.1.4. Established significant modifications to the price determination criteria contained in Law No. 24,065 [*i.e.*, the Electricity Law] and such modifications were arbitrary and caused the compliance with the Agreement to be excessively burdensome for the Concessionaire according to the provisions under section 1198 of the Civil Code.

Article 56.2 of HPDA concession continues to establish that:

> "Should the Concession Grantor perform any of the acts mentioned in subsection 56.1 above, causing an actual damage to the Concessionaire, the latter will request it to adopt, within a reasonable period depending on circumstances, the measures required to amend the conditions claimed and, as the case may be, to rectify its consequences. In addition, the Concessionaire will require the Concession Grantor to offer a public hearing, before the maturity of such term, to disclose and document the grounds for its request. Should the Concession Grantor fail to adopt the requested measures after such term has elapsed, the Concessionaire will demand it in due manner to do so in a term not exceeding 15 (fifteen) days, under the admonition of termination. After such term has elapsed with no favourable outcome, the Concessionaire may declare the Agreement terminated on the Concession Grantor's fault."[359]

278. Thus, by the aforementioned provisions, HPDA's concession grants to the Concessionaire a right to terminate the Concession and to claim damages under Argentina's civil code in case of substantial modifications of the criteria to determine prices contained in the Electricity Law when they are arbitrary and make performance too onerous.

3. Total's Complaint Concerning the Alteration of the Electricity Sector's Legal Framework l

3.1 General

279. Total's claim with respect to HPDA and Central Puerto is based on Argentina's alleged commitments in the Electricity Law and the HPDA Concession (there is no concession or any other contractual arrangement as to Central Puerto), upon which Total says it relied when making its investments,

280. More precisely, Total submits that,

> "Argentina's promise was therefore that SoE would act as a fair and neutral regulator in a free market and give effect to the rules in the Electricity Law, that

[359] By referring to the latter provision of HPDA's concession, Argentina points out that HPDA did not avail itself of this remedy. See Argentina's Counter-Memorial, para 241.

> is: (a) that all payments to generators would be at a uniform rate; (b) that one of those payments would be a payment for capacity, as distinct from electricity actually dispatched in the system (Article 35(b)) of the Electricity Law); (c) that the prices paid to generators would be based on the economic cost of producing electricity; and (d) that this economic cost includes the long-term cost of producing electricity".[360]

281. According to Total, "Argentina was committed to the stability of the pricing rules in the Electricity Law."[361] More specifically, it is Total's view that,

> "Argentina's promises to power generators were set out in the Electricity Law. That is the controlling text here. Those promises constituted legally enforceable rights in Argentine law. […] the Electricity Law remains on the statute books, without amendment. Argentina's argument that "*[t]he evolution of host State's laws is part of the context where investments and investors act*" is of academic interest here: the Electricity Law did not change. And it is clear under international law that promises enshrined in statute are promises that may be relied upon by foreign investors, and in this way generate legitimate expectations protected by the Treaty."[362]

As to the protection of its legitimate expectations that the price determination system provided by Argentina would remain stable, Total relies on various international and domestic legal authorities.[363]

282. In other words, according to Total,

> "[I]n short, the pricing rules in the Electricity Law were a commitment that Argentina expressly made to power generators and investors in such companies, like Total here. The existence of the commitment is beyond question. It follows from several considerations, each of which would of itself be sufficient:
> (a) the presentations that we saw Argentina made to prospective investors prior to the passage of the Electricity Law;
> (b) the fact that the commitments were set forth, not in administrative regulations, but an Act of Congress – which is still on the statute books;
> (c) ten years of successful, consistent, and faithful implementation of the Electricity Law by the SoE;
> (d) the rule of Argentine Law according to which the pricing rules in the Electricity Law constitute enforceable rights vested in the power generators (paragraph 826 above); and (e) the express written commitment that all power generators made, on entry in the market, to abide by the Electricity Law, including its pricing rules."[364]

[360] See Total's Post-Hearing Brief, para. 113.
[361] See Total' Post-Hearing Brief, para. 858.
[362] See Total's Post-Hearing Brief, para. 102.
[363] See Total's Post-Hearing Brief, paras 867-874.
[364] See Total' Post-Hearing Brief, para. 854.

According to Total, the above-mentioned 'considerations', include the provisions contained in HPDA's concession,[365] as already recited by the Tribunal.[366]

283. Total alleges that a number of measures taken by the Argentine Executive breached or revoked the commitments given to attract investment in the power generation sector that were contained in the Electricity Law (especially Article 36), and upon which Total relied in making its investments.[367] The measures complained of by Total are the Emergency Law (Article 8) and a number of Resolutions adopted by the Secretariat of Energy, some of which were specifically based on, and others which just followed, the Emergency Law. According to Total, through the Emergency Law and these SoE Resolutions, Argentina has altered the basic principles of the electricity legal regime in such a manner as to breach the fair and equitable treatment clause in the BIT.

284. A connected but distinct argument by Total is that these measures were in breach of Argentina's law, namely the Electricity Law (Article 36). Total argues that the core issue for the Tribunal is whether the measures adopted by the SoE comport with the Electricity Law, *i.e.*, do these Measures respect the promise of remuneration to generators at a uniform rate, based on the economic cost of the system, which takes account of the cost of unsupplied energy?[368] In this regard, it is Total's position that all of the regulations adopted by the SoE during and after the state of emergency are in conflict with Article 36 of the Electricity Law (which is still in force) because they

> "resulted in: (a) generators no longer receiving a uniform rate; (b) prices no longer reflecting the economic cost of the system; and (c) prices no longer reflecting the cost that unsupplied energy represents for the community, ie, no longer encouraging investment in capacity to satisfy peak demand, and no longer promoting long-term investment to satisfy future demand."[369]

3.2 Specific Measures Complained of by Total and Their Impact

[365] See Total' Post-Hearing Brief, paras 855-859.
[366] See above, paras 276-278.
[367] See Total's Memorial, para. 33.
[368] See Total's Post-Hearing Brief, para. 880.
[369] See Total's Post-Hearing Brief, para. 881.

285. Total identifies what it terms "radical alterations" of the existing regime for the power generation sector resulting from the various measures taken by Argentina through the SoE, which it submits constitute a breach of the BIT.

286. Total complains of the following measures:

(i) the pesification of the spot price, and any other payments to which power generators were entitled, specifically the capacity payments and the payment of unsupplied energy, at a one to one rate; (ii) the alteration of the uniform marginal price mechanism in the power generation market through violation of the uniform rate rule and the introduction of a fixed price cap; and (iii) the "refusal" to pay power generators their dues even at the dramatically reduced values resulting from the measures,[370] followed by the 'forced' conversion of Total's existing and future receivables (that CAMMESA is not able to pay) into participations in new power plants. (*i.e.*, "*Fondo para Inversiones Necesarias que Permitan Incrementar la Oferta de Energía Eléctrica en el Mercado Eléctrico Mayorista*", hereinafter also "FONINVEMEM")

287. As to (i), the pesification of the spot price and of any other payments to which power generators are entitled (specifically the capacity payments and the payment of unsupplied energy) at a one to one rate was effected through SoE Resolution 2/02 based on the Emergency Law. In this respect, Total also complains about Article 8 of the Emergency Law and MoE Resolution 38/02 of April 9, 2002[371] in that they effected the pesification and freezing of electricity tariffs and, indirectly, led to the pesification of the wellhead natural gas price on which the price structure for electricity was based.[372]

[370] This list is contained in para. 33 of Total's Memorial. A more detailed description of the measures complained of and their specific impact is found in Total's Request for Arbitration, paras 104-116, 135-140, 180-198.
[371] See Exhibit C-25.
[372] See LECG Report on Electricity, paras. 46 and 50 ff.; Total's Memorial, paras 332 and 279; Request for Arbitration, paras 179-181; Total's Memorial, para. 209 where Total explains that "Since (a) for the purpose of variable cost declarations, the cost of gas was subject to a ceiling equal to the gas reference price; and (b) this gas reference price was frozen and pesified by the Emergency Law and subsequently allowed to increase only incrementally and still remain far from their 2001 values, the spot price is now mainly determined by the artificially low gas reference price, …". See also Total's Post-Hearing Brief para. 123(a), where Total points out that "First, the ENARGAS price that served as a cap for the cost of gas that generators could declare was converted to pesos at a 1:1 nominal rate ("pesification") and frozen …".

288. As to (ii), the alteration of the uniform marginal price mechanism in the power generation market occurred through the violation of the uniform rate rule and the introduction of a fixed price cap. This alteration was effected through the enactment of SoE Resolution 240/03. Furthermore, in 2006, the SoE enacted Resolution 1.281/06[373] (*Energía Plus* Program) to foster new investments in the sector. To this end, this resolution allowed new plants or upgrading of existing plants to receive higher capacity payments than the existing plants, which continued to receive capacity payments amounting to AR$12 per MW,[374] thereby discriminating between existing and new capacity.

289. In this respect, Total claims that, beginning in 2002, Argentina breached the following three basic principles of the Electricity Law, which Total regards as promises or commitments.[375]

290. First, Total says that generators no longer received a uniform rate, contrary to Article 36 of the Electricity Law ("*tarifa uniforme*"). Total explains that the system under Article 36 was implemented (though this was not provided for explicitly in the law) by a uniform spot price (a "monomic" price that changed seasonally) that was equivalent to the variable costs of the marginal unit.[376] Instead, under Resolution 240/03, the spot price was set by units of burning natural gas. Liquid–fuel (petrol) units which have higher variable costs, are not taken into account for setting the price for all units, so that the spot price is lower than it would have been under the initial system. Generators burning more expensive liquid fuel units receive additional "transitory dispatch costs."[377] As a result, generators are no longer paid the same price for the electricity that they produce.

291. Second, Total submits that prices no longer reflect the economic cost of the system (also contrary to Article 36 of the Electricity Law). Total makes two arguments in this regard. Contrary to sound market pricing theory, the price is no longer set by the marginal plant.[378] Further, the (highest) spot price, which previously

[373] See Exhibit C-565.
[374] See LECG Report on Electricity, paras 97 ff.
[375] See Total's Post-Hearing Brief, para 881; Total' Memorial, paras. 206-345; Total's Reply, paras 330-345; LECG Report on Electricity, paras 3 and 46-100.
[376] See Total's Post-Hearing Brief, para. 810 (f).
[377] See Total's Post-Hearing Brief, paras 809, 884-885, and footnote 933 at p. 304.
[378] See Total's Post-Hearing Brief, paras. 811, 891.

were variable to reflect the risk of failure, has been capped at AR$120/MWh,[379] thereby disregarding the "risk of outages",[380] which previously was taken into account to encourage additional investments in capacity building through the "risk of failure" variable price. It is worth noting here that before the measures were taken, this price varied between US$120/MWh at lowest risk times and US$1,500/MWh at highest-risk times (see above paragraph 272). Moreover, Total says that this cap was below the variable costs of the marginal unit 40% of the time: thus it is an administrative price not reflecting the cost of the system.[381] According to Total,

> "[T]o make matters worse, ENARGAS's intervention to reduce artificially the price of gas […] compounds the effect of Resolution 240/2003. Without this intervention, the free-market price of gas would be much higher. The spot price, which is based in large part on the price of gas most of the time (especially after Resolution 240/2003), would have been correspondingly higher."[382]

292. Third, Total submits that prices no longer "reflect the cost that unsupplied energy represents for the community", *i.e.*, no longer encourage investment in capacity to satisfy peak demand, and no longer promote long-term investments to satisfy future demand (with respect to the capacity payments). This concerns the "capacity payments."[383] That amount was set in 1994 at US$10/MW and remained at that level until the end of 2001. At the beginning of 2002, the capacity payments were pesified at a rate of one-to-one, from US$10/MW to AR$10/MW. The capacity payments were increased to AR$12/MW in July 2002,[384] thus not compensating for the impact of the decrease of value in terms of US dollars due to the pesification,[385] nor

[379] See Total's Post-Hearing Brief, para. 892.
[380] See Total's Post-Hearing Brief, para. 892.
[381] See Total's Post-Hearing Brief, paras. 822, 893-895 and table at p. 338. Witness Sruoga called by Argentina has explained that this cap was set to reflect the normal cost of a gas-burning plant and stated that the marginal cost was only exceptionally above this cap. See Total's Post-Hearing Brief, para. 896.
[382] See Total's Post-Hearing Brief, para. 898 (and also para. 899). As to this ENARGAS' intervention on the gas price, Total also refers to the arguments that support its claim related to the investments in exploration and production. See Total's Post-Hearing Brief, paras 694-695 as to the pesification of the reference price of gas and paras 695 ff. as to the freezing of the maximum reference price for the well-head price component of the gas tariffs.
[383] See Total's Post-Hearing Brief, para. 816.
[384] See SoE Resolutions 246/02 of July 4, 2002 (Exhibit A RA 112) and 317/02 of July 4, 2002 (Exhibit C-425). By the enactment of these Resolutions, the SoE also changed the criteria according to which capacity payments had been calculated until then. The new method of calculating capacity payments de-linked capacity payments to the actual dispatch of electricity by each generator in the previous six months. According to these new criteria, each generator is remunerated for its individual capacity, regardless of whether it was actually dispatched. See LECG Report on Electricity, para 89 and footnote 113.
[385] See Total's Post-Hearing Brief, para. 817.

reflecting the actual economic and social cost of unsupplied energy for the community."[386]

293. The third complaint by Total listed in paragraph 286 (iii) above concerns the "refusal" to pay power generators their dues even at the dramatically reduced values resulting from the implementation of the measures,[387] and also the "forced" conversion of Total's existing and future receivables (that CAMMESA is not able to pay) into participations in new power plants (FONINVEMEM). Total explains that Resolution 943/03,[388] reflects the inability of the Stabilization Fund[389] to pay the amounts owed to the generators, since both past and future receivables would be paid only when the fund was able to do so, at a date that the SoE would determine in the future. According to Total and contrary to the arguments of Argentina,[390] participation in FONIMVENEM was only on its face voluntary. It was the only way for generators to be paid 35% of their receivables while contributing to FONIMVENEM with, and thus potentially recovering, the other 65%.[391] Moreover, according to Total, the fair valuation of those contributions in 2006 (pursuant to an independent valuation) amounted at most to only 50% or 60% of the nominal value corresponding to the receivables converted into contribution.[392] The alternative would have been to suffer even greater losses since non-participating generators were to be paid at an uncertain date to be determined in the future by SoE.

294. The Tribunal recalls that from September 2003, CAMMESA was unable to pay generators for the electricity that they were supplying, since the tariffs paid by the consumers were not adequate to cover the payments owed by electricity distributors to the generators. In fact, since 2002 Argentina has been using the money accumulated in the Stabilization Fund to pay generators their dues and this fund has

[386] See Total's Post-Hearing Brief, paras 816 ff. and 905 ff.
[387] See above para. 286.
[388] SoE Resolution 943/2003 of 27 November 2003, Exhibit A RA 150, discussed in Total's Post-Hearing Brief at para 934.
[389] As to the Stabilization Fund, see above paras. 265-266.
[390] Argentina's Counter-Memorial, para 231.
[391] Pursuant to Resolution 406/03 and Resolution, 826/04 at Exhibit A AR 160. Total points out that HPDA and Central Puerto became the largest shareholders of the new plants because they were the largest power-generators in Argentina and thus the largest creditors of the Stabilization Fund. See Total's Post-Hearing Brief, para 941.
[392] See Direct Examination of J. Chambert-Loir, transcript, Day 3, 816, 5-17 and Exhibit C-554; Total's Post-Hearing Brief, para 937. In case of sale, the buyer might not be available to value the participation at more than 30%, *ibidem* and para. 970.

been depleted.[393] Since the Stabilization Fund is in deficit, it became impossible to cover "the difference between Prices and Charges invoiced to demand agents and, the amounts to be paid to creditors of the WHOLESALE ELECTRICITY MARKET (MEM)"[394] To cope with this problem, the SoE enacted Resolution 406/03 on September 8, 2003.[395] On the one hand, this Resolution (Article 2) authorised CAMMESA to resort to the "unified fund" ("*Fondo Unificado*"), to make it possible to access the necessary financial assistance pursuant to Section 5.7 of the Procedures.[396] On the other hand, it established a temporary mechanism "for the assignment of the scarce and insufficient resources to face the credits of the Wholesale Electric Market (WEM) …" (Preamble, third paragraph). To this end, the same resolution set forth a priority system according to which CAMMESA had to make partial payments to generators for their sales of electricity in the spot market. According to the new system, CAMMESA had to first pay all generators (both thermal power and hydroelectric generators) their short-term variable costs and, in addition, to pay thermal units any "transitory dispatch costs." Any funds available thereafter had to be assigned *pro rata* among all generators (Article 4(e)). However, because of the grave deficit of the stabilization and unified funds, the resolution provided that any generators' receivables that could not be covered by the limited cash available became a debt of the Stabilization Fund towards generators, which in turn became unsecured creditors thereof. As a result, according to Total and its experts, "A total of AR$19.7 million is owed to Central Puerto and HPDA as "sales credits"[397] and, practically, "… the Government ended up withholding, through Cammesa, approximately 65% of the generator's gross margins."[398] In addition, according to Article 5, on the one hand, all payments made to generators under this system entail "the creditors' commitment to pay providers for the necessary fuel, inputs and human resources for the operation and maintenance …"; on the other hand, CAMMESA and the SoE precluded generators from declaring that their units were unavailable due to the lack of funds necessary to operate, under penalty of

[393] See Total's Memorial, para. 217 ff.; LECG Report on Electricity, para. 76 and footnote 89.
[394] See SoE's Resolution 406/03, Preamble, second paragraph (Exhibit C-80).
[395] *Ibidem*.
[396] See Total's Memorial, para. 218 and footnote 325, where Total points out that several successive loans were granted to the Stabilization Fund by a number of decrees: Decree 1.181/03 of December 5, 2003 (AR$150 million); Decree 365/04 of March 31, 2004 (AR$200 million); Decree 512/04 of April 27, 2004 (AR$200 million); Decree 962/04 of August 2, 2004 (AR$300 million); and Decree 1672/04 of December 7, 2004 (AR$300 million).
[397] See Total's Memorial, para. 219.
[398] See LECG Report on Electricity, para. 76.

withholding the payments due to them.[399] Moreover, on November 27, 2003, Article 1 of SoE Resolution 943/03 qualified generators' receivables in two items:

- "one with certain due date, which is based on the available resources to face them, and
- another one with uncertain due date, to be determined by the Secretary of Energy, according to the provisions of the corresponding rule."

In addition, the same Article made it clear that those receivables that would be paid at a date to be determined by the SoE "do not constitute a liquid and payable debt according to the provisions of Article 819 of the Civil Code." Moreover, in July 2004, through SoE Resolution 712/04, Argentina created the FONINVEMEM to finance the building of two new generators.[400] The building of these new generators, to be operational by 2007, was to be financed by generators, with "voluntary" contributions consisting of those receivables, to be paid at a date to be determined by the SoE that "do not constitute a liquid and payable debt according to the provisions of Article 819 of the Civil Code," pursuant to SoE Resolutions 406/03 and 943/03.

295. According to the Preamble of Resolution 712/04, the creation of the FONINVEMEM aimed to add new capacity to Argentina's power generation sector and was made necessary by a number of facts. Among these were the "constant increase in the demand of electricity due to the growth in the Argentine economy and the gas scarcity for the generation" (eighth paragraph) as well as "the evident financing difficulties for the sector" (twelfth paragraph). This was due to the current situation in the MEM that made it impossible to resort to private capital. As the same Resolution acknowledges, the new system of allocation of payments to generators for their sales introduced by Resolutions 406/03 and 943/03 resulted in an accumulation "of vast amounts of money" (Preamble, fourth paragraph) being owed by the Stabilization Fund to generators; and at the same time, it allowed generators only to cover "the Minimum Maintenance and Operation Costs" (Preamble, fifth paragraph).

[399] In this respect, see also LECG Report on Electricity, para. 77.
[400] SoE Resolution 712/04 at Exhibit C-218.

296. In order to carry out the two projected investments the SoE had to "invite" generators to make the contributions required more than once.[401] As outlined above, Total explains that under Resolution 943/2003, both past and future receivables would be paid only when the fund was able to do so, at a date to be determined by the SoE in the future.[402] Based on the above evidence, Total submits that through the aforementioned Resolutions, Argentina effected a 'forced' conversion of Total's existing and future receivables (that CAMMESA is not able to pay) into participation in new power plants (FONINVEMEM).

4. BIT Breaches Alleged by Total

297. Total claims that the fair and equitable treatment obligation of Article 3 of the BIT was breached by the measures discussed, since the obligation to provide such treatment protects investors against fundamental alterations of the regulatory framework on which they legitimately relied in making their investment. Total considers that the Electricity Law contained specific promises, and submits that, although a breach of domestic law does not in itself amount to a breach of international law in every case, here it does. The administration's failure to comply with fundamental investment framework frustrated Total's reasonable and legitimate expectations. At the same time, Total submits that the issue of whether Argentina had promised legislative stability and whether Total had reasonably assumed such stability is moot, because the Electricity Law had not been amended since its promulgation and Argentina had not observed it.[403]

298. Total claims that the conduct of Argentina also breached the obligation found in Article 5(1) of the BIT that "Investments made by investors of one Contracting Party shall be fully and completely protected and safeguarded … in accordance with the principle of just and equitable treatment mentioned in Article 3 of this Agreement", either as part of fair and equitable treatment or as a self standing obligation.[404] Under this standard, according to Total, Argentina was required to take positive steps to

[401] See SoE Resolution 826/04 dated 11 August 2004 (Exhibit C-223), Article 1; SoE Resolution 948/04, dated 20 September 2004, Article 1 (Exhibit C-477).
[402] See above para. 293 ff.
[403] See Total's Post-Hearing Brief, paras 962-966 referring to *CMS Gas Transmission Company v. Argentina*, *supra* note 29, paras 275-276 and *LG&E v. Argentina*, *supra* note 111, paras 133 and 139.
[404] Total's Post-Hearing Brief, paras 240 ff, 967 ff.

protect Total's investments. Instead, Argentina did the very opposite. It adopted measures that directly contradicted the applicable statute (the Electricity Law) – fully aware that this would destroy Total's investments. Argentina's conduct – coercing Central Puerto and HPDA to accede to the terms of FONINVEMEM – further violates its duty under the Treaty.[405]

299. According to Total's Request for Arbitration, through the various measures Argentina also failed to observe the obligation not to take measures equivalent to expropriation without prompt, adequate and effective compensation in breach of Article 5(2) of the BIT and that of refraining from discriminating against Total (Article 4).[406]

300. In its subsequent submissions, and specifically in its Post-Hearing Brief, Total focused only on the breaches of the fair and equitable treatment clause (Article 3 BIT)[407] and of the duty to accord to foreign investments full security and protection under Article 5(1).[408] For the sake of completeness, the Tribunal will also deal with Total's claims under Article 4 and Article 5(2) of the BIT.

5. Argentina's Position

301. As to the changes in the domestic regulation of electricity generation and market set up under the Electricity Law, Argentina denies that the modifications adopted by the SoE were in breach of the law and exceeded its competence. As mentioned above, Argentina maintains that the SoE had broad powers to regulate generation activities on grounds of general interest (see above at paragraph 250). The measures adopted from 2002 onwards complained of by Total were legitimate and reasonable in view of the economic and social reality affecting Argentina.[409] The measures adopted in the power generation sector took into account the seriousness of the crisis and were proportionate to the changes that had taken place, such as increases in certain prices and the lack of certain inputs (*e.g.*, natural gas since 2003). While respecting the legal regime established by the Electricity Law, the measures were

[405] Total's Post-Hearing Brief, para 969.
[406] See Request for Arbitration, paras. 229-232 and 233-238, respectively.
[407] See Total's Post-Hearing Brief, paras. 961-966.
[408] See Total's Post-Hearing Brief, paras. 967-971.
[409] See Argentina Post-Hearing Brief, para. 352 ff.

effective in avoiding major interruption in electricity supply. In view of the above, Argentina submits that no breach of the fair and equitable treatment standard has taken place. A foreign investor must anticipate that circumstances may change and accordingly, must take into account the possibility of normative modifications. Such transformations do not entail legal responsibility in the absence of specific commitments that Argentina did not stipulate.[410]

302. As to the pesification of the capacity payments and other monetary parameters, Argentina submits that the abandonment of the fixed exchange rate that led to the pesification of the whole economy was reasonable and proportionate to the aims and to the context of these measures.[411]

303. As to the impact of its various measures on the rights invoked by Total under the BIT, Argentina submits that none constitute a breach thereof.

6. Damages Claimed by Total

304. Due to the total impact of the measures, the Claimant complains that it has suffered damages to its investment in HPDA and Central Puerto and that Argentina has to compensate it for these damages under the BIT regime. Using the discounted cash flow ("DCF") method, Total's experts evaluated the damages suffered by Total to be in an amount of US$147.1 million for Total's investment in HPDA[412] and US$235.4 for Total's investment in Central Puerto (corresponding to a total amount of US$382.5 million).[413] Alternatively, to reflect Total's sale of its equity participations in November 2006, Total's experts have proposed to assess Total's damages in the power generation sector using the transaction approach. Under this method, Total's damages amount to US$215.4 as to its investment in HPDA and US$295.9 as to its investments in Central Puerto (corresponding to a total amount of

[410] See Argentina Post-Hearing Brief, para. 442-456. Argentina relies on *Parkerings-Companiet v. Lithuania*, *supra* note 260, para 332-333 and *SGS Société Genérale de Surveillance S.A. v. Republic of the Philippines*, *supra* note 187, para 121: "The host State must have assumed a legal obligation, and it must have been assumed *vis-à-vis* the specific investment - not as a matter of the application of some legal obligation of a general character."
[411] See Argentina Post-Hearing Brief, para. 447.
[412] See LECG Addendum on Damages, at p. 10.
[413] See LECG Report on Damages, at p. 65.

US$511.3).[414] Total contends that it has written off US$364.5 million in its financial statements in order to reflect the economic impact of the measures on the value of its participations in Central Puerto and HPDA.[415] Total submits that "absent Argentina's Measures, those participations would have been worth US$655 million at the time of the sale."[416]

7. Evaluation of Total's Claim of Breach of the Fair and Equitable Treatment Standard

7.1 General Considerations

305. As mentioned above, Total's claim as to HPDA and Central Puerto is based on Argentina's "commitments" regarding the stability of the electricity regime and Argentina's obligation to comply with the Electricity Law, upon which Total had legitimately relied when making its investments. Beyond the claim that Argentina's overall conduct in the sector from 2002 onwards breached its promises and commitments in violation of the BIT, Total alleges that the various measures which it challenges have specifically breached the BIT standards that it invokes.

306. Accordingly, the Tribunal will deal with each distinct claim of breach by Total, as set forth in paragraph 286 above, and thereafter examine these claims in their entirety. Before so proceeding, the Tribunal notes that Total relies heavily on the alleged breaches of the Electricity Law by the SoE, because it did not act as a "fair regulator" as it was supposed to do under the basic pricing rules of the Electricity Law (Article 36), which have remained unchanged: "Argentina was committed to the stability of the pricing rules in the Electricity Law."[417]

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[414] See LECG Report on Damages, at p. 69. The higher amount of damages under the transaction approach is because Total's experts estimate the actual value of Total's shares in Central Puerto to be US$95 million and in HPDA as US$195 million, while Total sold its equity stakes in the two generators for US$35 and 145 million, respectively. See LECG Report on Damages, at p. 66.

[415] See Total's Post-Hearing Brief, footnote 88 at p. 45. The Tribunal recalls that, in 2001, Total had spent a total amount of US$327.45 to acquire its two investments in HPDA and Central Puerto and had subscribed debt of approximately of US$177 million.

[416] See Total's Post-Hearing Brief, para. 98 and footnote 87 at p. 44-45, where Total has clarified that it also sold the debt subscribed in the two generators when it sold its shares in 2006. Total makes clear that it "makes no claim in respect of those participations."

[417] Total's Post-Hearing Brief, para 858.

307. The Tribunal reiterates that a breach of the BIT can be found irrespective of a breach of domestic law, as Total itself recognizes. On the other hand, a breach of domestic law may entail a breach of international law.[418] In any case, Total has not challenged the legality of the SoE administrative resolutions in Argentina nor has Total asked that the Tribunal decide these issues based on Argentina's law, notwithstanding the reference to Argentina's law in Article 8(4) of the BIT. Total states, moreover, that "the Law could have been changed or abrogated. But it was not … It is still the controlling text. Argentina has not observed it."[419]

308. Total bases its claims on those commitments and promises of stability as the basis on which its legitimate expectations have been frustrated, pointing to previous case law that considered "an investor's legitimate expectations of stability of the basic parameters of the operative regulatory framework" as protected by the fair and equitable treatment obligation of a BIT.[420]

309. The Tribunal has extensively discussed this issue, and the relevant concepts in general and as they present themselves under the Argentina–France BIT, when it applied them to Total's claim relating to TGN, so that there is no need for further discussion here. However, the Tribunal recalls briefly its basic considerations and conclusions above, namely that:

(a) on the one hand, stability, predictability and consistency of legislation and regulation are important for investors in order to plan their investment, especially if their business plan extends over a number of years;[421]

(b) on the other, signatories of BITs do not thereby relinquish their regulatory powers nor limit their prerogative to amend legislation in order to adapt it

[418] In its Post-Hearing Brief, para. 962 Total submits that: "[…] Although a breach of domestic law does not in itself amount to a breach of international law in every case, here it does.[…]"
[419] Total's Post-Hearing Brief, para 965.
[420] Total's Post-Hearing Brief, paras 867-871 with reference to *Sempra Energy International v. Argentina*, *supra* note 189, para. 299; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, *supra* note 20, para. 107; *Occidental Exploration and Production Company v. The Republic of Ecuador*, *supra* 112, para. 183; *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, *supra* note 96, para. 114. The Tribunal notes that not all of those quotations refer to factual or legal circumstances comparable to those at issue here.
[421] See above para. 114.

to change, new emerging needs and requests of their people in the normal exercise of their prerogatives and duties;[422]

(c) the BIT between France and Argentina does not contain any reference to stability of the legal framework, not even in the preamble;[423]

(d) the legal regime in force in the host country at the time of making the investment is not *per se* covered by a "guarantee" of stability due to the mere fact that the host country entered into a BIT with the country of the foreign investor. A specific provision in the BIT itself or some "promise" of the host State, are required to this effect so rendering such an expectation legitimate,;[424]

(e) when relying on the concept of legitimate expectations, arbitral tribunals have often stressed that "specific commitments" limit the right of the host State to adapt the legal framework to changing circumstances. Representations made by the host State are enforceable and justify the investor's reliance only when they are made specifically to the particular investor;[425]

(f) legislative provisions, regulations of a unilateral normative or administrative nature, not so specifically addressed, cannot be construed as specific commitments that would be shielded from subsequent changes to the applicable law. The Tribunal has found that this is the situation in the case of the Gas Regime applicable to TGN. The Tribunal notes that the various provisions of the Electricity Law set forth above and invoked by Total are not different as to the absence of specific promises. A similar view was expressed by Judge Higgins:

> "In my view the right distinctions are here being drawn: governments may indeed need to be able to act qua governments and in the public interest. That fact will prevent specific performance (including restitution) from being granted against them. But that is not to liberate them from the obligation to compensate those with whom it has entered into specific arrangements. That is the reasonable place

[422] See above para. 115.
[423] See above para. 116.
[424] See above para. 117.
[425] See above para. 119.

to strike the balance between the expectations of foreign investors and the *bona fide* needs of governments to act in the public interest."[426]

(g) Absent such promises, changes to the regulatory framework applicable to capital intensive long term investments and the operation of utilities can be considered unfair if they are contrary to commonly recognized financial and economic principles of "regulatory fairness" or "regulatory certainty" applied to investments of that type (be they domestic or foreign);[427]

(h) The host State's right to regulate domestic matters in the public interest has to be taken into consideration as well. Therefore the circumstances, reasons (importance and urgency of the public need pursued) and modalities (non-discrimination, due process, advance notice if possible and appropriate) for carrying out a change impacting negatively on a foreign investor's operations on the one hand, and the seriousness of the prejudice caused on the other hand, compared in accordance with a standard of reasonableness and proportionality, are relevant. Thus an evaluation of fairness must take into account the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a standard of reasonableness and proportionality;[428] and

(i) the conduct of the investor is also "subjectively" relevant since BITs "are not insurance policies against bad business decisions."[429]

310. In light of the above principles, the Tribunal does not agree with Total's argument that the legal regime (the pricing rules) that Argentina changed was the object of a "promise" by Argentina that was binding on Argentina, and on which Total was entitled to rely ("legitimate expectations") as a matter of international law. It is immaterial in this respect whether or not the "radical" changes in the Electricity Law regime that Total complains of are also in breach of Argentina's law and/or represent a use by SoE of its power in disregard of the Electricity Law.

[426] See Higgins, Taking of Property by the State: Recent Developments in International Law, (1982) Recueil Des Cours III, 338-339, quoted by Total (CL-189) in its Post-Hearing Brief para. 773.
[427] See above para. 122.
[428] See above para. 123.
[429] See above para. 124.

311. With respect to "capacity payments", Article 36 of the Electricity Law does not explicitly provide for such payments; it is telling that the cost of unsupplied energy is an element considered in determining the uniform energy rate. Total submits the economic explanation that capacity payments are essential to ensure that: (i) upfront investments can be amortized; and (ii) new investments are made.[430] Argentina's experts dispute this purpose.[431] The Tribunal notes that the SoE's regulatory powers to fix a capacity payment are so broad that the authority could even abolish such payments. This was meant to happen in June 2001 (shortly before Total entered the electricity sector, convertibility was abandoned and the later enactment of measures challenged by Total) by Decree 804/01, later abrogated by Law 25.468, as pointed out by both parties.[432]

312. The Tribunal has found that the rules concerning tariffs in the Gas Regime were not in the nature of specific commitments. In view of the freedom that States generally enjoy to amend their laws, laws could be changed in light of subsequent developments and needs. The Tribunal notes that the various provisions of the Electricity Law set forth above and invoked by Total are not different from a formal point of view from those invoked by Total in respect of the gas sector. They were and are regulation of a general nature, organizing a certain public interest sector in which private companies operate and setting forth the conditions of their operation. No guarantee of stability was included in those provisions. If anything, they were in many respects less rigid rules than those applicable to gas distribution. The Secretariat of Energy appears to have broader powers to regulate the electricity sector under the law than ENARGAS has for the gas sector. In light of the legal principles on which the Tribunal relied with respect to the TGN claim above, the changes made in the pricing structure, including specific parameters, are not *per se* in breach of promises or legitimate expectations of the investors.

[430] See Total's Post-Hearing Brief, para. 818.

[431] See Argentina's Post-Hearing Brief, para. 358 where Argentina submits that: "Capacity payments were not created as a guaranty to cover capital or recovery costs of the investments, and such circumstance was acknowledged by Abdala at the Hearing: 'In addition, capacity payments of $4 are a significant departure from the commitments that the investors would have an opportunity to recover their investments. An opportunity is not a guarantee, but an opportunity' […]." In response, Total answers that the margins recognized by the spot price would be insufficient to make a return on investment by private operators and "the capacity payment was an incentive to invest …". (see Total's Post-Hearing Brief, paras 119 and 122)

[432] See Total's Post-Hearing Brief, para. 120 and Argentina's Post-Hearing Brief, para. 351.

313. This does not mean that any change or alteration of the regime, negatively affecting the operations of the private generators and their economic equilibrium, is shielded from the application of the fair and equitable treatment standard guaranteed by the BIT. The respect for economic equilibrium principle entails that, in normal situations and from a long term perspective, the private generators are able to cover their costs and make a return on their investment, while providing their services to the market and consumers as required under the Electricity Law. If this was not the case due to the changes made to the electricity pricing principles after 2002, Argentina would have breached its obligations under Article 3 of the BIT.

314. Total quotes a public statement by the head of ENRE in November 2000 to the effect that Argentina's legislation recognizes the long-term nature of the investments in electricity so that "the companies should get a return on their capital investment such that it will guarantee maintenance of the infrastructure required to provide the service."[433] This is a relevant acknowledgment of a standard of treatment that conforms to sound management principles for the electricity sector for evaluating subsequent changes. This statement does not elevate, however, the specific pricing rules in the Electricity Law to an express commitment by Argentina on which Total could base legitimate expectations.[434] Moreover, what Total labels as "pricing rules" are better defined as "principles", as textually mentioned in Article 35.2 of the Electricity Law ("*atendiendo a los siguentes principios …*"), concerning not just prices but a regulatory method of calculation of tariffs (Article 36.1).

7.2 Evaluation of Specific Measures

7.2.1 The pesification of the capacity payments and of the spot price

315. The specific change relating to capacity payments about which Total complains is basically their redenomination in Argentine pesos, which transformed the US$10/MW rate to AR$10 (equivalent to US$4), subsequently increasing to AR$12.[435] Another effect of pesification complained of by Total is that the spot price was indirectly affected by pesification of gas tariffs in that "the ENARGAS price that

[433] See Total's Post-Hearing Brief, para. 836.
[434] See Total's Post-Hearing Brief, paras 828 and 854.
[435] See Total's Post-Hearing Brief, paras 123 and 910 ff. with reference to Resolution 2/02 of 14 March 2002 at Exhibit C-81.

served as a cap for the cost of gas that generators could declare was converted to pesos at a 1:1 nominal rate ("pesification") and frozen."[436]

316. These changes resulted in a consistent reduction in dollar terms of those prices as a direct consequence of Argentina's abandonment of the free convertibility system at par with the dollar at the end of 2001 – beginning of 2002 in response to the major economic crisis that the country was then facing. The reasons for and the way in which the convertibility regime was abandoned are well known and have been described above.[437] Values expressed in dollars, into which the peso had until then been freely changeable at a 1:1 rate, were converted into pesos at that same par value (and not readjusted according to the devaluated free exchange rate of the peso against the dollar, except partially for bank deposits). Values expressed in pesos remained so expressed since the peso was and remained the official currency of Argentina. It is therefore inaccurate to describe the process as the result of a "decision to reduce the capacity payment rate by 60% without any justification" as Total asserts , quoting its expert Dr. Abdala.[438] The Tribunal recognizes at the same time that the subsequent increase of the capacity payment in June 2002 (from AR$10 to AR$12), which was not, however, followed by any further adjustment, reflected an administrative decision by the SoE. The grounds for this decision have not been explained by Argentina in these proceedings.[439] On the other hand, as pointed out above at paragraph 270, the amount of the capacity payment was not legally linked to any definite parameter.

317. The Tribunal has already explained why the abolition of the convertibility of pesos assets, value and tariffs, which were interchangeable with their expression in dollars (the dollar being in free circulation in Argentina, accounts being freely available in dollars, etc.) under the convertibility regime, was within the competence of Argentina and not barred by the BIT clauses invoked by Total. The Tribunal has also justified its conclusion that even tariffs specifically fixed in U.S. dollars and the periodic readjustments to be made based on a U.S. price index (PPI) could be pesified in the circumstances at issue without breaching the BIT. This is because of

[436] See Total's Post-Hearing Brief, para. 123(a). See also above para. 287.
[437] See above paras 71-79.
[438] Total's Post-Hearing Brief, para 911.
[439] See in this respect Total's Post-Hearing Brief, footnote 1056 at p. 346 quoting Mr.Adbala's testimony. (Transcript (English) Day 5, 1352:7-1353:7)

the major economic, monetary and social crisis that forced Argentina to cease pegging the peso to the dollar. The Tribunal has found that the pesification affected all sectors of the economy and was carried out in a non-discriminatory way.[440]

318. That reasoning is also applicable in respect of the values, parameters and prices prescribed in the electricity system. If anything, reliance on the continuous application of dollar values or re-valued equivalent values in pesos was even less tenable in this sector for the following reasons.

319. First, there was no legal provision mandating that the prices and parameters on which Total relies be expressed in dollars and/or linked to foreign parameters (such as the link to the US PPI in respect of gas transport tariffs). In fact, Total does not suggest the contrary. The evidence indeed shows that it was common practice under the convertibility regime for peso and dollar currency denominations to be interchangeable. Accordingly, the denomination of a price or parameter in pesos rather than in dollars did not signal that a different regime was being applied." [441]

320. Thus Total's reference to individual elements of electricity prices that were specifically expressed in dollars is not supported by the evidence. Nor has Total pointed to particular features of such elements that would justify them being shielded from the devaluation and the abandonment of the convertibility regime.

321. Secondly, the monetary values determined by and used in the electricity law, such as the capacity payment, the variable spot price, the monomic price and the caps were applicable across the electricity sector to all generators, other entities and consumers. It is difficult to see how Argentina – even if it had wished to do so – could have maintained unchanged the previous values and prices in dollars in favour of some foreign-owned generators only. Even more so since some of those values

[440] See above paras 159-165.

[441] Most values set forth or fixed under the Procedures (Resolution 61/92) are expressed in pesos, as evidenced either by the use of the symbol or of the word "pesos". Some values are expressed in dollars (such as by using "u$s"). More precisely, sometimes in the Procedures the same value expressed in pesos is later referred to with the symbol of u$s. Compare Article 33 of Resolution 61/92, where capacity payment is expressed in pesos (5 $ (cinco pesos) per MWh), with Section 2.4.2.1 of Resolution 137/ 92, where the same value is expressed at p. 72 in US dollars (5 u$s/Mw hfv). Similarly, compare Article 34 of Resolution 61/92, where the "*Costo de la Energía no Suministrada*" is fixed at "0,75 $ (setenta y cinco centavos) por KILOVATIO-HORA", with Section 2.4.2.4 of Resolution 137/92, where the same amount is expressed at p. 74 in u$s. This confirms that under the general convertibility regime no difference was made in referring to one or the other currency that were for all purposes interchangeable.

were in turn derived from the costs of components produced in other sectors of the economy (such as the gas and other reference prices used in the calculation of the costs of the generators).

322. Additionally, Total's claim must be evaluated in the light of the "subjective" conduct of Total in making its investment. It is uncontested that Total acquired its shares in the two generators in September 2001. It is common knowledge, supported by the parties' exhibits in the present case, that at that date the economic and financial troubles of Argentina were already substantial; they were of domestic and international concern, not just within the business community and financial circles. This was just a few months before the explosion of the crisis and the ensuing currency devaluation, the enactment of the Emergency Law and the abandonment of the convertibility regime. The deterioration had accelerated in the first half of the year, with the abrupt replacements of the Minister of Economy and the Governor of the Central Bank, the modification of the peso's parity regime, and a major international bond swap. The assistance of the IMF under a Stand-By Arrangement launched at the beginning of the year had increased, notwithstanding growing doubts both about the ability of Argentina to respect the agreed upon conditions and the sustainability of the convertibility regime that the program was meant to support. When Total made its investment in Argentina, the country was suffering from a sustained capital flight (which would have almost completely drained the country's reserves within another few weeks) and foreign investors were taking measures to protect the monetary value of their funds in Argentina.[442]

323. In view of this context, it cannot be overlooked that Total made a long term investment in Argentina, of more than US$300 million, at a moment where the maintenance of the convertibility of the pesos with the US dollar at par was being put in doubt, irrespective of the soundness of the operation from an electricity business point of view.[443] On the one hand, as Total points out, the specific legal regime was

[442] See IMF, *Lessons from the Crisis*, *supra* note 53, 35-38, and Appendix II, Chronology of Key Developments in 2001-2 pointing to the lowering of Argentina's debt rating between July and October 2001. For an account of the development of Argentina's crisis in 2001 see above paras. 71-79 and sources quoted there. On capital flight from July 2001, see IMF *Evaluation Report*, *supra* note 53, 5, 13, 50-51.

[443] Total points out that electricity prices were at the time low because of over-capacity and that their increase had been forecasted following an expected increase in demand, so that the investment at that time made economically sense. See Total's Post-Hearing Brief, para 841ff, with reference to the testimonies of Mr Abdala and Montmayeur.

well established and investor-friendly, when Total made its investment. On the other hand, the financial and currency conditions of Argentina had already deteriorated markedly and steadily throughout 2001. As stated by the IMF:

> "[…] at the end of July, spreads between peso- and US dollar-denominated interest rates had reached 1,500-2,000 basis points, rendering the option of a zero deficit both increasingly unlikely and ineffective in maintaining the currency board. Indeed, the resumption, in July, of a large scale withdrawals of the deposits from Argentine banks were perhaps the clearest sign of the system's impending collapse absent any dramatic changes in economic policies or circumstances"[444]

324. The possibility of abandoning the 1:1 fixed parity with the US dollar, which would have affected the value of Total's investments and its future revenues in dollar terms, should therefore have been taken into account by a prudent and experienced international investor such as Total. The Tribunal considers that this context should have influenced Total's expectations when making its investments.[445]

7.2.2 The Alteration of the Uniform Marginal Price Mechanism

325. The Tribunal has already described the alterations complained of by Total and their impact on the conduct of the generators' business (see above 286 ff). The main feature is the abandonment of the uniform spot price, which was based on the variable cost of the marginal unit (namely the least expensive producer excluded by CAMMESA from the merit order), in favour of a reference to the costs of the units burning natural gas. Moreover, a fixed cap of AR$120/MWh replaced the previous variable "maximum price mechanism" that reflected the anticipated cost of failure. According to Total, the new price mechanism did not reflect the economic cost of the system and made it impossible for generators to operate with a reasonable margin and to cover their investment costs.[446] This is why, in 2002, both Central Puerto and

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On the other hand Argentina submits that the situation described was due to the recession that was affecting the country's economy.

[444] See IMF, *Lessons from the Crisis*, *supra* note 53, 36.

[445] This may well have been the case and have been reflected in the price paid by Total (US$327.45 million for Central Puerto's and HPDA's shares) since this price amounts to a fraction of the but-for value of Total's shares in the aforementioned generators (US$655 million) calculated by Total's experts six years later at the end of 2006 (see above para. 304). The Tribunal notes that this but-for value of Total's investments at the end of 2006 did not include any consideration of the above context.

[446] Total's Post-Hearing Brief, para 911

HPDA defaulted on their foreign currency loans even though the amount of those loans was reasonable.[447]

326. As to the general economic impact of the price changes (both spot and capacity), Total points out that there were shortages and a lack of new investments. This compelled Argentina to start importing electricity and, moreover, to resort to new programmes such as *Energía Plus* and the FONINVEMEM scheme in order to increase electricity supply.[448]

327. The Tribunal recalls its findings that the various features of the price structure described by Total, which were in place when Total made its investments, were not the object of specific promises by Argentina. The law spells out the general principle that the uniform price should reflect the economic cost of the system. It does not directly provide that such price be determined by the mechanism of a spot price based on the marginal unit. It is conceivable that a different system might have equally respected the principle of the economic equilibrium allowing generators to cover their costs and make a reasonable return on their investment as mentioned in general terms at paragraph 313 above. This requirement would have been met had the spot price been fixed on the basis of the costs of the marginal unit (uniform marginal price mechanism), without a cap of AR$120, according to the principles in force in 2001 (since that mechanism was indisputably fair and no different fair mechanism had been put in place nor proposed by Argentina as an alternative benchmark).

328. It cannot be disputed however, that the pricing system the SoE progressively put in place after 2002 is at odds with those principles as spelled out in the Electricity Law, even leaving pesification out of consideration. After 2002, the market has been characterized by unreasonably low tariffs.[449] These, in turn, have massively reduced the returns of the generators, barely permitting them to cover their variable costs, contrary to sound economic management principles for power generators operating

[447] Total's Post-Hearing Brief, para 122 referring to the testimony of Dr. Montamayeur.
[448] See Total's Post-Hearing Brief, para. 912 ff.
[449] The 2004 average price of residential electricity in Argentina was a fraction of prices in all industrial countries, around 20% of those in Germany, Japan, Italy; less than one third of those in France and the U.K.; and less than half of those in the US. In this regard, see Total's Post-Hearing Brief, para. 133 and table therein from Energy Information Administration, 2007, Exhibit C-706. Total emphasizes that the price of electricity in Argentina was already one of the lowest in the world in 2001: new investments in the sector since 1992 had more than doubled installed capacity, had eliminated power shortages and had brought the prices steadily down to the benefit of consumers, see Total's Post-Hearing Brief, paras 831-833 and tables there.

within a regulated system of public utilities[450]. The low prices encouraged a substantial increase in consumption that could not be matched by a parallel increase in supply, since the producers could not finance new investments under the rigid administrative pricing system in place.[451] The unsoundness of such a policy in light of practices generally followed in modern societies to ensure electricity supply, when this is left to private companies, is demonstrated by the subsequent lack of investment, power failures and the need to import electricity to Argentina (while the country was previously self-sufficient or even an exporter to neighbouring countries).[452]

329. The *Energía Plus* program and the FONINVEMEM scheme (to finance new generators through the use of unpaid receivables of existing generators) show that the pricing mechanisms put in place after 2002 were not economically sustainable. The Tribunal recalls that new electricity producers are to be remunerated at higher prices under the *Energía Plus* program so as to encourage new investments since existing generators lacked resources to expand due to the default of CAMMESA and the Stabilization Fund. This mechanism is in contrast with the principle of the uniform price, which should reflect the economic cost of the system and ensure that new investments are made according to the demand.[453]

330. The Tribunal considers that this situation, brought about by the SoE with full awareness of its negative impact on affected generators operating under sound economic principles, cannot be reconciled with the fair and equitable treatment

[450] According to Prof. Spiller and Dr Abdala, the current spot price is one third of the marginal cost, based on Cammesa figures, see Total's Post-Hearing Brief, para. 123(a) and graphic therein. Moreover, the fixed price cap of AR$120/MWh operates 40% of the time. In this regard, see Total's Post-Hearing Brief, paras 123(c), 893-895 and graphic therein; LECG Report on Electricity, para. 73.

[451] See Total's Post-Hearing Brief, para. 877, based on the data contained in the LECG Report on Electricity that have not been challenged by Argentina: "Argentina is on the brink of an energy crisis, as it was in the late 1980s. Electricity demand has grown 30% since 2002 [footnote 1015: Gallino and Sruoga, at para 66]; the economy has grown 8.8% annually [footnote1016:MoE, "*Informe Económico*" Año 2006, Exh. C-605, at 24.]; yet there has been no investment in new capacity". Total contrasts this evolution with the situation from 1999 to 2001, when lower growth in the demand for electricity had been due to the reduction in GDP. See Total's Post-Hearing Brief, para. 847 referring to Abdala cross-examination, Transcript (English) Day 5, 1411:8-1412:11.

[452] See Total's evidence mentioned supra at notes 442 and 444. The same evaluation has been expressed in the international press. See The Economist, August 23, 2008, 42-43 "*Argentina – Clouds gather again over the Pampas.*"

[453] Reference should be made not only to Article 36 but also to Article 2 (b) "… foster investments for the purpose of guaranteeing the gas supply in the long term" and (f) "encourage private investments in production… ensuring market competitiveness where possible" as recalled by Total in its Post-Hearing Brief, para. 879.

standard of Article 3 of the BIT. As a consequence, the Tribunal finds that Argentina has violated the BIT in this respect.

331. The disregard of the basic principles of the Electricity Law is relevant irrespective of whether the changes introduced were in violation of Argentina's domestic legal system, an issue that the Tribunal does not need to resolve. This finding of unfairness is reinforced by the fact that the complete overhaul of the electricity regime established by the Electricity Law which remained on the books, was effected through acts of administrative authorities.

332. The security that a regime established by law offered to investors, who necessarily plan on a long-term basis, was thereby severely undermined. This evolution goes beyond the normal regulatory risk that could be anticipated under the Electricity Law since the SoE operated from 2002-2003 with "unfettered discretion."[454]

333. The fair and equitable treatment standard of the BIT has been objectively breached by Argentina's actions, in view of their negative impact on the investment and their incompatibility with the criteria of economic rationality, public interest (after having duly considered the need for and responsibility of governments to cope with unforeseen events and exceptional circumstances), reasonableness and proportionality. A foreign investor is entitled to expect that a host state will follow those basic principles (which it has freely established by law) in administering a public interest sector that it has opened to long term foreign investments. Expectations based on such principles are reasonable and hence legitimate, even in the absence of specific promises by the government. Hence, the fair and equitable standard has been breached through the setting of prices that do not remunerate the investment made nor allow reasonable profit to be gained contrary to the principles governing the activities of privately owned generators under Argentina's own legal system. This is especially so in the utility or general interest sectors, which are subject to governmental regulation (be it light or strict), where operators cannot suspend the service, investments are made long term and exit/divestment is difficult.

[454] Total's Post-Hearing Brief, para. 849. This holds true regardless of the correctness or relevance of the distinction that Total emphasizes (at paras 849, 863 ff) between "public interest sectors" such as electricity generation, governed by free-market rules that limit regulatory discretion, and distribution, which Total describes as a tariff-based sector, where prices are completely regulated.

334. An additional element that supports the Tribunal's conclusion is the qualification of generators' rights under Electricity Law regime. Their right to respect for the price determination rules set forth under the Electricity Law have been considered "acquired rights" of property under Argentina's Constitution "in a sector which, by operation of law, does not consist of a public service but a public interest activity". These rules are "the legal standards which should be considered to effectively determine administratively set prices."[455]

335. Finally, the Tribunal finds further support for its conclusion in the terms of HPDA's concession. Article 56 of the concession grants a right of termination to the concessionaire in case of substantial modifications to the criteria for determining prices set forth in the Electricity Law, when those modifications are arbitrary and make performance too onerous "under section 1198 of the Civil Code."[456] The Tribunal is mindful that this provision is not directly applicable here. This is because HPDA has not acted on this clause in Argentina nor has Total invoked it directly. Still, the Tribunal considers it significant that radical changes in electricity pricing rendering the concessionaire's contractual obligation an "excessively onerous performance" would be a just cause for termination of the concession by the concessionaire. This provision shows that administrative authorities do not have such broad discretion to make radical changes to the system under the Electricity Law, as Argentina claims.

7.2.3 The "Refusal" to Pay Power Generators Their Receivables and the Conversion of Receivables Into a Stake in FONINVEMEM

336. The Tribunal agrees with Total that the measures discussed at paragraph 293 ff. resulted in a *de facto* refusal by Argentina to pay power generators their receivables, even at the reduced values resulting from the measures.

337. The Tribunal is not convinced by Argentina's argument that generators who decided to participate in FONINVEMEM (among those Total's generators) did so on a voluntary basis. On the contrary, based on the evidence submitted, the Tribunal agrees with Total that the conversion offered by Argentina as of August 11, 2004

[455] See Total's Post-Hearing Brief, para. 873 based on the decision of the Federal Administrative Court of Appeals of 11 March 2004 *AGEERA c EN – PEN – Resol 8/02 SE y Otros s/ Amparo Ley 16,986* at Exhibit AL RA 215.
[456] See above para. 277; Total's Post-Hearing Brief, para. 856.

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), which was appointed by the public regulator to manage the market efficiently, 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.[457]

338. This scheme must be considered as a kind of forced, inequitable, debt-for-equity swap, not due to unfavourable market conditions or a company's crisis (as is usually the premise of such swaps in the private market), but due to governmental policy and conduct by Argentina. As such, in the view of the Tribunal it represents a clear breach of the fair and equitable treatment obligation of the BIT for which Argentina is liable to pay damages. The liability of Argentina is not excluded by the fact that the shares resulting from the conversion have a market value as adduced by Argentina, since the generators have been or are being installed. The determination of the value of these shares is relevant to the valuation of damages and will have to be taken into account in the quantum phase.

8. Consequences of the Tribunal's Findings on Total's Claim for Damages

339. In view of the above findings, the calculation of damages proffered by Total cannot be accepted by the Tribunal since the ambit and basis of the breach found here is different and considerably more limited than that assumed by Total. A quantum phase is, therefore, necessary for the parties to elaborate and document their respective positions as to damages. More specifically, the quantum phase shall deal with the determination of the losses suffered by Total because of the negative impact

[457] See SoE Resolution 826/04, Preamble seventh paragraph (Exhibit C-223). In its Post-Hearing Brief Total points out at para. 970 (b) that under the subsequent SoE Resolution 1.193/05 (Exhibit A RA 288) "the Government ultimately used the receivables of those generators that refused to participate to FONINVEMEM to finance the construction of the two new plants, and prevented them from becoming shareholders in the new plants."

of Argentina's actions on HPDA and Central Puerto that have been found to be in breach of the BIT.[458]

9. Examination of Total's Claims under Articles 4, 5(1) and 5(2) of the BIT

340. The Tribunal considers that Total's claim concerning the pesification of the capacity payments and the spot price does not involve a breach of the expropriation and full security standards, since the conclusion above at paragraphs 315-324 was that the pesification was a lawful measure by Argentina in the circumstances. As to Total's claim regarding the alteration of the uniform marginal price mechanism, which the Tribunal has in large part accepted at paragraphs 325-335, the findings of breach were based on the unfairness of Argentina's conduct.

341. As is evident from the analysis above, the various measures did not amount to, nor entail an expropriation of Total's investments in the power generation sector in breach of Article 5(2) of the BIT notwithstanding that they resulted in a consistent decrease in value of the assets due to decreased revenues caused by the actions of Argentina's authorities in the sector. This is because, as the Tribunal has clarified at paragraph 191 ff. above, the mere loss of value of an investment due to host State measures without deprivation of control is not a sufficient basis to find an unlawful indirect expropriation. This conclusion is reinforced in view of the text of Argentina-France BIT, as stated at paragraph 194.

342. The "refusal" to pay power generators their dues and the forced conversion of receivables into participation in FONINVEMEM, which the Tribunal has found in breach of Article 3 of the BIT, might be considered also an expropriation in breach of Article 5(2) of the BIT. The Tribunal believes, however, that damages under a finding of expropriation would not be different from those to be determined in the quantum phase under the finding of breach of the fair and equitable standard made above at paragraph 339 so that the Tribunal finds unnecessary to examine Argentina's conduct further under Article 5(2) of the BIT.

[458] This includes determining the proper "but for scenario", the actual scenario and the possible influence of both the purchase price paid by Total in 2001 and the sale price of its equity stakes in Central Puerto and HPDA at the end of 2006.

343. Under Article 5(1) of the BIT investments made by nationals of one Party in the territory of the other Party benefit from full protection and security in accordance with the principle of fair and equitable treatment in Article 3 of the BIT (In the Spanish version of the BIT: "*protección y plena seguridad en aplicación del principio del tratamiento justo y equitativo mencionado en el artículo 3 del presente Acuerdo*". In the French version of the BIT: "*d'une protection et d'une sécurité pleines et entières, en application du principe de traitement juste et équitable mentionné à l'article 3 du présent Accord*"). A plain reading of the terms used in Article 5(1) of the BIT, in accordance with Article 31 VCLT, shows that the protection provided for by Article 5(1) to covered investors and their assets is not limited to physical protection but includes also legal security. The explicit linkage of this standard to the fair and equitable treatment standard supports this interpretation. This appears to be consistent with the interpretation of differently worded BIT clauses adopted by other tribunals, even if not uniformly.[459] Total's claim under Article 5(1) is rooted in the alleged violation by Argentina of its obligation to extend legal security (rather than physical protection) to Total's investments.[460] As already outlined above, the regime for generators established by Argentina after 2002 was characterized by a marked difference between the principles in the Electricity Law and the regulation resulting from SoE enactments, so that, according to Total, Argentina breached also its duty to grant to Total's investments legal security and protection. Argentina opposes this argument and points to the broad powers granted to the SoE under Argentina's legal system. The Tribunal is of the view that an analysis in depth of Total's claim under Article 5(1) of the BIT is unnecessary. In fact, the obligation set forth in Article 5(1) forms part of the fair and equitable treatment standard, so that a finding of breach of that obligation would form part of the breach of Article 3 rather than be an independent finding of breach. The Tribunal has already found such a breach in respect of the same facts so that no additional finding of breach of Article 5(1) is warranted. Moreover, no further damages would result from following a different approach.

344. Finally, as to the prohibition of discrimination in Article 4 of the BIT, Total has emphasized that the severe limitations on the price of electricity were imposed by

[459] See *supra* note 113.
[460] See above at paras 279-284.

Argentina in order to subsidize other sectors of the economy, including the export industry, at the cost of the generators. This may well be the case, but such a policy would not *per se* represent a breach of the non-discrimination standard. This standard requires, as a rule, a comparison between the treatment of different investments, usually within a given sector, of different national origin or ownership, as stated above in respect of the TGN claim.[460] The purpose is to ascertain whether the protected investments have been treated worse without any justification, specifically because of their foreign nationality. The similarity of the investments compared and of their operations is a precondition for a fruitful comparison. The alleged cross-sector subsidisation does not comply with such a condition. Such a policy choice should clearly be made at the expense of foreign investors in order to breach Article 4.[461] *In casu*, Total has not shown that its power generators were treated differently from others, nor specifically that this would have reflected a nationality bias. This claim cannot therefore be accepted.

10. Argentina's State of Necessity Defence

345. Before concluding, the Tribunal must address the plea of Argentina based on the defence of "state of necessity" under customary international law in order to excuse its breaches of the BIT found by the Tribunal in respect of Total's investments in power generation. The Tribunal recalls in this respect its analysis of the issue in respect of Total's TGN claim, and specifically the rigorous conditions that are required to sustain such a defence in light of Article 25 of the ILC Articles on State Responsibility.[462] In respect of Total's claim concerning its investments in power generation, the Tribunal has found the pesification of capacity payments, spot price and any other parameters and/or values prescribed in the electricity system not to be in breach of the BIT. On the contrary, the Tribunal has found the alteration of the uniform marginal price mechanism (discussed at paragraph 325 ff. above) and the refusal to pay power generators their receivables and their conversion into a stake in FONINVEMEM (discussed at paragraph 336 ff. above) to be in breach of the fair

[460] See *supra* para. 210 ff.
[461] The Tribunal recalls that Total has not shown a *prima facie* case of discrimination based on foreign nationality as to the power generation sector.
[462] See para. 220 ff. above.

and equitable treatment standard. As a consequence, the Tribunal must address Argentina's state of necessity defence in respect of these two measures only. 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 pointed out by Total, alternatives not in breach of the BIT, such as targeted subsidies, were available to Argentina in order to keep electricity tariffs at affordable levels for consumers in need.[463] 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.

[463] See Total's Post-Hearing Brief, paras. 1047 ff.

346. The Tribunal, based on the above reasoning and findings,

- concludes that Argentina has breached its obligations under Article 3 of the BIT to grant to Total fair and equitable treatment, in respect and as a consequence of:

(a) the alteration of the uniform marginal price mechanism, as specified in the preceding paragraphs;

(b) the non-payment of receivables arising from energy supplied in the spot market by HPDA and Central Puerto and the conversion of such receivables into shares in new generators under the FONINVEMEM scheme.

- concludes that the damages thereby suffered by Total must be indemnified/compensated by Argentina in the amount to be determined in a separate quantum phase of these proceedings;
- rejects all other claims by Total related to its investment in HPDA and Central Puerto under Articles 4 and 5 of the BIT;
- defers the determination of the above damages to the quantum phase; and
- rejects any other plea and defences by Argentina, including those premised on the "state of necessity."

Part IV - Total's Claim as to its Investments in Exploration and Production of Hydrocarbons

1. Total's Investments in Exploration and Production of Hydrocarbons

347. Total's original investment in Argentina was with respect to the exploration and development of an area in and around the Austral Basin in Tierra del Fuego known as Area 1 De La Cuenca Austral, also known as Cuenca Marina Austral – 1 ("CMA-1"). The terms of Total's investment were set out in a contract between *Yacimientos Petrolíferos Fiscales Sociedad del Estado* ("YPF") and Total Exploration S.A. and its other Consortium members who had been successful in the competitive bidding process for the contract. The *Contrato Para La Exploración y Explotación Del Área No. 1 De La Cuenca Austral – Tierra del Fuego* ("Contract 19.944") was approved by Decree 2853/78, dated 1 December, 1978. It was executed on 24 April, 1979.[464] Pursuant to the terms of Contract 19.944, the Consortium was required to explore and develop CMA-1. In exchange, YPF was required to buy all of the hydrocarbons the Consortium extracted (including crude oil and natural gas) at a price calculated on the basis of free-market prices as reflected by the price of Nigerian bonny light crude oil.[465]

348. Contract 19.944 was approved by Decree 2853/78 pursuant to Article 98(g) of the *Ley de Hidrocarburos*, Law No. 17.319, adopted on 23 June, 1967.[466] Pursuant to that law, the National Executive Power was responsible for setting national policy with respect to the exploitation, industrialization, transport and commercialization of hydrocarbons and had the power to grant exploration permits and concessions for the

[464] See Exhibits C-63(1) and C-63(2). At the time of the award of Contract 19.942, the members of the consortium (the "Consortium") were Total Exploration S.A., Deminex Deutsche Erdoelversorgungsgesellschaft mbh, Bridas S.A.P.I.C. and Arfranco S.A. As described by Total's witnesses, the composition of the Consortium changed somewhat over time. Total's investment came to be held by Total Austral S.A. In July 1999, Deminex changed its name to Wintershall Energía S.A. In 1998, after a reorganization process, Bridas, which had previously acquired Arfranco's interest, transferred its rights in the Consortium to Panamerican Sur SRL, a joint venture between Bridas (40%) and Amoco, now BP Amoco (60%); see Contie WS1, para.13. The respective interests in the Consortium for the purposes of this arbitration are: Total 37.5%; Deminex 37.5%; and Panamerican 25%.

[465] See Total's Memorial, para. 126 and the sources cited there; Total's Post-Hearing Brief, paras. 626-628; Contie WS1, ¶15. Pursuant to the Contract, YPF was required to calculate the energy equivalent in natural gas of a barrel of Nigerian bonny light crude oil and then pay the Consortium the portion of that price necessary to generate one million BTUs of natural gas.

[466] See Exhibit C-64.

exploitation and transportation of hydrocarbons. Article 6 of the *Ley de Hidrocarburos* provided as follows:

> *Art. 6.* Permit holders and concessionaires shall have ownership of the hydrocarbons which they extract and, consequently, they shall be able to transport, sell and industrialize them pursuant to the regulations adopted by the National Executive on reasonable technical-economical bases which addressed the needs of the internal market and stimulated exploration and production of hydrocarbons. When national production of liquid hydrocarbons is not sufficient to cover internal needs it shall be mandatory for all such hydrocarbons of national origin to be used in the country, except where legitimate technical reasons make this unadvisable. Consequently, new refineries or extensions shall adapt to the rational use of national petroleum.
>
> If, in the said period, the Executive set the sale prices for crude petroleum products in the internal market, such prices shall be equal to those established for the relevant State company, but, in any event, they shall not be less than the prices for imported petroleum of similar condition. In the event the price of imported petroleum increases significantly due to exceptional circumstances, those prices are not to be considered for the setting of sale prices in the internal market. Rather, the latter could be set on the basis of the actual cost of production of the State company, the technically applicable depreciation rate and a reasonable rate of return on the investments made by the said State entity. Any prices fixed for sub-products were required to be compatible with those set for petroleum.
>
> The Executive shall permit the export of hydrocarbons or derivatives not required to adequately meet internal needs, provided that such exports are carried out at reasonable commercial prices. Further, the Executive is empowered to set rules for the internal market in order to ensure rational and equitable access to it by all producers in the country.
>
> Natural gas production may be used in the exploitation requirements of the fields extracting them and of other fields of the area, whether or not they belong to the concessionaire and pursuant to the provisions in Article 31. The State company rendering public gas distribution services shall have preference for acquiring, within the acceptable terms, the amounts exceeding the prior use for agreed upon prices, which ensure a fair rate of return of the corresponding investment, considering the special characteristics and conditions of the field.
>
> With the approval of the applicable authority, the concessionaire shall decide the destination and the availability conditions of gas which is not used in the previously indicated form.
>
> The commercialization and distribution of gas hydrocarbons is subject to the regulations of the National Executive.

349. When Total and the other Consortium members entered into Contract 19.944, Law 19.640 of 2 June, 1972 exempted exports from Tierra del Fuego from export taxes.[467]

[467] See Exhibit C-292. Subsequently, the Customs Code confirmed the validity of the Tierra del Fuego exemption by providing for a distinction between general customs areas and confirming Tierra del Fuego's status as a special customs area. See Exhibit C-293.

350. After Contract 19.944 was signed, Total conducted exploratory drilling and obtained positive results . In 1987, Total and the Consortium members arranged for US$250 million in financing to develop the main oil field in the CMA-1 region, Hidra. Production from the Hidra field commenced in July 1989. By the beginning of 1990, the Hidra project consisted of two production platforms that produced approximately 27.000 barrels per day. In addition, following the discovery that there was a connection between another field in the CMA-1 area (the ARA Field) and an onshore field owned by YPF known as Cañadón Alfa, YPF agreed to accord the Consortium the right to production in the Cañadón Alfa Field according to the terms of Contract 19.944 (the "Unitization Agreement"). Total and the Consortium made substantial investments in the Cañadon Alfa Field such that, by 1994, Cañadon Alfa had 71 gas wells that, on average, delivered to YPF approximately 6.3 million cubic metres of natural gas per day.[468] In 1993, Total announced the discovery of substantial additional offshore gas reserves.[469]

351. In 1989, Argentina undertook a process of reform and privatization of many aspects of its economy. Argentina sought to increase private investment in the exploration, production and distribution of hydrocarbons, through privatization of YPF, the divestment of a number of YPF's concessions; the break-up and privatization of Gas del Estado and the creation of a concession system that provided for the production of hydrocarbons by private enterprises. These goals, among others, were implemented by way of a number of legislative measures.

352. One of the first steps taken by Argentina was the adoption of Decree 1212/89 which called for the renegotiation of existing contracts between foreign investors and YPF. Decree 1212/89 was intended to increase production of hydrocarbons and to support progressive deregulation; replace State intervention with free market mechanisms and the principle of free disposal of crude petroleum and its derivatives; permit the prices for hydrocarbon products of national origin to reflect international prices; and replace rules that limited the free commercialization of crude oil and its derivatives. Decree 1212/89 provided in relevant part as follows:

[468] See, generally, Contie WS1, paras. 16-20.
[469] Contie WS1, para. 21. This new discovery referred to reserves at drill sites named Carina, "Carina e-3" and "Carina e-4". These were similar to discoveries Total had made in the early 1980s at Carina e-1 and e-2.

Art. 3. EXTENSION OF THE FREE MARKET. *YACIMIENTOS PETROLÍFEROS FISCALES SOCIEDAD DEL ESTADO* is hereby instructed to negotiate in a mutual agreement, within a term of six (6) months, with holders of pre-existent hydrocarbon extraction work, export and production contracts, whereby *YACIMIENTOS PETROLÍFEROS FISCALES SOCIEDAD DEL ESTADO* is bound to receive the extracted hydrocarbons, the reconversion of said contracts into the concession system or association of the Law No. 17.319 and its regulations. In every case, the contracts reconversion shall be subject to the approval of the National Executive after the opinion issued by the Secretary of Energy.

The contracts emerging from the regime established by the Decree No. 1443/85, as amended by the Decree No. 623/87, shall be exempted from the aforementioned provisions. The Ministry of Economy and Public Works and Services shall establish the policies governing said contracts in a term of one hundred and eighty (180) days, which policies shall be compatible with the principles established in the Decree No. 1055/89 herein.

After the six (6) months mentioned in the first paragraph in this article, *YACIMIENTOS PETROLÍFEROS FISCALES SOCIEDAD DEL ESTADO* shall submit the proceedings to the Secretary of Energy, which shall propose the measures it considers adequate to the contractors in order to re-establish the financial economic balance. In case that is not possible and that there are justified public interest and/or fiscal reasons preventing the continuity of said contracts, the Secretary of Energy shall provide the legal measures that may be adopted to those ends.

….

Art. 4. FREE AVAILABILITY. The oil produced by the new concessionaire and the percentage related to the private partner will be freely available as per Art. 15 of Decree No. 1055/89.

….

Art. 6. FREE IMPORT AND EXPORT. Prior authorization is not needed for the import of crude oils and its by-products, which shall be exempt from import fees until the condition or term established in article 5 hereof is complied with. As from that moment, the import of crude oil and its by-products shall be subject to the general fee policies.

For the export of crude oil and its by-products, the Secretary of Energy shall make a decision regarding the authorization of the export within a maximum term of seven (7) working days as from request, after which it shall be deemed automatically granted.

….

Art. 9. PRICE FREEDOM. After the transition period, the price of oil will be agreed upon freely. The prices of all oil by-products at all the stages shall be freed.[470]

353. Two other decrees were issued in conjunction with Decree 1212/89. These were Decrees 1055/89 and 1589/89.[471] Together these Decrees were referred to collectively by the Claimant as the "Deregulation Decrees". Decree 1055/89 provided in relevant part as follows:

WHEREAS:

[470] See Exhibit C-65(2).
[471] See Exhibits C-65(1) and C-65(3).

….
There are hydrocarbons fields operated by *YACIMIENTOS PETROLÍFEROS FISCALES SOCIEDAD DEL ESTADO* where a low level of production is registered as a consequence of the long lasting inactivity and/or semi-exploitation state.
Such fields, for its marginality characteristic, require the application of an exploitation scheme that permits the active and direct participation of investments deriving from private capital for its reactivation and increase of production.
It is also necessary, in those fields operated by *YACIMIENTOS PETROLÍFEROS FISCALES SOCIEDAD DEL ESTADO* registering a greater level of production, to achieve a better recovery of the resource applying assisted production techniques.
Such techniques require the contribution of modern technology and financial-economic capacity concurring to the development of the fields together with *YACIMIENTOS PETROLÍFEROS FISCALES SOCIEDAD DEL ESTADO*.
….
The objective of the national Government is to replace State intervention in the setting of prices, margins and quotas with market mechanisms and the free play of offer and demand.
It is the Government's policy to deregulate the sector to permit effective and free competition as quickly as possible in order to reflect international values and, therefore, it was necessary to permit the free disposition of hydrocarbons both in the internal market and the export market.
Sections 8, 9, 10 and 11 of the Law No. 23,696 and sections 2, 6, 11, 95 and 98 of the Law No. 17,319 confer related powers to the National Executive.
….
Article 1. Articles 8, 9, 10 and 11 of the Law 23,696 and articles 2, 6, 11, 95 and 98 of the Law No. 17.319 are regulatory. The promotion, development and execution of plans intended to increase the national production of liquid and gas hydrocarbons, including its by-products, are of top priority need in order to ensure the internal self-supply and an adequate margin of reserves, to reach the full development of the petrochemical industries and to obtain exportable balances, giving privilege to the industrialization of the resources in their place of origin.
….
Art. 14. FULL RIGHT OF DISPOSITION OF HYDROCARBONS. Hydrocarbons produced from concessions governed by the National Mining Code would benefit from a full right of free disposition, as from the one hundred and eighty (180) days from the due date hereof.
Art. 15. The free availability of hydrocarbons referred to in sections 5(d), 13 and 14 of this Decree, shall be governed by the following provisions:
a) The products can be sold freely in the internal and the external markets, within the terms of the applicable legal framework
b) The companies shall be ensured access to the systems and means of treatment, movement, storage, and dispatch at rates compatible with international prices.
c) The payment of royalties on freely available hydrocarbons shall be borne by the companies, in conformity with the provisions set by the SECRETARY OF ENERGY.[472]

354. Decree 1589/89 provided in relevant part as follows:

[472] Decree 1055/89, Exhibit C-65(1).

WHEREAS:

Article 3(2) of the Decree No. 1212/89 exempted the contracts deriving from the regime of the Decree No. 1443/85, as amended by Decree No. 523/87 from the regime, and established that the Ministry of Economy, Public Works and Services shall set the polices for such contracts, in a compatible way with the principles established in the Decree No. 1055/89, setting a term of one hundred eighty (180) days to those ends.

The Government has an interest in establishing clear and definite rules which guarantee the stability and legal security of existing contracts in the petroleum sector.

….

Art. 3. EXPORT AND IMPORT OF HYDROCARBONS: The export and import of hydrocarbons and its by-products is hereby authorised, which will be exempt from any present or future tariffs, rights or duties. They shall not be entitled to any present or future reimbursements or rebates, falling due as from the effectiveness of the current decree.

The export documentation shall be authorised with as provided for in article 6(2) of Decree No. 1212/89. The related requests may relate to singular transactions or term exports programs which, in the case of liquid hydrocarbons, may not exceed 1 (one) year.

….

Art. 5. ON THE FREE AVAILABILITY: The producers with free availability of crude oil, natural gas and/or liquefied gases as defined in articles 6 and 94 of Law 17319, 14 and 15 of Decree No. 1055/1989, articles 3 and 4 of Decree 1212/1989 and the producer that agree thus in the future shall have the free availability of currencies established in the competitive biddings and/or renegotiations, or agreed upon in the related contracts, whether the hydrocarbons are exported, in which case they would not have to bring into the country the foreign currency related to such percentage or are sold on the domestic market, in which case they will be entitled to the foreign currency related to such percentage. In all the cases, the maximum freely available percentage on the free foreign exchange market may not exceed 70% (seventy percent) of the value of each transaction.

Art. 6. ON EXPORT RESTRICTIONS: In the event the National Executive proceeds to establish on the exportation of crude petroleum and/or its derivatives, Article 6 of the Law No. 17.319 shall become enforceable, by virtue of which producers, refiners, and exporters shall receive, per product unit, an amount not less than that of petroleum, and derivatives of a similar nature.

In the event of restrictions on the right of free availability of gas, the price of a thousand cubic meters (1,000 m^3) of gas of nine thousand three hundred calories (9,300 kilocalories) shall not be less than thirty five per cent (35%) of the international price per cubic meter of Arabian Light petroleum of 34 API.

The National Executive shall notify the decision of restriction to exports of crude and/or other derivatives twelve (12) months before the restriction

application date. For the purposes hereof, the currency equivalence shall be determined applying the rate of exchange established in Article 4 hereof.[473]

355. In 1991, Argentina adopted Decree 2411/91 (the "Reconversion Decree") which authorised YPF to renegotiate its service contracts that had been adopted under the previous legislative regime, including Contract 19.944, and to convert these into new agreements consisting of two parts: exploration permits and exploitation concessions. The Reconversion Decree specifically referred to the Deregulation Decrees, which established as guiding principles of the national government's policy for the hydrocarbon sector: the promotion of [free] market rules in fixing prices and [the production] quantities of hydrocarbons; and the right of free disposal and free commercialization, domestically and internationally, of the hydrocarbons produced by the concessionaires.[474] With respect to the reconversion of the service contracts into concessions, the Reconversion Decree provided the following rights for the holders of the new concessions:

> Art. 5. Holders of the exploitation permits and concessions deriving from the reconversion provided for herein shall enjoy full property rights over hydrocarbons they produce in their areas, pursuant to Article 6 of the Law 17,319 and shall also enjoy the free availability of said products pursuant to Article 15 of the Decree No. 1055 dated 10 October, 1989; Article 4 of the Decree No. 1212, dated 8 November, 1989 and Articles 5 and 6 of the Decree No. 1589 dated 27 December, 1989, which terms are incorporated in the permit and/or concession title for its whole term of duration.
>
> Art. 6. Holders of the exploitation concessions deriving from the reconversion established herein, shall have the free availability of seventy per cent (70%) of the currency deriving from the commercialization of hydrocarbons extracted in the area, pursuant to the provisions of Article 5 of the Decree No. 1589, dated 27 December, 1989, unless another rule authorizes a higher percentage or there is no obligation of entering the currency.
>
> Art. 7. Every restriction to the free availability referred to in the previous Articles shall empower concessionaires of the exploitation to receive, for the time of the restriction, a value that is not lower than the one established in Article 6 of the Decree No. 1589, dated 27 December, 1989.
>
> Art. 8. The provisions established in Articles 5, 6 and 7 above shall apply to the exploration permits deriving from the reconversion set forth in this Decree.
>
> Art. 9. Holders of the exploration permits or exploitation concessions shall be subject to the applicable general fiscal legislation; the provisions that may be imposed in a discriminatory way on, or specifically in relation to the person, the judicial condition, or

[473] Decree 1589/89, Exhibit C-65(3).

[474] See Exhibit C-66, Preamble, which reads as follows:

Decree No. 1055, dated 10 October, 1989 and Decree No. 1212, dated 8 November, 1989, establish two governing principle of the National Government Policy for the hydrocarbons sector, to wit: the privilege conferred on the market rules in the determination of prices and amounts of hydrocarbons and its free availability on the part of the concessionaires, and the associates to the former *YACIMIENTOS PETROLÍFEROS FISCALES SOCIEDAD DEL ESTADO*, which implies its free internal and international commercialization.

the activity of the permit holder or the assets intended for the execution of the respective areas shall not be applicable.

Permit holders or concessionaires shall pay the fee established in Article 57 and 58 of the Law No. 17,319, as it may correspond.

Art. 10. Concessionaires shall be responsible for the direct payment to the province where the concession they hold is located, on behalf of the National State, of the royalties resulting from the application of Articles 59 and 62 of the Law No. 17,319, paying up to twelve per cent (12%) of the production valued on the base of the prices effectively obtained in the operations of commercialization of hydrocarbons from that area, with the deductions established in Articles 61, 62 and 63 of the Law No. 17.319.

….[475]

356. In 1992, Argentina adopted a new law regulating the transport and distribution of natural gas (the "Gas Law").[476] The general goals of the new Gas Law were stated to be as follows:

Art. 2. The following objectives for the national policy on electricity supply, transportation and distribution of natural gas are hereby established. They shall be executed and controlled by the *Ente Nacional Regulador del Gas*, created under Art. 50 hereof:

(a) To adequately protect the rights of users;

(b) To promote competition in the electricity production and demand markets, and to foster investments for the purpose of guaranteeing the gas supply in the long term;

(c) To promote the operation, reliability, equality, free access, non-discrimination and widespread use of services and installation of electricity transportation and distribution;

(d) To regulate activities connected with electricity transportation and distribution, by ensuring that applicable services be fair and reasonable;

(e) To promote efficiency in the transport, storage, distribution and use of natural gas;

(f) To promote the rational use of natural gas, looking after an adequate protection of the environment;

(g) To intend that the price of the supply of natural gas to the industry be equivalent to the one in foreign countries having similar resources and conditions.

357. In 1993, YPF conducted an initial public offering in the United States of America in order to issue tradeable debt in that country. In this connection, YPF, which was still a publicly-owned entity, issued a prospectus regarding the issuance of American depository shares in which it described the regulatory regime as follows:

[475] Exhibit C-66.
[476] Exhibit C-31.

Market Regulation

> Under the Hydrocarbons Law and the Oil Deregulation Decrees, holders of production concessions have the right to produce oil and gas, and own and are allowed to dispose of such production in the market without restriction. As a result, the Company, as well as private companies producing oil and gas under service contracts with YPF following conversion of such contracts to concessions, may sell their production in domestic or export markets, and refiners may obtain crude oil from suppliers within or outside Argentina.
> The Hydrocarbons Law authorizes the National Executive to regulate the Argentine oil and gas markets and prohibits the export of crude oil during any period in which the National Executive finds domestic production to be insufficient to satisfy domestic demand. In the event the National Executive restricts the export of oil and petroleum products or the free disposition of natural gas, the Oil Deregulation Decrees provide that producers, refiners and exporters shall receive a price, in the case of crude oil and similar imported petroleum products, and in the case of natural gas, not lower than that 35% of the international price per cubic meter of Arabian light oil, 34 API.
>
> *Taxation*
>
> Holders of exploration permits and production concessions are subject to federal, provincial, and municipal taxes and regular customs duties on imports. The Hydrocarbons Law grants such holders a legal guarantee against new taxes and certain tax increases at the provincial and municipal levels. Holders of exploration permits and production concessions must pay an annual surface tax based on area held. In addition, "net profit" (as defined in the Hydrocarbons Law) of holders of permits or concessions accruing from activity as such holders is subject to a special 55% income tax. This tax has never been applied. Each permit or concession granted to an entity other than the Company has provided that the holder thereof is subject instead to the general Argentine tax regime, and a decree of the National Executive provides that the Company also is subject instead to the general Argentine tax regime.[477]

358. In 1993, after the adoption of the Reconversion Decree, YPF requested that Total and the members of the Consortium agree to convert Contract 19.944 into a concession agreement pursuant to the terms of the Reconversion Decree. As the operator of the Consortium, Total represented the Consortium in negotiations with the Argentine authorities.[478] After several months of negotiations, Total and Argentina reached agreed terms for the conversion of Contract 19.944 into the new concession agreement regime.[479] On 23 November 1993, Total and YPF signed a

[477] YPF "Prospectus, YPF Sociedad Anónima, 105 American depository shares representing 105 million Class D shares", dated 28 June 1993, Exhibit C-308, pp. 69-70.
[478] See Contie WS1, paras. 28 and following. Total was represented by Patrick Rambaud, Total Austral's general manager at the time and Michel Contie, vice-president of Total Latin America at the time. Argentina was represented generally by YPF and, on several occasions, by the Argentine Secretary of Energy.
[479] See Contie WS1, paras. 29-31. According to Mr. Contie and Total, there were two preconditions for the conversion of Contract 19.944 into a concession. These were that the replacement concession agreements would

document known as the "*Acta Acuerdo*" which set out the parties' agreement for the reconversion of Contract 19.944 into a production concession and an exploration permit under the new concession agreement regime.[480] This *Acta Acuerdo* provided for the conversion of Contract No. 19.944 into an exploration permit with a term until 1 May, 1996 and a production concession (*concesión de explotación*) with a term of 25 years (plus a possible extension pursuant to Article 35 of Law 17.319) in return for the rescission of Contract No. 19.944 and the extinguishment of the rights and obligations assumed by the parties pursuant to that contract. The *Acta Acuerdo* referred specifically to the Deregulation Decrees and the Reconversion Decree and the rights granted to the holders of the new concessions pursuant to those instruments.[481]

359. The terms of the above *Acta Acuerdo* and the provisions of the Deregulation Decrees were specifically referred to, approved and adopted in Decree 214/94 (the "Concession Decree") adopted on 15 February, 1994. The Concession Decree provided, in part, as follows:

> That the reconversion of Contract No. 19,944 implies for its holders, a substantial juridical change for the abandonment of its position as contractor of *YPF SOCIEDAD ANÓNIMA*, preserved, to a great extent, from the economic risk of exploitation once the mining risk phase had been overcome. The important change in their economic position is also relevant for them upon the extinction of *YPF SOCIEDAD ANÓNIMA*'s obligation to receive the hydrocarbons produced and to pay higher prices than the ones established by the National Executive for them.
>
> Therefore, it becomes necessary to implement agreements tending to maintain the economic balance of the project for the Companies which are holders of the Contract No. 19,944 in the light of the damage that they may otherwise sustain and the new risks that they may assume due to the reconversion.

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have to guarantee Total's right to freely dispose of the hydrocarbons it produced in Argentina, both in the domestic and international markets and that Total would be free from restrictions on the export of hydrocarbons, including export fees and duties without prior notice of one year and full compensation. Second, the replacement concession agreements could not result in losses to Total. At the time, Total performed a calculation to estimate the difference between the discounted cash flows expected to be generated under Contract 19.944 and the discounted cash flows that would be generated over the same period of time under new concession agreements. The estimated difference was approximately US$410 million. As stated by Total in its Memorial at para. 140, to compensate the loss caused by the conversion of the Contract into a concession agreement, YPF agreed to transfer to the Consortium, of which Total was a member, certain assets and interests in new fields that YPF had not developed for technological reasons or that it had left undeveloped. These were a participating interest in the San Roque and Aguada Pichana exploitation concessions, the concession for a natural gas field called Aries Norte and the oil reserves in the area of Cañadon Alfa in the Austral Basin.

[480] Exhibit C-92.

[481] See Article 8-11 of the *Acta Acuerdo*.

….

Art. 6. Holders of the Exploration Permit, of the Exploitation Concessions and of Joint Venture Agreements celebrated between *YPF SOCIEDAD ANÓNIMA*, according to the attributions conferred by Articles 3 and 4 of the Law No. 24,145 and their Bylaws and *TOTAL AUSTRAL SOCIEDAD ANÓNIMA*, *DEMINEX ARGENTINA SOCIEDAD ANÓNIMA* and *BRIDAS AUSTRAL SOCIEDAD ANÓNIMA* for the complementary exploitation, development and exploration of the Areas "AGUADA PICHANA" and "SAN ROQUE", emerging from the conversion of the Contract No. 19,944 established in Article 1 hereof, shall have the ownership and the free availability of the hydrocarbons that are produced in the respective areas, pursuant to the provisions of the Law No. 17,319 and Decrees No. 1055, dated 10 October, 1989; No. 1212, dated 8 November, 1989; No. 1589, dated 27 December, 1989 and No. 2411, dated 12 November, 1991, whose terms are in full force and effect as from 23 November, 1993, shall be incorporated in the titles of the corresponding Exploitation Concessions and the Exploration Permit and the aforementioned Joint Venture Agreements for the validity term thereof.

….

Art. 8. Every restriction to the free availability referred to in Article 6 hereof shall empower holders of the Exploration Permits, the Exploitation Concessions and the Joint Venture Agreements mentioned in Article 6 of this Decree, to receive a value not lower than the one established in Article 6 of the Decree No. 1589, dated 27 December, 1989, for the duration thereof.

Art. 9. Holders of the exploration permits or exploitation concessions shall be subject to the general fiscal legislation which applies to them; the provisions that may be imposed in a discriminatory way on, or specifically in relation to the person, the judicial condition, or the activity of the permit holder or the assets intended for the execution of the respective areas shall not be applicable..

….

Art. 17. In case that, as a consequence of the facts or the acts deriving from the Public Powers, the holders of the Exploration permit, of the Exploitation Concession and of the Joint Venture Agreements mentioned in Article 6 of this Decree are prevented from exercising the rights emerging hereof, despite their intention to do so, they shall have the right to cause the National Executive Power to instruct the Application Authority or whoever it may correspond to receive the hydrocarbons produced pursuant to Article 6 of Decree No. 1589, dated 27 December, 1989, for the duration of the restriction, pursuant to the terms of the Exploration Permit, of the Exploitation Concessions and of the Joint Venture Agreements. The National Executive shall be responsible for the applicable damages and compensations pursuant to Article 519 of the Civil Code.[482]

[482] Concession Decree, Exhibit C-67.

360. Following the adoption of the Concession Decree, Total expanded its exploration and hydrocarbon production activities in Argentina.[483] The production opportunities, in which Total and the other members of the Consortium invested included, the following:

- Development of the Aguada Pichana field;

- Increased participation in the CAA 35 Consortium and becoming operator of the off-shore area;

- Acquisition of interests in the Sierra Chata Exploitation Block;

- Acquisition of a participating interest in CNQ-37 "Veta Escondida" and CNP-38 "Rincon de Aranda";

- Investment of approximately US$400 million in Carina and Aries; and

- Investment of approximately US$100 million in the debottlenecking of the San Roque and Aguada Pichana fields.[484]

Total also made a number of investments in several exploration properties in order to locate new reserves.[485]

361. Total entered into long-term contracts with local distributors for the sale of natural gas.[486] Total also entered into export contracts for natural gas with Chilean customers, which were approved by the Argentine authorities.[487] In general terms,

[483] See, generally, Contie WS1, paras. 31-42; Contie, Transcript (English) Day 4, 1003-1004.
[484] Slide III.17 of Total's Opening Statement; Total's Post-Hearing Brief, para. 668 and the sources cited there.
[485] Total's Post-Hearing Brief, para. 671; Slide III.18 of Total's Opening Statement.
[486] According to Mr. Grosjean of Total, over 95% of the natural gas produced by Total was sold under long-term contracts of ten years or more. The price of the gas was freely agreed between Total and its customers and was expressed in US dollars. This was done both on the domestic and on the export market. See Grosjean, Transcript (English) Day 3, 882-887. See Grosjean WS1, para. 12 for a list of Total's long-term sales contracts for natural gas for first delivery dates between 1995 and 2005.
[487] Total's Post-Hearing Brief, para. 672 and the sources cited there. Exports of natural gas were subject to resolutions issued by the Secretary of Energy. Essentially, the criterion for approval of exports of natural gas was the ability to confirm that adequate reserves existed to ensure the natural gas supply needed for the domestic market. See Total's Post-Hearing Brief, paras. 672-674 and the sources cited therein. Prior to 1998, Total's contracts to export to Metro Gas, a Chilean customer, were approved pursuant to Law 24.076 and Decree 1.738/92, as amended. Resolution 131/01 provided for the automatic approval of export contracts provided that current gas reserves exceeded certain levels (see SoE Resolution 131/01, dated 9 February 2001, Exhibit C-133; Grosjean WS2, para. 22). According to the terms of the resolution, this automatic approval of export contracts was appropriate in view of regional gas reserves, the confirmation that adequate reserves continued to be available, as well as the existence of a reasonable relationship between reserves and production after accounting for export volumes granted on the basis of sufficiency of supply of the domestic market. Among the long-term contracts approved pursuant to the applicable regulations were the following: Metro Gas (SoE Resolution 200/97, Exhibit C-330); Colbún S.A. (SoE Resolution 353/99, Exhibit C-341); Colbún (SoE Resolution 3/02, dated 3 September 2002, Exhibit C-427); Methanex (SoE Resolution 41/02, dated 11 September 2002, Exhibit C-428). The last two contracts referred to were approved on the basis of meeting the requirements set out in SoE Resolution 131/01 and authorised

production in the Argentine market for natural gas increased significantly such that Argentina became a regional exporter of natural gas.[488]

362. Unlike natural gas sales, oil and LPG sales were not subject to approval and Total freely agreed sales agreements with its customers on both the domestic and international markets.[489] Total's crude oil production came primarily from the Hidra field in Tierra del Fuego. Pursuant to the terms of Law 19.640, crude oil exports from Tierra del Fuego were exempted from export taxes.[490]

363. By the end of 2001, Total's share of overall production of natural gas in Argentina was approximately 22%. Among the exploration and production companies operating in Argentina, Total had the highest percentage of its production (in energy equivalent terms) in gas.[491] Of its total production, the large majority (82%) was natural gas and the remainder (18%) represented crude oil and LPG.[492] Of Total's gas production, the majority was sold in the domestic market to distribution companies and large industrial customers, including power generation plants. Total also entered into a significant number of long-term export contracts for the sale of natural gas, primarily to purchasers in Chile.[493]

2. Measures Taken by Argentina

364. In response to its financial crisis and other situations that arose in the Argentine energy market, Argentina passed a number of general and more specific laws, regulations and other measures that had an impact on investors involved in the exploration and production of hydrocarbons.

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the long-term export of natural gas in amounts of 1,650,000 m^3/day for a term of 14 years and three months (to a total of 8,580 million m^3 of natural gas and one million m^3/day for four years and 2,200,000 m^3 for 16 years to a total of 15,022 million m^3 of natural gas, respectively.

[488] See YPF "Prospectus", dated 28 June 1993, Exhibit C-308 at 13; Grosjean, Transcript (English) Day 3, 888-889.

[489] Grosjean, Transcript (English) Day 3, 880-883.

[490] See Law 19.640, Exhibit C-292. See also Código Aduanero, Article 600-607, Exhibit C-293; MoE general instruction 19/02, 26 May 2002, Exhibit C-406; Legal and Technical Customs Deputy Director's Opinion, 128/04, dated 21 September 2004, Exhibit C-478.

[491] See Grosjean, Transcript (English) Day 3, 900 – 901.

[492] See Grosjean, Transcript (English) Day 3, 900-902, 989-990.

[493] See Grosjean WS1, para. 12; Transcript (English) Day 3, 880-883. According to Mr. Grosjean, approximately 95% of its natural gas sales were pursuant to long-term contracts. See also *supra* note 479.

365. As already discussed, in January 2002, Argentina enacted the Emergency Law [494] together with a series of implementing measures. The Emergency Law eliminated Argentina's convertibility system, which had pegged the Argentine peso to the US dollar at a one to one ratio.[495] Further, the Emergency Law redenominated all private law contracts, including dollar denominated long term sales contracts, at the exchange rate of one peso to one US dollar.[496] At the time of the redenomination of private law contracts, the peso was trading at a rate of approximately three pesos to the US dollar.[497]

366. The redenomination, or "pesification", of private law contracts implemented by the Emergency Law, Article 11, changed the price terms of a number of contracts between Total and various refineries for the sale of crude oil.

367. The pesification of private contracts also affected the price Total received pursuant to gas sales contracts.

368. In addition, pursuant to the terms of Article 8 of the Emergency Law, the tariffs payable for transportation and distribution of natural gas were pesified at the rate of one peso to one dollar. Then, commencing in May 2002, ENARGAS established a maximum reference price distributors could charge for the well-head price component of the Consumer Gas Tariff.[498] The effect of this measure was to freeze the level of the Consumer Gas Tariff at the same level as in 2001, but pesified, *i.e.*, at the same peso value but, in US dollar terms, at approximately one-third of the amount that it had been in 2001. The Consumer Gas Tariff comprises the well-head gas price, the gas transportation tariff and the gas distribution tariff. Before the measures, the well-head gas price was negotiated between the producers and distributors and passed through to customers as a component of the Consumer Gas Tariff. The Emergency Law pesified the reference price component (which notionally represents the well-head gas price) of the Consumer Gas Tariff.[499] This

[494] See Exhibit C-13, Law 25.561/02 dated 7 January 2002.
[495] See the Emergency Law, Articles 1-4; see also Grosjean WS1, para. 15.
[496] See Emergency Law, Article 11 at Exhibit C-13.
[497] Total's Post-Hearing Brief, para. 686.
[498] ENARGAS Resolution 2612/02 dated 24 June 2002 at Exhibit C-155; ENARGAS Resolution 2665/02 dated 15 August 2002 at Exhibit C-34(1); ENARGAS Resolution 2653/02 dated 22 August 2002 at Exhibit C-34(2); ENARGAS Resolution 2654/02 dated 22 August 2002 at Exhibit C-34(4); and ENARGAS Resolution 2663/03 dated 22 July 2002 at Exhibit C-34 (5).
[499] See Grosjean WS2 at paras. 11 – 16.

had the effect of "suppressing" the price that producers' customers could pay for natural gas, as distributors could not charge their customers more than the pesified Consumer Gas Tariff.[500]

369. In October 2002, the Ministry of Economy adopted Resolution 487/02 to exempt ENARGAS (and ENRE, the *Ente Nacional Regulador de la Electricidad*) from the freeze on tariffs in order to undertake tariff revisions to maintain conditions that would ensure the continuity of public services.[501] However, any revision of the tariffs was blocked by way of injunctions in the Argentine courts.[502]

370. The Emergency Law also provided the executive with the authority to impose export withholding taxes on hydrocarbons. Pursuant to this authority, in February 2002, Argentina imposed a 20% export tax on crude oil[503] and a 5% export tax on LPG.[504] These taxes were not applied to exports from Tierra del Fuego and the legal and technical customs deputy director (of the Federal Administration of Public Income) issued opinions in 2002 and 2004 confirming that exports from Tierra del Fuego were exempt from the new measures.[505]

371. In February 2004, the SoE designed an agreement with producers of natural gas (the "Price Path Recovery Agreement")[506] that would return domestic prices to a level capable of sustaining the hydrocarbon production industry. Total Austral agreed to the Price Path Recovery Agreement by signing it in the beginning of April 2004. The Price Path Recovery Agreement was approved by means of Ministry of Federal Planning, Public Investments and Services Resolution 208/04.[507] The agreement set July 2005 as the intended date for industrial and other large consumer prices to return to free market pricing,[508] and 31 December, 2006 as the date for a return to free market pricing for residential and small commercial consumers.[509] Argentina agreed

[500] See Grosjean WS1, para. 19.
[501] Ministry of Economy, Resolution No. 47/02, Exhibit C-58; see also above para. 88.
[502] See, for example, injunction dated 25 February 2003 In the Matter of *Unión de Usuarios y Otros c/ Ministerio de Economía e Infraestructura* – Exhibit C-178; see also above para. 88.
[503] Decree 310/02 dated 14 February 2002 at Exhibit C-149; also see Grosjean WS1, para. 25.
[504] MoE Resolution 11/02 dated 5 March 2002 at Exhibit C-150; also see Grosjean WS1, para. 25.
[505] MoE General Instruction 19/02 dated 26 March 2002 at Exhibit C-406; Legal and Technical Customs Deputy Director Opinion 128/04 dated 21 September 2004 at Exhibit C-478.
[506] Exhibit A RA-269
[507] Exhibit A RA-23.
[508] See Grosjean WS1, para. 42.
[509] Decree 181/04 dated 16 February 2004 at Exhibit C-197; Ministry of Planning Resolution 208/04 dated 22 April 2004 at Exhibit C-208; Grosjean, Transcript (English) Day 3, 893: 7 – 9.

to increase well-head prices applicable to industrial consumers of natural gas, supplied either by distributors or the producers, by 35% in May 2004, and then by 16% in each of October 2004, May 2005 and July 2005. Argentina's factual witness described the Price Path Recovery Agreement in this way:

> That the purpose of the price recomposition agreement was to take internal prices to levels that permit to sustain hydrocarbon producers, in particular producers of natural gas; yes, I agree with that concept.[510]

372. In March 2004, in response to the energy shortage expected for the winter of 2004, the Secretary of Energy passed Resolution 265/04 and Undersecretary of Fuels passed Disposition 27/04, which are referred to collectively as the "Gas Rationing Program".[511] The Gas Rationing Program limited exports of natural gas by producers to the volume of natural gas exported during the same month in 2003 unless a special exemption was granted by the Secretary of Energy, and gave the Undersecretary of Energy the power to suspend the export of natural gas not otherwise restricted and to redirect that gas to specific consumers on the local market.[512]

373. In June 2004, the Gas Rationing Program was replaced with a new program, the "*Programa Complementario de Abastecimiento al Mercado Interno de Gas Natural.*"[513] It required exporting producers to supply additional volumes of natural gas to the local market to meet any unsatisfied demand of protected customers as determined by the SoE, before complying with their export commitments. There was no limit on the amount of additional natural gas that the SoE could require from exporting producers for the domestic market.[514]

374. Also in 2004, Argentina twice increased the value of the export tax on crude oil.[515] In May 2004, the rate of the withholding tax on crude oil was increased to 25%.[516] In August 2004, Resolution 532/04 was passed and it introduced a sliding scale of export taxes based on increases in the West Texas Intermediate ("WTI")

[510] Cross-examination of Diego Guichón, Transcript (Spanish) Day 5, 1340:17 – 22.
[511] SoE Resolution 265/04 dated 26 March 2004 at Exhibit C-205 and Undersecretary of Fuels Disposition 27/04 dated 31 March 2004 at Exhibit C-206.
[512] SoE Resolution 265/04 dated 26 March 2004 at Exhibit C-205 and Undersecretary of Fuels Disposition 27/04 dated 31 March 2004 at Exhibit C-206; see also Grosjean WS1, paras. 46 – 47.
[513] SoE Resolution 659/04 dated 18 June 2004 at Exhibit C-215.
[514] SoE Resolution 659/04 dated 18 June 2004 at Exhibit C-215; also see Grosjean WS1, para. 50.
[515] MoE Resolution 337/04 dated 12 May 2004 at Exhibit C-211; MoE Resolution 532/04 dated 5 August 2004 at Exhibit C-222; MoE Resolution 335/04 dated 12 May 2004 at Exhibit C-210.
[516] See Grosjean WS1, para. 25.

price of crude oil.[517] The withholding tax was increased to 45% when the WTI crude price exceeded US $45 per barrel.[518]

375. In 2004, Argentina imposed a 20% withholding tax on the export of natural gas[519] and increased the amount of the withholding tax on LPG from 5% to 20%.[520]

376. In late 2004, the SoE passed Resolution 1679/04, which required that crude oil made available for export first be offered on the domestic market.[521]

377. In April 2005, Argentina set a hard cap on LPG prices for units sold in the domestic markets to residential users, and a cap for the remaining sales equal to the average price of LPG sold in the previous 24 months (the "LPG Law").[522]

378. In May 2005, Argentina set gas prices under the same price reference stated by Resolution 659/04, which introduced a protection mechanism called "Additional Permanent Injections".[523] It is argued that these two measures abandoned the commitment to return to free market pricing contained in the Price Path Recovery Agreement for large consumers, by extending the set volumes agreed with the industry and imposing lower prices than those that had been agreed with the natural gas production sector.[524]

379. As already discussed, Law 19.640, passed in 1972, had established a special customs regime for Tierra del Fuego, including an exemption from export withholding taxes. Total's witnesses testified that the benefits of Law 19.640 were critical to Total's decision to invest in the harsh Tierra del Fuego region.[525] This region had limited pipeline capacity (TGS pipeline) and high transport costs to Buenos Aires.[526] Much of the gas from this region was exported into Chile under long-term contracts, rather than sold into the domestic market.[527] In late 2006, Argentina passed Resolution 776/06, which retroactively imposed export taxes on

[517] MoE Resolution 532/04 dated 5 August 2004 at Exhibit C-222.
[518] See Grosjean WS1, para. 25.
[519] Decree 645/04 dated 27 May 2004 at Exhibit C-212.
[520] MoE Resolution 335/04 dated 12 May 2004; see also Grosjean WS1, para. 25.
[521] See Grosjean WS1, para. 51.
[522] Law 26,020 dated 8 April 2005 at Exhibit A RA 170.
[523] SoE Resolution 752/05 dated 23 May 2005 at Exhibit C-497.
[524] Total's Post-Hearing Brief at para. 708.
[525] Cross-examination of Michael Contie, Transcript (English) Day 4, 1050:7 – 1051:1; Contie WS2, paras. 18 – 23.
[526] Contie WS2, para. 18.
[527] Grosjean WS1, para. 12.

exports from Tierra del Fuego.[528] This action was codified into law with the passage of Law 26.217/07.[529]

380. In November 2007, Resolution 394/07 again increased the export taxes on crude oil and fuel.[530] These taxes were a direct tax on exports paid by the exporter. The effect was to prevent producers from receiving more than US$42 per barrel of oil produced (any and all amounts in excess of this amount is retained by Argentina). One of the purposes of Resolution 394/07 was stated to be the protection of the economy and consumers from increases in the price of crude oil and to capture for the state the profits otherwise receivable by producers. The sixth recital of Resolution 394/07 states:

> [T]he modification of the export rights, which are applicable to a group of those products, is deemed convenient, in order to ensure competitiveness of the national economy.[531]

3. Impact of the Measures Alleged by Total to be in Breach of Article 3 of the BIT

381. In this arbitration, Total claims that these measures impacted its investments in the exploration and production sector and seeks damages for what it says is a breach of its rights under Argentina's legal system and, as a consequence, a breach of its legitimate expectations based on those rights. In other words, Total contends that the fair and equitable treatment clause contained in the Argentina-French BIT clause covers Total's expectations that Argentina would not act contrary to the rights that it had guaranteed to Total under both its own general legal enactments and such a specific instrument as Total's concession.

382. The thrust of Total's argument is that Argentina's measures (listed and described in the previous pages), by eviscerating Total's rights under the relevant legal framework and, consequently, frustrating Total's legitimate expectations with respect to its investments in the exploration and production sector, breached Argentina's

[528] MoE Resolution 776/06 dated 11 October 2006 at Exhibit C-575.
[529] Law 26.217 dated 16 January 2007 at Exhibit C-613.
[530] MoE Resolution 394/07 dated 16 November 2007 at Exhibit C-708 (d).
[531] MoE Resolution 394/07 dated 16 November 2007 at Exhibit C-708 (d).

obligation to treat Total fairly and equitably under the BIT.[532] For the purpose of discussion, Total divides the numerous measures by their alleged impact on each expectation that it identifies in relation to its investments in the exploration and production sector: expectations with respect to the domestic sale of natural gas; expectations with respect to the export of natural gas; expectations related to the sale of crude oil; expectations related to taxes on crude oil exports; and expectations related to pricing of LPG.

383. All Total's expectations were, therefore, based on the following rights which Total is entitled to as a holder of a production concession: full property rights over the hydrocarbons produced, including the right freely to dispose of all of those hydrocarbons set out in Article 6 of the Concession Decree and the right to be compensated by the government for limitations of those rights pursuant to Article 8 of the Concession Decree. Furthermore, Total lists its rights under its concession, referring to the (domestic and international) sale of the different products: as to the domestic sale of crude oil, full property rights over the hydrocarbons produced, including the right freely to dispose of all of those hydrocarbons (Article 6 of the Concession Decree and Article 6 of the Hydrocarbons Law); as to the international sale of crude oil, the right freely to export crude oil without restrictions (Article 6 of the Concession Decree which incorporates by reference Decree 1589/89); as to the domestic sale of natural gas, full property rights over hydrocarbons produced, including the right freely to dispose of all of those hydrocarbons under Article 6 of the Concession Decree and Article 5 of Decree 2411/91 (the so-called Reconversion Decree); and the right to receive compensation for government-imposed limitations on these rights, enshrined in Article 8 of the Concession Decree.

384. In this respect the Tribunal considers it useful to briefly recall the content of Article 8 of the Concession Decree. This provision incorporates by reference Article 6 of Decree 1589/89. As to the restrictions to the export of petroleum, Article 6 of this Decree incorporates by reference Article 6 of the Hydrocarbons Law. More specifically, Article 6 of Decree 1589/89 provides that in the case of restrictions on the export of crude oil and/or its derivatives, under Article 6 of the Hydrocarbons Law compensation should be equivalent to an amount per product unit that is not

[532] See Total's Post-Hearing Brief, para. 61; Total's Memorial, para. 372 ff.

below that of petroleum and petroleum by-products of a similar nature. As to the limitations on the right freely to dispose of natural gas, Article 6 of Decree 1589/89 provides for compensation amounting to a price not below 35% of the international price per cubic meter of Arabian light oil, 34° API (see also Article 17 of the Concession Decree).

3.1 Domestic Sale of Natural Gas

385. Many of the measures complained of in this section have already been considered by the Tribunal in its review of the claim with respect to Total's investment in gas transportation. However, in this portion of the Decision, the Tribunal reviews the alleged impact of these Measures on Total's investments in the exploration and production sector. Total's claims with respect to the domestic sale of natural gas relate to what it refers to as manipulation of the gas prices.

386. The first measure of which Total complains is Argentina's decision to redenominate all private law contracts at the artificial exchange rate of one US dollar to one peso (the "redenomination").[533] Total submitted that it and its counterparties had expressed the price of their long-term contracts in dollars instead of pesos even for domestic sales because they wanted a "stability reference price … [A] price well-defined which would not be exposed to variation in the local currency".[534] After this measure was adopted, the exchange rate for the peso fluctuated and was at one point trading at a rate of approximately three pesos to the US dollar. Thus, the price that Total received under its long-term contracts was approximately one-third of the value of the price negotiated with its counterparties. Total submits that the net effect of the measures was to eviscerate Total's property rights over the hydrocarbons produced.[535]

387. The second measure that Total claims to have impacted its rights was the forced conversion at a rate of one US dollar to one peso ("*pesification*") of the reference price component of the Consumer Gas Tariff, which Total asserts compounded the

[533] Total's Post-Hearing Brief, para. 686; Law 25,561/02 dated 7 January 2002 at Exhibit C-13, Article 11. It is important to note that Total does not complain that the other Measures (abolishment of the convertibility system and the "*corralito*" – restrictions on the ability to withdraw funds from banks) violated its treaty rights.
[534] Grosjean, Transcript (English) Day 3, 889:13 – 16.
[535] Total's Post-Hearing Brief, para. 689.

effects of the redenomination.[536] Total alleges that the gas regulatory structure was designed to ensure that ENARGAS passed through the well-head price (freely negotiated between the producer and distributor) to the consumer through the Consumer Gas Tariff. However, according to Total, the pesification of the well-head prices paid for natural gas in 2001 artificially suppressed the price that Total's customers could pay for natural gas.[537] Distributors could not pay producers, like Total, more than the pesified well-head gas price.[538]

388. The third measure allegedly affecting Total's right to freely dispose of the natural gas that it produced, and the measure claimed by Total to be the critical step, was Argentina's decision in May 2002 to freeze the maximum reference price that natural gas distributors could charge to consumers for gas at the 2001 pesified levels.[539] Total argues that this step codified the depressed well-head price of gas created by the measures. When ENARGAS later indicated a willingness to review tariffs, the Argentine courts enjoined ENARGAS from revising upward the Consumer Gas Tariff.[540] Total submits that: the ENARGAS resolutions suggest that ENARGAS was aware of the difference between the cost of producing natural gas and the price consumers would have been required to pay for it under the Gas Law; ENARGAS felt unable to take the costs of producers into account; and ENARGAS felt the existing situation was incompatible with a truly competitive market for natural gas.[541] Total says that these measures resulted in hydrocarbon producers shouldering the cost of the recovery of Argentina's economy by having them subsidize low energy prices.[542] Finally, on this point, Total submits that Argentina's measures were not necessary – its goals of relieving the effects of the crisis could have been more

[536] Total's Post-Hearing Brief, paras. 690 – 694.
[537] LECG Report on Damages dated 15 May 2007 at Annex R (i) to the Reply, paras. 198 – 200.
[538] Total's Post-Hearing Brief, para. 692.
[539] ENARGAS Resolution 2612/02 dated 24 June 2002 at Exhibit C-155; ENARGAS Resolution 2665/02 dated 15 August 2002 at Exhibit C-158; ENARGAS Resolution 2614/02 dated 24 June 2002 at Exhibit C-34(1); ENARGAS Resolution 2653/02 dated 22 August 2002 at Exhibit C-34(2); ENARGAS Resolution 2654/02 dated 22 August 2002 at Exhibit C-34(3); ENARGAS Resolution 2660/02 dated 22 August 2002 at Exhibit C-34(4); and ENARGAS Resolution 2663/03 dated 22 August 2004 at Exhibit C-34(5).
[540] Injunction issued by Judge Rodríguez Vidal, File No. 162,765/02 dated 25 February 2003, "Union de Usuarios y Consumidores y Otros v. Ministerio de Economía y Intraestructura" at Exhibit C-178; see also above para. 88.
[541] ENARGAS Resolution 2614/02 dated 24 June 2002 at Exhibit C-34(1); ENARGAS Resolution 2660/02 dated 22 August 2002 at Exhibit C-34(4); and ENARGAS Resolution 2703/02 dated 25 September 2002 at Exhibit C-34(6).
[542] Total's Post-Hearing Brief, para. 699.

efficiently met by providing impoverished residential consumers with a direct subsidy.[543]

389. Total submits that all of the above measures breached Total's treaty rights by frustrating its legitimate, investment-backed expectations that it would enjoy the right to freely dispose of natural gas produced.[544] Total submits that: Argentina had promised that it would enjoy the right to freely dispose of the natural gas it produced; Total relied on that promise when it agreed to the conversion of Contract 19.944 and made substantial investments in Argentina; the measures and their effects breached that promise; and that Total has suffered damages as a result.

390. In particular, Total contends that Article 11 of the Emergency Law, which provided:

> That monetary provisions payable since the day of the enactment hereof, deriving from private contracts executed between individuals, in dollars or any other foreign currency, or which contain adjustment clauses in dollars or any other foreign currency be cancelled in pesos at currency board of one peso equal to one US dollar …

breached the express representations made by Argentina to Total by changing the terms of the long-term gas sales contracts that Total had signed with various counterparties in reliance upon the Concession Decree. Total argues that Argentina changed the price under its contracts and that this amounted to a direct measure against Total in violation of the Concession Decree.[545] Total says that the pesification of the reference price in connection with ENARGAS's calculation of the Consumer Gas Tariff also violated Total's rights of free disposition.[546] Total submits that even Argentina's fact witness on the exploration and production sector pointed out that an extensive study of the effects of the measures on producers like Total concluded that the natural gas prices in Argentina were unsustainable and incapable of allowing producers to receive an acceptable rate of return.[547] Total argues that, despite Argentina's knowledge of the impact of the measures on gas producers, Argentina refused to compensate the producers for past losses, agreeing only to a gradual return

[543] Total's Post-Hearing Brief, para. 701.
[544] Total's Post-Hearing Brief at paras. 702 – 709.
[545] Total's Post-Hearing Brief at para. 702 – 703.
[546] Total's Post-Hearing Brief at para. 704.
[547] Cross-examination of Diego Guichón, Transcript (Spanish) Day 5, 1339:5 – 1343:7.

of market prices within the context of the Price Path Recovery Agreement, which not only failed to compensate producers, but also was not implemented by Argentina.[548]

391. In response to Argentina's argument that Article 6 of the Hydrocarbons Law relieves Argentina of its obligations toward Total because it was entitled to regulate hydrocarbons sales when domestic supply is threatened, Total submits that the measures listed in paragraph 386 ff. above were not enacted to ensure the domestic supply of natural gas.[549] Total also submits that the Hydrocarbons Law does not immunize the state from liability for regulation,[550] and the obligation to compensate is a basic principle of Argentine law.[551] Total also submits that by virtue of the Concession Decree, Total enjoys all the rights provided for by the Hydrocarbons Law in accordance with the Deregulation Decrees and the Conversion Decree.[552]

392. Finally, Total confirms its position that it did not waive its claims to damages for Argentina's manipulation of the price of natural gas by signing the Price Path Recovery Agreement. Total submits that such a waiver was initially requested by Argentina, but that no such waiver was included in the final agreement.[553]

3.2 Export of Natural Gas

393. Total submits that the restrictions on Total Austral's natural gas exports also frustrated its legitimate expectations. Total states that the Concession Decree conferred on Total "full property and full disposition" rights with respect to natural gas,[554] and that Argentina promised compensation to Total if the National Executive restricted the export of oil and petroleum products or the free disposition of natural gas.[555] Total says that Argentina's fact witness confirmed that the regime established in the Deregulation Decrees, further incorporated by reference in the Concession Decree, required Argentina to compensate Total in the event that the National Executive restricted exports.[556] Total submits that its right to export was limited only

[548] Total's Post-Hearing Brief at paras. 705 -709.
[549] Total's Post-Hearing Brief, para. 712.
[550] Total's Post-Hearing Brief at para. 713.
[551] Total's Post-Hearing Brief at para. 714.
[552] Total's Post-Hearing Brief at para. 715; Cross-examination of Diego Guichón, Transcript (Spanish) Day 5, 1367:20 – 1368:5; Concession Decree, Exhibit C-67.
[553] Total's Post-Hearing Brief at paras. 717 – 718.
[554] Concession Decree (Exhibit C-67), Article 6.
[555] Total's Post-Hearing Brief, para. 719.
[556] Cross-examination of Diego Guichón, Transcript (Spanish) Day 5, 1367:20 – 1368:5.

by the requirement that contracts for the export of natural gas be reviewed in advance by the state.[557] Total says that it signed various export contracts after the Concession Decree was issued and that the requests for exports under each of those contracts was reviewed and approved by the Argentine Secretary of Energy. Total considers that these approvals constituted express guarantees by the state that Total's export rights would be respected.

394. Total submits that the Gas Rationing Program imposed limits on all natural gas exports by automatically limiting exports from producers for amounts that exceeded the volume of natural gas exported during the same month in 2003, and arrogated the power to suspend any export of natural gas not otherwise restricted and to redirect that gas to specific consumers on the local market. In June 2004, the Gas Rationing Program was replaced with a new program, which required that producers exporting natural gas supply additional volumes of natural gas to the local market to meet any unsatisfied demand of protected customers before being permitted to comply with their export commitments.[558] Total claims that the result of this resolution was to fully restrict exports.[559]

395. As a result of Undersecretary of Fuels Disposition 27/04, Total says that Total Austral had to suspend its exports to Colbun SA, a power generation facility in Chile, under the terms of a contract known as Colbun 2, because the automatic export limitation limited the amounts permitted to be exported to the levels exported in the same month of 2003. In 2003, Total had not exported substantial amounts under the new contract.[560] Total submits that it suffered losses with respect to the natural gas, which was originally destined for export to Chile, that instead was sold to specific consumers in the domestic market below export price.[561] Total states that Argentina put Total in a position where it had no choice but to breach the contracts with its Chilean counterparties and receive as much as two-thirds less for its natural gas.[562]

396. Total submits that Argentina's defences with respect to its refusal to compensate Total for its losses are inadequate. Total submits that Article 6 of the Hydrocarbons

[557] Total's Post-Hearing Brief, para. 720.
[558] Secretary of Energy Resolution 659/04; Total's Post-Hearing Brief, para. 725.
[559] Total's Post-Hearing Brief, para. 725.
[560] Grosjean WS1, para. 48.
[561] Total's Post-Hearing Brief, para. 726.
[562] Total's Post-Hearing Brief, para. 726; also see Grosjean WS1 at para. 49 et seq.

Law, even if applicable, does not release Argentina from the obligation to compensate Total for its losses. Second, in response to Argentina's argument that Total had suffered no damages because it was granted relief in the Sierra Chata arbitration against AES Gener, Total submits that this arbitration was of no consequence as it related only to Total's very small Sierra Chata interest.[563]

3.2 Sale of Crude Oil

397. Total also claims losses with respect to mandatory renegotiation of its crude oil contracts. Total states that Article 11 of the Emergency Law, which pesified all private contracts at a one to one ratio, changed the price terms of a number of short term contracts between Total and various refineries for the sale of crude oil. Total notes that it never signed an agreement with the Argentine government concerning the production of crude oil and that it, therefore, had the unrestricted rights of free disposal and exemption from export duties under the Concession Decree.[564] Total submits that it was unable to recover the full value of the altered price terms and that it claims for those losses occasioned by Argentina's direct actions.[565]

3.3 Taxes on Crude Oil Exports

398. Total submits that Argentina imposed export taxes on crude oil, which had the purpose of manipulating and reducing the domestic price of oil. Total says that Resolution 397/07 effectively prevented Total from receiving more than US$42 per barrel of oil produced, despite the then-current prices that exceeded US$100 per barrel.[566] The export taxes were taxes payable by Total to Argentina.

399. Total submits that the export taxes violated the export guarantees of the Concession Decree and the Deregulation Decrees, which required one year's notice of, and compensation for, any restriction or duty imposed on the export of liquid hydrocarbons.[567] Total says that the export taxes damaged it in two ways. First, the

[563] Total's Post-Hearing Brief, paras. 728 & 732; see also Cross-examination of Pablo Spiller and Manuel Abdala, Transcript (English) Day 8, 2432:20 – 2433:9.
[564] Total's Post-Hearing Brief, paras. 733 – 735; Cross-examination of Yves Grosjean, Transcript (English) Day 4, 981:19 – 982:1.
[565] Total's Post-Hearing Brief, para. 736.
[566] Total's Post-Hearing Brief, para. 737.
[567] Decree 310/02 dated 14 February 2002 at Exhibit C-149; Total's Post-Hearing Brief, para. 739.

export taxes impacted the price it received for its exports of crude oil. Second, the export taxes impacted the domestic price of crude oil by limiting the amount that local refineries would pay: the export price less the export tax. Total refers to this as the export parity issue.[568]

400. Total also submits that the export taxes constitute unlawful restrictions of Total's full property and free disposal rights under the Concession Decree. Total submits that Argentina breached this promise. Further, Total submits that the reference within that Section 17 of the Concession Decree to Article 519 of the Argentine Civil Code created an additional, express promise to compensate Total in the event that Argentina prevents Total from enjoying its full property rights.[569]

401. As already discussed, Argentina first imposed export taxes in 2002, and then increased those taxes in 2004 and again in 2007. Total submits that the purpose of these taxes was to insulate the domestic market for crude oil from the impact of free market price movement, and to take, for the benefit of the government, the "extraordinary" profits enjoyed by exporters as a result of the rise in the price of crude oil.[570]

402. Argentina points out that Article 9 of the Concession Decree states that concessionaires are subject to the general fiscal regime applicable in the country. With respect to this defence, Total asserts that this interpretation of Article 9 is incorrect. According to Total, Article 9 provides that the general fiscal regime does not apply when the fiscal legislation is discriminatory, *i.e.* when it applies only to hydrocarbons producers for the purpose of restricting the price of their product. Second, according to Total, while Article 9 is very general, the prohibitions on limitations of exports and on restrictions on full ownership and free disposal are quite specific; any potential conflict between the provisions should be resolved in favour of the specific provision.[571] Third, Total submits that an agreement to subject oneself to a general tax regime is not a waiver of rights under international law with respect to the imposition of a particular tax or taxes, if the tax was (or the taxes were) adopted

[568] Total's Post-Hearing Brief, para. 740; Direct Examination of Yves Grosjean, Transcript (English) Day 3, 896:17 – 899:19.
[569] Total's Post-Hearing Brief, paras. 752 – 753.
[570] Total's Post-Hearing Brief, para. 741; Cross-examination of Yves Grosjean, Transcript (English) Day 4, 979:17 – 20.
[571] Total's Post-Hearing Brief, para. 758.

in bad faith or for unlawful purposes.[572] Total argues that the export taxes are discriminatory, confiscatory and their purpose is the manipulation of the national hydrocarbons market.

403. Total claims that it suffered similar losses in its LPG and gas export businesses as a result of the export taxes introduced by Argentina.[573]

404. Total also submits that Argentina exacerbated the effects of the export taxes by eliminating the long standing exemption from such taxes applicable to Tierra del Fuego. Initially, the general export taxes imposed on oil and gas did not apply to exports from Tierra del Fuego. In late 2006, Argentina retroactively (to 2002) imposed export taxes on exports from Tierra del Fuego. Total says that its decision to invest in Tierra del Fuego depended on the tax exemption for exports from this region, as it planned to export much of the gas from this remote and geographically extreme area to closer, more easily accessible markets.[574] As a result, it says the decision to impose export taxes from this region violated the promises contained in Law 19.640, as confirmed by the 1981 Customs Code[575] and violated Total's rights under Article 3 of the BIT.[576]

3.5 Pricing of LPG

405. In its final claim related to the exploration and production sector, Total submits that through the LPG Law, Argentina intervened in LPG market prices and damaged Total. The LPG Law set a hard cap on LPG prices for units sold in the domestic markets. For residential users, prices could not exceed US$32 for a typical 45 kilogram LPG unit. For the rest of the sales, a cap was set equal to the average price of LPG sold in the previous 24 months.[577] Total argues that this law violated the promise in the Concession Decree of free disposition.[578] Total states that it has not

[572] Total's Post-Hearing Brief, para. 759.
[573] Total's Post-Hearing Brief, para. 763; MoE Resolution 11/02 dated 2 March 2002 and effective 30 September 2002 at Exhibit C-150; and Decree 645/04 dated 27 May 2004 at Exhibit C-212.
[574] Total's Post-Hearing Brief, paras. 764 – 768.
[575] Total's Post-Hearing Brief, para. 766.
[576] Total's Post-Hearing Brief, paras. 770 – 773.
[577] Total's Post-Hearing Brief, para. 778; Law 26.020 dated 8 April 2005 at Exhibit A RA 170.
[578] Total's Post-Hearing Brief, para. 779.

waived its rights to compensation and that Argentina should compensate it for the damages flowing from the LPG Law.[579]

4. Argentina's Position

406. Through the description above of Total's allegations with respect to the impact of Argentina's measures on its investments in exploration and production of Hydrocarbons, the Tribunal has already set forth Argentina's position concerning Total's claims. This notwithstanding, for the sake of completeness, the Tribunal will briefly sum up Argentina's arguments in the following paragraphs.

407. In respect of Total's claim as to its investments in this sector, the thrust of Argentina's defence is that all of Total's rights under the concession, which are described by Total in its submissions as absolute and unrestricted, are instead subject to the fundamental principle of the priority of domestic market supply enshrined in the Hydrocarbons Law.[580] In this respect Argentina argues that:

> "… Article 6 of the Hydrocarbons Law provides for that:
>
> (a) liquid hydrocarbons export is subject to prior supply to the domestic market;
>
> (b) the Argentine Executive may allow the export of hydrocarbons or by-products not required to satisfy the domestic market, provided that such exports are performed are [sic] reasonable commercial prices; and
>
> (c) in the event of allowing the export, the Argentine Executive may establish the criteria governing transactions in the domestic market to assure self-supply and an equitable participation of all producers in such supply."[581]

408. The same is true also as to the export of gas and LPG pursuant to the Gas Law and to the LPG Law, respectively.[582] It is Argentina's position that "… Presidential Decree No. 214/94 establishes that the members of the Consortium (TOTAL among them) enjoy title to and free availability of hydrocarbons but always pursuant to the provisions of the Hydrocarbons Law."[583] Under Article 6 of the Hydrocarbons Law (that the Concession Decree explicitly incorporates) broad powers are granted to the

[579] Total's Post-Hearing Brief, para. 780.
[580] See Argentina's Counter-Memorial, para. 563.
[581] See Argentina's Post-Hearing Brief, para. 100.
[582] See Argentina's Post-Hearing Brief, para. 101.
[583] See Argentina's Post-Hearing Brief, para. 103.

Executive such as those of establishing restrictions on exports, quotas and domestic prices.[584]

409. Moreover, Argentina argues that Total is not entitled to receive compensation for the restrictions on gas exports provided for Article 8 of the Concession Decree, in light of the Executive's ability under Article 6 of the Hydrocarbons Law, to delink domestic prices of hydrocarbons from international prices "when oil international prices are significantly increased due to exceptional circumstances … ".[585] According to Argentina, "[T]hen, if the crude oil international price does not serve to fix domestic market prices, it can neither serve as a reference to fix prices of gas sale to the domestic market."[586] Furthermore, the conclusion in April 2004 of the *Acta Acuerdo* between producers and the Executive, with the objective of restoring the natural gas price, supports the fact that Argentina could fix the domestic price of gas without having regard to its international price. In fact, the determination of domestic prices of natural gas agreed under the *Acta Acuerdo* of 2004 took actual exploitation costs of producers (rather than gas international price) as a benchmark. In turn, actual exploitation costs were based on a SoE's study on producers' costs for exploration and production of natural gas.[587]

410. As to the tax exemption claimed by Total, Argentina argues that there was no tax stability agreement with Total and its partners. On the contrary, in accordance with the terms of the concession, Total and its partners were subject to the general tax system.[588] It is Argentina's position that the export duties introduced by Article 6 of the Emergency Law were lawful and a legitimate exercise of State sovereignty not giving rise to an obligation to compensate.[589] Moreover, according to Argentina, the charges on hydrocarbons export are reasonable in the context of Argentina's crisis during 2001/02, and also taking into account various surrounding circumstances. Among these were the abandonment of the currency board system, the severe

[584] See Argentina's Post-Hearing Brief, para. 104-106.
[585] See Argentina's Post-Hearing Brief, paras 109-113.
[586] See Argentina's Post-Hearing Brief, para. 114.
[587] See Argentina's Post-Hearing Brief, paras 115-116.
[588] See Argentina's Post-Hearing Brief, paras 131-136.
[589] See Argentina's Post-Hearing Brief, paras. 137-143 and Argentina's Counter-Memorial, paras. 591 ff.

devaluation of the Argentine peso and the extraordinary increase of the crude oil price in the international market.[590]

411. As to the elimination of Tierra del Fuego's tax exemption, Argentina first objects to the Tribunal's jurisdiction on the basis of the "fork-in-the-road" provision contained in Article 8(2) of Argentina-France BIT.[591] In the event that the Tribunal asserts jurisdiction to hear Total's claim, Argentina suggests that the claim has to be rejected for the following reasons. First of all, Law 19.640 expressly set forth the possibility that a successive law could eliminate the exemption concerning Tierra del Fuego. This occurred in 2007 through the enactment of Law no. 26.217. Second, there was no tax stability agreement with Total that guaranteed against the elimination of the tax exemption on exports from Tierra del Fuego such that its actual elimination could not have frustrated Total's legitimate expectation.[592]

5. Tribunal's Legal Evaluation

412. Total claims that it has been treated in an unfair and inequitable manner contrary to Article 3 of the Argentina-France BIT insofar as, by enacting the measures referenced above, Argentina limited Total's right to freely dispose of all hydrocarbons produced.

413. In Total's view, Argentina had specifically guaranteed this general right, and all of the above-mentioned rights invoked by Total, in various instruments of general and specific character, that is, the Concession Decree, which incorporates the terms of the *Acta Acuerdo* agreed between Total and Argentina, the Deregulation Decrees, the Reconversion Decree and the Gas Law. All of these rights (including Total's right to be compensated for limitations on its right to freely dispose of all hydrocarbons that it produced) are enshrined in Argentina's general enactments, as well as in a specific bilateral arrangement agreed by Argentina with the investor, namely the Concession Decree.

[590] See Argentina's Post-Hearing Brief, paras. 144-149.
[591] See Argentina's Post-Hearing Brief, paras. 150-159
[592] See Argentina's Post-Hearing Brief, paras 160-166.

414. According to the Claimant, Argentina – under its own legal system – promised that these rights would be respected . Therefore, all of Argentina's 'promises', contained in the Concession Decree, which in turn incorporates the relevant provisions of Argentina's law related to the Exploration and Production of Hydrocarbons mentioned above, created Total's legitimate expectations that this regime would remain stable during the lifetime of its investment, and that any detrimental change would be compensated as was provided for by Argentina's legal system.[593]

415. The Claimant contends that the measures enacted by Argentina as of January 2002 limit rights guaranteed to Total under Argentina's own legal system and specifically under the Concession Decree. Because the Claimant had relied upon these rights (including the right to be compensated in the event of their limitation) when it made its investment, these measures are in breach of the fair and equitable treatment clause in the BIT since they impaired Total's investment without compensation for Total.

416. Due to the totality of the measures affecting its investments in exploration and production of hydrocarbons, Total complains that it has suffered damages amounting to a total net of US$575.4 million. The total net losses that Total claims to have suffered are articulated in the LECG Addendum Report as follows: a) as to natural gas US$192.9 million (up to December 2006); b) as to crude oil U.S.$260.6 million (up to December 2006 and projections of future damages to 2012); and c) as to LPG US$121.9. million (up to 2006 plus projections of future damages until 2012).[594]

417. As already emphasized in relation to Total's claim concerning TGN, the import of the Argentina's law is crucial for at least two reasons. On the one hand, according to Article 8(4) of the BIT, Argentina's domestic law is part of the law to be applied by the Tribunal, which accordingly has jurisdiction to interpret that law. On the other hand, the Tribunal has to identify the precise content of Total's pre-existing rights under the Concession Decree, as governed by Argentina's relevant legislation and its amendments from time to time, in order to establish whether the measures were in

[593] See Total's Post-Hearing Brief, paras. 681, 684.
[594] See LECG Report on Damages, at p. 33-58; LECG Addendum on Damages, Table II at p. 8.

breach of the fair and equitable treatment standard, having frustrated Total's legal expectations based on those rights.

5.1 The Content of Argentina's Law

418. The task of interpreting the key elements of the Argentine legal regime applicable to Total's investments in exploration and production of hydrocarbons is not easy, due to the intricacy of the relationship between different successive enactments. This task involves interpretation of the rights invoked by Total in its claims, namely the oil producers' right freely to dispose of all hydrocarbons produced, both domestically and internationally, and the right to be compensated for any government imposed limitations.[595]

419. The Hydrocarbons Law is dated 1967 and covers all hydrocarbons (both liquid-oil and non liquid-gas). It was intended to regulate a state-run or controlled sector, reflecting that, at the relevant time, the state owned YPF, had the monopoly in the sector. The successive decrees of 1989 (from which the privatization proceeded and on which Total's concession was based) reversed the system, without however abrogating the Hydrocarbons Law. On the contrary, the "Deregulation decrees" of 1989 and, in particular, decree 1589/89 refer to various articles of that law. After the Emergency, Argentina again enacted stricter regulations, weakening the liberalized regime created in 1989. Argentina invokes its powers under the Hydrocarbons Law to sustain the legality of the measures challenged by Total.[596]

420. A core question which the Tribunal has to deal with is whether, under Argentina's legal system as it existed up until 2002, the producers' right to freely dispose of crude oil and natural gas entails both the right to sell these commodities to anyone they choose and the right to freely fix their prices. The starting point of this analysis is an examination of the content of the Concession Decree in which Total's right of free disposal of hydrocarbons and the right to be compensated are specifically enshrined.

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[595] See Total's Post-Hearing Brief, para. 636.

[596] The Tribunal notes that, by making its investments in Argentina's gas sector, Total was aware that the Hydrocarbons Law was the fundamental regulation of the natural gas industry. The Information Memorandum dated September 1992 in respect of the IPO of Gas del Estado, submitted to the Tribunal by Total as Exhibit C-50, made clear during the privatization process that "… The Hydrocarbons Law continues to be the primary legislation governing the upstream industry…" (para. 1.3 at page 6)

421. The Concession Decree stated that Total, as one of the holders of the hydrocarbons exploration and production concession in Tierra del Fuego, holds "the ownership and the free availability" of the hydrocarbons produced "under" the Hydrocarbons Law and the Deregulations Decrees (*i.e.*, Decrees No. 1055/89, No. 1589/89, and No. 2411/91). According to the Concession Decree (Article 6), the rights of the holders of the concession are explicitly made subject to the Hydrocarbons Law and the above referenced decrees. Moreover, according to Article 8 of the Concession Decree, every restriction on the "free availability" of the hydrocarbons produced, granted to the holders of the concession pursuant to Article 6, entitles them to receive for the time of the restriction an amount that shall not be less than that determined under Article 6 of Decree No. 1589/89.

422. In turn, Article 6 of Decree No. 1589/89 envisages two different types of restrictions on producers' rights, each of which entails a different amount of compensation. In the case of government imposed restrictions on the export of crude oil, compensation is due to oil producers, refiners and exporters in accordance with Article 6 of the Hydrocarbons Law. The text of Article 6, paragraph 1 of Decree No. 1589/89 (quoted above at paragraph 354) provides that this compensation shall be equivalent to an amount, per product unit, not less than that of petroleum and petroleum by-products of a similar nature. By contrast, according to Article 6, paragraph 2 of the same decree, in the case of government imposed restrictions on the right freely to dispose of natural gas (which is not restricted to cases of shortages in the domestic market), compensation shall be an amount not less than that of 35% of the international price of a cubic meter of Arabian Light Petroleum of 34° API.

423. The Concession Decree refers, therefore, to different regulations and standards of compensation under the Hydrocarbons Law and the applicable Deregulation Decrees. On the one hand, it refers to limitations on the export of petroleum and petroleum by-products, and, on the other hand, to restrictions on the right of free disposal of natural gas.

424. As to government imposed restrictions to the export of crude oil and its by-products, Article 6 of Decree No. 1589/89 provides that: a) the Executive has to give 12 months' notice of projected restrictions prior to their coming into force (paragraph 3); and b) in case of such a restriction, Article 6 of the Hydrocarbons Law shall be

applicable "by virtue of which producers, refiners, and exporters shall receive, per product unit an amount not less than that of petroleum, and derivatives of similar nature."[597] However, Article 6 of the Hydrocarbons Law, to which Article 6 of Decree No. 1589/89 specifically refers, actually provides for more detailed regulation. According to Article 6, paragraph 3, first sentence of the Hydrocarbons Law, (quoted above at paragraph 348) when national production does not cover domestic needs, the Executive may fix the crude oil price in the domestic market to be equal to that established for crude oil produced by the state owned company, which, in any case, cannot be lower than the price of imported crude oil of a similar condition ("*de condiciones similares*"). However, this rule shall not be applied when imported crude oil prices significantly increase due to exceptional circumstances (Article 6, para 3, second sentence). In this case, international crude oil prices shall not be taken into account when fixing the price in the domestic market. Instead domestic prices shall be based on the actual exploration costs, any amortization and a reasonable interest on updated and depreciated investments.

425. Pursuant to the Hydrocarbons Law, "the hydrocarbon exploration, production, transport and commercialization activities shall be carried out by oil companies pursuant to the provisions contained therein and the further regulation set out by the Executive (Article 2). According to the same law, Argentina's Executive is charged with the following tasks: a) establishing the appropriate national policy regarding hydrocarbon exploration and production activities, taking into account as a primary objective the country's need for hydrocarbons, maintaining the appropriate reserves required for this purpose (Article 3); b) establishing regulation based on such reasonable technical and economic parameters as necessary in order to take account of the domestic market's interest and to promote hydrocarbon exploration and production (Article 6, paragraph 1). Moreover, as clearly stated by the same Article 6, paragraph 1, "oil companies may exercise their property right over exploited hydrocarbons and, accordingly, transport and commercialize them, work and commercialize hydrocarbons by-products" in conformity with further regulation set out by the Executive. In addition, when national hydrocarbon production does not cover domestic needs "the use of all availabilities of national origin of said

[597] The meaning of this phrase is obscure and has not been clarified by the parties during the arbitration. In any case, as specified hereafter at paragraph 434, the Tribunal has found that this provision is not applicable *in casu*.

hydrocarbons shall be mandatory" (Article 6, paragraph 2). Conversely, the Executive shall authorise the export of hydrocarbons and their by-products provided that they are not required to satisfy domestic needs (Article 6, paragraph 4). Finally, Article 6 paragraph 3, which is expressly incorporated in Total's concession, grants the government the power to fix the domestic sale price of crude oil in case of domestic supply problems, without regard to the international price of crude oil.

426. Some conclusions can be drawn from this overview. It is true that Article 9 of Decree No. 1212/89 provided that "oil prices shall be freely agreed upon" and also that the regulation implementing Articles 2 and 6 of the Hydrocarbons Law contained in Decree No. 1055/89 was aimed at replacing governmental intervention in price setting with a market-oriented mechanism of setting prices based on supply and demand. However, it is also true that Article 6 of Decree No. 1589/89 expressly incorporates the rule contained in Article 6 of the Hydrocarbons Law. Therefore, even after the enactment of the Deregulation Decrees, the government reserved to itself the power to restrict producers' rights freely to dispose of petroleum and petroleum by-products both domestically and internationally. Thus, under Argentina's legal regime (as it existed when Total acquired the concession), the government could fix the domestic price of those products (even without having regard to the international price in certain circumstances). Further, it was required that the petroleum produced be used to meet domestic needs first, such that petroleum could be exported only if the domestic market did not need it.

427. In light of the above, Total's right freely to dispose of petroleum does not entail the right freely to fix its prices or to export it without limitations. Contrary to Total's statements that "the Concession Decree lays out the guarantee of export without restriction as set out in Decree No. 1589, which is incorporated by reference in Article 6 of the Concession Decree"[598] and that "[I]n the Concession Decree, Total was promised the right to full ownership and free disposal of the crude oil it produced under the relevant concessions,"[599] there was no guarantee that oil could be exported or absolute freedom to negotiate the commercialization price under the concession.

[598] See Total's Post-Hearing Brief, para. 748.
[599] See Total's Post-Hearing Brief, para. 733.

6. Measures Challenged by the Claimant Relating to Crude Oil

6.1 Domestic Sales of Crude Oil

428. With regard to the domestic sale of crude oil and crude oil by-products, the Tribunal notes that the measures challenged by Total are the pesification of its long-term contracts with distributors (Article 11 of the Emergency Law)[600] and the imposition by Argentina of export taxes on crude oil starting from January 2002.[601]

429. As concerns pesification, the Tribunal recalls its findings in respect of Total's claim concerning TGN.[602] The pesification was a measure of general application to all sectors of Argentina's economy and to all legal obligations expressed in monetary terms within the country. It was a devaluation and redenomination of the national currency within the monetary sovereignty of the State. Moreover, this measure was taken in good faith in a situation of recognized economic emergency of an exceptional nature. In this context, a series of measures, having harsh effects on the population (such as the blocking of withdrawals from banks – *corralito*), was taken in order to avoid a general collapse of the economy, and hence of the State and society, and to foster a progressive recovery. As already stressed by the Tribunal, this measure and its application cannot be considered as being unfair in the circumstances, considering the inherent flexibility of fair and equitable treatment standard. Unfairness must be evaluated in respect of the measures challenged, in the light of both their objective effects and the reasons that have led to their adoption (subjective good faith, proportionality to the aims and legitimacy of those aims according to general practice). It is, therefore, not possible to share Total's view, developed in particular in the LECG Report, that pesification was a breach of Total's treaty rights, the effects of which must be factored for in the calculation of damages suffered by Total for which it claims compensation under the BIT. Such changes in general legislation, in the absence of specific stabilization promises to the foreign investor, reflect a legitimate exercise of the host State's governmental powers that are not prevented by, and do not breach, the fair and equitable treatment obligation under

[600] Total refers to pesification and its effects when it claims that its freedom to negotiate domestic prices with distributors was suppressed, see above para. 390.
[601] See Total's claim as set forth above paras. 397-404.
[602] See above paras. 163-165.

a BIT. The general character, good faith and absence of discrimination by Argentina, as well as the exceptional circumstances that led Argentina to adopt the measures at issue, in the Tribunal's view, objectively preclude a finding that Argentina thereby breached the fair and equitable treatment obligations incumbent on it under the BIT.

430. As mentioned previously, the pesification of the economy, that is the elimination of the fixed link to the US dollar, necessarily also entailed the de-dollarisation of private contracts and public service tariffs The 1:1 rate reflected the impossibility for holders of debt in US dollars to pay the market rate for the US dollar when all of their claims, income, etc., had been converted forcibly and necessarily at the official rate while the peso had devaluated by two-thirds. The de-dollarisation of contracts was thus a non-discriminatory measure of general application applied to all the sectors of the economy and to all inhabitants of Argentina. The Tribunal notes that the Emergency Law, while having pesified all private contracts, provided that they could be renegotiated to mitigate negative effects. In fact, Total renegotiatied existing crude oil contracts with its customers as reported by the LECG Report on Damages.[603]

431. Therefore the Tribunal is of the view that, contrary to Total's claim, the pesification of oil domestic sale contracts does not entail a breach of the fair and equitable standard treatment by Argentina. As a consequence, Total's claim of indemnification of losses due to the pesification of the domestic oil prices must be dismissed.

6.2 Export Taxes on Crude Oil

432. As to the export taxes on crude oil imposed by Argentina as from January 2002, Article 6 of the Emergency Law authorised the government to increase the direct taxes on the export of hydrocarbons to increase the government revenues needed to address the emergency in the banking and financial sector. According to the Claimant, following Argentina's enactment of successive measures (implementing

[603] See LECG Report on Damages, para. 170 at p. 89.

Article 6 of the Emergency Law), "[d]epending on the international price of oil, the nominal rates of export withholding taxes now range from 25% to 45%".[604]

433. Total complains both of the direct effects of the imposition of crude oil export taxes on its exports and of their indirect effects on its domestic sales. According to Total, the export taxes on crude oil had the general effect of curtailing exports and were "in violation of the export guarantees of the Concession Decree and the Deregulation Decrees requiring one year's notice and compensation for any restriction or duty imposed on the export of liquid hydrocarbons".[605] However, Total has not alleged that the imposition of those export taxes has actually interfered with or restricted existing or planned crude oil export contracts. Total rather complains *in abstracto* of the general effect of those taxes as limiting exports and claims that Argentina's introduction of the export taxes amounts to an export "restriction" that is in breach of its rights under the Concession Decree.

434. In any case, as already outlined above at paragraphs 426-427, Argentina did not grant Total absolute freedom to export crude oil under the concession. Total has not proved (nor in fact claims) that Argentina has actually enacted "restrictions" on exports of crude oil that specifically and in concreto have impaired Total's crude oil exports. The export taxes challenged cannot be considered as "restrictions" under Argentina's relevant regime. They are rather fiscal measures (to which oil producing and exporting countries normally have recourse) that are generally applicable to crude oil exporters (and not addressed specifically to Total nor especially affecting Total's export contracts). Moreover, these export taxes are part of "general fiscal legislation" to which Total is subject in accordance with Article 9, first sentence, of the Concession Decree. Total's argument that the export taxes are contrary to Article 9, second sentence of the Concession Decree appears to be groundless. According to this provision, Total is not subject to "the provisions that may be imposed in a discriminatory way on or specifically in relation with the person, the judicial condition, or the activity of the permit holder or the assets intended for the execution of the respective areas.". This means that Total cannot be subject to taxes and duties imposed only on its operations or specifically linked to the areas to be exploited by Total under the relevant concession, such as local and provincial taxes. By contrast

[604] See LECG Report on Damages, para. 175 at p. 92.
[605] See Total's Post-Hearing Brief, para. 739.

Total may be subject, in accordance with Article 9, first sentence, to state taxes of general application, as are crude oil export taxes, which are not contrary to Article 9, second sentence of the Concession Decree. Therefore, by imposing them Argentina has not acted in breach of its obligation to accord fair and equitable treatment to Total's investments to which Total is entitled under Article 3 of the BIT.

435. The principal complaint of Total as to crude oil export taxes is, rather, the alleged indirect negative effect of such taxes on the domestic price of oil. Total contends that the measures imposing export taxes on crude oil had the effect of reducing its domestic price, limiting Total's right to sell crude oil (and crude oil by-products) at a freely negotiated price in the domestic market.[606] Also this argument is not convincing for the following reasons. First, the imposition by Argentina of crude oil export taxes does not prevent Total from selling crude oil (and crude oil by-products) in the domestic market (or abroad) or from choosing its counterparties. Secondly, even if it were accepted that the export taxes had the indirect effect of reducing the domestic price of oil as Total alleges, this is not contrary to Total's right of free disposal of crude oil (and crude oil by-products). This is because this right was subject to the potential for government intervention in accordance with Article 6 of the Hydrocarbons Law. This law provided explicitly that the Executive may fix the domestic price of crude oil in case of a significant increase in the price of imported crude oil (which obviously reflects international prices) due to exceptional circumstances. Thirdly, the crude oil export taxes imposed by Argentina had the purpose (as stated in the Emergency Law) of providing additional resources to the State in the crisis situation taking place in 2002. The further increase in 2007 was intended to recoup resources from the extra profits of exporters and specifically to disconnect the domestic oil market from the extraordinary increase in international prices.[607] Total asserts that this last tax "is discriminatory, confiscatory and has its purpose the manipulation of the national hydrocarbons market".[608] Absent any evidence that this "disconnection" was arbitrary or confiscatory, this alleged purpose

[606] See Total's Post-Hearing Brief, para. 740 ff. and LECG Report on Damages, para. 178 ff. See the text of Article 9 of the Concession Decree at paragraph 359 above.
[607] See the Preamble of Resolution 394/07, at Exhibit C-708(d).
[608] See Total's Post-Hearing Brief, para. 759.

is irrelevant.[609] Nor can Total invoke any promise by Argentina to be exempt from application of its general fiscal legislation because the concession does not promise such fiscal stability. Additionally, the Tribunal notes that such "windfall profit taxes" on oil are currently common and have been introduced in many oil producing countries including in the industrialized world.[610]

436. For all of the above-mentioned reasons, the Tribunal concludes that the crude oil export taxes were not enacted by Argentina in violation of Total's rights and, consequently, that the taxes are not in violation of Total's legitimate and reasonable expectations. Thus the measures are not in breach of the fair and equitable treatment standard.

7. Elimination of the Tierra del Fuego Tax Exemption

437. With respect to the elimination of the tax exemption, Total complains that Argentina, by Resolution 776/06,[611] from the time of the enactment of the Emergency Law, retroactively eliminated the exemption from customs duties that was applicable to production in Tierra del Fuego.[612] Total complains that Argentina thereby "eviscerated the immunity from customs duties it had guaranteed to Total with respect to investments made in Tierra del Fuego."[613]

438. In fact, Resolution 776/06 eliminated retroactively the exemption by stating that Article 6 of the Emergency Law intended *ab origine* to subject all oil exports, including those from Tierra del Fuego, to the newly established export tax.

439. In addition to Total's complaint regarding the retroactive elimination by Resolution 776/06 of the exemption from customs du*ties concer*ning Tierra del

[609] In its Counter-Memorial (at p. 157), Argentina has supplied a graphic (shown also as a slide at the Hearings in the merits) which indicates that, when the export tax was introduced in 2002, the price of oil was around $20. In 2006, the price increased to more than $60, of which about $20 went into taxes.
[610] See Argentina's Counter-Memorial, para. 617 listing a number of oil producing and exporting countries which have adopted such increases in recent years. See also *The Economist*, 20 Sept. 2008, Special Report on Globalization, p. 18. See T. Wälde, A. Kolo, *Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty*, 35 *Intertax* (2007) 424, 443. The two authors point to 'normal' state practice in tax matters as a yardstick to judge whether or not host states' conduct in tax matters is in breach of an investment treaty regime.
[611] See Exhibit C-575.
[612] See Total's Post-Hearing Brief, para. 764 ff.
[613] See Total's Post-Hearing Brief, para. 765.

Fuego, Total also complains of the express elimination of the exemption granted in Law 19.640 of 1972 by Law 26.217 in 2007. [614]

440. As to the elimination of the exemption granted in Law 19.640 of 1972 by Law 26.217 of 2007,[615] the Tribunal does not see any basis for concluding that the 1972 Tierra del Fuego exemption could not be revoked by a later statutory enactment. The 1972 Law did not guarantee any minimum period of application (it had remained in force in any case for 30 years). On the contrary, Article 13(c) of Law 19.640 expressly stated that future taxes would be applicable if the legislative acts introducing them explicitly provided that this was the case. Therefore, the elimination in 2007 of the exemption from customs duties concerning Tierra del Fuego is applicable to Total (and its investments) since Law 26.217 of 2007 explicitly so provides. As a conclusion, this law is not in breach of Total's rights under the BIT. Total also objects to the elimination of the tax exemption, relying on an exemption, which Argentina obtained from the MERCOSUR Council in 1994, that allowed Argentina to maintain the special Tierra del Fuego custom regime until 2013.[616] This authorisation did not, however, compel Argentina to retain the exemption until 2013 nor could it create a right or form the basis for a legitimate expectation by a private beneficiary such as Total that the regime would remain in force until 2013.[617]

441. As to the distinct challenge by Total of the retroactive revocation of the exemption by Resolution 776 with effect from 2002, the Tribunal takes note that Total has submitted certain statements issued by Argentina's administrative authorities in 2002 and 2004 to the effect that the export taxes were not applicable to exports from Tierra del Fuego. These statements stated that such exports had remained exempted from those taxes.[618] The convoluted reasoning in the preamble of Resolution 776/06 to the contrary is not convincing. Moreover, Argentina's

[614] Total's refers in its Post-Hearing Brief (para. 767 ff.) to the written testimony of its manager Michel Contie (Second Statement, at Annex N to the Reply, para. 22) and to his cross-examination at the Hearing on the merits (Transcript (English) Day 4, 1050:7-1051:1. See also Total's Reply, para. 261 ff.

[615] See Exhibit C-613.

[616] See Exhibit C-314.

[617] Total states at para. 262 of its Reply that Argentina had assured Total, during the renegotiation of Contract 19,944, that the maintenance of the custom regime would be authorised by MERCOSUR. The Tribunal is not convinced by the documents and testimonies supplied by Total in support of this statement.

[618] See MoE General Instruction 19/02, dated 26 March 2002 at Exhibit C-406; *Subdirección General de Legal y Técnica*, Nota 1318/04 DI ASLE, dated 1 July 2004 at Exhibit C-703(b); Legal and Technical Customs Deputy Director Opinión 128/04, dated 21 September 2004 at Exhibit C-478.

competent authorities had confirmed by those statements the non-applicability of the new taxes (specifically in response to Total's request) for almost four years. This makes the change of position of Argentina's authorities in 2006 a breach of a specific promise made to Total and, therefore, a breach of the fair and equitable treatment clause in the BIT. Furthermore, the Tribunal recalls that Articles 13(c) of Law 19.640 of 1972[619] requires an express legislative enactment to effect a future elimination of the export tax exemption. Since the Emergency Law did not contain such an explicit statement, Resolution 776/06 could not by way of interpretation cure the absence of the specific provision required to eliminate the exemption from customs duties applicable to Tierra del Fuego in conformity with Law 19.640.

442. The claim by Argentina that Total is liable to pay back taxes under Resolution 776/06 is thus in breach of the obligation to accord fair and equitable treatment in Article 3 of the BIT. Clearly no argument of necessity can be entertained to oppose such a conclusion. Total has explained that the collection of the tax for 2002-2006 is currently suspended while Total Austral has engaged in a judicial domestic challenge of the tax claim. In view of the Tribunal's conclusion above, if Argentina's authorities enforce Resolution 776/06 and obtain from Total Austral the payment of the export taxes from 2002 to 2007 (*i.e.*, as of the date of entry into force of Law 26.217) through domestic litigation or otherwise, Argentina would thereby commit an additional breach of Total's rights under Article 3 of the BIT. In such an event, Total would be entitled to recover, as damages, whatever amount Total Austral would have been compelled to pay and any costs incidental thereto.

443. In respect of the above-mentioned domestic litigation, Argentina has raised a preliminary exception based on the "fork in the road" provision of Article 8.2 of the BIT.[620] Argentina claims that, since Total has pursued its opposition to the retroactive

[619] Law 19.640/72 at Exhibit C-292.

[620] In accordance with Article 8 of Argentina-France BIT, an investor of either Contracting Party can choose to submit "any dispute relating to investments made under this Agreement" with the other Contracting Party to the domestic courts thereof or to ICSID or UNCITRAL arbitration. However, according to Article 8(2) "once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final." See Argentina's Post-Hearing Brief, paras 151 ff. On 16 November 2010 Argentina submitted to the Tribunal the text of a decision dated 25 August 2009 by the "Cámara Contenciosa Administrativa Federal" which in the recourse by Total's subsidiary mentioned in the text has declared Resolution 776/2006 unconstitutional. The Claimant has commented on 30 November 2010 that this decision has been revoked by an attached decision of the Supreme Court of 18 November 2010, submitting that these decisions "are of no relevance to the proceedings". The Tribunal recalls that it has decided not to take into consideration new

application of the afore-mentioned export taxes from Tierra del Fuego in Argentina's courts, Total is precluded from raising this claim in this arbitration under the BIT. Total rejects the invocation of Article 8(2) by Argentina because the present arbitration was initiated before the domestic litigation so that its claim concerning this issue must be viewed as predating the domestic proceedings. Total explains that its specific claim against Argentina's demand for the tax payment at issue is ancillary to Total's initial arbitration request, to which it was added when Argentina requested payment of those taxes in 2006, while these proceedings were pending. The Tribunal does not need to deal with this issue because it considers that the two proceedings have a different object. The object of the arbitration before this Tribunal is the alleged breach of the BIT by Argentina's demand for retroactive tax payment; the claim before Argentina's domestic courts is that the demand is in breach of Argentina's law. Further, the claimant in the domestic proceedings for *amparo* is Total's subsidiary, Total Austral, and not Total itself. It is the Tribunal's view therefore that Article 8.2 of the BIT is not applicable.

444. In view of the above, the Tribunal concludes that the retroactive elimination of the Tierra del Fuego tax exemption effected by Argentina through the enactment of Resolution 776/06 is in breach of the fair and equitable treatment clause of the BIT. Consequently, any Argentine authorities' request of payment of export taxes addressed to Total for its exports from Tierra del Fuego concerning the period from 2002 to the entry into force of Law 26,217 in 2007 would be in breach of the BIT.

8. Domestic and International Sale of Natural Gas

445. The Tribunal recalls (as stated above in paragraph 383) that Total's claims in this respect are based on Argentina's guarantee to Total of full property rights over, and full rights freely to dispose of, hydrocarbons produced that is enshrined in Article 6 of the Concession Decree. According to Total, this guarantee must be understood as

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evidence and arguments submitted by the Parties subsequent to the post-hearings briefs (see para. 20 above) and determines that the submission of Argentina of 30 November 2010 is in any case irrelevant.

entailing "the right to sell the hydrocarbons it extracts to its willing counterparties in the amount and for the price it negotiates."[621]

446. As to its private law contracts for the domestic sale of natural gas, Total has claimed that the following measures are in breach of the fair and equitable treatment clause: (i) the pesification of all private law contracts (including Total's private law contracts) through Article 11 of the Emergency Law because it eviscerated "Total's all property rights over hydrocarbons produced, including the right freely to dispose of its hydrocarbons by artificially re-denominating the price that had been freely negotiated between the contracting parties"[622]; (ii) the pesification of the gas tariffs (including the reference price used to calculate the well-head price component of the Consumer Gas Tariff) because it "limited the revenues of Total's distributor customers for the sale of gas to consumers and, therefore, rendered renegotiation of Total's pesified contracts futile";[623] (iii) the freezing of the gas tariffs at 2001 levels because Argentina, by establishing a maximum reference price that distributors could charge for the well-head price component of the Consumer Gas Tariff, nullified any possibility that Total could have had to renegotiate its supply contracts with distributors.[624] As stated by LECG Report on Damages, "this measure meant the de-facto intervention of wellhead price formation in the natural gas market."[625]

447. As to the pesification of Total's private contracts and the pesification of the gas tariffs (the reference gas price included), the Tribunal recalls its finding and reasoning concerning the same measure in relation to Total's claim regarding its investments in TGN at paragraphs 159-165 above; namely, the Tribunal has concluded that the pesification was not in breach of the BIT, being a measure of general application justified by the circumstances and applied without discrimination.

448. The Tribunal will deal now with the freezing of the Consumer Gas Tariff. The Tribunal recalls that it has in part analyzed the legal regime for the sale of natural gas, when it dealt with the provisions of the Hydrocarbons Law and those contained in the Concession Decree referring explicitly to the Hydrocarbons Law and the

[621] See Total's Post-Hearing Brief, para. 69.
[622] See Total's Post-Hearing Brief, para. 689.
[623] See Total's Post-Hearing Brief, paras. 70 (b) and 690-694.
[624] See Total's Post-Hearing Brief, para. 70 (c).
[625] See LECG Report on Damages, para. 90 b at p. 45.

Deregulation Decrees (at paragraphs 421-425 above). For this reason, the Tribunal will focus here only on the features of the legal regime for the sale of natural gas that are relevant in order to evaluate whether the freezing of gas tariffs effected by Argentina was in breach of Total's rights under the BIT.

449. The Tribunal recalls that the Hydrocarbons Law is referred to in Article 6 of the Concession Decree. Pursuant to Article 6, paragraph 7 of the Hydrocarbons Law of 1967, "gas commercialization and supply is subject to the further regulations set out by the Executive". These further regulations are contained in the Deregulation Decrees of 1989 and in the Gas Law of 1992.

450. In turn, Article 10, paragraph 1 of Decree No. 1212/89 provided that "natural gas prices for users and producers shall be determined on a monthly basis by the MINISTRY OF PUBLIC WORKS AND SERVICES, through the SECRETARY OF ENERGY, until multiple suppliers market conditions are generated." According to Article 10, paragraph 4, first sentence, the Consumer Gas Tariff has to be fixed "based on the producer price, plus conditioning, transport and distribution costs". If the Consumer Gas Tariff is fixed below the latter basis, "the amount of the corresponding subsidy shall be determined, with charge to general profits" (Article 10 paragraph 4 second sentence). Finally, "the producer price shall be determined on a "netback" basis, with transport and conditioning costs based on international values" (Article 10 paragraph 5). This regulation was, however, superseded in 1992 by the successive enactment of the Gas Law.[626]

451. As already outlined by the Tribunal in respect of Total's claim in relation to TGN, the Gas Law states a series of paramount principles by which the gas regime and ENARGAS enforcement activity shall be guided (Article 2). The objectives of the Gas Law can be summarized as follows: the protection of consumer rights, encouraging the competitiveness "of the natural gas production and demand markets" and fostering investments for the purpose of guaranteeing the long-term gas supply. According to Article 37, the Consumer Gas Tariff "shall be the sum of: a) the well-head price of gas in the loading point to the transmission system; b) the gas

[626] Article 1, paragraph 1 of the Gas Law states that it applies to transport and distribution of natural gas while the Hydrocarbons Law remains applicable to its production, extraction and treatment. According to Article 1, paragraph 2 of the Gas Law the Hydrocarbons Law is applicable also to transport and distribution of natural gas only when the Gas Law refers expressly to its provisions.

transportation tariff; and c) the gas distribution tariff." In addition, Article 38(c) provides that the gas sale price that distributors charge to consumers shall include the cost of gas purchases. With regard to the contracts concluded after the coming into force of the Law, ENARGAS may prevent these costs from being charged to consumers if it determines that they are higher than the gas supply prices negotiated by other distributors in similar conditions.

452. On the basis of the analysis above, the Tribunal concludes that the Argentine natural gas market (as it existed when Total acquired the relevant concession) was not a free market. Instead, it was a state regulated market in accordance with both Decree 1212/89 and the subsequent Gas Law (as well as the Hydrocarbons Law). The Tribunal notes also that, from an economic point of view, the LECG Report on Damages acknowledges that [natural gas] "[…] unlike crude oil or LPG, is not a fully tradable commodity" and, therefore, "its prices are not necessarily linked to international parity levels (that is, neither import nor export prices have to be the same as prices in the domestic market)."[627]

453. After having given an overview of the relevant legal regime, the Tribunal will turn now to the evaluation of the freezing of the Consumer Gas Tariff under the BIT. Total specifically contends that Argentina, by fixing the well-head price component of the Consumers Gas Tariff from June 2002 to August 2004 (ENARGAS Resolution 2612/02 dated 24 June 2002 and successive Resolutions[628]), acted contrary to the Gas Law[629] and Total's rights under the relevant concession. In particular, these measures prevented Total from negotiating the domestic natural gas price with its counterparties and fixed such a depressed gas price as to be unsustainable and incapable of allowing producers to receive an acceptable rate of return.[630]

454. It is true that the concession accorded Total the right to dispose of the natural gasi. However, this right was not absolute, taking into account the content of Argentina's general legal enactments governing the gas market incorporated by reference in the concession, as outlined above. This results from the text of Article 6

[627] See LECG Report on Damages, para. 92.
[628] These successive ENARGAS Resolutions are referred to by the Tribunal at note 532 above and are listed in Total's Post-Hearing Brief, footnote 823 at page 270.
[629] See Total's Post-Hearing Brief, para. 696.
[630] See Total's Post-Hearing Brief, para. 705.

of Decree 1589/89. Specifically, Article 6 of Decree 1589/89 envisages restrictions being imposed on the "free availability" of gas by the government. The provision states, however, in this case that "the price of ONE THOUSAND CUBIC METERS (1000 m^3) of gas at NINE THOUSAND THREE HUNDRED KILOCALORIES (9,300 kilocalories) shall not be inferior to THIRTY PERCENT (35%) of the international price for a cubic meter of Arabian Light at 34^o API." In applying this rule, the gas prices fixed by Argentina should not have been below "(35%) of the international price for a cubic meter of Arabian Light at 34^o API."[631]

455. Total complains that the domestic gas prices resulting from the measures mentioned above were unsustainable from the gas producing companies' point of view and were incapable of allowing producers to receive an acceptable rate of return.[632] The Tribunal understands that the 35% of the international price per cubic meter of Arabian light oil, 34° API was precisely a guarantee to producers of a given minimum price in case of future restrictions. Nevertheless, while invoking the 35% of the international price per cubic meter of Arabian light oil, 34° API as a benchmark for compensation in case restrictions are imposed, Total does not submit any evidence enabling the Tribunal to gather that the price resulting from the measures was below 35% of the international price per cubic meter of Arabian light oil, 34° API. Nor does Argentina give any indication to the Tribunal that the price resulting from the measures was above this benchmark. In the light of the analysis above, the Tribunal considers that, in so far as Argentina has fixed the domestic price of gas below the relevant benchmark without providing for compensation to Total as required by Article 6 of Decree 1589/89, Argentina has breached the fair and equitable treatment standard of the BIT. This would constitute an unfair and unreasonable interference with Total's rights under Articles 6 and 8 of the Concession.

456. If this is, in fact, the case, Total is entitled to damages for this breach of the fair and equitable treatment standard amounting to the difference between the actual price and the benchmark price. Argentina's breach of the fair and equitable treatment - subject to evidence showing that domestic gas prices resulting from the enacted

[631] This is stressed by Total in its Post Hearing Brief, paras. 73 and 714.
[632] See Total's Post-Hearing Brief, para. 705 where Total also refers to the study on the effect of Argentina's Measures conducted by Mr Guichón, Argentina's witness on the Exploration and Production sector.

measures were below 35% of the international price per cubic meter of Arabian light oil, 34° API - took place from June 2002 to April 2004. This is because of the Price Path Recovery Agreement agreed between the government and gas producers (Total included) that was signed on 2 April 2004.[633] The Price Path Recovery Agreement provided for progressive increases by the SoE of the well-head price of natural gas applicable to industrial consumers between May 2004 and July 2005, with the aim of liberalising the well-head prices for industrial consumers as of August 2005. It set out a different recovery regime for prices for residential consumers, providing for the liberalisation of those prices as of January 1, 2007.[634]

457. There is no reason for the Tribunal to consider that Total has not validly agreed to the recovery system described above by signing the Price Path Recovery Agreement with Argentina's authorities. Total has not challenged the validity of this Agreement. Instead Total has complained that, although during the course of the negotiations "the producers sought a full recovery of the market-based method for determining the price of natural gas at the well-head, and compensation for the losses incurred in the aftermath of the Measures … Argentina refused to compensate the producers for past losses."[635] The Tribunal, therefore, concludes that Total's right to invoke the 35% of the international price per cubic meter of Arabian light oil (34° API) standard of compensation concerns the period from June 2002 to April 2004. Further details, including the relevance, if so, of Argentina not having fully implemented the Price Path Recovery Agreement, as Total complains, should be left to the quantum phase.[636]

[633] The Price Path Recovery Agreement that had as an object "*la Implementación del Esquema de Normalización de los Precios del Gas Natural en Punto de Ingreso al Sistema de Trasporte…*" to be completed by 31 December 2006, was concluded on April 2, 2004 and then approved by the Ministry of Federal Planning, Public Investments and Services with Resolution 208/04 dated 21 April 2004 (Exhibit C-208).

[634] See Total's Memorial, paras 159-160; Total's Reply, para. 242 (as to the *Acta Acuerdo* see also See Total's Post-Hearing Brief, paras. 705-709).

[635] See Total's Memorial, para 158 and Post-Hearing Brief, paras. 708-709. Mr. Grosjean, who signed the Price Path Recovery Agreement for Total, testified at the Hearing on the merits that Total did not waive any rights vis-à-vis Argentina by signing the Agreement, despite Argentina having asked the producers to do so (Transcript (English) Day 3, 892:13-22-893:1-3). In the Tribunal's view, this statement, which is not reflected in the text of the Agreement or any other contemporary document, cannot invalidate the content of the Price Path Recovery Agreement in respect to the gas prices agreed by the parties according to its terms. Cf. the cross-examination of Mr. Grosjean, Transcript (English) Day 4, 935:10-22; 936: 1-4.

[636] See paras. 371, 390 above and Total's Post-Hearing Brief, paras. 708-709. The Price Path Recovery Agreement was later extended by another agreement (Resolution SE 599/07 dated 14 June 2007, Exhibit A RA 269).

458. Total makes two claims regarding the limitation of gas exports. First, Total complains of the negative effect on its revenue due to the introduction by Argentina of natural gas export taxes.[637] Second, Total claims that the measures that Argentina enacted in March 2004 to respond to the gas shortage in the domestic market – such as SoE Resolution 265 and Undersecretary of Fuels Disposition 27/04 (together, the Gas Rationing Program) and SoE Resolution 659/04 (which replaced in June 2004 the Gas Rationing Program with a new one) – interfered with the export contracts that Total had entered into with various Chilean companies to the point of preventing Total from performing those contracts.[638] These export contracts had been authorised in accordance with Article 3 paragraph 2 of the Gas Law (no objections had been made to the export contracts submitted by Total within 90 days).[639] In particular, Total contends that "as a direct result of Resolution 659, Total suffered losses for the redirection of natural gas originally destined for export to Chile, which was sold instead to specific consumers in the domestic market below export price. In short, Argentina put Total in a position where it had no choice but to breach the contracts with its Chilean counterparties and to receive as much as two-thirds less per MBTUs from the customers to whom it was ordered to sell its gas."[640] In addition, Argentina had not provided for the compensation it had guaranteed to Total under the Concession Decree.

459. As to the first complaint concerning the negative effect on its revenue due to the introduction by Argentina of natural gas export taxes, the Tribunal recalls its previous findings based on Argentina's regime applicable to the subject matter. The Tribunal considers therefore that export limitations imposed to ensure domestic supply were lawful under the applicable legislation so that their application (however unwise they might have been from an economic point of view) cannot be considered *per se* in breach of the BIT. Furthermore, gas export taxes cannot be labelled as restrictions on Total's rights of free disposition of gas. The Tribunal concludes, therefore, that the export limitations imposed by Argentina to ensure domestic supply are not in breach of the fair and equitable treatment standard.

[637] For a more detailed description of the effect of the natural gas export taxes, see LECG Report on Damages, paras. 103-105 and 111-112.
[638] See Total's Post-Hearing Brief, paras. 722-725.
[639] See Total's Post-Hearing Brief, paras. 75-78.
[640] See Total's Post-Hearing Brief, para. 726.

460. However, the Tribunal reaches a different conclusion regarding Total's second claim concerning its export contracts.[641] The Tribunal recalls here that, under Argentina's legal framework, the export of natural gas should be authorised by ENARGAS within 90 days "on the basis of sufficiency of supply in the internal market". Taking into account this mechanism for authorisation, Argentina's interference with Total's export contracts was in breach of Argentina's own law..[642] It is the Tribunal's view that once an export contract had been duly authorised pursuant to the domestic applicable legal regime, the subsequent withdrawal of those contractual rights at least constitutes unfair treatment as Total has argued.[643] Argentina's argument that Total has prevailed in the litigations started by its Chilean buyers for breach of the export contract, because Total successfully invoked "force majeure" on the basis of Argentina's interference, appears irrelevant to the Tribunal.[644] Total is entitled in any case to be compensated by Argentina for its loss of reasonably expected profits under these contracts since this loss is due to Argentina's interference with Total's export contracts in breach of the fair and equitable treatment clause of the BIT. In respect of the above-mentioned breach, Total's damages should be based on the difference between the domestic prices it received for the gas redirected and sold in the domestic market and the export prices agreed in export contracts.[645] As to the duration of Total's export contracts, the relevant period will have to be determined in the quantum phase based on the evidence that the parties submit.

461. For the reasons stated above, the Tribunal concludes that the export taxes introduced by Argentina after 2002, and the limitations on gas exports in general, are not in breach of Total's rights under the BIT. In contrast the Tribunal concludes that the measures by which Argentina has specifically interfered with Total's gas export contracts that had been duly authorised by Argentina's authorities are in breach of Total's rights under the BIT.

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[641] In respect of these export contracts see extensively *supra* para. 361 and note 488.
[642] The Tribunal addresses Argentina's plea of necessity at paras. 482 ff. hereunder.
[643] The Tribunal considers that Argentina's conduct at issue here could also be labelled as (and could amount to) an expropriation of contractual rights without compensation. In this respect Total has, however, invoked the breach of Article 3 of the BIT rather than the breach of Article 5.2 of the BIT.
[644] See Argentina's Post-Hearing Brief, para. 633.
[645] In any case, the exact calculation of Total's damages and its basis will have to be dealt with in the quantum phase, avoiding any double recovery.

9. Pricing of LPG

462. In its final claim related to hydrocarbon exploration and production, Total argues that Law 26,020 of 2005 (the so-called LPG Law)[646] and subsequent resolutions violated its rights under the Concession Decree of full ownership and free disposal of crude oil.[647]

463. Before dealing with Total's claim regarding LPG production and sale, the Tribunal considers it useful to clarify two points. First, as is apparent from Total's submissions, Total submits that the same legal regime governing crude oil also applies in respect of LPG production and commercialization, LPG being considered as an oil derivative.[648] Second, while Argentina has pointed out that Total has waived any right it could be entitled to when it signed the LPG Agreement,[649] Total makes clear that it "… has no claims for losses under the LPG Agreement. Its losses arise under the LPG Law."[650] It is Total's view that Argentina's enactment of the LPG Law breached the Total's rights because the LPG Law prevented Total from negotiating free market prices for the LPG that it produced.

464. In any case, the Tribunal notes that Total has not elaborated in detail its claim with respect to the LPG sector either in its Post-Hearing Brief or in its previous submissions. On the other hand, Mr. M. A. Abdala and Mr. T. Spiller, the experts appointed by Total, dealt more extensively with Total's claim concerning LPG in their Report than Total itself in its memorials. In particular the LECG Report considers as government measures, the impact of which it takes into account for the purpose of calculating Total's damages, the following measures: the introduction of export taxes on LPG since March 2002; the imposition in 2006 of taxes on hydrocarbon exports from Tierra del Fuego; and the enactment of the LPG Law.[651] It

[646] Law 26.020 dated 8 April 2005 at Exhibit A RA 170.
[647] Total's Post-Hearing Brief, para. 95. In any case, the Tribunal recalls here that the first relevant measure enacted by Argentina as to the LPG sector was the LPG Agreement of 2002 (the "*Acuerdo de Estabilidad en el Precio Mayorista de Gas Licuado de Petroleo en el Mercado Argentino*") between the Executive and LPG producers, Total Austral included (in this regard see below para. 474).
[648] See also LECG Report on Damages, footnote 163 at page 97.
[649] Resolution 196/02 (at Exhibit A RA 113).
[650] See Total's Post-Hearing Brief, para. 96 (a).
[651] See LECG Report on Damages, para 65, points c), d) and e). As to the introduction of export taxes on LPG and the elimination of the tax-exemption concerning Tierra del Fuego, see more extensively LECG Report on Damages, paras. 81-85 and 184-185. As to the price intervention through the enactment of the LPG Law, see more extensively LECG Report on Damages, paras. 86-89 and 186-188.

is noteworthy that, with the exception of the measures relating to the LPG Law and the export taxes, Total's memorials did not present arguments relating to the above mentioned measures listed in the LECG Report in support of its claim with respect to LPG.[652]

465. Summing up, the Tribunal has inferred from the brief part of Total's Post-Hearing Brief concerning LPG claim that the thrust of Total's argument in this respect is that Argentina's regulatory intervention through the LPG Law[653] interfered with Total's right of free disposition of crude oil (its derivatives included) as enshrined in the Concession Decree. The Tribunal is familiar with this legal argument in spite of its brief exposition given by Total in respect to LPG claim, because Total developed it extensively in respect of the hydrocarbon sector in general and the Tribunal has already discussed it in detail above. However, the LECG Report bases the quantum calculation concerning LPG on further alleged breaches resulting from other measures besides the LPG Law and export taxes.

466. The Tribunal, therefore, considers it appropriate to evaluate in respect of Total's claims both the LPG Law and the afore-mentioned measures listed in the LECG Report. This approach is taken by the Tribunal notwithstanding that, absent any specific claim by Total in respect to the afore-mentioned measures listed in the LECG Report or any reference by Total in its memorials to the arguments put forward by the LECG Report, the Tribunal does not believe that it could (or should) take into account the LECG Report alone in order to find a breach by Argentina of the BIT or as a basis for the establishment of damages thereunder. For the sake of completeness and clarity, however, the Tribunal will deal with all the above measures separately in the following paragraphs, irrespective of whether the measures are challenged directly by Total in its memorials or by its experts alone in their report.

467. As to the pesification of LPG prices, as already stated with regard to the other claims submitted by Total and for the same reasons, the Tribunal does not consider that the pesification effected by Argentina was in breach of Total's rights under the BIT. As a consequence, the Tribunal considers Total's claim of indemnification of losses due to pesification as unfounded also in respect of LPG operations.

[652] Total's Post-Hearing Brief, para. 763.
[653] Total's Post-Hearing Brief, paras. 778-779.

468. As to Argentina's imposition of taxes on hydrocarbon exports from Tierra del Fuego in 2006, and any demand for payment thereof by Argentina, the Tribunal has already stated above that the retroactive elimination of the Tierra del Fuego tax exemption effected by Argentina through the enactment of Resolution 776/06 is in breach of the fair and equitable treatment clause of the BIT. Furthermore, the Tribunal has already concluded above that any Argentine authorities' request for payment of export taxes addressed to Total for its exports from Tierra del Fuego concerning the period from 2002 to 2007 would be in breach of the BIT. The same Tribunal's findings and holdings have to be applied with regard to any export of LPG from Tierra del Fuego carried out by Total Austral.

469. According to the LECG Report on Damages, Total's claim relating to the export taxes imposed by Argentina on LPG as of 2002 has two prongs. More specifically, the LECG Report on Damages states that "the imposition of withholding taxes on LPG exports has effects analogous to those imposed for the crude oil market."[654] The claim is that, on the one hand, Argentina's introduction of taxes on the export of LPG reduced the prices received by producers for sale of LPG in the international market, thereby limiting their exports of the product and reducing their revenues. On the other hand, the same taxes artificially reduced LPG prices in the domestic market.

470. As to the negative impacts of the export taxes on both Total right to export LPG without limitations and on Total's revenue, the Tribunal considers it appropriate to recall its findings regarding the crude oil export taxes at paragraph 434. The challenged export taxes imposed by Argentina cannot be considered as "restrictions" under Argentina's regime. They are instead fiscal measures (to which oil producing and exporting countries normally have recourse) generally addressed to the exporters of crude oil and their derivatives (not specifically to Total). These export taxes are part of "the general fiscal legislation" to which Total is subject in accordance with Article 9, first sentence, of the Concession Decree. Moreover, the Tribunal notes that these export taxes did not affect directly Total's operations or any LPG export contract concluded by Total with other counterparties. On the contrary, even if it were accepted that the export taxes could be classified as restrictions, they negatively affected Transportadora de Gas del Sur (TGS) transactions as Total's experts

[654] See LECG Report on Damages, para. 184.

conceded.[655] TGS is a company unrelated to Total, which processes most of the LPG produced by Total Austral in Argentina, and carries out all of the export sales of that product.

471. For the reasons already stated above, it is the Tribunal's view that the introduction of LPG export taxes was not in breach of Total's rights under the Concession Decree either directly as "restrictions" on exports or indirectly because of their depressing effect, if any, on domestic prices.

472. The Tribunal must now address Total's main claim concerning LPG prices, namely that the LPG Law set prices in breach of Total's right under the Concession Decree to sell LPG at freely negotiated prices in the domestic market. In this respect, the Tribunal recalls its conclusions in the previous paragraphs, that Total had not an absolute right to negotiate the commercialization price of crude oil and its derivatives under the Concession Decree. Total's right of free disposal of crude oil and its derivatives (LPG included) was subject to the possibility of government interventions under Article 6 of the Hydrocarbons Law.

473. In this respect, Argentina points out that the legal regime applicable to crude oil authorises governmental intervention in pricing and that the massive increase of LPG consumption by the families hit by the crisis justified such intervention. It is undisputed that LPG is the fuel most easily substituted for residential natural gas consumption. According to the data supplied by Total's experts, as of 2001, LPG is the primary source of fuel for 45.8% of households in Argentina because they are not connected to gas networks.[656] As the LECG Report also indicates, "customers without access to natural gas distribution networks rely primarily on LPG for heating and cooking purposes. Retail LPG prices in domestic currency doubled in 2002 as compared to the previous year (from AR$9.0 per 10 kg container to AR$18.0)".[657] According to same Report, domestic currency prices received by LPG producers increased during 2002 and the export price increased by 162,8%.[658]

[655] See LECG Report on Damages, para. 82.
[656] See LECG Report on Damages, footnote 193 at page 111.
[657] See LECG Report on Damages, para. 215.
[658] See LECG Report on Damages, para. 216. The Tribunal notes that the LECG Report further states that "Measured in US dollars, the export price received by LPG producers dropped by 18.6%. The export parity price for LPG was affected by the introduction of an export withholding tax, which reduced the net price received by

474. The Tribunal also notes that, in June 2002, well before the enactment of the LPG Law in 2005, the LPG Agreement was entered into with the objective of procuring the supply of LPG at agreed prices in the domestic market. This agreement was concluded between Argentina's Executive (represented by Mr. Roberto Lavagna, the then Minister of Economy) and the major producers/distributors in the sector (including Total Austral, which was represented by Mr. Grosjean and Mr. Pera) in order to stabilize LPG prices in the domestic market during the period from June 1, 2002 to September 30, 2002. According to the resolution implementing the Agreement, producers committed to sell LPG to Argentina's "*empresas fraccionadoras*" (bottling companies) at an average price of LPG not above $(pesos)/TN 600. In addition, producers committed to supply to distributors and sub-distributors, upon the Ministry of Economy's request, a quantity of LPG amounting to 33.000 TN at a price of $(pesos)/TN 300.[659] One of the producers' main conditions on entering into the Agreement, was the reduction of the export tax on LPG from 20% to 5% with retroactive effect from June 1, 2002.[660] This condition was fulfilled by Argentina by means of Resolution 196/02 (Articles 2 and 4).

475. According to Total, before the LPG Law was enacted, the LPG price was not fixed by governmental interventions but was freely established in the market.[661] However, the conclusion of the LPG Agreement between LPG producers and the Executive in 2002 undermines this argument. Total claims that it accepted the Agreement "under protest" and "with a full reservation of rights."[662] The Tribunal notes, however, that this does not result from the text of the agreement submitted to the Tribunal or from any other written documents. Conversely, the LPG agreement entailed advantages for the producers, such as being subject to export taxes on LPG at a lower level than that which would have applied without the agreement. Moreover, this preferential treatment guaranteed by Argentina to LPG producers,

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producers." The Tribunal notes that these statements provide the basis in the LECG Report for calculating losses suffered by Total as to LPG operations. However, the Tribunal has rejected Total's claims that either the pesification or the introduction of the export taxes were in breach of Total's rights under the BIT.

[659] See Resolution 196/02 (Exhibit A RA 113), Annexed Agreement, point 2º) and point 3º).

[660] See Resolution 196/02 (Exhibit A RA 113), Annexed Agreement, point 6º).

[661] See Total's Post-Hearing Brief, para. 95.

[662] See Total's Post-Hearing Brief, para. 96 (b) with reference to the oral testimony of Mr. Grosjean who signed the Agreement on behalf of Total Austral. (Transcript (English) Day 4, 985:4 – 987: 18).

namely to be subject to an export tax rate of 5% (instead of 20%), lasted until 2004, that is beyond the term of the LPG Agreement.[663]

476. Subsequently, in 2005, Argentina passed the LPG Law, which explicitly supplements both the Hydrocarbons and the Gas Laws. As stated in Article 1 of the LPG Law, the legislation aimed first of all to ensure regular and affordable LPG supply to residential users of modest economic means.[664] At the same time, the price mechanism it introduced was meant to allow players in the LPG market (producers included) to obtain a price sufficient to cover their efficient costs and to allow a reasonable return. More specifically, according to Article 34, paragraph 2, the reference price of LPG for a typical 45 kilogram LPG unit, to be fixed by the competent authority each semester, should be calculated:

> "…, in order for active subjects to have a retribution for their efficient costs and a reasonable rate of return, based on the monthly price of LPG in bulk at the exit of the producer plant calculated in accordance with the principles established in Article 7(b), the values sent by the corresponding bulk-breakers, under a sworn statement of sale, the distribution market information and the estimates made by the Applicable Authority."

477. Total contends that its rights under the concession to full ownership and free disposal of the crude oil that it produced were breached by this regulation because "… the LPG Law capped Total's ability to negotiate free market prices for its product."[665] The Tribunal notes to the contrary that the pricing rules set by the LPG Law are consistent with the powers that Argentina's Executive had under the Hydrocarbons Law, which was in force in 1994, when the concession on whose terms Total relies was concluded. The Tribunal recalls its previous reasoning examining in detail the references in the concession to the various Deregulation Decrees, which in turn referred to the Hydrocarbons Law.[666] Specifically, the Tribunal recalls that under Article 6 of the Hydrocarbons Law in times of domestic scarcity preference must be given to domestic needs. Moreover, domestic prices could be set at a lower level than international prices when the latter had significantly increased due to exceptional circumstances. In this respect the Tribunal recalls its

[663] In this respect see also LECG Report on Damages, para. 81.
[664] Article 7 letter b) of the LPG Law provides that the supply of LPG must be guaranteed to the domestic market at prices for consumers not above export parity prices in order to guarantee domestic supply and availability of LPG for consumers.
[665] See Total's Post-Hearing Brief, para. 95.
[666] See above paras. 421-427.

conclusions at paragraph 472 above, and the data referred to in the LECG Report mentioned above, concerning the LPG market from 2002 onwards.[667] The pricing rules contained in the LPG Law correspond to the afore-mentioned principles of the Hydrocarbons Law on the pricing of crude oil and its derivatives in the domestic market, including the requirement that the producers' costs be covered and a reasonable return be ensured.[668] Furthermore, the pricing principles of the LPG Law appears similar to the pricing principles of the Gas Law.

478. Total has not submitted to the Tribunal evidence that would show that LPG prices in accordance with the LPG Law[669] were below those agreed by Total under the LPG Agreement or were insufficient to cover costs, and include a reasonable return, contrary to the principles of Article 34 of the LPG Law. In any case the legal framework in place before the enactment of the LPG Law did not guarantee to producers such as Total the right to sell domestically at international prices. By contrast the LECG Reports on Damages[670] are based principally on the difference between the projected future prices of LPG, calculated on the basis of the variations in the international price of LPG in US dollars, and the actual prices paid to Total Austral by TGS which processes and trades Total's LPG in the export market.[671]

479. Based on the analysis above of the facts and the legal arguments submitted by the parties, the Tribunal concludes that the price mechanism introduced by the LPG Law is not, as concerns Total, in breach of the fair and equitable treatment standard of the BIT and, therefore, it rejects Total's claim under Article 3 of the BIT as to its operations in the LPG sector.

10. Evaluation of Total's Claim under Article 4 of the BIT

480. Finally, the Tribunal has to examine Total's claim that Argentina breached Article 4 of the BIT in treating its investments in the energy sector in general (its

[667] See above para. 473.
[668] In this regard see Article 34 of the LPG Law quoted above at para. 476.
[669] These prices are set as follows: for residential users prices could not exceed US$32 for a typical 45 kilogram LPG unit and for the rest of the sales, a cap was set equal to the average price of LPG sold in the previous 24 months. See above para. 405.
[670] See LECG Addendum on Damages, Table II at page 8 which estimates Total's damages in respect to LPG to US$ 121.9 million in US$ of December 2006.
[671] See LECG Report on Damages, paras 186-187 (see also para. 86).

investments in exploration and production of hydrocarbons included) in a discriminatory way.[672] As Total explained in its Reply,

> Total's case is predicated on Argentina's deliberate policy of discriminating against the energy sector as a whole, in favour of domestic industrial, commercial and residential consumers. Although on their face the Measures do not contain any limitations on, or preference for, nationality, the key consideration is that industry and commerce largely represent Argentine's interests, while the energy sector was, until recently, largely in the hands of foreign private investors.[673]

481. The Tribunal recalls its discussion of Total's claim of discrimination concerning its investments in TGN and in power generation. On the basis of the principles highlighted above at paragraphs 210-217, the Tribunal is of the view that Total has not demonstrated that it has been treated in a legally relevant discriminatory manner as concerns its investments in exploration and production of hydrocarbons. The Tribunal therefore concludes that Argentina has not breached in this respect Article 4 of the BIT.

11. Argentina's State of Necessity Defence

482. Argentina has raised the defence of necessity under customary international law also in respect of Total's claims as to its investments in exploration and production of hydrocarbons.[674] As in the case of Total's other investments, the Tribunal must therefore examine this defence in the light of the criteria stated in Article 25 ILC Articles on State Responsibility as it relates to measures adopted by Argentina in breach of the BIT.[675]

483. As to the retroactive elimination of the Tierra del Fuego tax exemption (discussed at paragraph 447 ff. above), Argentina's request for payment of back taxes pursuant to Resolution 776/06 for the period 2001-2006 can in no way be considered required "to safeguard an essential interest" of Argentina "against a grave and imminent peril". Nor did Argentina present any evidence to the contrary. The same can be said of the fixing of the domestic price of gas below the relevant benchmark without

[672] See Total's Memorial, paras. 344-345; Total's Reply, paras. 7-29 and 499 ff. and Post-Hearing Brief paras. 620 ff.
[673] See Total's Reply, para. 499.
[674] Argentina has raised the defence of necessity against all of Total's claims generally, as far as the Tribunal would have considered them a violation of the BIT; see Argentina's Counter-Memorial, paras. 876 ff. The essential interest alleged by Argentina there is "the preservation of the State own existence and that of its population at times of public emergency."
[675] See the analysis by the Tribunal at paras. 220 ff. above.

providing for compensation to Total in accordance with Article 6 of Decree 1589/89, as addressed by the Tribunal at paragraph 455 above. Providing for such compensation to Total could not have impaired an essential interest of Argentina. Again, Argentina did not present any evidence to the contrary.

484. As to Argentina's interference with Total's export contracts in 2004,[676] the Tribunal recognizes that in time of shortages, diverting gas intended for export to domestic consumption could qualify, in the abstract, as an act adopted "to safeguard an essential interest against a grave and imminent peril." However, this is subject to the party invoking the defence showing that the peril is grave and imminent and that the action is "the only way" to safeguard the essential interest at stake. Argentina, however, did not provide any evidence that the limitation of the gas export placed upon Total in 2004 (when the emergency of 2001 had been overcome) was correlated to a grave and imminent peril to consumers' access to essential gas supply. The Tribunal, therefore, concludes that Argentina's defence based on the state of necessity under customary international law is groundless.

[676] See paragraphs 372, 395 above.

Part V - Decision of the Tribunal on Liability

485. Based on the above reasoning and findings, the Tribunal, partially granting Total's claims, DECIDES as follows:

a) Argentina breached its obligations under Article 3 of the BIT to grant to Total fair and equitable treatment, as specified in paragraphs 184, 346, 444, 455, 461, causing damage to Total;

b) All other claims by Total, including those under Articles 4 and 5 of the BIT, are rejected;

c) All defences by Argentina, including those relating to the alleged state of necessity, are rejected;

d) The Argentine Republic is liable to Total for the aforementioned violations of the BIT and the damages thereby suffered by Total must be compensated by Argentina, as will be determined in a separate quantum phase of these arbitration proceedings, and in respect of which the Tribunal retains jurisdiction. The Tribunal will issue a separate order concerning the further proceedings for the quantum phase.

e) Any decision on the costs of the arbitration is reserved.

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

Mr. Henri Alvarez
Arbitrator
Date: 21 December 2010

Subject to the attached dissenting opinion

Mr. Luis Herrera Marcano
Arbitrator
Date: December 12, 2010

Subject to the attached concurring opinion

Prof. Giorgio Sacerdoti
President of the Tribunal
Date: December 8, 2010