INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

WEBUILD S.P.A. (FORMERLY SALINI IMPREGILO S.P.A.)
Claimant

and

ARGENTINE REPUBLIC
Respondent

ICSID Case No. ARB/15/39

AWARD

Members of the Tribunal
Ms. Lucinda A. Low, President
Professor Kaj Hobér
Professor Jürgen Kurtz

Secretary of the Tribunal
Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to the Tribunal
Professor Freya Baetens

Date of dispatch to the Parties: 28 April 2025

REPRESENTATION OF THE PARTIES

Representing Webuild S.p.A.:

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Representing the Argentine Republic:

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Procurador del Tesoro de la Nación

Mr. Juan Ignacio Stampalija
Subprocurador del Tesoro de la Nación

Sr. Julio Pablo Comadira
Subprocurador del Tesoro de la Nación

Ms. Mariana Lozza
Directora Nacional de Asuntos y Controversias Internacionales

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TABLE OF ABBREVIATIONS/DEFINED TERMS

Capitalized terms not defined herein shall have the same meaning as in the Decision on Liability.

Acta acuerdo	Agreement between Puentes and Argentina of 20 October 2000
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
Argentina or the Respondent	The Argentine Republic
Bidding Terms	Pliego de Bases y Condiciones del Concurso y sus Circulares
BIT or the Treaty	Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments which was signed on 22 May 1990 and entered into force on 14 October 1993
Boskalis Ballast	Boskalis-Ballast Nedam Baggeren, one of Puentes' principal subcontractors and the claimant in an ICC arbitration brought against Puentes for unpaid services that resulted in an award of approximately USD 30 million and was the basis of a 2007 bankruptcy petition against Puentes
BRG's Implementations of the Directions on Quantum	Claimant's experts' submission entitled "BRG'S Implementations on the Directions on Quantum" dated 9 June 2023, filed together with Claimant's Post-Decision on Liability Response of the same date
Claimant	Webuild S.p.A. (formerly known as Salini Impregilo S.p.A.)
C-[#]	Claimant's Exhibit
Claimant's Memorial	Claimant's Memorial on the Merits dated 3 January 2017
Claimant's Reply	Claimant's Reply on the Merits dated 16 November 2018

Claimant's Post-Decision on Liability Response or Claimant's Response to the Tribunal's Instructions on Quantum	Claimant's letter of 9 June 2023 with its response to the Tribunal's instructions on Quantum
CL-[#]	Claimant's Legal Authority
Concession	Concession for the Project set out in the Bidding Terms
Concession Contract or Contract	Concession Contract executed between the Claimant's local Argentine incorporated company, Puentes del Litoral S.A., and the Argentine Republic on 28 January 1998
Consortium	The Claimant, Hochtief Aktiengesellschaft, and several Argentine construction companies
Convertibility Law	Law No. 23,928
CPI	U.S. Consumer Price Index
Creditor Settlement Agreement	Court Order in Puentes del Litoral S.A. s/insolvency proceedings, 30 December 2009 (C-0206)
DCF	Discounted Cash Flow
Decision on Jurisdiction	Decision on Jurisdiction and Admissibility issued by the Tribunal on 23 February 2018
Decision on Liability	Decision on Liability and Directions on Quantum issued by the Tribunal on 3 March 2023
Decision on Reconsideration	Decision on Respondent's Request for Reconsideration issued by the Tribunal on 25 September 2024
DoQ	Tribunal's Directions on Quantum included in the Tribunal's Decision on Liability of 3 March 2023
Emergency Law	Law No. 25,561
FAL or Financial Assistance Loan	Financial Assistance Loan agreement executed 21 February 2003 and 4 March 2003
FET	Fair and Equitable Treatment
FIFA	Firm and Irrevocable Financing Agreement

First LOU or 2006 LOU	Letter of Understanding of 16 May 2006
First Transitory Agreement	Transitory Agreement of 17 December 2009
Foreign Investment Act	Decree No. 1853/93
Fourth Transitory Agreement	Transitory Agreement of 6 March 2012
Hearing on the Merits or Hearing	Hearing on the Merits held on 2 February 2021 and from 11 to 19 February 2021 by video conference
Hochtief	German international construction group Hochtief Aktiengesellschaft
Hochtief Arbitration	*Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31
Hochtief Shareholder Loans	Shareholder Loans made by Hochtief
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IDB	Inter-American Development Bank
IDB Loan or Loan	Loan agreement between Puentes and the Inter-American Development Bank of 1 August 2000
IRR	Internal Rate of Return
Joint Updated Valuation Model	Joint Updated Valuation Model prepared by Daniela Bambaci and Santiago Dellepiane of Berkeley Research Group ("BRG") and Melani Machinea and Ernesto Schargrodsky from Universidad Torcuato di Tella ("MS") (jointly referred to therein as "Experts") to provide responses to the Tribunal's Decision on Liability and Directions on Quantum dated 3 March 2023.
MEyOSP	Argentine Ministry of Economy and Public Works and Services
MFN	Most-Favored-Nation Clause

MS	Melani Machinea and Ernesto Schargrodsky (Respondent's experts on *quantum*)
NCC	Net Capital Contributions
OCCOVI	Órgano de Control de Concesiones Viales
Post-Decision on Liability Valuation Report by Machinea & Schargrodsky	Respondent's experts' submission entitled "Post-Decision on Liability Valuation Report" by Melani Machinea and Ernesto Schargrodsky, dated 8 June 2023, filed together with Respondent's Post-Decision on Liability Brief, dated 9 June 2023
Project	The construction of several roads and a series of bridges and embankments, including a 608-meter-long cable-stayed main bridge, which would connect the cities of Victoria and Rosario in the provinces of Entre Ríos and Santa Fe, Argentina
PTN	Procuración del Tesoro de la Nación
Puentes, PdL or Concessionaire	Puentes del Litoral S.A.
PdL Judgment or Local Judgment	Judgment rendered on 27 June 2024 by the Federal Court on Administrative-Contentious Matters No. 8 of the Argentine Republic in case 25047/2014, *Puentes del Litoral S.A. c/Ministerio de Planificación s/Proceso de Conocimiento*
Renegotiation Protocol	Protocol for the renegotiation of the Concession agreed on 6 April 2005
Renegotiation Report	Report on the Merits of the Memorandum of Understanding UNIREN – PUENTES DEL LITORAL SA of 19 January 2007
Request	Request for Arbitration from Salini Impregilo S.p.A. against the Argentine Republic dated 1 September 2015
Resolution 14	Resolution SOP No. 14/03
Respondent or Argentina	The Argentine Republic
R-[#]	Respondent's Exhibit

Respondent's Counter-Memorial	Respondent's Counter-Memorial on the Merits dated 21 June 2018
Respondent's Rejoinder	Respondent's Rejoinder on the Merits dated 7 March 2019
Respondent's Post-Decision on Liability Brief	The Post-Decision on Liability Brief of the Argentine Republic dated 9 June 2023
RL-[#]	Respondent's Legal Authority
Second LOU	Letter of Understanding of 16 May 2006
Second Transitory Agreement	Transitory Agreement of 14 June 2010
Shareholder Loans	Loans made by Claimant and Hochtief to Puentes
SOP	Secretariat of Public Works
State Reform Law	Law No. 23,696
Termination Resolution	Argentine resolution of 26 August 2014, terminating the Concession Contract
Third Transitory Agreement	Transitory Agreement of 13 October 2011
Tr. Day [#]: [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on 11 July 2016 and reconstituted on 15 July 2021
UNIREN	Unit of Renegotiation and Analysis of Public Utility Contracts
Valuation Date	Date of the Termination Resolution (31 August 2014) in Claimant's damages calculations
WACC	The weighted average cost of capital
Webuild	Webuild S.p.A. (formerly, Salini Impregilo S.p.A.), an Italian industrial group incorporated under Italian law
Webuild Shareholder Loans	Shareholder Loans made by Webuild

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments which was signed on 22 May 1990 and entered into force on 14 October 1993 (the "**BIT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 (the "**ICSID Convention**").

2. The Claimant is Webuild S.p. A. (previously Salini Impregilo S.p.A) ("**Webuild**" or "**the Claimant**"), an Italian industrial group specialising in large civil engineering projects, incorporated under Italian law. Depending on the date of the Parties' submissions, the names of **Salini**, **Salini Impregilo** or **Webuild** are used interchangeably to designate the Claimant.

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

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

5. The Claimant and other investors formed a Consortium to participate in a bid for the construction of several roads and a series of bridges and embankments, including a 608-meter-long cable-stayed main bridge, which would connect the cities of Victoria and Rosario in the provinces of Entre Ríos and Santa Fe (hereinafter defined as "**the Project")**. The Consortium won the bid, and on 28 January 1998 executed a Concession Contract with the Respondent for the performance of the Project.[1] A locally incorporated Argentine company, Puentes del Litoral S.A. ("**Puentes**", **"PdL"** or the **"Concessionaire"**), was created as required by the Concession Contract and began

[1] Claimant's Memorial, ¶ 47.

construction in late 1998.[2] The Claimant submits that it owns 26% of Puentes' stock and confirms having invested USD 33.2 million in the Project.[3]

6. The Claimant alleges that Argentina has failed to restore Puentes' "Concession Contract's economic balance following the enactment of the Emergency Law, has hindered the Claimant's investment to the point of complete loss, has ended the Concession Contract by using pretextual reasons and has failed to compensate Claimant and Puentes for the adverse economic effects of its unlawful conduct".[4] As a result, the Claimant contends that the Respondent breached several provisions under the BIT, in particular: (i) the fair and equitable treatment ("**FET**") standard (Article 2.2); (ii) the non-discrimination standard (Articles 2.2 and 3); and (iii) the obligation not to unlawfully expropriate an investment (Article 5).[5] The Claimant also invokes Article 7 of the US-Argentina BIT by way of the most-favored nation clause ("**MFN**") under the BIT (Article 3.1).[6]

7. The Respondent argues that its "actions showed full support and commitment to the works for the Rosario-Victoria physical connection […]. In spite of Concessionaire's breaches, the State maintained the Concession, until the time where PdL's shareholders decided to terminate such concession upon dissolution of Concessionaire. The abrupt

[2] Claimant's Memorial, ¶ 4.
[3] Request for Arbitration, ¶¶ 3, 20.
[4] Request for Arbitration, ¶ 4; Claimant's. Memorial, ¶ 168. Tr. Day 2: 142:18-22, 150:5-14.
[5] Claimant's Memorial, ¶ 177.
[6] Claimant's Memorial, ¶¶ 161-162. The Request for Arbitration identified a larger number of claims than were ultimately set forth in the Memorial (¶ 10): "Argentina has breached at least the following obligations and standards of conduct with respect to Salini Impregilo's investment: Investments by investors of one of the Contracting Parties shall not be nationalized, expropriated, seized or otherwise appropriated, either directly or indirectly, through measures having an equivalent effect in the territory of the other Party, unless the following conditions are complied with: the measures are taken for a public purpose, in the national interest or for security; they are taken in accordance with due process of law; they are non-discriminatory or not contrary to any commitments undertaken; and they are accompanied by provisions for the payment of prompt, adequate and effective compensation; Each Contracting Party shall always accord fair and equitable treatment to the investments made by the investors of the other Contracting Party; Each Party shall observe any obligations it may have entered into with regard to investments; Neither Party shall impair by unjustified or discriminatory measures, the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other Contracting Party's investors; Each Contracting Party shall, in its own territory, accord to investments made by investors of the other Contracting Party, to the returns and activities related thereto and to any other matter regulated by this Agreement, a treatment not less favorable than that accorded to its own investors or to investors of third countries; Investment shall at all times ... enjoy full protection and security and shall in no case be accorded treatment less than that required by international law; and Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations." (Footnotes omitted)

alteration in the economic and financial balance of the Contract was a result of financing problems faced by Concessionaire and its shareholders, not attributable to the State, prior to the outbreak of the crisis in late 2001 and the adoption by the State of emergency measures to counteract such crisis […]. Also, the financing difficulties faced by Concessionaire and its shareholders, prior to the crisis and the emergency measures, were the factor leading PdL to file for insolvency proceedings in order to avoid being adjudged bankrupt as petitioned by its subcontractors".[7] As a result, the Respondent asks the Tribunal to reject the Claimant's claims.

II. POST-DECISION PROCEDURAL HISTORY

8. On 3 March 2023, the Tribunal issued a Decision on Liability and Directions on Quantum (the "**Decision on Liability**"). The full text of the Decision on Liability as well as of the Tribunal's Decision on Jurisdiction and Admissibility dated 23 February 2018 are hereby made an integral part of this Award. Capitalized terms used in this Award shall have the same meaning as are ascribed to them in the Definition. The Tribunal refers to Section II of the Decision on Liability for the prior procedural history, and to Section III also of that Decision for the factual background of the case.

A. DECISION ON LIABILITY

9. In the Decision on Liability, the Tribunal concluded, unanimously, that:

> (1) "Webuild's claims with respect to its Shareholder Loans are admissible;
>
> (2) Argentina has violated Article 2.2 of the BIT, first sentence, the obligation to give fair and equitable treatment to investments covered by the BIT, through its failure by September 2006, after the end of the economic emergency, to reestablish the economic equilibrium of the Concession as required by the Concession Contract and the Emergency Law;
>
> (3) Argentina has also violated Article 2.2 of the BIT, second sentence, by its unjustified conduct in failing to reestablish the

[7] Respondent's Counter-Memorial, ¶ 8.

economic equilibrium of the Concession within a reasonable time after the end of the economic emergency;

(4) In light of the Tribunal's decision relating to Article 2.2 (first and second sentences), no decision needs be reached by the Tribunal on the discrimination claims raised by the Claimant under Articles 2.2, 3 and 4, or the expropriation claim raised by the Claimant under Article 5, of the BIT;

(5) Argentina's defense of necessity is denied;

(6) With respect to damages as a consequence of the breaches noted above, no final decision on the quantum of damages and interest to be awarded is made at this time, with such decision being deferred to the Award following further submissions of the Parties on the questions set forth in subsection B of this section and further deliberations of the Tribunal. The Tribunal has determined that the Chorzów Factory standard of full reparation, using an income method, calculated on the basis of free cash flow to the firm, shall be used to calculate damages, including historical damages from September 2006 to the Valuation Date of 31 August 2014, and future damages from that date to the end of the Concession; and,

(7) The Tribunal reserves any decision on costs for the final Award in these proceedings."[8]

B. DIRECTIONS ON QUANTUM

10. The Tribunal instructed the Parties (or a Party, as indicated) to prepare revised calculations of damages consistent with the Decision on Liability on the following bases:

a. *"Toll Rates.* Initial toll rates should correspond to those set forth in the 2006 LOU, which by its terms was aimed at a partial restoration of the Concession's equilibrium. Readjustment of rates after the initial period set by the 2006 LOU shall be done on an annual basis consistent with the indices and 5% threshold specified in that LOU (based on paragraph 390 above).

b. *Toll Subsidy.* The revised calculations of damages shall include a figure showing the impact of termination of any toll subsidy included in the 2006 LOU after 2012 versus the continuation of such subsidy until the end of the Concession (based on paragraphs 393 to 396 above).

[8] Decision on Liability, ¶ 438.

c. *Elasticities.* The revised calculation of damages should be based on three different assumptions regarding elasticity values: one at the low end of the envelope of values put forward by Mr. Bates in the *Hochtief* Arbitration; one at the high end; and one at the midpoint. Given the Tribunal's finding of greater inelasticity of demand for heavy rather than light traffic, the values in each calculation should reflect this differential, using the same degree of differential as reflected in Table 9 set forth in paragraph 399 above.

d. *Rate of Return.* The Claimant is also requested to clarify to what extent, if any, future cash flows in any calculation of damages are based on an IRR in excess of 8.87% and, to the extent that may be the case, to provide an additional calculation based on an IRR of no greater than 8.87%, along with a calculation using an IRR of 9.18% (or such other rate as may result from the new calculation of damages requested by this Decision), taking into account any variations caused by actual performance), so that the effect of any higher rate that the Claimant's experts consider historical performance may justify is clear, as set out in paragraphs 406 to 413 above.

e. *Working Capital: Current vs. Non-Current Assets and Duration of Tax Credit Carryover.* The Parties are requested to clarify the position regarding tax credit carryovers, as set forth in paragraphs 414 to 416 above. If such carryovers are limited in duration to five years under Argentine law, the revised calculations of damages shall be consistent with that limitation.

f. *Rate of Interest on the FAL.* To enable the Tribunal better to understand the treatment of the interest rate on the FAL in the "but-for" scenario, the Claimant is requested to confirm specifically the assumed rate of interest on the Financial Assistance Loan in that scenario. The Parties are also requested to confirm the Interest Rate for Loans to Leading Companies in the 25th percentile as published by the Argentine Central Bank, as referenced in Section 9 of the 2006 LOU. Assuming the 2006 LOU provisions have been correctly applied, the FAL rate reduction shall be unchanged from the earlier calculations performed by Claimant's experts. If, however, that rate has not been correctly applied, a new calculation shall be performed using the correct rate based on the 2006 LOU (paragraphs 417 to 421 above).

g. *Rate of Interest on Shareholder Loans and Additional Shareholder Loans.* The assumed rate of interest on shareholder loans (including the Shareholder Loans) shall be unchanged from the earlier calculations performed by those experts. No additional shareholder loans shall be assumed to have been made in the "but-for" scenario (paragraphs 422 to 426 above).

h. *Effect of Debt Overhang from Pre-Operation Phase.* The Claimant is requested to clarify the extent to which, if any, in the "but-for" scenario there existed a debt overhang from the construction phase (whether to subcontractors such as Boskalis-Ballast, shareholders or Argentina under the FAL) that would presumably not have been present absent the cancellation of the IDB Loan and the effects of the economic emergency on Puentes' ability to retire such debt, and the impact any such overhang might have on the revenues Puentes would be required to earn in order to achieve the targeted IRR in that scenario (paragraph 368 above).

i. *Other.* Except as set forth herein, all other assumptions in the calculation of damages in the "but-for" scenario shall remain unchanged.

j. *Interest Rate on Historical Losses.* Historical losses are to be calculated using a risk-free standard commercial rate of interest on or around the Valuation Date. The Tribunal invites further submissions from the Parties as to what a non-risk-based normal commercial rate around the Valuation Date in 2014 would have been. A short-term instrument such as a one-year U.S. Treasury bill would appear to be inapposite for a long-term investment and in light of the standard of a commercial rate of interest; the Parties should therefore consider rates based on instruments of longer tenor, *e.g.*, five or ten years. Alternative calculations should be provided using the chosen rates (paragraph 432 above).

k. *Discount Rate for Future Losses.* The discount rate for future projected losses shall continue to be the WACC (paragraph 433 above).

l. *Compounding.* Interest shall be compounded annually (paragraph 437 above)."[9]

11. In addition, the Tribunal requested answers to the following questions from the Parties (or a Party, as indicated):

a. *"Current Legal Status of Puentes.* The Claimant is invited to clarify the current status of Puentes, including whether its dissolution is complete, and if so, the date on which that dissolution occurred. If any liquidating distributions were made to shareholders, these should be identified, by shareholder. The Claimant and the Respondent are also invited to provide information on the current status of the two domestic court cases pending at the time of the submissions in this case.

[9] Decision on Liability, ¶ 439.

> b. *Subcontractor and Other Repayments.* The Claimant is also invited to confirm: (1) that all subcontractors are fully repaid in its "but-for" scenario, and to specify the timing of such repayment(s); and (2) to provide current information regarding any repayments of Shareholder Loans (including to Webuild) or third parties, including but not limited to subcontractors, that have been made pursuant to the reorganization plan, to the extent the record is not up to date, or to confirm that the record fully reflects such repayments.
>
> c. *Effect of Reduction of Interest Rate on Shareholder Loans.* The Claimant is requested to confirm that the Tribunal's reading of paragraph 140 of the Second BRG Report is correct in considering that the word "increase" should be "decrease" (and if not, to clarify the position on the issue discussed in paragraphs 422-426 above).
>
> d. *Double Recovery Issues. To avoid double recovery, the* Claimant is also requested to confirm the status of any recovery it or its shareholders have received from any claims it has pursued in Argentine courts, and to indicate the status of any such proceedings."[10]

12. Finally, the Respondent was requested to "provide any information that the Claimant may reasonably require to respond to the Tribunal's requests" and both Parties were "encouraged to work together to provide joint or agreed responses to these questions" within sixty days of the Decision on Liability. [11] Alternatively, if they could not reach agreement on the calculations, the Parties had to "note any areas of disagreement in their joint submission, or make separate simultaneous submissions". [12]

C. EXTENSION OF TIME LIMITS

13. In its letter of 15 March 2023, the Respondent indicated that its valuation experts Melani Machinea and Ernesto Schargrodsky would not be available to start working on the revised calculations of damages consistent with the bases provided by the Tribunal in its Directions on Quantum within sixty days of the Decision on Liability. Therefore, "considering the extensive volume of work ahead, the time required to complete the administrative procedure for retaining the experts, their unavailability within the indicated time period, as well as [the Office of the Treasury Attorney General's]

[10] Decision on Liability, ¶ 440.
[11] Decision on Liability, ¶¶ 441-442.
[12] Decision on Liability, ¶ 442.

previously scheduled commitments during the months of April and May", the Argentine Republic requested the Tribunal to extend the time limit for the new submission until 16 June 2023.

14. In its email of 21 March 2023, the Claimant rejected Argentina's proposal, arguing that "it contradicts the Tribunal's directions, is an attempt to use the process as an impermissible appeal, is inefficient, and seeks to delay the issuance of the final award." The Claimant indicated its preparedness to work with Argentina to provide the Tribunal with a joint submission within sixty days of the Decision on Liability but also indicated it would not object to a 2-week extension, *i.e.*, until 17 May 2023.

15. In its Letter of 27 March 2023, the Tribunal decided, first, to give the Parties an extension of 30 days, *i.e.*, until 2 June 2023, which it considered "to be sufficient to overcome the difficulties listed by the Respondent, while also not unduly risking inefficiency and delay of the issuance of the final award".[13] Secondly, the Tribunal agreed with the Claimant that "it would be more efficient for the Parties' respective experts to be able to communicate and identify the areas of agreement and disagreement at the outset of their work". In particular, the Tribunal found the Claimant's suggested protocol reasonable:

> - That the Parties authorize their respective experts to communicate with each other, without prejudice, to discuss a workplan and prepare the revised calculations per the Tribunal's instructions (including identifying areas of agreement and disagreement).
>
> - That the experts be allowed to communicate with the respective Party who appointed them as experts to provide regular updates and information on the progress of the calculations.

Thirdly and finally, the Tribunal reiterated that it was asking for answers to targeted questions based on a decision regarding the appropriate methodology, so it requested the Parties to ensure that the submissions were limited to those questions.

[13] Letter of 27 March 2023, p. 1.

16. On 31 May 2023, the Parties requested a further extension of the deadline for the Parties' experts to submit a joint valuation model.

17. On 9 June 2023, the Respondent submitted: (i) a joint valuation model of BRG and experts Melani Machinea and Ernesto Schargrodsky ("**Joint Updated Valuation Model**"); (ii) a joint table reflecting a summary of the position of BRG and experts Melani Machinea and Ernesto Schargrodsky; (iii) the Expert Report of Melani Machinea and Ernesto Schargrodsky dated 8 June 2023; (iv) the Argentine Republic's submission in response to the Tribunal's questions and instructions in the Decision on Liability ("**Respondent's Post-Decision on Liability Brief**"); and (v) a list of the exhibits and legal authorities referred to in the Expert Report of Machinea and Schargrodsky and in the Argentine Republic's submission.

18. On the same date, the Claimant submitted (i) its response to the questions raised by the Tribunal in its Decision on Liability ("**Claimant's Response to Tribunal's Instructions on Quantum**" or "**Claimant's Post-Decision on Liability Response**"), and (ii) BRG's supplementary expert report entitled "BRG's Implementations of the Directions on Quantum" by Daniela Bambaci and Santiago Dellepiane.

19. On 27 June 2023, the Respondent filed the English translation of the Post-Decision on Liability Valuation Report prepared by experts Melani Machinea and Ernesto Schargrodsky dated 8 June 2023, and of the Post-Decision on Liability Brief of the Argentine Republic dated 9 June 2023, together with a corrected version of the Respondent's *Escrito de la República Argentina Posterior a la Decisión sobre Responsabilidad*, with corrections to minor clerical errors marked in the text.

20. On 14 September 2023, the Centre requested each Party to make an additional advance payment of USD 70,000.00 to ICSID, which in accordance with ICSID Administrative and Financial Regulation 16 had to be made within 30 days (*i.e.*, by 14 October 2023). On 22 September 2023, the Centre acknowledged receipt of the Claimant's payment.

21. On 17 October 2023, the Respondent filed a communication claiming violations of due process and of its right to be heard, reserving its right to raise the corresponding grounds

for annulment in the terms of Article 52 of the ICSID Convention once the Award has been rendered.

22. On 19 October 2023, the Tribunal invited the Claimant to comment on the Respondent's communication of 17 October 2023 within 10 business days from receipt of the English courtesy translation (provided on 20 October 2023).

23. On 24 October 2023, the Centre invited the Respondent to inform on the status of its outstanding payment by 27 October 2023, which they did the same day. Subsequently, on 10 November 2023, the Centre requested the Respondent to indicate the date when the Centre should be receiving Argentina's payment of the 4th advance requested by letter of 14 September 2023.

24. On 30 October 2023, the Claimant filed its comments on the Respondent's communication of 17 October 2023, categorizing Argentina's conduct as "despicable, and an unmistakable sign of opportunistic behavior in light of the imminent final award to be rendered against it."

25. On 15 November 2023, the Claimant informed the Tribunal that to avoid further unnecessary delays in the case it was prepared to pay Argentina's share of the requested advance payment, requesting the Tribunal to "allow Webuild to pay Argentina's share of the advance and either: (i) reimburse Webuild the advance payment if Argentina finally makes that payment before the final award is rendered; or (ii) include the amount advanced by Webuild as part of the costs award against Argentina."

26. On 17 November 2023, the Respondent provided an update on the status of its outstanding payment, indicating that it was in no capacity to provide a precise date when it would take place.

27. In light of the above, on 30 November 2023, in accordance with ICSID Administrative and Financial Regulation 16, the Centre notified the Parties of the Respondent's default, inviting either Party to pay the outstanding amount of USD 70,000.00 within 15 days (*i.e.*, by 15 December 2023).

28. On 20 December 2023, the Centre acknowledged receipt of a wire transfer in the amount of USD 70.000,00 from the Claimant, corresponding to the Respondent's portion of the advance requested in the Centre's letters of 14 September 2023 and 30 November 2023, which had been credited to the trust fund established for this case.

29. On 18 April 2024, the Tribunal informed the Parties that while it was in the process of drafting its Award, and having deliberations on the same, the Tribunal would find it useful to have the Claimant's comments on the Respondent's requests in its 9 June 2023 submission concerning the local proceedings in connection with the risk of double recovery under paragraph 117(c), (d), (e), and (f) of that submission. The Claimant was requested to file this submission by 26 April 2024.

30. Also on 18 April 2024, the Respondent requested leave from the Tribunal to respond to the Claimant's comments on the matter concerning the risk of double recovery.

31. On 19 April 2024, the Tribunal granted leave to the Respondent to reply to the Claimant's comments by 7 May 2024, giving the Claimant the opportunity to respond, if it so wished, to the Respondent's reply by 15 May 2024.

32. As scheduled, (i) on 26 April 2024, the Claimant filed its comments on the Respondent's requests concerning the local proceedings in connection with the risk of double recovery under paragraph 117(c), (d), (e), and (f) of the Respondent's submission of 9 June 2023; and (ii) on 7 May 2024, the Respondent filed its response. Subsequently, on 10 May 2024, the Claimant filed further comments on the matter.

33. On 31 May 2024, at the Tribunal's request, the Parties filed their respective statements of costs, updating their previous submissions of 12 March 2021.

34. On 1 July 2024, the Respondent filed a request for the admission of new evidence: a judgment rendered on 27 June 2024 by the Argentine Federal Court on Administrative-Contentious Matters No. 8: case 25047/2014, entitled "*Puentes del Litoral S.A. c/Ministerio de Planificación s/Proceso de Conocimiento*" (the "**PdL Case**") (the "**PdL Judgment**" or "**Local Judgment**"), rejecting PdL's claim for annulment of Resolution DNV No. 1994/2014, and rejecting all other claims and amendments in that case.

35. On 2 July 2024, the Claimant objected to the Respondent's request, but stated that if the Tribunal were to permit the incorporation of the PdL Judgment, the Tribunal should also allow the Respondent to file a short submission, to be followed by the Claimant's response, with no further submissions.

36. On the same date, the Tribunal informed the Parties that it would allow one round of submissions: the Respondent was to file a copy of the PdL Judgment together with a submission not to exceed 10 pages, by 9 July 2024, and the Claimant, if it so wished, was to file a response with the same page limit by 16 July 2024. By communication of the same date, the Respondent stated that it reserved its rights to request an opportunity to file observations on the Claimant's response. Subsequently, at the Parties' request, the Tribunal extended those deadlines by one day, in light of a national holiday in Argentina.

D. DECISION ON RECONSIDERATION

37. On 10 July 2024, the Respondent filed a submission on the PdL Judgment's impact in this arbitration, together with the PdL Judgment, as Exhibit **A RA-0645**, and Legal Authorities **AL RA-059, AL RA-0201**, **AL RA-0398**, and **AL RA-0405** to **AL RA-0411**. The Respondent's submission, styled "Argentine Republic's Submission on the Implications of the PdL Judgment", included a request on the basis of the PdL Judgment for the Tribunal to revise its Decision on Liability (the "**Request for Reconsideration**").

38. On 19 July 2024, the Claimant filed a response to the Respondent's Request for Reconsideration, styled "Claimant's Response to the Argentine Republic's Request for Reconsideration of the Decision on Liability," together with Exhibits **C-0461** to **C-0463** in English and Spanish, and Legal Authorities **CL-0254** to **CL-0260** (the "**Claimant's Response on Reconsideration**").

39. On 23 July 2024, having considered the Parties' positions and requests, and after due deliberation, the Tribunal notified the Parties of its decision to authorize a second round of sequential submissions, and provided instructions to such effect. The Respondent's submission would be due by 31 July 2024, and the Claimant's by 7 August 2024.

40. As scheduled, on 31 July 2024, the Respondent filed its reply on the Request for Reconsideration, styled "Reply of the Argentine Republic on the Implications of the Judgment in the PdL Case (the "**Respondent's Reply on Reconsideration**"), with the English version following on 6 August 2024.

41. On 7 August 2024, the Claimant filed the rejoinder to Argentina's Reply, styled "Claimant's Surrebuttal to the Argentine Republic's Request for Reconsideration of the Decision on Liability" (the "**Claimant's Surrebuttal on Reconsideration**").

42. On 25 September 2024, the Tribunal issued a Decision on the Respondent's Request for Reconsideration ("**Decision on Reconsideration**"), rejecting the application and indicating it would assess costs against the Respondent in relation to the application. The full text of the Decision on Reconsideration is hereby made an integral part of this Award. The Claimant was given fifteen days to submit a supplemental statement of costs in relation to the application.

E. UPDATED SUBMISSIONS, UNDERTAKING AND FINAL ADVANCE PAYMENTS

43. On 10 October 2024, the Claimant filed an updated cost submission, and on 16 October 2024, the Respondent filed observations to that submission.

44. On 17 October 2024, the Tribunal (i) provided directions to the Parties for an updated Joint Valuation Model; and (ii) gave the opportunity to the Respondent, to update, if it so wished, its submission on costs by 25 October 2024. This was followed by the Respondent's extension request of 21 October 2024, and the Claimant's response of the same date.

45. On 22 October 2024, the Tribunal extended the deadline for the Parties' experts to submit the updated Joint Valuation Model by 28 October 2024, and provided directions to the Respondent for the filing of an updated statement of costs, and a subsequent submission on costs. The Tribunal also directed the Parties to refrain from making any further submissions unless specifically requested by the Tribunal.

46. On 25 October 2024, the Respondent filed an updated statement of costs.

47. On 28 October 2024, by separate emails, each of the Parties filed their experts' updated Joint Valuation Model. The Claimant additionally filed a letter of the same date with certain arguments concerning interest, to which the Respondent objected. On 30 October 2024, the Tribunal informed the Parties that it had decided to disregard the Claimant's letter of 28 October 2024 in light of the Tribunal's directions of 22 October 2024.

48. On 8 November 2024, (i) the Respondent filed an updated submission on costs, together with legal authorities **AL RA-412** to **AL RA -414**; (ii) the Centre requested the Parties to make a final advance payment; and (iii) the Tribunal invited the Claimant to submit, within ten (10) days (*i.e.,* by 18 November 2024), a written undertaking with respect to the issue of double recovery ("**Undertaking**"), consistent with its prior submissions. Subsequently, at the Claimant's request, the Tribunal extended the deadline for the filing of the Undertaking until 21 November 2024, when the Claimant's Undertaking dated 18 November 2024, was filed.

49. On 25 November 2024, the Respondent requested leave from the Tribunal to briefly comment on the Claimant's Undertaking by 29 November 2024, which was granted on 26 November 2024. Accordingly, on 29 November 2024, the Respondent filed its observations on the Claimant's Undertaking ("**the Respondent's Observations**").

50. On 5 December 2024, the Claimant offered to respond to the Respondent's Observations ("**the Claimant's Offer**"). On the same date, the Tribunal (i) acknowledged receipt of the Claimant's Undertaking, the Respondent's Observations, and the Claimant's Offer; (ii) directed the Claimant to make certain changes to the Undertaking, and to provide a revised version by 13 December 2024; and (iii) rejected the Claimant's Offer noting that the Tribunal did not wish to receive nor needed a further round of submissions on the subject. Finally, the Tribunal informed the Parties that any other related matters would be addressed in the Award, and reiterated that given the advanced stage of the Award drafting, the Parties were to refrain from making further submissions unless expressly directed by the Tribunal.

51. On 13 December 2024, the Claimant filed a revised Undertaking ("**Revised Undertaking**") stating as follows:

> "Claimant, Webuild S.p.A., in accordance with the Tribunal's instruction dated November 8, 2024, for Claimant to formalize its prior representations to the Tribunal that it will not seek double recovery of damages, hereby complies with the request as follows:
>
> Webuild S.p.A., through Dr. Pietro Salini, its Chief Financial Off[ic]er, hereby undertakes:
>
> - To not seek double recovery; that is, we will not collect in any local proceeding any damages that, taking into account the nature of the claims and the relevant measure of damages, would represent double recovery, in whole or in part with the damages Claimant collects as part of the damages awarded in this arbitration (ICSID Case No. ARB/15/39).
> - To reaffirm its commitment that it will not seek double recovery of any damages granted in the upcoming Award and will remain available to attempt to work with the Argentine Republic to mutually resolve any remaining concerns once the Argentine Republic fulfills its own legal duty to pay the upcoming Award."

52. Subsequently, on 18 December 2024, the Tribunal directed Claimant to "confirm in writing its understanding that any third party that might acquire any right in the Award subsequent to its issuance would be notified in writing of the undertaking by the Claimant and provided with a copy of it, and further notified in writing of its understanding that such third party would be bound by the undertaking to the same extent as the issuing party with respect to any issues of double recovery," by 2 January 2025. On 3 January 2025, the Claimant requested an extension of this deadline until 17 January 2025, which was granted on 6 January 2025.

53. With regard to the final advance payment requested by the Centre on 8 November 2024, on 5 December 2024, the Centre acknowledged receipt of the Claimant's share of the requested payment. On 12 December 2024, the Centre invited the Respondent to inform on the status of its payment. On 18 December 2024, the Respondent replied that "as ICSID had been informed on previous occasions, in the economic, financial, fiscal, administrative and social circumstances prevailing in the Argentine Republic, payments of advances of funds had been suspended, in view of which Rule 16 of the ICSID Administrative and Financial Regulations would be applicable" (Tribunal's

translation).[14] On the same date, the Secretary of the Tribunal, on behalf of the Secretary-General of ICSID, notified both Parties of the default, and gave them the opportunity to pay the outstanding amount of USD 30,000.00 within 15 days (*i.e.*, by 2 January 2025). On 13 January 2025, the Claimant (i) informed the Tribunal that it had paid the Respondent's share of the advance funds (*i.e.*, USD 30,000.00) in accordance with the default letter of 18 December 2024; (ii) noted that the Claimant was, once more, paying the Respondent's share of advance costs in good faith to avoid further unnecessary delays in this case; and (iii) requested the Tribunal to include in the Award the amounts that the Claimant has advanced as part of the costs award against Argentina. On 15 January 2025, the Centre confirmed having receipt the Claimant's default payment of USD 30,000.00.

54. By letter dated 13 January 2025, the Claimant filed the Confirmation Understanding requested by the Tribunal on 17 December 2024, stating as follows:

> "Claimant, Webuild S.p.A., in accordance with the Tribunal's instruction dated December 18, 2024, hereby confirms its understanding that any third party that might acquire any right in the Award subsequent to its issuance would be notified in writing of the undertaking by the Claimant and provided with a copy of it, and further notified in writing of Webuild's understanding that such third party would be bound by the undertaking to the same extent as the issuing party with respect to any issues of double recovery."

55. On 17 January 2025, the Tribunal declared the proceedings closed pursuant to ICSID Arbitration Rule 38. Subsequently, on 11 February 2025, the Respondent informed of the appointment of the new *Procurador del Tesoro de la Nación de la República Argentina*.

[14] Respondent's communication of 18 December 2024, stating: "*[c]omo se ha informado al CIADI en oportunidades anteriores, en las circunstancias económicas, financieras, fiscales, administrativas y sociales imperantes en la República Argentina, se han suspendido los pagos de anticipos de fondos, en vista de lo cual es aplicable la Regla 16 del Reglamento Administrativo y Financiero del CIADI*."

III. FINAL DECISIONS ON QUANTUM

A. RESPONSES OF THE PARTIES TO THE TRIBUNAL'S QUESTIONS

(1) Current Legal Status of Puentes, the Reorganization Proceedings, and the Other Domestic Litigation

56. The Parties appear to be in agreement about the current status of Puentes. The Claimant states that Puentes' dissolution has not yet been completed, that Puentes' reorganization proceeding is ongoing, and that Argentina's failure to comply with the First Transitory Agreement has prevented Puentes from being able to fully comply with the Creditor Settlement Agreement.[15]

57. The Respondent notes that, on 30 June 2014, it was resolved at the Annual and Special Shareholders' Meeting of Puentes to "unanimously: (i) declare the Company dissolved pursuant to Art. 94 (5) of the [Argentine] Companies Law, the Company being thus subject to liquidation proceedings [...]."[16] However, Puentes continues to be subject to liquidation proceedings and no liquidation remainders have been distributed to the shareholders. It is unclear at the time of this Award when such proceedings may be concluded and whether there will be in fact any such distributions. The ongoing reorganisation proceedings are entitled "Puentes del Litoral S.A. s/ concurso preventivo" (File No. 20328/2007, pending before Commercial Trial Court No. 13 in and for the City of Buenos Aires, Clerk's Office No. 26).[17]

58. As far as Puentes' lawsuit to request the annulment of the rescission of the Concession Contract due to Argentina's failure to re-establish its economic equilibrium is concerned: as stated above, on 27 June 2024, the Federal Court on Administrative-Contentious Matters No. 8 rendered its judgment, rejecting PdL's claim for annulment of Resolution DNV No. 1994/2014 as well as all other claims and amendments in that case.

[15] Claimant's Post-Decision on Liability Response, I(A), pp.1-2.
[16] Respondent's Post-Decision on Liability Brief, ¶ 58 (Footnotes omitted).
[17] Respondent's Post-Decision on Liability Brief, ¶ 59 (Footnotes omitted).

59. At a time when the first instance case was still pending, the Respondent recalled that "the State holds claims in PdL's reorganisation proceedings, and has requested the allowance of such claims on account of PdL's failure to comply with the Concession Contract, the FAL, expropriations, penalties, and interest on penalties. The ancillary proceeding for allowance of the State's claims is now suspended by virtue of the court case commenced by PdL for the termination of the Concession Contract. In this respect, the court overseeing the reorganisation proceedings has decided that it will not render a decision on the allowance of the State's claims 'until a final judgment has been issued [in the case brought by PdL against the Argentine State].'"[18] The Tribunal has received no indication of any change in this position.

60. In these proceedings, the Respondent is requesting the Tribunal:

> a. "to reduce any compensation payable to Claimant taking into account the effect of PdL's debt overhang from the pre-operation phase, as it is not attributable to the Argentine Republic;
>
> b. to bear in mind that repayment to the subcontractors in the but-for scenario could not have been achieved through the 2006 Letter of Understanding;
>
> c. to order Webuild to cause the termination of the local proceeding styled "Puentes del Litoral S.A. c/EN. M. Planificación IP y s/Proceso de Conocimiento," File No. 25047/2014, pending before Federal Contentious Administrative Trial Court No. 8, and to waive any and all rights in connection with such court case;
>
> d. to order Webuild to assign to the Argentine Republic its claims, and those of its direct or indirect subsidiaries, affiliates, controlling and controlled companies, as allowed in the reorganisation proceedings styled "Puentes del Litoral S.A. s/ concurso preventivo," File No. 20328/2007, pending before Commercial Trial Court No. 13, Clerk's Office No. 26, in their current status, and that it be deprived of any rights under the Award to be issued by the Tribunal in the event it breaches, frustrates or otherwise circumvents compliance with, this condition;
>
> e. to order Webuild to assign to the Argentine Republic the right to any amounts that may be determined as a liquidation remainder of PdL that Webuild may be entitled to by virtue of its shareholding in PdL, as well as that of its direct or indirect subsidiaries, affiliates, controlling and controlled companies, in their current

[18] Respondent's Post-Decision on Liability Brief, ¶ 60 (Footnotes omitted).

> status, and that it be deprived of any rights under the Award to be issued by the Tribunal in the event it breaches, frustrates or otherwise circumvents compliance with, this condition;
>
> f. to order Webuild to carry out the above-mentioned assignments with all of the necessary validity requirements under Argentine law so as to render them enforceable against third parties;
>
> g. not to modify the rate of the FAL contemplated in Resolution 14 in the but-for scenario;
>
> h. to determine that the valuation date is the date on which the Tribunal found that the conduct in breach of Article 2.2 of the BIT took place, that is, September 2006;
>
> i. in the event the Tribunal decides not to modify the August 2014 valuation date, to adopt as the historical loss adjustment rate that of US five-year Treasury bills;
>
> j. to adopt for the calculation of interest on the amount of compensation it determines as of the valuation date the yield rate of US one-year Treasury bills; and
>
> k. for all purposes, to take into account and admit the arguments contained in this Post-Decision on Liability Brief and in Machinea and Schargrodsky's Third Report, as well as those in the Argentine Republic's prior written and oral submissions made in this proceeding, and the evidence submitted by it, at the time of issuing its Award." [19]

61. The Tribunal concludes that Parties would seem to be in agreement that Puentes' dissolution has not yet been completed, liquidation proceedings are ongoing and the distribution of any liquidation remainders to the shareholders has not yet taken place. Although Puentes' lawsuit to rescind the termination of the Concession Contract has now resulted in a judgment of the court of first instance, the Tribunal understands that further appeals are possible and that it may therefore not be final. The Tribunal thus needs to consider the implications of these ongoing proceedings on its Award, particular in relation to any potential for double recovery.

[19] Respondent's Post-Decision on Liability Brief, ¶ 117.

(2) Subcontractor and Other Repayments

62. With respect to the status of repayments to shareholders, subcontractors, and others assumed in the "but-for" scenario and made in fact pursuant to the reorganization plan, as to the first question, Webuild confirms that its damages model assumes that Puentes "repays all of its outstanding subcontractor debt in 2006 in the but-for scenario, after the economic equilibrium of the Concession is restored."[20]

63. The Claimant's experts explain that:

> "our valuation relies on the actual evolution of PdL's financing prior to the renegotiation. However, once the economic equilibrium of the Concession is restored, we assume PdL refinances its debt. In doing so, the company repays all of its outstanding subcontractor debt in 2006 in the but-for scenario, after the economic equilibrium of the Concession is restored. This debt is reported in the PdL's 2005 audited financial statements, as subcontractor debt is reported in its liabilities with a balance of ARS 70.6 million as of December 2005 which in our model is paid with cash flows produced in 2006." [21]

64. As to the status of repayments in fact under the reorganization plan, the Claimant states that the record is complete as to those matters, which it reconfirms as follows: "[t]he record is complete as to Puentes del Litoral's payments made under the Creditor Settlement Agreement to its shareholders, Boskalis-Ballast, and to Respondent for the Financial Assistance Loan."[22]

65. The Respondent and its experts submit that:

> "PdL's audited financial statements show that, as of 31 December 2005, PdL's debt to its subcontractors, which would not have been incurred if the company had complied with its obligation to timely obtain financing, accounted for 21.5 % of PdL's total liabilities as of that date."[23]
>
> "It should be noted that PdL's debt to its main subcontractors, i.e. Boskalis and Ballast Nedam, was incurred prior to Argentina's 2001

[20] Claimant's Post-Decision on Liability Response, II(F), p. 11.
[21] BRG's Implementations of the Directions on Quantum, ¶ 87.
[22] Claimant's Post-Decision on Liability Response, I(B), p. 2 (Footnotes omitted).
[23] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 96.

crisis. The evidence in this case shows that repayment of this debt was a condition for the 2006 LOU to come into force."[24]

"In its valuation model, BRG assumed that PdL's debt to the subcontractors would have been repaid in 2006 in the but-for scenario. However, in the Annual Report of PdL as of 31 December 2005, dated 9 June 2006, the Board of Directors informed the shareholders of the conditions of the 2006 LOU and explicitly warned them that, under such conditions, the debt owed to the subcontractors could not be repaid (…)." [details from report][25]

"In this regard, UNIREN informed that PdL 'alleged that the funds granted under the Letter of Understanding dated 6 May 2006 were not sufficient to repay the outstanding debts to its subcontractors, to repay the financial assistance to grantor and to comply with its other contractual investment obligations.'"[26]

"Therefore, the evidence in this case clearly shows that the funds obtained under the 2006 LOU would have not been sufficient for PdL to repay the debt owed to the subcontractors. We understand that, in April 2007, PdL was notified of a bankruptcy petition presented by Boskalis and Ballast Nedam in December 2005. As shown by the evidence, we may assume that would have also been the case in the but-for scenario, given the lack of funds to repay the debt."[27]

"The Joint Updated Valuation Model shows that cash flows for 2006 are negative. Negative initial cash flows would have required additional debt. Therefore, for purposes of the valuation model, the negative cash flows for 2006 result in a decrease in the value of equity."[28]

"[T]he evidence in the record confirms that during the renegotiation process PdL stated that the level of revenues envisaged in the 2006 Letter of Understanding would not allow it to face its debt commitments, including those relating to its subcontractors. For this reason, the Unit for Renegotiation and Analysis of Public Services Contracts ("UNIREN") had to seek and discuss with Concessionaire other alternatives that allowed the Concession to move forward harmoniously."[29]

"Along the same lines, on 9 June 2006 PdL's directors informed the company's shareholders that it was not possible to pay the debt to the subcontractors with the cash flows envisaged in the 2006 Letter of

[24] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 97.
[25] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 98.
[26] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 99.
[27] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 100.
[28] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 101.
[29] Respondent's Post-Decision on Liability Brief, ¶ 39.

> Understanding. This is not surprising if account is taken of the fact that the prior regularisation of PdL's debt to its subcontractors was precisely a condition for the 2006 Letter of Understanding to become effective, and the inability to regularise such situation resulted in the failure of the Letter of Understanding."[30]
>
> "The evidence shows that PdL had already received the funds to pay the subcontractors through the State subsidy it had requested in the bid; it is therefore totally illogical to assume that the 2006 Letter of Understanding should have contemplated additional funds for such purpose, as argued by Claimant's experts, who assume that PdL's debt to its subcontractors would have already been repaid in 2006 in the but-for scenario. This assumption, in addition to being wholly unsupported, contradicts the evidence showing the impossibility to repay that debt in the conditions envisaged in the 2006 Letter of Understanding."[31] [additional details on pending proceedings omitted]
>
> "It is worth recalling that, in accordance with the law applicable to the determination of damages identified by the Tribunal, reparation must 're-establish the situation which would, in all probability, have existed if th[e] [illegal] act had not been committed.' In this respect, assuming in the but-for scenario that PdL's debt to its subcontractors would have already been repaid in 2006 is not a situation which, in all probability, would have existed."[32]
>
> "With respect to item (2), Claimant's claim as a creditor of PdL has already been allowed in PdL's reorganisation proceedings and Claimant has collected so far a total of USD 6,779,863. Subcontractors Boskalis and Ballast Nedam have received a partial payment of their claim as allowed, up to instalment No. 8, having collected so far a total of USD 8,120,694." [33]

66. While the Parties' numbers regarding the status of repayments in the reorganization proceeding are not entirely consistent, it appears there have been no further repayments beyond those already reflected in the record.

67. The Parties disagree, however, as to the validity of the assumptions made by the Claimant's experts regarding repayments in the "but-for" scenario, with Respondent disputing in particular Puentes' ability to pay its subcontractors in the wake of the 2006

[30] Respondent's Post-Decision on Liability Brief, ¶ 40.
[31] Respondent's Post-Decision on Liability Brief, ¶ 41.
[32] Respondent's Post-Decision on Liability Brief, ¶ 44.
[33] Respondent's Post-Decision on Liability Brief, ¶ 45.

MOU. Its submissions in this regard are based on contemporaneous factual materials as well as the results of the Joint Updated Valuation Model.

68. The Tribunal will address this issue further in its assessment of the debt overhang issue in Section III.C(7) *infra,* and particularly in paragraphs 140 to 141.

(3) Effect of Reduction of Interest Rate on Shareholder Loans

69. In paragraph 440(c) of its Decision on Liability, the Tribunal asked Webuild "to confirm that the Tribunal's reading of paragraph 140 of the Second BRG Report is correct in considering that the word 'increase' should be 'decrease' (and if not, to clarify the position on the issue discussed in paragraphs 422-426 above)." The Claimant's experts clarify that the word "increase" in the Second BRG report is correct:

> "We confirm that the word '*increase*' in paragraph 140 of the second report is correct. As explained above and in our reports, we estimate damages to Claimant based on its equity stake and debt stake in PdL. For its equity stake in PdL, we estimate damages as the present value of PdL's expected historical and future free cash flows as of the Valuation Date. With regards to Claimant's debt stake in PdL, we estimate damages assuming that the outstanding debt in PdL's 2005 audited financial statements was rolled over every year until the valuation date, accruing interest estimated at our estimation of PdL's cost of debt, which is much lower than the 15% interest rate accruing as of 2005 on the shareholder loans.
>
> In their second report, MS [Machinea-Schargrodsky] argued that the original conditions of the shareholder loans would have been maintained in the but-for scenario, even after the reestablishment of the economic equilibrium of the Concession. Based on this assumption, MS estimated damages assuming a 15% pre-tax cost of debt in the calculation of the discount rate to compute the present value of future cash flows. And based on instructions to follow the *Hochtief* award, MS estimated no damages related to Claimant's debt stake in PdL in their reports.
>
> In Table 8 of our second report, we illustrated that when damages to Claimant's debt stake in PdL was considered, maintaining the shareholder's loan rate of 15% resulted in an overall *increase* in damages to Claimant as of the Valuation Date. As shown in Table 8, replicated as Figure 12 below, this assumption results in an overall *increase* in damages to Claimant from USD 174.2 million to USD 198.0 million, a USD 23.8 million *increase."* [34]

[34] BRG's Implementations of the Directions on Quantum, ¶¶ 90-92.

70. Moreover, the Claimant's experts argue that:

> "Following the Tribunal's instruction, our revised calculation of damages in the Joint Updated Valuation Model assumes that no additional shareholder loans are needed and that existing shareholders loans are renegotiated at commercial rates (measured by our estimation of PdL's cost of debt) once the economic equilibrium of the Concession is restored in 2006."[35]
>
> "As explained in our reports, and confirmed by the Tribunal's decision, we calculate damages to Claimant for both its equity and debt stakes in PdL."[36]
>
> "To estimate Claimant's equity stake, we subtract PdL's net debt as of the Valuation Date from PdL's but-for firm value, where:
>
> a. PdL's but-for firm value is equal to the present value of the future free cash flows to the firm;
>
> b. PdL's net debt as of the Valuation Date is equal to the net debt as of December 2005 plus compounded interest at PdL's annual cost of debt, ranging between 6% and 8%."[37]
>
> "The calculated net debt as of August 2014 is also the basis for our calculation of the Claimant's debt stake."[38]
>
> "These calculations assume that upon the resolution of the uncertainty regarding the restoration of PdL's economic equilibrium, PdL would have had access to lower long-term interest rates and would no longer have had to rely on loans from the shareholders. Indeed, the Tribunal concluded the same, stating:
>
> *"¶**423**. The Claimant's response to this criticism appears to be that in the "but-for" scenario, once economic equilibrium had been restored and the toll rates had been increased, the uncertainty surrounding the Project's financial viability would have been reduced, and other financing would have been available, enabling Puentes to rely less on shareholder financing (or at least be able to compel shareholders to reduce their interest rates). [...]*
>
> *¶**424**. Given the Tribunal's decision on admissibility of the Webuild Shareholder Loan claims, this change would therefore appear to*

[35] BRG's Implementations of the Directions on Quantum, ¶ 54.
[36] BRG's Implementations of the Directions on Quantum, ¶ 55.
[37] BRG's Implementations of the Directions on Quantum, ¶ 56.
[38] BRG's Implementations of the Directions on Quantum, ¶ 57.

> *benefit Argentina. It also appears to the Tribunal to be logical and reasonable.'"*"[39]

> "During the proceedings, Respondent's experts argued that PdL would require additional shareholder funds at their original interest rate of 15%. In our second report, we explained that this assumption led to an *increase* in overall damages, as Claimant's debt stake capitalized at a 15% rate resulted in greater damages for Claimants' debt stake than the reduction in Claimant's equity stake."[40]

> "In contrast to their prior proposals, MS now propose to recalculate PdL's cost of debt using the annual average 5-year U.S. Treasury rate. This is different to our proposal as well as their own proposal in prior presentations. This adjustment reduces damages from USD 174.2 million to USD 166.5 million, a USD 7.7 million decrease."[41]

> "This adjustment has no merit as, even after the renegotiation, PdL would not have been able to access debt at the same rate as the U.S. Treasury. Indeed, only the U.S. Treasury is able to finance itself at these rates. Had PdL been able to refinance its shareholder loans through commercial debt in the but-for scenario, PdL would have had access to financing in line with its cost of debt. MS's adjustment is also inconsistent with their own calculation of the rate at which PdL would obtain debt, which is 7.6% higher than the 2014 U.S. Treasury rate." [42]

71. The Respondent's experts claim that:

> "It is a basic principle of corporate finance that equity is more expensive than debt because shareholders bear a higher risk than creditors. The reasons for these higher costs/risks are, in particular, the following: (i) returns to shareholders are uncertain and not guaranteed; (ii) the possibility of dilution, loss of control, and loss of financial benefits as new shareholders join; (iii) the reduced rights of shareholders vis-à-vis creditors in the event of the company's bankruptcy or insolvency, as shareholders do not have a secure claim but are entitled to a contingent residual value; and (iv) dividends are not deductible for income tax purposes, while interest on debt is."[43]

> "[I]t is undeniable that the cost of equity (the expected return for shareholders) always exceeds the cost of debt (expected return for lenders) because the risk to shareholders is greater than to lenders. Particularly, the higher the percentage of the firm's indebtedness the higher the cost of equity: as creditors take priority of payment over

[39] BRG's Implementations of the Directions on Quantum, ¶ 58.
[40] BRG's Implementations of the Directions on Quantum, ¶ 59.
[41] BRG's Implementations of the Directions on Quantum, ¶ 60.
[42] BRG's Implementations of the Directions on Quantum, ¶ 61.
[43] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 67.

shareholders, the higher the firm's percentage of debt, the higher the returns required by shareholders to compensate for the greater risk assumed."[44]

"The Tribunal established that it was not appropriate to update at a risk-adjusted rate, particularly the WACC used by BRG, the historical losses associated with the claim for damages brought by Claimant as shareholder until the valuation date. As debt is always less risky than equity due to the former's priority of payment, based on the same rationale, it would not be appropriate to update at a risk-adjusted rate Webuild's debt up to August 2014 for the purposes of calculation of damages to Claimant as creditor."[45]

"In line with the Tribunal's logic, under which the historical losses of Webuild as shareholder until the valuation date shall be adjusted at a risk-free standard commercial rate of interest, in our opinion, Webuild's debt as of December 2005 should be adjusted to the valuation date following the same approach."[46]

"Using any risk-adjusted rate to update Webuild's outstanding debt as of 2005 to the valuation date, such as BRG's estimated cost of debt, which includes not only the industry default premium but also the country risk premium, would contradict the Tribunal's own instruction to update Claimant's historical damages as shareholder at a risk-free rate."[47]

"As a result of updating Webuild's debt as of December 2005 at the same rate we used to adjust historical cash flows for the calculation of damages as shareholder, *i.e.*, the yield on the 5-year US Treasury bonds, capitalized annually, damages to Webuild as a creditor amount to USD 35.4 million as of August 2014."[48]

"We find that BRG's method of calculating damages to Webuild as creditor, which consists in updating Webuild's outstanding 2005 debt as reported in PdL's audited financial statements, converted to US dollars, at the cost of debt estimated by BRG, that is, a risk-adjusted interest rate, is contrary to the Tribunal's instruction to update historical damages as shareholder at a risk-free rate, because debt is always less risky than equity. This sensitivity is reflected in the Joint Updated Valuation Model." [49]

[44] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 68.
[45] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 69.
[46] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 70.
[47] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 71.
[48] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 72.
[49] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 73.

72. The Tribunal will address this issue further in Section III.C.(7) of this Award, *infra.* It appreciates the Respondent's experts' explanation, and considers that it provides additional support for the "but-for" scenario's assumption that the interest rate on shareholder debt would be reduced to a market rate rather than maintained at the 15% rate in that scenario. What that market rate should be, however, is a completely distinct question from the question of what interest rate should apply to historical damages, as well as pre- and post-Award damages. The Tribunal considers a market rate assumption regarding the interest rate on this debt in the "but-for" scenario to be reasonable and appropriate.

(4) Double Recovery

73. The Tribunal's final question to the Parties related to potential double recovery issues, and specifically asked for information regarding any recovery Puentes or its shareholders had received from any claims pursued in the Argentine courts. Other than the payment of initial instalments under the Creditor Settlement Agreement before Argentina's failure to comply with the First Transitory Agreement,[50] the Claimant submits that Puentes' shareholders, including Webuild, have not recovered from any claims pending in Argentine courts.[51]

74. The Respondent argues:

> "[T]he prohibition of double recovery on account of the same loss is a well- established principle that has been recognised by numerous arbitral tribunals. (…)"[52]

> "Taking into account the different alternatives adopted in the above-mentioned cases, it can be concluded that the appropriate measures to minimise the risk of double recovery will depend on the facts of each case and the degree of progress of the international arbitration proceeding vis-á-vis the local proceedings."[53]

> "The following difficulties are present in the instant arbitration proceeding:

[50] See ¶ 57 *supra*.
[51] Claimant's Post-Decision on Liability Response, I(B), p. 4 (Footnotes omitted).
[52] Respondent's Post-Decision on Liability Brief, ¶ 47 (Footnotes omitted).
[53] Respondent's Post-Decision on Liability Brief, ¶ 52.

i. PdL is subject to ongoing reorganisation proceedings;

ii. the court overseeing PdL's reorganisation proceedings allowed Webuild's (formerly Salini Impregilo) claims and Claimant has indeed collected its claims in a partial manner;

iii. PdL brought an action for damages against the Argentine State in the local courts on account of the termination of the Concession Contract —this is an ongoing proceeding which is at an advanced stage, as it only remains for the parties to produce lesser evidence, after which the parties will file their closing statements and the court will enter judgment."[54]

"In its Decision on Jurisdiction and Admissibility ('Decision on Jurisdiction'), the Tribunal stated that 'there is no danger of double recovery, having regard *inter alia* to the express assurances given by the Claimant in oral argument.' The Tribunal cited as grounds for its conclusion Claimant's statement at the Hearing on Jurisdiction:

The local case brought by Puentes, the local lawsuit, if it were within the control of Salini Impregilo, it would be dismissed. [...] Now, the real issue being raised by Article 8(4) in this context is one of a double recovery issue, but as the Tribunal noted yesterday, tribunals, under international law, can take care of that issue, and we can take care of that issue. We can provide assurances to this Tribunal that we will not seek double recovery; that is, we will not collect we will not have a double recovery for Salini Impregilo."[55]

"As of the present date, Claimant's statement is insufficient to minimise the risks of double recovery. The situation of the local proceedings brought by PdL against the Argentine State is not the same now as when the Hearing on Jurisdiction was held. At that time, Hochtief — the other PdL shareholder holding 26% of the company— had not as yet submitted its waiver in the local proceedings. Indeed, when Claimant provided its justification as to why it had not complied with the obligation contained in Article 8(4) of the BIT to withdraw from the court proceedings when it commenced this arbitration proceeding, Claimant's argument was that it could not control PdL's decision to withdraw since it only held 26% of the company."[56]

"As a result of Hochtief's waiver submitted in the local proceedings, Claimant became the shareholder in PdL with control to pursue or withdraw from such claim. Consequently, as the circumstances on which Claimant relied to justify its non-compliance with Article 8(4) of the BIT have changed, the Argentine Republic requests that the

[54] Respondent's Post-Decision on Liability Brief, ¶ 53 (Footnotes omitted).
[55] Respondent's Post-Decision on Liability Brief, ¶ 54 (Footnotes omitted).
[56] Respondent's Post-Decision on Liability Brief, ¶ 55 (Footnotes omitted).

> Tribunal order Claimant to have the local proceedings terminated and to waive any and all rights in connection with the local claim."[57]
>
> "In addition, given that this Tribunal, unlike the tribunal in *Hochtief v. Argentina*, has admitted Claimant's claim in its capacity as a creditor of PdL, and having regard to the fact that Claimant's claims have also been allowed in PdL's reorganisation proceedings (and have been partially paid), and that any funds entering the reorganisation estate would be first applied to the payment of creditors' claims, including those of Claimant, the Argentine Republic requests that Claimant assign to the State its claims and those of its direct or indirect subsidiaries, affiliates, controlling and controlled companies, in PdL's reorganisation proceedings pending before Commercial Trial Court No. 13, Clerk's Office No. 26, in their current status, and that Claimant be deprived of any and all rights under the Award to be issued by the Tribunal in the event Claimant breaches, frustrates or otherwise circumvents compliance with, this condition. In addition, for all purposes, Claimant must assign to the Argentine State the right to any amounts that may be determined as a liquidation remainder due to it for its shareholding in PdL, as well as those of its direct or indirect subsidiaries, affiliates, controlling and controlled companies, in their current status, with Claimant being deprived of any and all rights under the Award to be issued by the Tribunal in the event it breaches, frustrates or otherwise circumvents compliance with, this condition. Both assignments must comply with all of the necessary validity requirements under Argentine law so as to render them enforceable against third parties."[58]

75. Subsequently, the Parties submitted their respective comments on the Argentine Republic's requests concerning the local proceedings in connection with the risk of double recovery under paragraph 117(c), (d), (e), and (f) of Respondent's submission of 9 June 2023 (Post-Decision on Liability Brief of the Argentine Republic):

> "(c) to order Webuild to cause the termination of the local proceeding styled 'Puentes del Litoral S.A. c/EN. M. Planificación IP y s/Proceso de Conocimiento,' File No. 25047/2014, pending before Federal Contentious Administrative Trial Court No. 8, and to waive any and all rights in connection with such court case;
>
> (d) to order Webuild to assign to the Argentine Republic its claims, and those of its direct or indirect subsidiaries, affiliates, controlling and controlled companies, as allowed in the reorganisation proceedings styled 'Puentes del Litoral S.A. s/ concurso preventivo,' File No. 20328/2007, pending before Commercial Trial Court No. 13, Clerk's Office No. 26, in their current status, and that it be deprived of any rights under the Award to be issued by the Tribunal in the event it

[57] Respondent's Post-Decision on Liability Brief, ¶ 56 (Footnotes omitted).
[58] Respondent's Post-Decision on Liability Brief, ¶ 57.

> breaches, frustrates or otherwise circumvents compliance with, this condition"
>
> (e) to order Webuild to assign to the Argentine Republic the right to any amounts that may be determined as a liquidation remainder of PdL that Webuild may be entitled to by virtue of its shareholding in PdL, as well as that of its direct or indirect subsidiaries, affiliates, controlling and controlled companies, in their current status, and that it be deprived of any rights under the Award to be issued by the Tribunal in the event it breaches, frustrates or otherwise circumvents compliance with, this condition;
>
> (f) to order Webuild to carry out the above-mentioned assignments with all of the necessary validity requirements under Argentine law so as to render them enforceable against third parties;"

76. The Tribunal recognizes the avoidance of double recovery as an important principle to take into account where relevant. It notes, however, that to date, Webuild has not received any payments from any local proceedings. There are therefore no such payments to be considered in the present Award. However, some safeguards against potential future double recovery can be incorporated. First and foremost, the Tribunal recalls the repeated commitment made by Webuild during various stages of the current proceedings that it will not seek double recovery. Moreover, the Tribunal points out that any double recovery issues that may arise in the future as a result of domestic proceedings, after the payment of the damages in the present Award, can be considered by the relevant domestic court based on its appreciation of the extent of the identity of claims.

77. Moreover, the Tribunal has taken into consideration that, in its Decision on Liability, it found only a violation of the FET standard, not an unlawful expropriation. Had the Tribunal found the latter, the compensation under the present Award would have been equivalent to the value of Webuild's shares in PdL. However, that is not the relevant measure of damages with an FET violation. As a result, were the Claimant to receive any payment on debt or a liquidating distribution in its capacity as a shareholder of PdL once the reorganisation is completed, that would not necessarily constitute a double recovery.

78. The Tribunal does not find it appropriate at this stage to order an assignment of rights, as that would be too speculative and hypothetical. Whether such an assignment might

be warranted in the future is a question to be decided by the adjudicatory authority awarding damages that might carry a risk of double compensation. However, the Tribunal considered that a formal written undertaking from the Claimant consistent with its submissions that it would not seek double recovery would be appropriate, and therefore invited the Claimant to provide such a document on 8 November 2024. The Claimant submitted the requested Undertaking on 21 November 2024 (extended deadline), and on 13 December 2024, submitted a revised undertaking ("**Revised Undertaking**") pursuant to the Tribunal's directions of 5 December 2024. By letter dated 13 January 2025, on instructions of the Tribunal of 18 December 2024, the Claimant also acknowledged its understanding that any third party that might acquire any right in the Award subsequent to its issuance would be notified in writing of the undertaking by the Claimant and provided with a copy of it, and further notified in writing of its understanding that such third party would be bound by the undertaking to the same extent as the issuing party with respect to any issues of double recovery.

B. VALUATION DATE

(1) The Parties' Submissions

79. As noted in paragraph 9 above, in its Decision on Liability, the Tribunal decided that Argentina's failure by September 2006, after the end of the economic emergency, to reestablish the economic equilibrium of the Concession, was a violation of the obligation of fair and equitable treatment under the BIT.

80. In its Post-Decision on Liability Brief of 9 June 2023, Argentina questions whether the Tribunal correctly established the valuation date of 31 August 2014 for purposes of compensation, and argues that the more appropriate valuation date based on the Tribunal's analysis ought to be September 2006:

> "[T]he Tribunal found that the failure to restore the economic equilibrium of the Concession by September 2006 was the conduct in breach of the obligation to afford FET and to refrain from adopting unjustified measures under Article 2.2 of the BIT. However, the Tribunal stated that, for the purposes of determining compensation, the *quantum* experts had to use the valuation date of 31 August 2014. The Tribunal provided no explanations whatsoever as to the reasoning or basis on account of which such valuation date was to be used, despite

> the fact that it found that the conduct in breach of the BIT took place in September 2006, rather than in August 2014."[59]

> "It does not go unnoticed that the date of August 2014 is the valuation date proposed by Claimant. However, that valuation date was premised on Claimant's claim for unlawful expropriation—'the valuation date must account for all of the acts that consummated the taking' —which placed the measure in breach of the BIT in 2014 — 'the measure that ripened into an expropriation is the Concession's termination, which occurred in 2014'—. However, the Tribunal rejected Claimant's claim, and it only found that there was a violation of the obligation to afford FET and to refrain from adopting unjustified measures pursuant to Article 2.2. of the BIT, on account of the failure to restore the economic equilibrium of the Concession in September 2006. As a consequence, in accordance with the Tribunal's determination of the conduct considered to be in breach of the BIT, the valuation date should be September 2006, rather than August 2014."[60]

81. In this same line, Argentina argues that "[w]hile the Tribunal considered that the failure to approve PdL's request for an equity injection […] adversely affected PdL and led to its dissolution as decided by its shareholders and to the automatic termination of the Contract in accordance with its terms, the Tribunal did not establish that this was a conduct that was in breach of the BIT." [61] Argentina claims that "PdL did not request an increase but a decrease in its capital stock, which was denied as it was contrary to the Concession Contract and the law applicable to it." [62]

82. Argentina also maintained during the merits phase in the present proceedings as well as in its Post-Decision on Liability Brief, that the valuation date should be January 2002, "as Claimant's claim was premised on the Emergency Law enacted on that date",[63] as opposed to what the Tribunal held, namely that the Claimant's claim was premised on "Argentina's failure within a reasonable time following the end of the emergency to restore the economic equilibrium of the Concession Contract."[64] Argentina claims that "this contradicts the Tribunal's previous acknowledgment" that the challenged measures "start with the Emergency Law",[65] while recognising that the

[59] Respondent's Post-Decision on Liability Brief, ¶ 68 (Footnotes omitted).
[60] Respondent's Post-Decision on Liability Brief, ¶ 69 (Footnotes omitted).
[61] Respondent's Post-Decision on Liability Brief, ¶ 70 (Footnotes omitted).
[62] Respondent's Post-Decision on Liability Brief, ¶ 70 (Footnotes omitted).
[63] Respondent's Post-Decision on Liability Brief, ¶ 71, citing to, *inter alia,* its Counter-Memorial, ¶ 587.
[64] Decision on Liability, ¶¶ 378-379.
[65] Respondent's Post-Decision on Liability Brief, ¶ 71.

Tribunal concluded that "the Emergency Law and the renegotiation process were legitimate exercises by Argentina of its police powers." [66]

83. In sum, Argentina emphasises that "the conduct that the Tribunal finally considered to be in breach of Article 2.2 of the BIT was the failure to restore the economic equilibrium of the Concession in September 2006, despite which it chose the date of 31 August 2014 as the valuation date. The Tribunal did not explain why it chose that valuation date or how it was based on the law applicable to the dispute." [67]

84. In Argentina's opinion, the 2006 LOU creates the legitimate expectation (of the return of economic equilibrium) that is then breached. The Tribunal construed the concept "within a reasonable time frame" as having occurred by the end of 2006, such that the breach arises at this point. Accordingly, Argentina's view is that the breach occurred in September 2006, and so damages should be evaluated at this point. It relies on prior case law:

> [73] "Arbitral tribunals have often held that the appropriate valuation date is the date immediately prior to the breach. For instance, the tribunal in *Abed El Jaouni v. Republic of Lebanon* found that: 'In general, unless the circumstances justify otherwise, the most appropriate date for the determination of fair market value is the date immediately prior to the breach.' The tribunal stressed that:
>
> *The principle of full compensation does not aim to maximise the amount of damages awarded to an injured investor, but to compensate for the harm suffered on the most financially sound and accurate basis possible. [...] It is further unclear how the valuation date of 31 December 2018 ensures that the alleged damages are 'a direct consequence of the Measures', rather than the date immediately preceding the Measures.* [68]
>
> [74] In this respect, the tribunal in *SAUR v. Argentina*, which found that the delay in implementing the renegotiation agreements had constituted a breach of the applicable treaty, adopted the approach of 'normal economic situation' for the purposes of establishing the date on which the value for the determination of compensation had to be calculated:

[66] Decision on Liability, ¶ 334.
[67] Respondent's Post-Decision on Liability Brief, ¶ 72.
[68] Respondent's Post-Decision on Liability Brief, ¶ 73, citing *Abed El Jaouni and Imperial Holding SAL v. Republic of Lebanon*, ICSID Case No. ARB/15/3, Award, 14 January 2021, ¶¶ 309-310 (**AL RA-345**).

> *The normal economic situation will be that in which Argentina is not committing an illegal act. Given that the first of the breaches was the postponement of the entry into force of the Second Letter of Understanding, the normal economic situation would have taken place if Argentina had implemented the Second Letter of Understanding without delay. That will be the date on which the value of OSM must be determined.*
>
> *The Arbitral Tribunal has concluded that the principle of full reparation requires compensating Sauri for the value of its Investment as of the date immediately prior to that on which the first act in breach of the BIT occurred. As the first breach was the delay in giving effect to the Second Letter of Understanding, the valuation date shall be that on which its entry into force should have occurred, without delay*.[69]
>
> [75] Similarly, the tribunal in *Gemplus v. Mexico* stated that, under international law, the relevant date for the determination of compensation is that preceding the first breach."[70]

85. The Respondent's experts, in parallel, submitted an alternative cash flow calculation using the September 2006 valuation date:

> "Cash flows are calculated pursuant to the Tribunal's instructions and the same sensitivities described in section III are presented. The only difference is that cash flows are discounted as of September 2006 rather than being discounted or updated as of August 2014."[71]

86. The Claimant did not address this issue in its corresponding submission of 9 June 2023. However, its experts put forward some arguments regarding the valuation date in response to the Respondent's experts' submissions on this issue. More specifically, the Claimant's experts note:

[69] Respondent's Post-Decision on Liability Brief, ¶ 74, citing *SAUR International, S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, 22 May 2014, ¶¶ 169 and 256 (emphasis added) (**AL RA-346**).
[70] Respondent's Post-Decision on Liability Brief, ¶ 75 (Footnotes omitted).
[71] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶¶ 76-78. The Respondent's experts go on to say that: "*Under this alternative calculation, but-for cash flows to the firm generated annually from September 2006 to May 2023 are discounted at the WACC calculated upon the basis of the information available as of September 2006. The net debt of PdL outstanding as of 31 December 2005 updated to 1 September 2006 is subtracted from the resulting firm value to calculate the value of equity, and then we update this amount to 31 August 2014 at the average annual yield on the 5-year US Treasury bonds, capitalized annually, so as to compare the result with the August 2014 calculation. Consistently, for the purpose of calculating damages to Webuild as creditor, we update Webuild's debt as of 31 December 2005 to August 2014 at the average annual yield on the 5-year US Treasury bonds." "Based on this method, we have estimated damages to Webuild as shareholder of USD 19.5 million and USD 31.0 million as creditor as of 31 August 2014. Thus, the total damages estimated as of August 2014 amount to USD 50.5 million*."

> "From an economic perspective, MS's adjustment is unreasonable as it results in the reduction of damages by applying an overestimated WACC rate to discount future cash flows as of 2006 and a low interest rate to update them back to August 2014 as Figure 9 below shows.
>
> […]
>
> Combining a high discount rate with a low update rate artificially reduces damages as illustrated in Figure 10 below. For illustrative purposes we rely on MS's estimate of the applicable WACC rate as of 2014 and 2006, and the applicable interest rate to update damages.
>
> […]
>
> We note, additionally, that the change of the valuation date to September 2006 would also require an ex-ante approach in which MS would also need to adjust Claimant's expectations as of that date to estimate future cash flows. Variables such as the renegotiation process, expected inflation, exchange rates, traffic forecasts, etc., would need to be adjusted. MS propose none of these adjustments.[72]

87. Although at an earlier stage of the case the Claimant appeared to oppose the 2014 valuation date in the context of expropriation,[73] it also opposed Argentina's 2006 valuation date in its Reply.[74] However, its experts, applying the Tribunal's instructions regarding the calculation of quantum, state as follows:

> "We understand that [setting 2006 as valuation date] this is not consistent with the DoQ as it defines the 'Valuation Date" as August 2014, and instructs the Parties to use BRG's model as baseline for the calculations:
>
> ¶ *369. Webuild presents a damages methodology that measures the fair market value of its investment in Puentes as of the date of the Termination Resolution in August 2014 (the 'Valuation Date')* […]."[75]
>
> "Indeed, in paragraph 438(6) the Tribunal states that: "[...] The Tribunal has determined that the Chorzów Factory standard of full reparation, using an income method, calculated on the basis of free cash flow to the firm, shall be used to calculate damages, including historical damages from September 2006 to the Valuation Date of 31 August 2014, and future damages from that date to the end of the

[72] BRG's Implementations of the Directions on Quantum, ¶¶ 66-67, 69 (Footnotes and figures omitted).
[73] Claimant's Memorial, ¶¶ 318, 319.
[74] Claimant's Reply, ¶¶ 345, 346.
[75] BRG's Implementations of the Directions on Quantum, ¶ 64, citing Decision on Liability, ¶ 369.

> Concession". We understand from this that it is clear that the Valuation Date is August 2014."[76]
>
> "From an economic perspective, MS's adjustment is unreasonable as it results in the reduction of damages by applying an overestimated WACC rate to discount future cash flows as of 2006 and a low interest rate to update them back to August 2014 as Figure 9 below shows."[77]
>
> "Combining a high discount rate with a low update rate artificially reduces damages as illustrated in Figure 10 below. […]"[78]
>
> "As shown in Figure 10 above, a cash flow of USD 100 is equivalent to USD 38 in 2014 when discounted at MS's estimated 2014 WACC rate of 16%. However, MS's alternative calculation yields an equivalent amount of USD 23 by discounting the same USD 100 cash flow to September 2006 using a 2006 WACC of 12% and then updating it using the 5-year U.S. Treasury rate ranging between 1% and 5% to August 2023. This represents a 40% decrease in value when compared to the methodology in the BRG Second Report Model (i.e., Valuation Date of August 2014)."[79]
>
> "We note, additionally, that the change of the valuation date to September 2006 would also require an ex-ante approach in which MS would also need to adjust Claimant's expectations as of that date to estimate future cash flows. Variables such as the renegotiation process, expected inflation, exchange rates, traffic forecasts, etc., would need to be adjusted. MS propose none of these adjustments."[80]

(2) The Tribunal's Analysis

88. While Argentina believes the valuation should occur at the initial breach, the Tribunal's analysis is of a continuing breach, which began with the initial breach in September 2006 and continued until the Concession Contract was irrevocably terminated in August 2014.

89. This can be seen from discussion in the Decision on Liability. The Tribunal linked the valuation date to the time *following* the breach of the FET standard: that is, breach begins to run from 2006:

[76] BRG's Implementations of the Directions on Quantum, ¶ 65, citing Decision on Liability, ¶ 438(6).
[77] BRG's Implementations of the Directions on Quantum, ¶ 66 (Figure 9 omitted).
[78] BRG's Implementations of the Directions on Quantum, ¶ 67 (Figure 10 omitted).
[79] BRG's Implementations of the Directions on Quantum, ¶ 68 (Figure 10 omitted).
[80] BRG's Implementations of the Directions on Quantum, ¶ 69.

> "In contrast, the basis of the Claimant's case here is not pesification, but Argentina's failure within a reasonable time following the end of the emergency to restore the economic equilibrium of the Concession Contract. Webuild has not sought to recover any damages for the period between 2002 and 2006 (including the period of the Financial Assistance Loan). Its historical damage calculations begin in September 2006, grounded in the terms of the 2006 LOU. Its 'but-for' scenario is consistent with the basis of the FET violation that the Tribunal has determined took place (i.e., the failure to restore the Concession's economic equilibrium at the time of the 2006 LOU).".[81]

90. Indeed, when discussing the breach of the FET, the Tribunal considers the consequences subsequent to that date:

> On the contrary, Argentina behaved in an arbitrary, grossly unfair, unjust and idiosyncratic manner in not renegotiating the Concession Contract within a reasonable time, i.e., not presenting a renegotiation proposal after the 180-day deadline set out in the Emergency Law; unilaterally replacing the first LOU; denouncing the second LOU; making representations regarding the First Transitory Agreement; not ratifying the Fourth Transitory Agreement; and in preventing Puentes' shareholders from injecting more capital into the company to avoid its dissolution. Equally, the Respondent conducted itself in an unjust manner when terminating the Concession.[82]

> The Tribunal appreciates that Argentina has argued that termination was an automatic result of the Concessionaire's dissolution and liquidation. While the Contract may have technically permitted such an action, FET requires that the Tribunal consider the termination not in isolation, but in conjunction with the other facts and circumstances of this case. Viewed in light of the totality of the facts and circumstances, it is clear that the termination was the final consequence of the failure to rebalance and the prolonged period of disequilibrium in which Puentes tried to operate under the unsustainable yoke of frozen tariffs, the terms of the Financial Assistance Loan, and increasing costs. If Respondent's failure to approve the equity infusion was the nail in the coffin of the investment following the failure to timely renegotiate, the termination of the Contract was its burial.[83]

[81] Decision on Liability, ¶ 379. The Tribunal notes that this last phrase – '*the failure to restore the Concession's economic equilibrium at the time of the 2006 LOU*' does not qualify the entire first clause but was intended to qualify the '*economic equilibrium*'.
[82] Decision on Liability, ¶ 265. The Fourth Transitory Agreement was concluded 6 March 2012 and terminated by resolution of 26 August 2014.
[83] Decision on Liability, ¶ 266.

91. This is reinforced by the Tribunal's conclusions on the breach of the negative FET standard under Article 2.2:

> As the foregoing analysis has indicated, the Respondent had an obligation to restore the Concession's equilibrium within a reasonable time in the wake of the 2002 Emergency Law, based on both the provisions of the Concession Contract and the Emergency Law itself. That did not occur. Instead, the Concessionaire was subjected to a protracted series of negotiations between 2006 and 2014 during which period of time its toll rates were frozen at 2002 levels and its financial viability increasingly undermined, culminating in its insolvency and the Concession Contract's termination. […] Accordingly, on the facts of this matter, the Tribunal finds that Article 2.2 (second sentence) has also been violated.[84]

92. Contrary to Argentina's claims "that valuation date [of August 2014, posited by the Claimant] was premised on Claimant's claim for unlawful expropriation";[85] the 2014 date is not based on the *expropriation* (on which the Tribunal did not make separate findings), but because the time at which the alleged expropriation took place was also the time of the investment's "burial".[86] The Tribunal sees the breach as beginning in 2006, and ending in 2014.

93. In its Decision on Liability, the Tribunal accepted the Claimant's submission that the appropriate valuation date was the 2014 date. While Argentina is correct that the Claimant's submissions in this regard were based on the date of the alleged expropriation, that does not preclude selecting that date as the date of the irrevocable FET breach. To be clear, the Tribunal considers that 31 August 2014 was in fact the date of the FET breach.

94. The Tribunal could in theory have chosen the date of the Award as the valuation date, and viewed the termination as simply another event in the continuing breach, but the finality of the Concession Contract termination suggested that the better approach was to focus on that termination date.

[84] Decision on Liability, ¶ 268.
[85] Respondent's Post Decision Liability Brief, ¶ 69.
[86] Decision on Liability, ¶ 266.

95. Indeed, the Tribunal's approach to compensation is premised on the idea of a continuing breach. The Tribunal relies on *Chorzów Factory* ("reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"),[87] and takes a broad approach:

> Whether they should be limited to the time period when the wrongful act occurred is more questionable; in the Tribunal's view, the principle of full reparation for the consequences of the act is the overriding principle, while principles such as non-remoteness rather than a temporal limit per se will operate to contain the extent of recoverable damages. [88]

96. When considering causation, the Tribunal uses the 2006 date as the breach and then considers continuing effect:

> Had the economic equilibrium of the Concession been restored in 2006, as the Tribunal has concluded it should have been, it is reasonable to assume that Puentes would have been able to avoid Boskalis-Ballast's filing of the insolvency petition, and the subsequent reorganization proceedings in 2007 […].[89]

97. If breaches of the FET standard set the date at the initial breach, then Argentina's position could be seen as correct. But given the continued efforts on the part of the Parties to renegotiate subsequent to that date, the Tribunal considers it appropriate to consider the continuing breach and to set the valuation date as the date when this breach culminated in the termination of the Concession Contract.

98. As the Tribunal held in the Decision on Liability,

> [T]he primary legitimate expectation of the Claimant was grounded in the Concession Contract itself: while this Contract may not create any expectation of a particular rate of return or profitability, it establishes the foundation for other expectations, including the expectations of a certain economic environment based on the existence of the Convertibility Law and the indexing of values, as well as the specific

[87] Decision on Liability, ¶ 361.
[88] Decision on Liability, ¶ 362.
[89] Decision on Liability, ¶ 367.

> expectation that the economic equilibrium of the contract would be maintained.[90]

99. An additional persuasive element in this regard was "the Argentine Commercial Court Judgment of 11 June 2008, holding that UNIREN's failure to continue renegotiation (after the 2007 LOU) was in breach of Argentine law, and expressing its concern that more than six years after enactment of the Emergency Law 'the grave imbalance in terms of the agreement persists'."[91] As a result, the Tribunal concluded that the FET breach stemmed from the obligation created by the Emergency Law (of 2002) and the First LOU (of 2006) to restore the economic equilibrium within a reasonable time.[92] The period of September 2006 to August 2014 was considered to have surpassed that reasonable time period.

100. For these reasons, the Tribunal reaffirms its earlier decision that the breach of the FET standard became irrevocable on 31 August 2014 and that that date, rather than September 2006, is therefore the appropriate valuation date for purposes of the calculation of damages.

C. SUBMISSIONS OF THE PARTIES REGARDING THE FURTHER INSTRUCTIONS FOR CALCULATION OF DAMAGES

101. The Tribunal instructed the Parties (or a Party, as indicated) to prepare revised calculations of damages consistent with its decision on the basis of a set number of instructions. The Parties were unable to agree regarding the outcome of such calculations as there were fundamental disagreements between them on all but a few of the questions raised by the Tribunal.

(1) Reliance on Toll Rates in 2006 LOU in "But For" and Frequency of Toll Rate Increases

102. As noted above, the Tribunal instructed the parties, in preparing their revised calculation of damages, that

> Initial toll rates should correspond to those set forth in the 2006 LOU, which by its terms was aimed at a partial restoration of the

[90] Decision on Liability, ¶ 256.
[91] Decision on Liability, ¶ 258.
[92] Decision on Liability, ¶ 267.

> Concession's equilibrium. Readjustment of rates after the initial period set by the 2006 LOU shall be done on an annual basis consistent with the indices and 5% threshold specified in that LOU (based on paragraph 390 above).[93]

103. The Parties do not disagree on this calculation, but Respondent has suggested the resulting rates have implications for other variables used in the calculation of damages, particularly elasticity of demand (discussed below in subsection (3) of this Section C).

104. The Claimant's experts submit that:

> "Following the Tribunal's instructions, we update the BRG Second Report Model by replacing the monthly toll rate inflation adjustments with annual toll rate inflation adjustments, considering the inflation threshold of Section 6 of the 2006 MoU and also by delaying the first inflation increase from September 2006 to January 2008."[94]

> "We do not consider that the 150-day maximum administrative period for the approval of toll rate readjustments mentioned in Section 6 of the MOU is relevant because, as can be observed in Figure 2 below, monthly accumulated inflation between 2007 and 2016 was above the 5% threshold by June, at the latest, in every year. Indeed, accumulated inflation between December 2005 (the 2006 MOU is expressed in 2005 ARS) and January 2008 (the date at which PdL readjusted its toll rates) was 28%. Therefore, it is reasonable to assume that PdL would have commenced its toll rate readjustment administrative process at this time, and would have adjusted the toll rate twelve months after its prior tariff readjustment." [95]

105. The Respondent's experts state that:

> "According to the Tribunal's instruction, initial toll rates should correspond to those set forth in the 2006 LOU, and readjustment of rates after the initial period set by the 2006 LOU shall be made on an annual basis consistently with the indices and the 5 % threshold specified in that LOU."[96]

> "We confirm that initial toll rates in the Joint Updated Valuation Model correspond to those set forth in the 2006 LOU, and that the readjustment of rates after the initial period set by the 2006 LOU has

[93] Decision on Liability, ¶ 439(a).
[94] BRG's Implementations of the Directions on Quantum, ¶ 10.
[95] BRG's Implementations of the Directions on Quantum, ¶ 12 (Footnotes and Figure 2 omitted).
[96] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 18 (Footnotes omitted).

> been made on an annual basis consistently with the indices and the 5 % threshold specified in that LOU."[97]

> "The experts agree as to the calculation made according to the Tribunal's instruction. However, it should be noted that the values resulting from this calculation imply the adoption of a but-for scenario in which the toll rates of the Rosario - Victoria connection would be significantly higher than those of the existing alternative routes, such as the Zárate - Brazo Largo bridge, with the consequent impact on demand and elasticity." [98]

106. The Tribunal accepts the revised calculation, which has been agreed by the Parties, and will consider the argument of the Respondent regarding the effect of these adjusted toll rates on demand elasticity in subsection (3) below.

(2) Assumption Regarding Toll Subsidy

107. The Tribunal determined that the revised calculations of damages had to include a figure showing the impact of termination of any toll subsidy included in the 2006 LOU after 2012 versus the continuation of such subsidy until the end of the Concession.[99]

108. The Claimant's experts submit:

> "Following the Tribunal instructions, we implement in the Joint Updated Valuation Model a sensitivity to assess the impact of the termination of the toll subsidies as of 1 February 2012. As shown in Table 3 below, implementing this sensitivity reduces damages to Claimant as of the Valuation Date from USD 174.2 million to USD 172.7 million, a USD 1.5 million decrease. We do not apply this adjustment in our revised calculation of damages as we understand from the Tribunal instructions that this adjustment was only requested as a sensitivity." [100]

109. The Respondent's experts note:

> "In the Joint Updated Valuation Model we agreed with BRG to include a switch that allows for quantification of the impact resulting from discontinuing toll subsidies in 2012, or alternatively maintaining subsidies until the end of the Concession."[101]

[97] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 19.
[98] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 20 (Footnotes omitted).
[99] Decision on Liability, ¶ 439(b).
[100] BRG's Implementations of the Directions on Quantum, ¶ 16 (Footnotes omitted).
[101] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 22 (Footnote omitted).

> "As this toll subsidy was cancelled for all road concessionaires in 2012 and as there is no reference to any rate compensation in the 2007 Letter of Understanding or in the subsequent Provisional Agreements, in our opinion the subsidy should be eliminated in 2012."[102]
>
> "More importantly, it should be noted that such toll subsidy was not included in the original offer documents used by bidders as the basis for their bids. Therefore, including such toll subsidy in the but-for scenario not only generates an extraordinary benefit for the Concessionaire beyond the offer terms but also violates the principle of equality among bidders. In fact, the increased traffic volume resulting from the application of this compensation generates a revenue surplus that is totally unrelated to the rebalancing of the Concession within the framework of the contractual renegotiation."[103]
>
> "Therefore, for the purposes of damage assessment, in our opinion, applying a toll subsidy in the but-for scenario is not admissible, as we stated in our reports. Removing such compensation in 2012 would partially correct the inconsistency outlined in the preceding paragraph."[104]
>
> "We disagree with BRG's position, as their calculations imply that the same level of toll subsidies will be maintained for the whole term of the Concession."[105]

110. The Claimant thus treats the subsidy as a sensitivity only, and continues to apply it on the basis that its calculations do not show a significant impact on damages, while the Respondent considers that it is improper to apply the subsidy after its termination in 2012. The Tribunal considers that the position of the Respondent is the better one and that it would be inappropriate to apply the subsidy after the evidence appears to indicate it was terminated. Since this subsidy was granted by Argentina to toll operators for a limited period of time, the Tribunal considers it appropriate to include it for the period of time during which it was in force.

(3) Elasticity Values

111. The Tribunal in its Decision on Liability requested the following with respect to elasticity values:

[102] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 23.
[103] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 24 (Footnote omitted).
[104] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 25 (Footnote omitted).
[105] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 26.

> The revised calculation of damages should be based on three different assumptions regarding elasticity values: one at the low end of the envelope of values put forward by Mr. Bates in the *Hochtief* Arbitration; one at the high end; and one at the midpoint. Given the Tribunal's finding of greater inelasticity of demand for heavy rather than light traffic, the values in each calculation should reflect this differential, using the same degree of differential as reflected in Table 9 set forth in paragraph 399 above.[106]

112. Elasticity in relation to demand seeks to measure the effect of price variations (here, toll rates) on demand for the product or service in question (here, the toll road), taking into account alternatives to the product or service. In lay terms, the lower the elasticity, the less impact a price increase will have on the demand for a product or service. The Tribunal's instructions that the calculations should reflect greater inelasticity of demand for heavy rather than light traffic reflected its evaluation that the evidence shows that heavy traffic, which is more commercial in nature, would be less inclined to seek alternative routes in the wake of toll increases than light traffic. The Parties performed the requested calculations, but remain divided as to what the appropriate elasticity value for this investment should be.

113. The Claimant's experts put forward that:

> "Following the Tribunal's instructions, our revised damages calculation uses Bates' range of elasticities adjusted for the light and heavy traffic differential from Table 9 of the DoQ."[107]

> "Mr. Bates estimated a range of elasticity parameters of -0.15 to -0.30 for light vehicles and a range of -0.10 and -0.25 for heavy vehicles. We point out that Bates's range of elasticities cannot be inferred from the evidence he provided in his report, which shows lower values in absolute terms (or less negative), particularly for heavy traffic. Figure 3 below compares Mr. Bates's range of elasticities to the evidence provided in his report."[108]

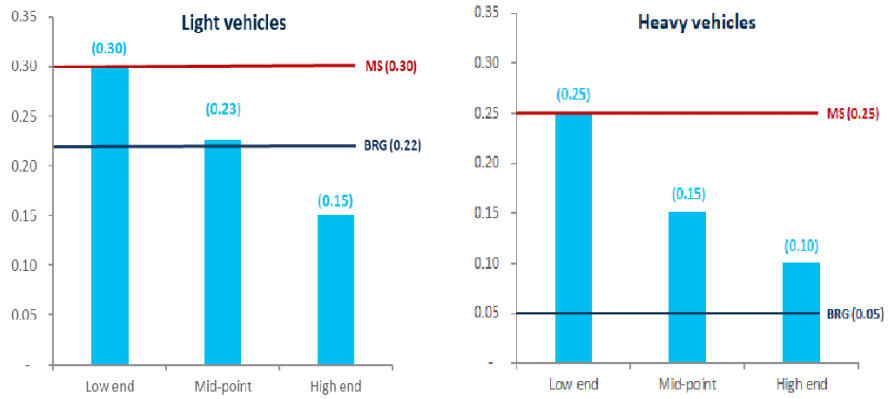
> "In his report, Bates also provides a cost analysis of the Rosario-Victoria Bridge's alternatives where he indicates any alternative route would represent substantial costs for the user, especially heavy vehicles. This conclusion is consistent with lower elasticity for heavy vehicles and is in line with our cost assessment, which indicated that

[106] Decision on Liability, ¶ 439(c).
[107] BRG's Implementations of the Directions on Quantum, ¶ 19.
[108] BRG's Implementations of the Directions on Quantum, ¶ 20 (Footnote and Figure 3 omitted).

the two alternatives to the Rosario-Victoria Bridge resulted in 2 to 4 times incremental transportation costs."[109]

"The Tribunal requested that we provide damages calculations for the low, mid, and high elasticities estimated by Bates. Since Bates only provides low and high levels, we calculate the mid-point as the average between his low-end and high-end estimations. Figure 4 below shows Mr. Bates's elasticity parameters for all categories, prior to the adjustment of the heavy traffic differential, compared to BRG's and MS's estimates. Note that considering that the elasticity parameters are negative, the lower end is the one that generates the highest impact on revenues since it is highest in absolute value."[110]

Figure 4: Mr. Bates's elasticity parameters compared to BRG and MS base case



Source: Rosario to Victoria Bridge Traffic and Revenues, Philip Bates, p. 57 (MS-13); Joint Updated Valuation Model (RD-139/MS-31)

"As requested by the Tribunal, we adjust Bates's elasticities for the light and heavy traffic differential. To do so, we use Mr. Bates's range of elasticities for Category 2 (which we apply for all light traffic) as the starting point. We then compute heavy vehicle elasticity by applying the ratio of heavy vehicle elasticity v. light traffic elasticity from Table 9 of the Tribunal's DoQ. This results in a ratio of 22%, meaning that heavy traffic elasticity is 22% of light traffic elasticity. Applying this ratio, we calculate the adjusted range of Bates's elasticity parameters in Figure 5 below. We then compare these elasticity parameters to those used by BRG and MS in our second reports respectively. After this adjustment, we find that Mr. Bates's mid-point elasticity is very similar to the one we have proposed in our assessment."[111]

[109] BRG's Implementations of the Directions on Quantum, ¶ 21.
[110] BRG's Implementations of the Directions on Quantum, ¶ 22.
[111] BRG's Implementations of the Directions on Quantum, ¶ 23 (Footnotes and Figure 5 omitted).

> "As shown in Table 4 below, applying the range of Mr. Bates's adjusted elasticity parameters results in a range between USD 168.4 million and USD 180.4 million as of the Valuation Date."[112]

> "Since the mid-point of Bates's adjusted elasticity is very similar to the elasticity we estimated in our original assessment based on academic and applied studies on traffic, we do not adjust our revised calculation for this item. Moreover, in our opinion, the information on Bates's calculations is insufficient to verify its reasonability. We do note that applying Bates's midpoint adjusted for the light/traffic differential has only a minor impact on damages, whereas the high (low) points increase (decrease) damages by USD 6.2 million (USD 5.8 million) respectively as shown in Table 4 above." [113]

114. The Respondent's experts posit that:

> "According the Tribunal's instructions, the revised calculation of damages should be based on three different assumptions regarding elasticity values: one at the lower end of the values curve offered by Mr Bates in the *Hochtief* arbitration, one at the higher end, and one at the midpoint. The values in Mr Bates' curve already reflect greater inelasticity of the heavy traffic category compared to the light traffic category. However, the Tribunal determined that the values of each calculation should reflect greater heavy traffic inelasticity pursuant to Table 9 included in paragraph 399 of the Decision on Liability."[114]

> "In the Joint Updated Valuation Model, we have included a switch to select the lower end of the value curve offered by Mr Bates, the higher end, or a midpoint calculated as the simple average between the low- and high-ends."[115]

> "However, we note that forcing the same degree of differentials between heavy and light traffic elasticities as illustrated in Table 9 prepared by BRG and included in paragraph 399 of the Decision on Liability, the higher end (which assumes the lowest traffic elasticity to toll rate increases) of Mr Bates' 'adjusted' curve results in even lower elasticity both for heavy and light traffic categories than the elasticity assumed by BRG in its reports. Mr Bates' 'adjusted' midpoint results in elasticity values almost identical to those assumed by BRG. Only Mr Bates' 'adjusted' lower end (which assumes greater traffic elasticity to toll rate increases) results in greater elasticity parameters than those assumed by BRG in its reports, and is therefore the only relevant sensitivity to BRG's assumption."[116]

[112] BRG's Implementations of the Directions on Quantum, ¶ 24 (Table 4 omitted).
[113] BRG's Implementations of the Directions on Quantum, ¶ 25 (Footnotes omitted).
[114] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 27 (Footnotes omitted).
[115] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 28 (Footnotes omitted).
[116] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 29.

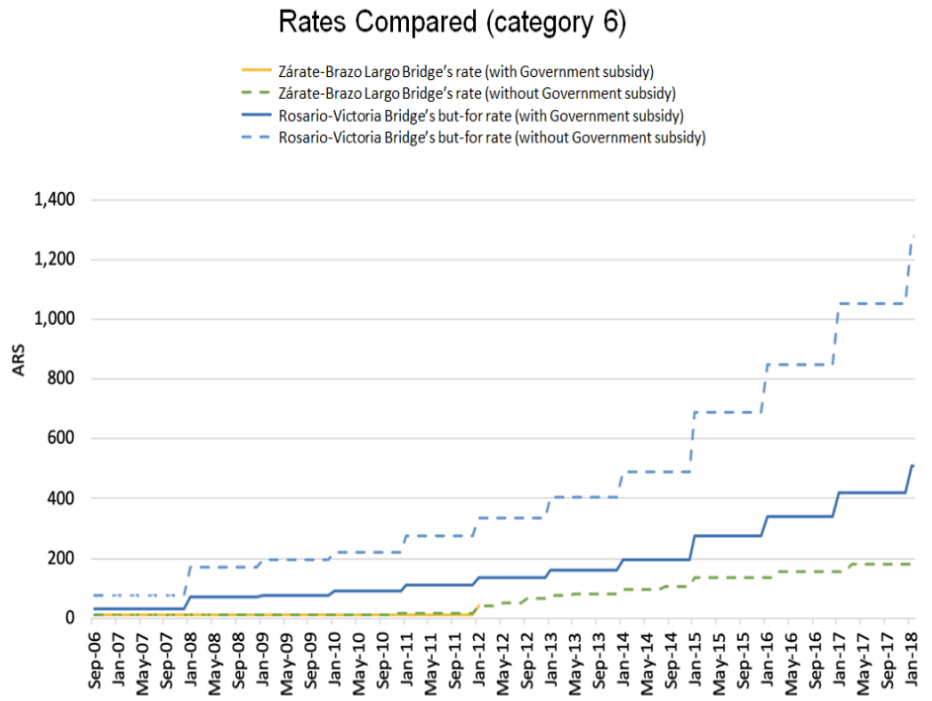
> "Therefore, in the Joint Updated Valuation Model we also included an option to adjust, or not to adjust, the heavy traffic elasticity parameter based upon the differential of Table 9 prepared by BRG and included in paragraph 399 of the Decision on Liability, so as to assess the impact of such adjustment. […]"[117]

> "Given the different framework between the case at issue and the *Hochtief* proceeding, the Tribunal decided it would not be appropriate to apply the *Hochtief* elasticity parameters. Even if the case were different from a legal perspective, the behaviour of the users of the Rosario – Victoria connection faced with changes in toll rate should be the same. In fact, the Bates' Report includes an empirical and detailed analysis of elasticity, traffic and demand specific to such connection. Thus, there would be no grounds to adjust those results."[118]

> "We also find that it is incorrect to assume heavy traffic inelasticity upon the basis of Claimant's allegations that there are no more convenient or direct alternative routes to connect the cities of Rosario and Victoria. Such assertion erroneously assumes that the origin-destination of all heavy traffic travelling on this connection starts and ends in the cities mentioned. This reasoning is incorrect, as we pointed out and as evidenced by the several specific studies conducted which show that most of the vehicles travel from and to other regions for the purposes of import or export of goods, using the Rosario – Victoria route as a Mercosur connection, or as a transoceanic corridor connecting the Atlantic to the Pacific Oceans. It is worth noting that there are other alternative roads to connect said ends, which, in addition, have charged toll rates which are significantly lower than the but-for toll rates according to the 2006 LOU,41 as shown in the chart below."[119]

[117] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 30 (Footnotes omitted).
[118] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 31 (Footnotes omitted).
[119] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 32 (Footnotes omitted).

Figure 1. Zárate - Brazo Largo Bridge's Rates Compared to Rosario – Victoria Bridge's But-for Rates



Source: Connections' Rates Compared, Zárate - Brazo Largo sheet, rows 15 and 22 (Exhibit MS-04); Joint Updated Valuation Model, Val Revs (m) sheet, rows 105 and 123 (Exhibit MS-31).[42]

> "In our Second Report, we made an alternative elasticity calculation where we estimated the effect that each toll rate increase had on traffic levels for category 2 (representative of light traffic) and category 5 (representative of heavy traffic) based on the actual evolution of traffic and toll rates for the Rosario – Victoria connection. It is striking that the Tribunal made no reference to these parameters in its Decision on Liability, although nothing could be more comparable than this analysis, given that the same route is involved and that the results obtained show greater elasticity for heavy traffic."[120]

115. At this point, the Respondent's experts refer to their Second Expert Report, submitted in the merits phase:

> 117. In any case, based upon the real evolution of traffic volumes and toll rates for the Rosario-Victoria connection, we have assessed the

[120] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 33 (Footnotes omitted).

> effect that each toll rate increase has had on the traffic volumes for category 2 (light traffic) and category 5 (heavy traffic). Taking into account all the increases as from March 2016, elasticity average is -0.28 and -0.14 for light traffic and heavy traffic, respectively. However, if the last increase announced on 30 November 2018 is excluded, given the seasonal variation of traffic on the bridge for December, then average elasticity for light traffic would be -0.45 and -0.10 for heavy traffic. There is no other better analysis for comparable purposes as this analysis is based on the same connection.

118. The table below shows the results of our estimate:

Table 6. Estimate of Elasticity for the Rosario-Victoria Connection Based upon Real Increases in Toll Rates

	Rates		Rates - Variation %		Traffic - Variation %		Elasticity	
	Category 2	Category 5	Category 2	Category 5	Category 2	Category 5	Category 2	Category 5
Until Mar-16	7.40	29.60						
Mar-16	12.40	49.59	67.5%	67.5%	-16.5%	7.9%	-0.25	0.12
Aug-16	16.53	66.12	33.3%	33.3%	-12.5%	9.7%	-0.38	0.29
Feb-17	24.79	99.17	50.0%	50.0%	-7.7%	-13.9%	-0.15	-0.28
Mar-18	33.06	132.23	33.3%	33.3%	-20.8%	4.9%	-0.62	0.15
Aug-18	45.45	181.82	37.5%	37.5%	-32.4%	-29.6%	-0.86	-0.79
Dec-18	57.85	231.40	27.3%	27.3%	15.6%	-8.5%	0.57	-0.31
						Average	-0.28	-0.14
						Average excluding last increase	-0.45	-0.10

Source: Prepared by the authors of this report based upon data submitted by the National Roads Office. See Exhibit MS-21.

116. Furthermore, the Respondent's experts continue in their Post-Decision on Liability Valuation Report:

> "In view of the above, the Tribunal's representation, based on the figures submitted by Claimants, which only consider vehicles that start their trip in Rosario to get to Victoria (or vice versa), is not applicable to heavy vehicles which, as explained above, mainly use the connection as a portion of a larger route from and to different locations, for which there are alternative roads."[121]

> "Such an analysis could only relate to certain light vehicles that mostly travel back and forth between the two cities, especially for tourism purposes, as shown by specific studies that collect historical traffic

[121] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 34 (Footnotes omitted).

> records. Furthermore, specific studies indicate that the growth of light traffic was favoured by a toll rate benefit provided for in the original Concession Contract, which is not applicable to heavy vehicles."[122]
>
> "Moreover, the Tribunal's instruction is also technically inconsistent, in that apparently it takes values from the Bates' Report, which result from a detailed analysis of several traffic studies, and then combines them with the results of a completely different analysis with no apparent technical justification. In summary, in our opinion it is appropriate to use the lower ends of Mr Bates' study of -0.30 for the light traffic categories, and -0.25 for the heavy traffic categories without adjustments. These elasticity parameters reflect greater inelasticity of heavy traffic compared to light traffic, consistent with the Tribunal's instruction. Therefore it is not necessary to force the same degree of differentials between elasticities as reflected in Table 9 prepared by BRG referred to in paragraph 399 of the Decision on Liability."[123]

117. The Tribunal examined extensively the question what elasticity value to use. To some extent, the Parties seem to be in agreement that there is a differential between light and heavy traffic. However, the Respondent wishes to use the lower end of the Bates study, presenting a number of actual data-based observations regarding the origins and destinations of road users (particularly how commercial vehicles are likely to use the toll road). The Claimant, on the other hand, argues that the Bates midpoint makes more sense (in particular as it is very close to the Claimant's own calculation). The Claimant bears the burden of persuasion on this issue. Ultimately, the Tribunal is not sufficiently persuaded by the Claimant's arguments and has therefore decided to adopt the Bates low end.

(4) Rate of Return Assumptions

118. The Tribunal, in its Decision, asked the Claimant:

> [T]o clarify to what extent, if any, future cash flows in any calculation of damages are based on an IRR in excess of 8.87% and, to the extent that may be the case, to provide an additional calculation based on an IRR of no greater than 8.87%, along with a calculation using an IRR of 9.18% (or such other rate as may result from the new calculation of damages requested by this Decision), taking into account any variations caused by actual performance), so that the effect of any

[122] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 35 (Footnotes omitted).
[123] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 36 (Footnotes omitted).

> higher rate that the Claimant's experts consider historical performance may justify is clear, as set out in paragraphs 406 to 413 above.[124]

119. The Claimant argues that:

> "[I]ts damages assessment is not based on an IRR in excess of 8.87%. Rather, BRG undertakes its assessment in a two-step approach, first calculating toll rates that would allow Puentes del Litoral to obtain a regulated IRR of 8.87% based on the 2006 MOU; and then applying the toll rate in Puentes del Litoral's expected cash flow projections to estimate the value of the Concession based on ex-post data. In its Second Report, BRG estimated the ex-post IRR to be 9.18%."[125]

120. The Claimant's experts explain further that:

> "Our damages assessment is not based on an *IRR in excess of 8.87%*. Instead, we undertake our assessment in a two-step approach:
>
> a. First, we calculate the toll rate that would allow the Concessionaire to obtain a regulated return of 8.87% based on the tariff scheme and framework set out in the 2006 MOU.
>
> b. Second, we apply the toll rate in PdL's expected cash flow projections to estimate the value of the Concession, and the ex-post rate of return."[126]
>
> "The Concessionaire's ex-post rate of return over its investments is expected to differ from the regulated IRR of 8.87% as PdL's cash flow projections incorporate contemporaneous data such as ex-post traffic and financial variables (e.g., deferred tax benefits, working capital adjustments), which are not reflected in the regulatory model. This interaction of ex-post data and financial variables are what can yield an ex-post IRR in the but-for cash flows that is either lower or higher than the regulatory IRR of 8.87%. In our second report, this ex-post IRR was 9.18%."[127]
>
> "Per the Tribunal's request, we have computed damages so that the *ex-post* IRR equals 8.87%. To do so we modify the two-step methodology described in par 73 and instead, using the same model, we calculate the toll rates that yield an ex-post IRR of 8.87%. Under this scenario, damages to Claimant decrease from USD 174.2 million to USD 169.4 million, a USD 4.8 million decrease. We note that in this case, the

[124] Decision on Liability, ¶ 439(d).
[125] Claimant's Post-Decision on Liability Response, II(A), p. 5 (Footnotes omitted).
[126] BRG's Implementations of the Directions on Quantum, ¶ 73 (Footnotes omitted).
[127] BRG's Implementations of the Directions on Quantum, ¶ 74 (Footnotes omitted).

> regulated rate of return, that is the IRR on the 2006 MoU cash flows will be lower at 8.60%."[128]
>
> "Responding to the parenthetical of the request, we calculate Claimant's damages and ex-post IRR after the implementation of the DoQ. That is, the adjustment in toll rates (section III.1.2), toll subsidy (section III.2.2), Bates's adjusted mid-point elasticity (section III.3.2), the working capital adjustment (section III.4.2), the correction to the calculation of costs (section III.5.2) and the US Prime rate as interest to update historical losses (section III.6.1). Together, these adjustments yield an ex-post IRR of 7.76%, which is lower than the Concession's original regulatory IRR of 12.94% and the 2006 MOU's regulatory IRR of 8.873%."[129]

121. The Respondent's experts submit that:

> "It is worth noting that the maximum IRR was 8.87 % and that there was no guarantee in the bidding terms and conditions as to a certain level of profitability, the Concession being a contract at risk. In this respect, PdL had already informed the rupture of the economic-financial equation of the Concession in July 2001. In this regard, the use of the 2006 LOU as a but-for scenario to re-establish the equilibrium of the Concession within the framework of the contractual renegotiation, even when it yields an IRR below 8.87 %, results in benefits for PdL that tend to correct variables that were among the risks assumed by the Concessionaire, such as the loss of income by PdL derived from the overestimation of traffic volumes in the bid. As already indicated, the application of a subsidy, which tends to increase the expected traffic, was not provided for in the bidding terms."[130]
>
> "In addition, under the Concession Contract, the value of category 5, 6, and 7 (heavy traffic) toll rates were equivalent, respectively, to 3, 4, and 5 times the value of category 2 (cars), while under the but-for model based on the 2006 LOU, as from September 2006, these values correspond to 5.25, 7, and 8.75 times the value of category 2, respectively. This amendment also deviates from the offer conditions under which the bidders submitted their bids and results in higher additional revenues for the Concessionaire. This is evidenced by the fact that the application of the 2006 LOU results in a significantly higher amount of damages than would be the case if the terms of the Concession Contract were applied." [131]

122. The Tribunal accepts the Claimant's revised calculation as consistent with its instructions. In its understanding, the use of *ex-post* data is helpful in this context to

[128] BRG's Implementations of the Directions on Quantum, ¶ 76 (Footnotes omitted).
[129] BRG's Implementations of the Directions on Quantum, ¶ 77 (Footnotes omitted).
[130] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 80 (Footnotes omitted).
[131] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 81 (Footnotes omitted).

avoid speculation. Use of *ex-post* data also answers at least in part the Respondent's point about assumed risks. While it is not disputed that the Concession Contract was a risk contract, it was also calculated based on a presumed rate of return. The revised calculations show this rate would have declined from the original offer and even from the 2006 MOU in the "but-for" scenario.

(5) Adjustment of Working Capital

123. In its Decision on Liability, the Tribunal requested that the Parties clarify the position regarding tax credit carryovers under Argentine law, given that, if such carryovers are limited in duration to five years, revised calculations would need to be made reflecting that limitation.[132]

124. The Claimant "agrees with the joint-experts' revised calculations which adjust BRG's Second Report Model by incorporating 'the expiration schedule of PdL's tax credits as of December 2005,' with the last credit expiring in 2010."[133]

125. The Claimant's experts elaborate:

> "We adjust the BRG Second Report Model by correcting our calculation of PdL's working capital by incorporating the expiration schedule of PdL's tax credits as of December 2005."[134]
>
> "In the BRG Second Report Model we include Pdl's tax credits in the working capital calculation since PdL would have had taxable profits after the renegotiation of the Concession. We therefore change the nature of the asset (i.e., the credits) from a 'non-current' asset in the actual scenario to a 'current' asset in the but-for scenario."[135]
>
> "As discussed at the Hearing, the Experts agree that PdL had ARS 135.6 million of net operating losses or tax credits as of December 2005 to be applied over the next years. These tax credits have a positive value as they can be used to deduct future tax liabilities when positive cash flows are achieved, increasing PdL's overall profitability and cash flows in a DCF valuation."[136]

[132] Decision on Liability, ¶ 439(e).
[133] Claimant's Post-Decision on Liability Response, II(B), p. 6 (Footnotes omitted).
[134] BRG's Implementations of the Directions on Quantum, ¶ 29.
[135] BRG's Implementations of the Directions on Quantum, ¶ 30.
[136] BRG's Implementations of the Directions on Quantum, ¶ 31 (Footnotes omitted).

> "PdL reflected uncertainty in its 2005 financial statements as to whether it would be able to use these accumulated tax credits. In the but-for scenario, however, such a provision would not have been made as PdL would have expected positive cash flows going forward as a result of the renegotiation, and thus would have expected to use the outstanding tax credits to its advantage. In other words, the accumulated tax credits would have been a current asset to the company, and not provisioned as a non-current asset."[137]

> "We have not considered the expiration of PdL's tax credit by including them in the working capital calculation of the BRG Second Report Model. In a further review of the audited financial statements, we identified a schedule where the total tax credit balance of ARS 135.6 million is broken down between different maturities between 2006 and 2010 (i.e., 5 years after 2005). We show a snapshot of PdL's 2005 audited financial statements in Figure 6 below."[138]

> "In this instance we adjust PdL's tax credits to reflect its expiration schedule. […]" [139]

126. The Respondent's experts note that:

> "We have included a carryover of the tax credits outstanding as of December 2005 to reduce the amounts of income tax due by PdL on the increased revenues derived from renegotiated toll rates over the next five years, as allowed under Argentine law. We have eliminated the adjustment to current deferred tax asset introduced by BRG in its second report. BRG has agreed."[140]

> "We agree with Bambaci and Dellepiane that, under the but-for scenario, PdL would be able to use its accumulated tax credits (or tax loss carryforwards) to reduce the amounts of income tax due on the increased income from the renegotiated toll rates over the next five years, as allowed under Argentine law. In the Joint Updated Valuation Model, we further agree that no adjustment should be made to the current deferred tax asset in 2005, consistent with our arguments in our Second Report. We therefore confirm to the Tribunal that at this instance the parties' experts have no differences in the calculation of the working capital variation in 2006."[141]

127. The Tribunal understands as a result of these submissions that the Parties have agreed on the calculation of the working capital variation in 2006, and accepts this agreement.

[137] BRG's Implementations of the Directions on Quantum, ¶ 32 (Footnotes omitted).
[138] BRG's Implementations of the Directions on Quantum, ¶ 33 (Footnotes and Figure 6 omitted).
[139] BRG's Implementations of the Directions on Quantum, ¶ 34 (Footnotes omitted).
[140] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 38.
[141] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 39.

(6) Interest Rate on the Financial Assistance Loan

128. The Tribunal, in its Decision on Liability, requested the Claimant "to confirm specifically the assumed rate of interest on the Financial Assistance Loan in that [the but-for] scenario."[142] It also requested that the Parties

> "confirm the Interest Rate for Loans to Leading Companies in the 25th percentile as published by the Argentine Central Bank, as referenced in Section 9 of the 2006 LOU. Assuming the 2006 LOU provisions have been correctly applied, the FAL rate reduction shall be unchanged from the earlier calculations performed by Claimant's experts. If, however, that rate has not been correctly applied, a new calculation shall be performed using the correct rate based on the 2006 LOU […]."[143]

129. The Claimant argues that BRG "estimate[s] the applicable interest rate of the FAL as the maximum between: a nominal rate of 9.5% and the interest Rate for Loans to Leading Companies in the 25th percentile as published by the Argentine Central Bank (BD-100)."[144] Lastly, the Claimant further notes that "BRG has also confirmed that no adjustments are required in the Updated Valuation Model on this issue."[145]

130. The Claimant's experts "confirm that the BRG Second Report Model estimates the applicable interest rate on the FAL as set forth in Section 9 of the 2006 MOU. That is, we estimate the applicable interest rate of the FAL as the maximum between (i) a nominal rate of 9.5%, and (ii) the interest rate for Loans to Leading Companies in the 25th percentile as published by the Argentine Central Bank." [146]

131. The Respondent's experts assert that they have "verified that the interest rate for loans to leading companies, 25th percentile, published by the Argentine Central Bank is the rate that has been applied in the but-for scenario on the Financial Assistance Loan", and that as they had "explained in [their] First Report, and to provide framework to this rate, the interest rate applicable to loans to leading companies, 25th percentile, published by

[142] Decision on Liability, ¶ 439(f).
[143] Decision on Liability, ¶ 439(f) (Paragraph citations omitted).
[144] Claimant's Post-Decision on Liability Response, II(C), p. 6 (Footnotes omitted).
[145] Claimant's Post-Decision on Liability Response, II(C), p. 7 (2nd paragraph) (Footnotes omitted).
[146] BRG's Implementations of the Directions on Quantum, ¶ 80. (Footnotes omitted)

the Argentine Central bank is lower than the rate set forth in Resolution 14 of 2003, which was already way below the rate applicable to shareholders loans".[147]

132. The Respondent puts forward that

> "[I]t is worth mentioning that a modification of the interest rate on the FAL duly determined by Resolution of the Public Works Secretariat ('SOP') No. 14 of 2003 ('Resolution 14') is well beyond the scope of full reparation under the law applicable to the calculation of damages. Indeed, the Tribunal determined that it would apply the customary international law standard under which reparation must wipe out all the consequences of the illegal act. Given that neither Claimant nor the Tribunal have considered Resolution 14 to be an illegal act under international law, in accordance with the applicable law there are no reasons to modify the interest rate on the FAL. The Tribunal found that the State's conduct in breach of the BIT was its failure to restore the economic equilibrium of the Contract in 2006. For this reason, the interest rate established in Resolution 14 cannot be a consequence of the failure to restore the equilibrium of the Contract in 2006 that had to be wiped out."[148]

> "The Decision on Liability is contradictory on this point. On the one hand, it admitted that Resolution 14 did not constitute a breach of the BIT. However, on the other hand, it concluded that it was reasonable to reduce the interest rate on the FAL established in Resolution 14, as the provisions of Resolution 14 purportedly exacerbated PdL's financial situation and made timely restoration of the economic equilibrium of the Contract even more necessary —when as a matter of fact it was the FAL that allowed the completion of the works and the commencement of the operational phase, in the face of PdL's failure to secure the financing undertaken at the construction phase— . The Tribunal made that decision without explaining how that would be in accordance with the law applicable to the determination of damages, under which only the consequences of the illegal act are susceptible of reparation under international law, or how that would be in accordance with the principle of causation that the Tribunal determined was applicable to the calculation of compensation."[149]

> "Moreover, the Tribunal stated that the FAL was 'modified by Resolution 14,' allegedly prejudicing PdL, without addressing the issues raised by Respondent. In this respect, Argentina explained that Resolution 14 did not increase the interest rate and that the FAL did not set any interest rates but it established that, once the bridge had opened to traffic, a certain procedure would be followed to establish the relevant interest rate. Such procedure was followed through relevant consultations to the Central Bank of the Argentine Republic

[147] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶¶ 83-84 (Footnotes omitted).
[148] Respondent's Post-Decision on Liability Brief, ¶ 63 (Footnotes omitted).
[149] Respondent's Post-Decision on Liability Brief, ¶ 64 (Footnotes omitted).

> ('BCRA') and the Bank of the Argentine Nation ('BNA') and subsequent technical reports, all of which resulted in the issuance of Resolution 14, with the applicable interest rate. […]"[150]
>
> "A reduction in the interest rate on the FAL in the but-for scenario as directed in the Decision on Liability, in addition to being unfounded and unsupported by the applicable law, is unreasonable if account is taken of the fact that the real interest rate of the 2006 Letter of Understanding was negative as from 2005, as confirmed by Claimant's experts. This reduction in the interest rate on the FAL in the but-for scenario increases the damages claimed by Claimant, as explained by experts Machinea and Schargrodsky."[151]
>
> "Additionally, the Tribunal stated that the terms of the FAL set out by Resolution 14 purportedly exacerbated PdL's financial situation, which is incorrect in accordance with the evidence in the record. In this connection, the Tribunal determined that the FAL allegedly had a 'high [] cost.' However, the rates in real terms on the FAL were lower than the rates on the loans granted by the shareholders to PdL. In other words, the rate on the FAL granted by the State at the request of PdL was more favourable than that on the shareholder loans to PdL."[152]

133. The Parties thus seem to agree on the correctness of the calculation according to the prescribed formula, but the Respondent argues that the FAL rate should not be reduced in the "but-for" scenario, on several grounds. In particular, it relies on the fact that the Tribunal did not find the FAL to be illegal. But that is not the issue in the "but-for" analysis. Rather, the Tribunal is seeking to determine on a non-speculative basis what the relevant conditions would have been under a scenario where the equilibrium would have been reestablished. For the same reasons that justify the reduction in the interest rate on shareholder loans in that scenario, the Tribunal considers that the FAL rate would also have been reduced. Accordingly, the Tribunal decides that no further change in the FAL rate is needed and that the prior calculation put forward by Claimant (based on the market rate) shall stand.

(7) Effect of the Debt Overhang from the Pre-Operation Phase

134. In its Decision on Liability, the Tribunal asked the Claimant

> "to clarify the extent to which, if any, in the 'but-for' scenario there existed a debt overhang from the construction phase (whether to

[150] Respondent's Post-Decision on Liability Brief, ¶ 65 (Footnotes omitted).
[151] Respondent's Post-Decision on Liability Brief, ¶ 66 (Footnotes omitted).
[152] Respondent's Post-Decision on Liability Brief, ¶ 67 (Footnotes omitted).

> subcontractors such as Boskalis-Ballast, shareholders or Argentina under the FAL) that would presumably not have been present absent the cancellation of the IDB Loan and the effects of the economic emergency on Puentes' ability to retire such debt, and the impact any such overhang might have on the revenues Puentes would be required to earn in order to achieve the targeted IRR in that scenario."[153]

135. The Claimant argues that:

> "there is no 'debt overhang from PdL's pre-operation phase in the but-for scenario." This is so because under the "but-for" scenario, PdL's outstanding debt with Boskalis-Ballast is repaid in 2006, the Financial Assistance loan is repaid by April 2008, and the intercompany loans are repaid by August 2014, with BRG calculating a positive equity value of Puentes del Litoral as of August 2014, which is net of any outstanding debt, including the intercompany loans."[154]

136. More specifically, the Claimant's experts confirm:

> "[T]hat any debt overhang from PdL's pre-operation phase is repaid in the but-for scenario. Specifically:
>
> PdL's outstanding Boskalis-Ballast debt of ARS 70.6 million in 2005 is repaid in 2006 in the but-for scenario after the economic equilibrium of the Concession is restored.
>
> The outstanding shareholder loans of ARS 202.4 million in 2005 are assumed to be refinanced at market rates at the start of the but-for scenario in September 2006, and are repaid in August 2014 as we compute a positive equity value of PdL, which is net of any outstanding debt.
>
> The financial assistance loan is repaid by April 2008 in the but-for scenario of our implementation of the Tribunal's instructions in the Joint Updated Valuation Model."[155]

137. Moreover, the experts

> "[…] note that the but-for scenario prior to the renegotiation is premised on the actual financing employed by PdL in the construction of the bridge. That is, the IDB Loan did not materialize and […] PdL recurred to other financing alternatives such as the shareholder loans. Pdl's financing prior to the renegotiation was more expensive than expected prior to the economic crisis. For example, the IDB Loan rates

[153] Decision on Liability, ¶ 439(h).
[154] Claimant's Post-Decision on Liability Response, II(D), p. 8 (Footnotes omitted).
[155] BRG's Implementations of the Directions on Quantum, ¶ 83 (Footnotes omitted).

> ranged between 8 and 9%, whereas the shareholder loans rate was 15%. After the renegotiation, we assume PdL repays these loans at their actual interest rate and replaces those loans with financing at its cost of debt."[156]
>
> "Finally, we clarify that PdL's financing decisions and any potential debt overhang have no impact on the resulting toll rate (and in PdL's revenues) as the 2006 MOU is not impacted by PdL's debt/interest payments. That is, PdL's financing decisions have no impact on the target regulatory return of 8.87% according to the 2006 MOU, and the toll rate that results from the re-establishment of the equilibrium of the Concession." [157]

138. The Respondent's experts, on the other hand, note that:

> "The Tribunal considered it inappropriate to hold Argentina responsible for 100% of the damage and that consideration should be given to the way in which Webuild's claims as a creditor and the pre-operational financial difficulties of PdL in general should be taken into account, in recognition of the fact that PdL's economic challenges were not entirely of Argentina's creation and resulted in an overhang in the operational phase of the Project."[158]
>
> "[…] We understand that Claimant considers that the debt owed to Boskalis-Ballast Nedam is repaid in the but-for scenario and that the debt owed to the shareholders does not need to be adjusted. However, the PTN has requested us to analyze the Tribunal's concern regarding PdL's overhang from the construction phase."[159]
>
> "The bridge began to be operated in May 2003. Until then, Webuild had provided USD 13.0 million in loans to PdL at an annual rate of 15 % in US dollars. After the bridge began operations, Claimant provided an additional USD 9.3 million in loans to PdL at that same rate."[160]
>
> "According to PdL's audited financial statements as of December 2005 (the last available financial statements prior to the start of the quantum calculation), Webuild's loans amounted to USD 34.6 million, a sum significantly higher than the nominal value of the loans granted (USD 22.3 million) due to interest capitalization at an annual rate of 15 %. That is, interest on the USD 22.3 million in nominal value was capitalized up to December 2005 at an annual nominal rate of 15 % in US dollars. By difference, it can be calculated that, PdL's debt with

[156] BRG's Implementations of the Directions on Quantum, ¶ 84 (Footnotes omitted).
[157] BRG's Implementations of the Directions on Quantum, ¶ 85 (Footnotes omitted).
[158] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 85 (Footnotes omitted).
[159] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 87 (Footnotes omitted).
[160] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 88 (Footnotes and Table 6 omitted).

> Webuild increased by USD 12.4 million due to interest, which accounted for 55.4 % of the nominal value of the loans."[161]
>
> "One way of partially assessing, in the but-for scenario, the debt overhang from the construction phase that would presumably not have been present absent the cancellation of the IDB Loan and the effects of the economic emergency on PdL's ability to repay such debt, is assuming that the debt incurred by PdL could have been raised at a rate lower than the 15 % rate fixed by PdL's shareholders."[162]
>
> "It is reasonable to assume that, in the but-for scenario, the interest rate on the loans granted to PdL by the shareholders in the construction phase would have been a market rate instead of an annual nominal rate of 15 %. For instance, the average interest rate for 30-day loans in US dollars, 25th percentile, for the year 1998, to leading companies was an annual nominal rate of 8.22 %. In addition, the interest rates under the agreement entered into with the IDB were the 6-month LIBOR rate + 5.25 % for the A loan and the 6-month LIBOR rate + 4.5 % for the B loan."[163]
>
> "If we recalculate interest on the loans granted by Webuild in the pre-operation phase capitalized up to December 2005, assuming that the shareholders granted the loans at the abovementioned market rates, the damage incurred by Webuild as a creditor is reduced. However, if we recalculate the debt owed to Webuild as of December 2005, the damage incurred as a shareholder also changes since, in that case, PdL's total outstanding debt as of December 2005 is lower. In order to calculate the but-for value of equity, the net debt outstanding and the interest accrued thereon to be paid to all of PdL's creditors before any distribution of capital or cash can be made should be deducted (total debt minus cash). As already explained in Section IV.I, in order to calculate the net debt as of August 2014, we update the net outstanding debt as of December 2005, translated into US dollars, at the yield rate on 5-year US Treasury bonds."[164]
>
> "If we introduce these changes to the calculation of Webuild's loans, our estimated total damages for Claimant as of August 2014 are reduced from the amount of USD 72 million […]. In addition, if we adjust BRG's damage calculation for the debt overhang from the construction phase that would presumably not have been present absent the cancellation of the IDB Loan and the effects of the economic emergency on PdL's ability to repay such debt, the total

[161] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 89 (Footnotes omitted).
[162] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 90.
[163] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 91 (Footnotes omitted).
[164] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 92.

> damage for Claimant based on BRG's assumptions is reduced from USD 114.8 million as of August 2014 […]." [165]

139. The Respondent concludes:

> "The debt to Boskalis-Ballast Nedam, the FAL and the shareholder loans at the construction stage relate to a period in which the Concession did not depend on toll rates (as the bridge had not been completed as yet), but it was to be financed with the subsidy and the funding that PdL undertook to secure and whose arrangement was at its own risk. The law applicable to the determination of damages identified by the Tribunal in its Decision on Liability and its finding that Argentina is not liable for 100% of the damage require isolating the effects on compensation caused by the debt overhang from the pre-operation phase and those damages resulting from causes not attributable to the State, such as the economic crisis and PdL's failure to secure financing during the initial years of the Concession."[166]

> "In sum, under the international law applicable to the calculation of compensation '[i]t is only '[i]njury ... caused by the internationally wrongful act of a State' for which full reparation must be made.' In its Decision on Liability, the Tribunal concluded that '[m]any tribunals have emphasized that while damages are not always susceptible of being quantified with complete precision, they need to be reasonable in amount and not too remote.' In the instant case, PdL's failure to secure financing and the debt overhang from the construction phase were not caused by the act identified by the Tribunal as a breach of the BIT, that is, the failure to restore the Concession's economic and financial equilibrium by 2006, but by PdL's business decisions and macroeconomic factors."[167]

> "In addition, the principles of proportionality and reasonableness apply to the instant case. It would be reasonable and proportional to deduct a percentage from the total amount of damages, given the problems arising from PdL's failure to obtain the necessary financing and the debt overhang from the construction phase."[168]

> "[…] The approach is based on the assumption in the but-for scenario that the loans granted to PdL by the shareholders in the construction phase were made at a market rate, rather than at an annual nominal rate of 15%. This approach results in a reduction of the total damage estimated for Claimant, as shown in Table 8 of the above-mentioned report. However, this adjustment—which would be the minimum indispensable adjustment to be made—does not capture all the effects

[165] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶¶ 93-94 (Footnotes and tables omitted).
[166] Respondent's Post-Decision on Liability Brief, ¶ 7 (Footnotes omitted).
[167] Respondent's Post-Decision on Liability Brief, ¶ 16 (Footnotes omitted).
[168] Respondent's Post-Decision on Liability Brief, ¶ 17 (Footnotes omitted).

of PdL's financing problems and debt overhang from the construction phase, but only a part of them (the part related to the shareholder loans). Looking only at Webuild's loans, it can be noted that PdL's debt to Webuild that would not have arisen absent the cancellation of the IDB loan and the economic emergency accounts for between 13.6% and 16.1% of Webuild's total claims as of 31 December 2005."[169]

"However, this does not capture the effect of the debt overhang from the construction phase with subcontractors or Argentina under the FAL that would not have arisen absent the cancellation of the IDB loan and the effects of the economic emergency. In order to reflect such impact, it will be necessary to apply a reduction percentage to the total amount of damages to be determined by the Tribunal, in line with the above-cited investment tribunals' decisions, which have applied reduction percentages ranging between 25% and 50%."[170]

"It is worth bearing in mind that a portion of the debt overhang was a product of the higher rates at which PdL borrowed from its own shareholders, as a result of PdL's failure to secure third-party financing and the overestimations in its bid traffic projections, which even led PdL, as early as in June 2001, to inform of the disruption of the economic and financial equation of the Concession Contract."[171]

"The Tribunal states that it finds such characterisation of PdL's economic difficulties odd 'since the Project was not completed at that time and Puentes therefore had no operating revenues.' Then, the Tribunal acknowledges that such financial problems threatened the completion of construction, but it seems to interpret that they were purportedly temporary, as the project entered into operation in 2003."[172]

"However, the disruption of the economic and financial equation reported by PdL, far from being a temporary difficulty, referred specifically to the unviability of the project in the long term, due to PdL's failure to secure third-party financing, as a result of the overestimation in the bid revenues."[173]

"Indeed, the Concessionaire's efforts to secure the IDB loan were fruitless precisely because the multilateral organisation detected serious repayment risks as the traffic projections were overly optimistic. In this respect, while it is true that the project went into

[169] Respondent's Post-Decision on Liability Brief, ¶ 18 (Footnotes omitted).
[170] Respondent's Post-Decision on Liability Brief, ¶ 19.
[171] Respondent's Post-Decision on Liability Brief, ¶ 20 (Footnotes omitted).
[172] Respondent's Post-Decision on Liability Brief, ¶ 21 (Footnotes omitted).
[173] Respondent's Post-Decision on Liability Brief, ¶ 22 (Footnotes omitted).

operation in 2003, this was only possible thanks to the FAL requested by PdL."[174]

"The Tribunal found that the Argentine Republic breached the FET standard as it did not restore the economic equilibrium of the Concession by September 2006. Hence, it is worth analysing the specific scope of such renegotiation, which originated in the enactment of the Emergency Law, as pointed out by the Tribunal."[175]

"In this connection, the Emergency Law, which abolished the peg of the Argentine peso to the US dollar, provided that any dollar adjustment clauses or clauses based on price indexes of other countries set forth in contracts entered into by the Public Administration were rendered invalid, while the relevant tariffs were set in Argentine pesos at an exchange rate of ARS 1 = USD 1. In addition, the Law authorised the Executive Branch to renegotiate any contracts encompassed by such provisions."[176]

"For the same reasons, as duly pointed out by the Argentine Republic, some arbitrary assumptions adopted by Dellepiane and Bambaci in their but-for scenario are likewise inadmissible. These assumptions, which were not analysed by the Tribunal, include:

i. The alteration of the multipliers of heavy traffic categories, vis-á-vis those established in the Contract.

ii. The calculation of an alleged September 2007 equilibrium toll rate, which purportedly restores the economic and financial equilibrium since the commencement of the Concession, as recognised by Claimant's experts. Such approach implicitly contains a calculation of damages for periods prior to September 2006, which is inconsistent with the Tribunal's finding that the alleged breach of the BIT took place on that date."[177]

"In sum, the values arising from the but-for model defined as per the Tribunal's directions contain benefits for Concessionaire that fall outside the scope of the renegotiation process, for whose lack of completion the Tribunal found the Argentine Republic liable. As pointed out by the Tribunal, the purpose of that renegotiation 'would not be the improvement of any company's position, but merely the restoration of the equilibrium.' However, there can be no doubt that the above-mentioned benefits unduly improve the company's position as they tend to partially remedy aspects that were part of the risks assumed by Concessionaire, such as the overestimation of the bid

[174] Respondent's Post-Decision on Liability Brief, ¶ 23 (Footnotes omitted).
[175] Respondent's Post-Decision on Liability Brief, ¶ 24 (Footnotes omitted).
[176] Respondent's Post-Decision on Liability Brief, ¶ 25 (Footnotes omitted).
[177] Respondent's Post-Decision on Liability Brief, ¶ 28 (Footnotes omitted).

traffic and its failure to secure the financing to which it had committed, all of which is compounded by the fact that they violate the principle of equality among bidders in the bidding process."[178]

"Therefore, the Tribunal is requested to contemplate these issues within the framework of its finding in the Decision on Liability that the Argentine Republic cannot be held liable for 100% of the damage, in order to remedy the points identified in the paragraph above."[179]

"As an additional matter, it is worth mentioning the petition for the commencement of bankruptcy proceedings filed by subcontractors Boskalis-Ballast Nedam against PdL and the subsequent reorganisation proceedings which, according to the Tribunal, could have been avoided if the economic equilibrium of the Concession had been restored in 2006 through the implementation of the 2006 Letter of Understanding. Such statement is not supported by any reasoning whatsoever and contradicts the evidence in the record."[180]

"First, there is an inescapable temporal issue. The implementation of the Letter of Understanding of May 2006 could never have prevented an event that took place prior to it: the petition for the commencement of bankruptcy proceedings filed by Boskalis-Ballast Nedam against PdL in December 2005. This is a factual impossibility."[181]

"The Tribunal does not explain how the 2006 Letter of Understanding could have prevented Boskalis-Ballast Nedam's petition for the commencement of bankruptcy proceedings against PdL, when such petition was filed in 2005, on the basis of PdL's failure to pay a 2003 ICC award in favour of Boskalis and Ballast Nedam in which PdL was held liable for its failure to pay debts for the November 2000-May 2001 period (the period prior to the operational phase). It is illogical and impossible for a subsequent event—the 2006 Letter of Understanding—to have prevented a prior event— Boskalis-Ballast Nedam's petition for the commencement of bankruptcy proceedings in 2005—."[182]

"The 2003 ICC award was explicit in stating that, by mid-2001, the State had already paid almost all of the subsidy and that PdL's failure to pay Boskalis-Ballast Nedam was not therefore attributable to the State, but to PdL's own actions. Such finding is not modified in any manner by the fact that PdL filed reorganisation proceedings in 2007, as was also confirmed by the tribunal in *Hochtief*. PdL filed reorganisation proceedings precisely in order to avoid the declaration of bankruptcy petitioned by Boskalis and Ballast Nedam in 2005 in order to collect the 2003 ICC award, by which PdL had been ordered

[178] Respondent's Post-Decision on Liability Brief, ¶ 29 (Footnotes omitted).
[179] Respondent's Post-Decision on Liability Brief, ¶ 30 (Footnotes omitted).
[180] Respondent's Post-Decision on Liability Brief, ¶ 31 (Footnotes omitted).
[181] Respondent's Post-Decision on Liability Brief, ¶ 32 (Footnotes omitted).
[182] Respondent's Post-Decision on Liability Brief, ¶ 33 (Footnotes omitted).

> to pay the subcontractors on account of debts arising from services rendered between November 2000 and May 2001. In other words, the events leading to PdL's filing a petition for reorganisation proceedings predate the 2006 Letter of Understanding and the operation phase (they date back to the construction phase, in which the State paid the subsidy in its entirety, but PdL failed to obtain the financing it had committed to)."[183]
>
> "Second, the Tribunal contradicted itself in establishing that Respondent should have restored the equilibrium of the Concession by 2006 and that the 2006 Letter of Understanding should have been implemented, but determining at the same time that 'the situation of Puentes with its subcontractors and suppliers and the filing of a petition for the commencement of insolvency proceedings [...] may have complicated or prolonged the renegotiation process to some extent.' If the situation with the subcontractors, which filed a petition for the commencement of bankruptcy proceedings in late 2005, was an event that may have complicated or prolonged the renegotiation, it cannot be understood how the Tribunal decided that the 2006 Letter of Understanding should have been implemented—as this Letter of Understanding was the most heavily affected by such circumstances—instead of a subsequent one, such as the 2007 Letter of Understanding or the 2008 Transitory Agreement, so that the parties could implement a viable agreement, as the 2006 Letter of Understanding could not prevent PdL from filing for reorganisation proceedings on account of its failure to pay subcontractors."[184]
>
> "Third, the Tribunal's finding contradicts the facts proven in this arbitration concerning the serious financing problems during the initial years of the Concession—that is, the construction phase—which were the main reason for PdL's failure and were entirely attributable to Concessionaire, in accordance with the allocation of risks explicitly set out in the Concession Contract."[185]
>
> "Finally, as explained in the section below, both PdL and the State duly stated that the 2006 Letter of Understanding did not allow the repayment of PdL's debt to Boskalis-Ballast Nedam and that the Letter of Understanding could not become effective absent a resolution of the situation with the subcontractors."[186]

140. The Tribunal considers it impossible to determine with absolute precision the effect of the debt overhang on PdL upon the partial restoration of the Concession's equilibrium in 2006. First of all, although Argentina puts full responsibility on PdL and its

[183] Respondent's Post-Decision on Liability Brief, ¶ 34 (Footnotes omitted).
[184] Respondent's Post-Decision on Liability Brief, ¶ 35 (Footnotes omitted).
[185] Respondent's Post-Decision on Liability Brief, ¶ 36 (Footnotes omitted).
[186] Respondent's Post Decision on Liability Brief, ¶ 37.

shareholders for the difficulties encountered in financing the Project, the evidence in that regard is mixed, and suggests that Argentina's deteriorating economic position was a factor in the IDB's decision not to proceed with its loan. Thus, the Tribunal considers that the problems of that era were not all of PdL's making, but likely were a result of both PdL's actions and the Argentine economic picture in the years prior to the declaration of the emergency. On the other hand, Argentina is right to suggest that had PdL not had to take out shareholder loans or the FAL, its borrowing costs would have been lower. The Tribunal also considers that the assumptions made by the Claimant's experts regarding the timing of restructuring of subcontractor debt and repayment of such debt in the wake of the 2006 MOU are unduly optimistic. Although some of these costs are reduced in the "but-for" scenario, the Tribunal is not convinced that PdL would be in a position to eliminate subcontractor and other debts as quickly as the Claimant's experts assume; while shareholder loans could presumably have been renegotiated fairly quickly, debt to third parties would likely take more time to renegotiate.

141. The Tribunal is aware that Boskalis-Ballast filed a petition of bankruptcy in 2005, but proceedings involving PdL in relation to that petition, as the Tribunal understands it, did not appear to move forward until 2007. Thus, in that period of time, PdL would have been able to address the situation with this subcontractor in due course, but the apparent assumption of the Claimant that subcontractor debt would be fully paid off in short order seems unrealistic. The Tribunal also takes note of the fact that capitalization of interest by the Claimant on its loans resulted in the principal of the loans increasing by more than 50%. The Respondent has calculated that the shareholder debt incurred as a result of the cancellation of the IDB Loan and the economic emergency represented between 13.6 and 16.1% of Webuild's claims. That, coupled with the Tribunal's conclusion that the Claimant's experts are unduly optimistic about how quickly subcontractor debt would be repaid in the "but-for" scenario, leads the Tribunal to conclude that 20% is the appropriate share of the Claimant's responsibility. The Respondent has suggested a figure of 25 to 50%, but this seems excessive based on the facts and circumstances of this case.

(8) Interest Rate on Historical Losses

142. In its Decision on Liability, the Tribunal indicated to the Parties that

> "[h]istorical losses are to be calculated using a risk-free standard commercial rate of interest on or around the Valuation Date." It also invited further submissions from the Parties "as to what a non-risk-based normal commercial rate around the Valuation Date in 2014 would have been", observing that "[a] short-term instrument such as a one-year U.S. Treasury bill would appear to be inapposite for a long-term investment and in light of the standard of a commercial rate of interest; the Parties should therefore consider rates based on instruments of longer tenor, *e.g.*, five or ten years. Alternative calculations should be provided using the chosen rates."[187]

143. The Claimant argues that:

> "[r]egarding the interest on historical losses, Webuild requests the use of the annual average U.S. Prime rate between 2006 and 2014, which ranges between 3% and 8.0%, as BRG justifies. In this sense, BRG explains that the US Prime rate 'reflects the rate that commercial banks in the United States charge their most creditworthy corporate customers (or clients)' and therefore 'excludes equity holder related risks from PdL's daily operations in the interest rate applied and excludes most debt holder related risks (as it is a benchmark for the most creditworthy U.S. corporate customers).'"[188]

144. Its experts substantiate this further:

> "Following the Tribunal's instruction to provide a non-risk-based normal commercial rate, we suggest the use of the observed average U.S. Prime rate between 2006 and 2014 ranging between 3% to 8%. The U.S. Prime rate reflects the rate that commercial banks in the United States charge their most creditworthy corporate customers (or clients). Commercial banks usually apply a premium to the U.S. Prime rate to loans lent to less creditworthy corporations. The U.S. Prime rate therefore excludes equity holder related risks from PdL's daily operations in the interest rate applied and excludes most debt holder related risks (as it is a benchmark for the most creditworthy U.S. corporate customers)."[189]

> "We note however that PdL's estimated cost of debt, which also excludes the equity risk is higher than the US Prime rate since PdL is a company operating in the Argentine transportation sector, therefore

[187] Decision on Liability, ¶ 439(j) (Citation omitted)
[188] Claimant's Post-Decision on Liability Response, II(E), pp. 8-9 (Footnotes omitted).
[189] BRG's Implementations of the Directions on Quantum, ¶ 40 (Footnotes omitted).

> bearing industry and country risk which is not considered in the US Prime. […]"[190]
>
> "MS suggest the use of the annual average 5-year U.S. Treasury rate, ranging between 0.8% and 4.8% throughout 2006 and 2014. In Figure 7 below we compare the evolution of this rate with the US Prime and MS's own estimation of PdL's after tax cost of debt of 9.2% in 2014."[191]
>
> "We disagree with the use of a U.S. Treasury rate as it is not a risk-free commercial rate as instructed by the Tribunal. The rate proposed by MS is the rate at which the U.S. Treasury obtains funds. Corporations do not have access to this rate. This is evident from the average premium between the US Treasury bonds and the US Prime rate that Figure 7 below shows. That is, an average premium of 2.2%. However, such a rate contradicts MS's own opinion of the reasonable cost of debt at which PdL would be able to obtain financing. MS compute PdL's cost of debt at 9.2% as of 2014, which is 7.6% higher than the 2014 5-year U.S. Treasury rate and 6.0% higher than the 2014 U.S. Prime rate."[192]

145. The Respondent's experts argue that:

> "In the opinion of the Tribunal, Argentina's position that the risk profile of historical losses is different from that of future losses is valid, and the Tribunal further determined that a risk-free rate is more appropriate than a risk-adjusted rate to update said losses. Besides, the Tribunal also held that the application 'a normal commercial rate of interest' does not mandate a WACC."[193]
>
> "Consequently, the Tribunal concluded that historical losses shall be calculated based upon a risk-free standard commercial rate of interest on or around the valuation date."[194]
>
> "In view of the Tribunal's instruction that the parties should consider risk-free standard commercial rates of interest based upon longer-term instruments, i.e. five- or ten-year instruments, in our opinion the average annual yield on 5-year US Treasury bonds is a risk-free standard commercial rate appropriate to update but- for cash flows for each year from 2006 to the 2014 valuation date. Over this period, such rate ranged from 0.76 % to 4.75 %."[195]

[190] BRG's Implementations of the Directions on Quantum, ¶ 41 (Footnotes omitted). *See also ibid*, ¶ 42 and Table 6.
[191] BRG's Implementations of the Directions on Quantum, ¶ 43 (Footnotes omitted).
[192] BRG's Implementations of the Directions on Quantum, ¶ 44 (Footnotes and Figure 7 omitted).
[193] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 43 (Footnotes omitted).
[194] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 44 (Footnotes omitted).
[195] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 45 (Footnotes omitted).

> "Besides, the LIBOR rate (London Interbank Offered Rate), while in effect, has been one of the most common benchmarks in global contracts at variable rates and frequently used as a risk-free commercial rate in arbitration cases. This rate derived from the rate at which banks offered unsecured funds to other banks in the wholesale money market or interbank market. While this rate was discontinued at the end of 2021, for the 2006 to 2014 update period it was still in effect. Although the longer LIBOR rate was a 12-month rate, in our opinion it would be a reasonable commercial risk-free alternative to the 5-year US Treasury yield rate. Over said period, this rate ranged from 0.56 % to 5.33 %. We have incorporated an option to use this rate in the Joint Updated Valuation Model."[196]

> "BRG proposes the annual average of the US Prime rate to calculate interest on the historical losses from 2006 to 2014, which ranged from 3.3 % to 8.0 %."[197]

> "The US Prime rate is a domestic rate charged by US banks. This implies that the US Prime rate has a built-in mark-up, which is managed by and will depend on each bank's funding system. The US Prime rate is set by reference to the federal funds rate plus a spread. It is a short-term rate used as a basis for pricing various short- and medium-term loan products."[198]

> "In our opinion, the US Prime rate used by BRG is not a risk-free commercial interest rate appropriate to update historical damages. Rather, a rate should be used to maintain the time value of money."[199] "Besides, according to the Federal Reserve of the United States, the US Prime rate is one of several base rates used by banks to price short-term business loans. The Tribunal rejected the use of a short-term rate to calculate historical losses, and instead considered it appropriate to use rates based on longer-term instruments. As the US Prime is a short-term rate, it is also contrary to the Tribunal's instructions. [200]

146. This leads the Respondent to conclude that:

> "The yield on the US Treasury bills is a commercial risk-free rate frequently used in investment arbitration, and the 5-year term is consistent with the Tribunal's direction that rates based on five- or ten-year instruments should be considered for the adjustment of historical losses."[201] "The US Prime interest rate proposed by experts Bambaci and Dellepiane is at odds with the Tribunal's directions.[…]"[202] "In addition, the US Prime rate has virtually no application in investment

[196] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 46 (Footnotes omitted).
[197] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 47.
[198] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 48 (Footnotes omitted).
[199] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 49.
[200] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 50 (Footnotes omitted).
[201] Respondent's Post-Decision on Liability Brief, ¶ 81 (Footnotes omitted).
[202] Respondent's Post-Decision on Liability Brief, ¶ 82.

> arbitration. For this reason, should the Tribunal change its decision and decide to adopt a short-term rate (contrary to its direction to the parties that they must consider rates based on five- or ten- year instruments), LIBOR is more frequently used in investment arbitration."[203]

147. The Tribunal agrees with the Respondent that the U.S. Prime rate is not a relevant rate for a case of this nature. But it also agrees with the Claimant that the Treasury rate is not a risk-free commercial rate. The Tribunal is persuaded that, even though it is not a long-term rate, the 12-month LIBOR rate provides a more suitable rate for historical losses. Although LIBOR was discontinued at the end of 2021, it is fully available for the historical period of 2006-2014. Accordingly, the Tribunal decides that historical losses should be calculated according to the 12-month LIBOR rate for that period.

(9) Discount Rate

148. In its Decision on Liability, the Tribunal confirmed that the relevant discount rate to be applied when calculating damages should be the WACC (the weighted average cost of capital) of the Claimant.[204]

149. The Claimant's experts put forward that:

> "Following the Tribunal's instructions to apply the WACC calculated by the Claimant's experts, our revised calculation of damages in the Joint Updated Valuation Model discounts future projected losses by applying the WACC calculated by BRG of 8.9%."[205] "In spite of the Tribunal's directions to use Claimant's experts' WACC, MS compute an alternative WACC rate of 16.1% as of 2014 to discount future projected losses. The use of MS WACC rate reduces damages from USD 174.2 million to USD 161.2 million, a USD 13.0 million reduction. Figure 8 below compares BRG and MS's WACC as of 2014."[206]

[203] Respondent's Post Decision on Liability Brief, ¶ 83 (Footnotes omitted).
[204] Decision on Liability, ¶ 439(k).
[205] BRG's Implementations of the Directions on Quantum, ¶ 46 (Footnote omitted).
[206] BRG's Implementations of the Directions on Quantum, ¶ 47. Figure 8 is part of ¶ 47.

Figure 8: BRG and MS WACC comparison

	BRG	MS
Risk Free Rate	2.54%	2.68%
Market Risk Premium	5.00%	5.48%
Beta Re-Levered- Adjusted to One	0.92	1.42
Country Risk Premium	4.94%	9.49%
Cost of Equity	**12.06%**	**23.97%**
Cost of Debt	9.48%	14.17%
Industry Premium	2.00%	2.00%
TAX Rate Argentina	35.00%	35.00%
Cost of Debt (After Tax)	**6.16%**	**9.21%**
Debt / Total Capital	53.35%	53.59%
Equity / Total Capital	46.65%	46.41%
WACC	**8.91%**	**16.06%**

Source: Joint Updated Valuation Model (BD-139/MS-31)

"In section VI.6. of our second report and slides 29-32 of our direct presentation we have discussed the differences in the discount rate with MS's assessment. We reproduce a summary of these in the paragraphs below:

MS overestimate the country risk premium of 13.5% that is commensurate with a default- level or financial distress premium. This is inconsistent with the risks that PdL would have faced in a but-for scenario where the economic equilibrium of the Concession Contract was restored. It is also inconsistent with the country risk premium implied by YPF's bonds at that time of 4.2%. Indeed, MS's country risk premium estimate results in a cost of debt of 14.2%, which is similar to the interest rate of Claimant's intercompany loans of 15% which reflected the financing risks prevalent at the time of the 2001 crisis, when the bridge was yet not operational, and the economic equilibrium of the project had not yet been restored. Such an assumption is inconsistent with the but-for scenario.

MS incorrectly estimates a beta of 1.42 using an 'engineering and construction' sample from Professor Damodaran that is not comparable to PdL's business. In contrast, we target our sample according to the GICS code 20305020 for roads, tunnels and railroads. Additionally, MS disregard the beta adjustment-to-one which is commonly applied to long-term valuations."[207]

[207] BRG's Implementations of the Directions on Quantum, ¶ 48 (Footnotes omitted). However: Table 8 above gives an MS country risk premium of 9.49%.

> "We therefore conclude that MS WACC does not accurately reflect Claimant's WACC as of 2014 in the but-for scenario in which the renegotiation agreement would have been implemented."[208]

150. The Respondent's experts claim that:

> "[t]he discount rate should be calculated based on the risk to which shareholders and creditors are exposed as at the valuation date. As the valuation date changes, the WACC must also be recalculated because all of its parameters change."[209]

> "In our previous reports, we presented the calculation of the cost of equity as of August 2014 because we were calculating only cash flows to equity, and there was no need to calculate the WACC, given the methodology selected. The cost of equity is one of the components of WACC calculation. In Table 4, we present our estimate of the cost of debt using the same calculation methodology as BRG, but based on our country risk premium assumptions."[210]

> "As we analyzed two alternative valuation dates—August 2014 and September 2006—we calculated the WACC as of these two dates, as shown in the table below. We elaborate further on the WACC calculation in Appendix A of this report."[211]

> "In our opinion, the 8.91 % WACC as of August 2014 calculated by BRG to discount future cash flows projected as from the termination statement, underestimates the risk implied therein. We believe BRG underestimates both the cost of equity and the cost of debt. The Tribunal has not examined or issued an opinion on the assumptions made by BRG for the calculation of the WACC's different components, despite the relevance of these assumptions for the valuation result."[212]

> "We basically disagree with BRG in the country risk assumption which impacts on the calculation of both the cost of equity and the cost of debt. Bambaci and Dellepiane estimated a 4.94% country risk premium as of August 2014, which the experts maintain constant for the 2014-2023 period, whereas professor Damodaran estimated an 8.33 % country risk premium as at February 2014 for Argentina, upon the basis of the same volatility methodology used by BRG."[213]

[208] BRG's Implementations of the Directions on Quantum, ¶ 49.
[209] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 53.
[210] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 54 (Footnotes and Table 4 omitted).
[211] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 55 (Footnotes and Table 5 omitted).
[212] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 56 (Footnotes omitted).
[213] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 57 (Footnotes omitted).

"Moreover, BRG's calculation of beta underestimates the true risk for PdL. Bambaci and Dellepiane estimate an average beta of 0.93 for the 1998-2014 period, that is, they assume that PdL is less volatile than the market. In addition, the adjustment as a beta reversion-to-one they make is a long term adjustment when infinite cash flows are estimated; however, this is not the case because the terms of the Concession provide for an expiration date. In the case at issue, the latest cash flow (2023) is a few years away from the 2014 valuation date; therefore, it would not be appropriate to make adjustments upon the basis of the beta long term trend."[214] "With regard to the second WACC component, the cost of debt (Kd), Bambaci and Dellepiane made a 'synthetic' estimation of such cost projecting interest rates ranging from 5.78 % to 8.04 % after income tax for each year, where the average rate is 6.76 % for the 2006-2014 period, based upon the following formula:

Kd = Rf + 2.0 % Industry premium + Country risk premium"[215].

"As shown, this approach adds the industry risk faced by lenders and the country risk to the risk-free rate. Bambaci and Dellepiane assume a 2.0 % industry risk calculated by Professor Damodaran for the companies operating in the transportation industry in the United States. Bambaci and Dellepiane estimate the country risk based upon a relative volatility approach, resulting in 4.94 % as of August 2014, as pointed above. The problem is that by using year the average [*sic*] volatility from the longest period available to date for each, the volatilities vary very little from year to year. That is, from 2007 to 2008, the data from several years ago are repeated and the only different data are those incorporated for 2008. As a result, volatilities capture virtually no changes in country risk from one year to the next."[216]

"In our First and Second Reports, we argued extensively that country risk must be estimated based upon the information available as of the valuation date and that the country risk premium estimated by Bambaci and Dellepiane based upon the relative volatility approach, which is not the most common method for calculation of the country risk premium, underestimates the true risk. This is indisputable in the light of what actually happened, as actual levels of country risk were higher than the BRG estimate. However, the Tribunal has not discussed such essential assumption."[217] "Thus, in our opinion, the country risk premium proposed by Bambaci and Dellepiane is not appropriate […]."[218]

[214] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 58 (Footnotes omitted).
[215] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 59 (Footnotes omitted.)
[216] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 60 (Footnotes omitted).
[217] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 61 (Footnotes omitted).
[218] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 62.

151. The Tribunal is not persuaded that the WACC calculated by the Claimant's experts requires recalculation. It is sufficiently persuaded by the Claimant's arguments that country risk premium and the *beta* for volatility have been appropriately treated in its computation. Accordingly, the discount rate to be used in the "but-for" scenario should be the WACC of 8.9%, rather than the alternative put forward by the Respondent.

(10) Compounding

152. The Tribunal, in its Decision on Liability, determined that annual compounding of interest is appropriate.[219]

153. The Claimant's experts conclude that "[f]ollowing the Tribunal's instructions, our revised calculation of damages in the Joint Updated Valuation Model applies annual compounding of interest."[220]

154. The Respondent's experts put forward that "[a]ccording to the Tribunal's instruction, we assume annual capitalization to update historical cash flows from September 2006 to the valuation date. We agree with BRG's capitalization approach up to the valuation date."[221]

155. The Parties thus appear to agree on the calculation that results from the implementation of annual compounding of interest up to the valuation date, and the Tribunal accepts this agreed calculation.

(11) Use of Inapplicable Indices from Decree No. 1295/02 to Update Expenses; Error in Not Annualizing

156. This item is essentially in the nature of an agreed correction.

157. The Claimant's experts submit that "[a]lthough the Tribunal's instruction is to maintain all other assumptions in the BRG Second Report Model unchanged, we agree with MS's implementation and correction to the model's annualization of expenses in 2014 and the calculation of the indices used from Decree No. 1295/02. We therefore agreed with MS to implement these corrections to the BRG Second Report Model. These

[219] Decision on Liability, ¶ 439(l).
[220] BRG's Implementations of the Directions on Quantum, ¶ 51.
[221] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶¶ 63-64 (Footnotes omitted).

adjustments reduce damages from USD 174.2 million to USD 173.2 million, a USD 0.7 million decrease."[222]

158. The Respondent's experts note that

> "[t]he Tribunal indicated that, except as set forth in the Decision on Liability, all other assumptions in the calculation of damages in the 'but-for' scenario shall remain unchanged. […] In our Second Report, we mentioned that BRG mistakenly calculated the road, bridge and resurfacing indices established in Presidential Decree No. 1295/02, which were used to update certain expenses and in the calculation of administrative costs as of 2014. Indeed Bambaci and Dellepiane corrected these mistakes over their presentation at the Hearing. In line with BRG, in our opinion such adjustment should be made in the Joint Updated Valuation Model, and Bambaci and Dellepiane have agreed to this. […] Bambaci and Dellepiane admitted and corrected these mistakes and, therefore, there is no discrepancy with BRG on this issue."[223]

159. The Tribunal accepts the agreed correction to the Joint Updated Valuation Model.

(12) Pre- and Post-Award Interest

160. The Parties have also made submissions on pre- and post-award interest, from the date of valuation to the date of the Award, and post-Award.

161. The Claimant argues that:

> "[i]n addition to the determination of the interest rate on historical losses, Webuild requests that in deciding the pre- and post-award interest rate, the Tribunal keep in mind that:
>
> - Argentina's agreed interest rate in the settlement with Repsol is 8.75%;
>
> - For US dollar-denominated debt, Argentine commercial courts typically grant an average interest rate of 7%, with a minimum of 6%. Of relevance, these percentages are pure interest rates, which means that they do not take into account US inflation;
>
> - In 2011, an ICSID Tribunal in a separate arbitration involving the same Parties and Treaty as in this arbitration ordered

[222] BRG's Implementations of the Directions on Quantum, ¶ 37 (Footnotes omitted).
[223] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶¶ 40-42 (Footnotes omitted).

> Argentina to pay 6% interest, compounded annually, until the date of payment;
>
> - For over ten years, Argentina has refused to pay Webuild the above referenced ICSID award, even after an ICSID annulment committee confirmed the award in 2014. Webuild had to start enforcement proceedings in U.S. courts due to Argentina's failure to pay;
>
> - Argentina has also failed to pay other investment arbitral awards, forcing the award- creditors to initiate enforcement procedures in U.S. courts." [224]

162. The Claimant adds that:

> "The Tribunal should award pre- and post-award interest compounded annually to fully compensate Webuild for the damages Argentina has caused it, including the loss of the use of its money, and to avoid Argentina unjustly enriching at Webuild's cost. As Webuild argued at the Hearing on the Merits, 'an appropriate interest rate would be a rate like that in the Settlement Agreement that Argentina reached with Repsol in connection with the nationalization of YPF,' which as noted above was 8.75%. In any event, Webuild submits that the pre- and post-award interest rate should be no lower than 6%, which is the minimum rate that commercial courts grant in Argentina and which, as noted, a previous ICSID Tribunal also awarded in favor of Webuild in a separate arbitration against Argentina."[225]
>
> "Webuild also requests that the Tribunal expressly include the resulting amount(s) of interest in its damage award, including both (1) interest on historical losses (i.e., interest from September 2006 until the Date of Valuation of August 2014[)] and (2) pre-award interest (i.e., interest from August 2014 until the date of the award). To do this, the Tribunal can use the model provided by the quantum experts, which includes a feature for the Tribunal to calculate the interest amount on historical losses as well as a variety of pre-selected options for calculating the pre-award interest rate. Additionally, the Tribunal can use a spreadsheet provided by BRG that gives the Tribunal the freedom to choose its own interest rate for pre-award interest other than those already pre-selected by the parties' quantum experts." [226]

[224] Claimant's Post-Decision on Liability Response, II(E), pp. 9-10 (Footnotes omitted).
[225] Claimant's Post-Decision on Liability Response, II(E), p. 10 (Footnotes omitted).
[226] Claimant's Post-Decision on Liability Response, II(E), p. 10 (Footnotes omitted).

163. BRG explains that, as of June 2023, the damages amount to USD 239.4 million, based on an interest rate for pre-award interest of 8.75% commensurate with the Repsol-Argentina settlement agreement.[227] More precisely, they state that:

> "We were instructed by Counsel to update our estimate of damages to Claimant from the Valuation Date of August 2014 to the Date of Award. We use the date of this report, June 9, 2023 as a proxy for the date of the final award.
>
> In its pleadings, Claimant proposed pre-award interest at Repsol's settlement rate of 8.75% and Argentina's lowest rate granted in commercial courts of 6%.
>
> We understand that in this matter, the purpose of updating damages is to fulfill the principle of full reparation, that is, to place the Claimant in the position it would be in but-for the breaches. In relation to interest, this means finding a rate of interest or update that compensates for the economic loss associated with being deprived of the value of its business during the period elapsed from the date of valuation. From an economic standpoint, this is best achieved by a rate of update that considers the specific business in which the investment was made, as well as the location of the investment, as well as taking into account the creditworthiness of the debtor.
>
> The economic rate that achieves the above is also understood as the price of money, or the opportunity cost of funds. We explain them briefly below."[228]
>
> "The opportunity cost is an economic concept that refers to the value of the best alternative foregone [sic]. In this case, as a consequence of Argentina's actions, Claimant did not have access to the cash flows from the Valuation Date of August 2014 to the Date of the Award. The opportunity cost would therefore reflect the profits (or cost savings) that Claimant would have obtained had it had access to these funds as of August 2014.
>
> The opportunity cost refers to a measure of the price or cost of a comparable alternative in contrast to a specific identifiable spillover or downstream effect. This is an important distinction, as it distinguishes the pricing of the funds stranded in Argentina from other types of claims (not made in this case) related to specific forgone opportunities in identifiable projects or investments.
>
> The losses as of the Valuation Date represent the forgone funds. As noted above, the risk profile of the investment, its location, and the

[227] BRG's Implementations of the Directions on Quantum, ¶ 5 (Footnotes and Table 1 omitted).
[228] BRG's Implementations of the Directions on Quantum, ¶¶ 93-96 (Footnotes omitted).

creditworthiness of the debtor are all relevant variables in determining the appropriate risk profile or 'price' associated with these funds. The higher the risk the funds are exposed to, the higher the return (or interest rate) the Claimant would need to receive to be made whole. In this case, the Republic of Argentina acts as debtor of the award. Once an award is issued, it implies that the debtor has deprived the creditor of the value of the award until payment is made and therefore, until then, the creditor (i.e., Claimant) is still exposed to the risk of non-payment, delay or default of this obligation.

Taking these concepts into account we analyze different alternative rates and consider their appropriateness. We also explain why MS's proposal of using U.S. Treasury rates does not satisfy the principle of full reparation."[229]

"The opportunity cost of Claimants' lost cash flows can be measured through a range of alternatives; it ultimately represents the price or interest rate at which an investor would voluntarily provide capital to this business to be held from the date of valuation until payment.

a. One possible indicator is the real rate of return of 12.9% initially agreed to in the Concession contract, which is equivalent to 15.4% in nominal terms. This is the rate at which Claimant voluntarily agreed to enter into the contract for the Rosario-Victoria bridge in Argentina.

b. Alternatively, in 2006, in the context of the renegotiation, when the funds had already been invested, it agreed to a reduction of this rate to 8.87% in real terms, around 12.4% in nominal terms when assuming U.S. inflation of 3.2% (applicable in 2006)."[230]

"Both of these rates represent the rate of return Claimant was at different times willing to receive in order to commit capital to its investment in PdL. Alternatively, we can look at the market rate of debt for Puentes del Litoral, of 6.76%. This is the rate at which Claimant would have voluntarily contributed debt to PdL, after the renegotiation. These are all project-specific observed rates and thus, capture the important elements described above in relation to satisfying the goal of placing the Claimant back in the position it would be in but-for the breaches."[231]

"From the point of view of the debtor, the passage of time has benefited the debtor by avoiding facing an obligation (and Claimant continues to be exposed to the creditworthiness of Argentina until payment is made effective). We understand in fact from Counsel for

[229] BRG's Implementations of the Directions on Quantum, ¶¶ 97-100 (Footnotes omitted).
[230] BRG's Implementations of the Directions on Quantum, ¶ 101 (Footnotes omitted).
[231] BRG's Implementations of the Directions on Quantum, ¶ 102 (Footnotes omitted).

Claimant that Argentina has denied payment to Claimant in a separate arbitration awarded in 2011 under the same Treaty. In this case the Tribunal decided compensation would be compounded annually at an interest rate of 6%. This has also been the case in Teinver v. Argentina, which Argentina has denied payment since May 2019."[232]

"Additionally, we understand from Counsel for Claimant that Argentina's CIADI/UNCITRAL award payments between 2012 and 2019 included a 25% haircut. Argentina issued USD-denominated bonds to cover these payments with interest rates between 7% and 8.75%. This data confirms that an award does not make the award risk-less both from a pre or post-award standpoint."[233] [sic]

"One measure of the risks inherent to the payment of the award is given by the market's perception of the yield of Argentina's sovereign debt. These risks are usually measured by Argentina's sovereign debt rate, calculated as the risk-free rate plus the emerging Bond Index (EMBI), which ranged between 6% to 25% in the 2014-2023 period."[234]

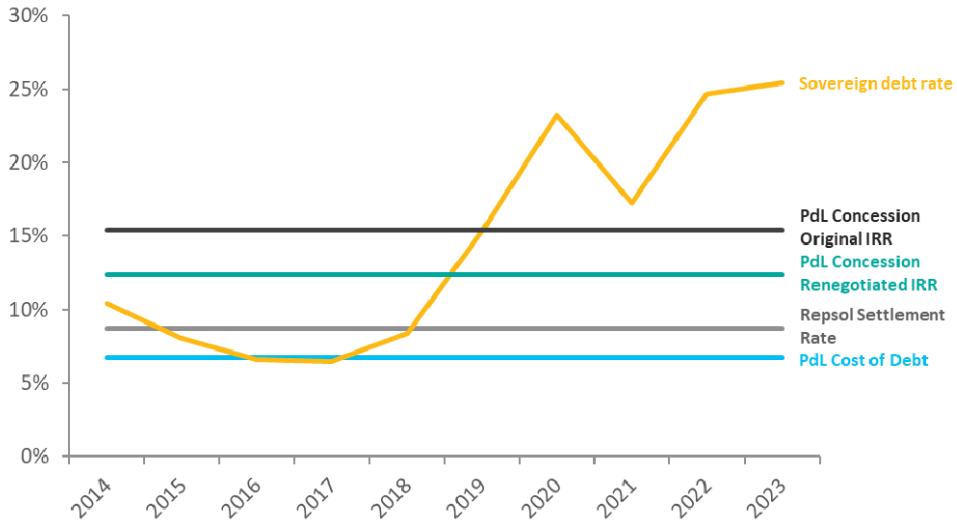
"Furthermore, any interest rate that is lower than the rate at which Argentina has access in the international markets would provide incentives for Argentina to delay payment. This would essentially allow Argentina to roll over its debt with Claimant on and on at rates lower than the ones it obtains in the market."[235]

"In its pleadings, Counsel for Claimant suggested a rate of 8.75% in line with the Repsol-Argentina settlement agreement in 2014. While this rate does not fully reflect the Argentine EMBI, it does reflect the deemed riskiness of the award payment."[236]

[232] BRG's Implementations of the Directions on Quantum, ¶ 103 (Footnotes omitted).
[233] BRG's Implementations of the Directions on Quantum, ¶ 104 (Footnotes omitted).
[234] BRG's Implementations of the Directions on Quantum, ¶ 105 (Footnotes omitted).
[235] BRG's Implementations of the Directions on Quantum, ¶ 106 (Footnotes omitted).
[236] BRG's Implementations of the Directions on Quantum, ¶ 107 (Footnotes omitted).

"A risk-free rate would not compensate Claimant for either the opportunity cost or for the risk of having the funds stranded in Argentina. Furthermore, only the U.S. Treasury can borrow funds at such low rates, because of its creditworthiness, as well as for the fact that it can issue hard currency (i.e., US Dollars) to satisfy its debts. No entity would voluntarily lend funds to Argentina at the same rate offered by the United States Treasury. Figure 13 below compares the rates mentioned above."[237]

Figure 13: Pre-award interest rates (USD Nominal)



Source: Joint Updated Valuation Model (BD-139/MS-31)

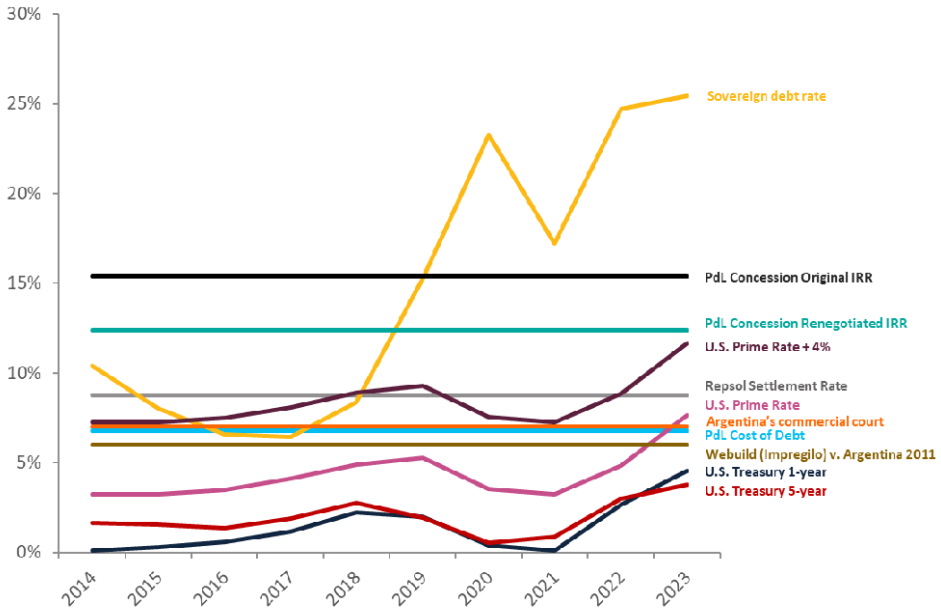
"In the event the Tribunal were to consider the often-cited concept of 'commercial rates' of update, we provide the following information. The concept of a commercial rate is quite wide, as the 'commercial' reality of one or another government or private entity can be very different. In general, however, we consider that at a minimum the notion of commercial rate is represented by the U.S. Prime rate which as we explain in section III.6 reflects the rate at which the most creditworthy U.S. corporations (i.e., rated as 'triple A') obtain debt capital. As we noted above however, Claimant does not have access to financing at this rate, nor does it reflect the risks borne by Claimant for the funds stranded in Argentina. For illustrative purposes, we show

[237] BRG's Implementations of the Directions on Quantum, ¶ 108 (Footnotes omitted).

the evolution of U.S. Prime plus a premium of 4% in Figure 14 below."[238]

"In its pleadings, Counsel for Claimant points out that the Argentina's commercial courts have historically granted an average rate of 7%,

Figure 14: Pre-award interest rates including U.S. Treasury rates



Source: Joint Updated Valuation Model (BD-139/MS-31)

including a minimum observed rate of 6%."[239]

"In contrast MS suggest the use of the 1-year and 5-year U.S. Treasury rates. As explained above, only the U.S. Government has access to obtaining funds at these rates. Therefore, MS's application of the 1-year and 5-year U.S. Treasury rates is not relevant for the determination of pre-award interest. Figure 14 below adds these rates to Figure 13 above for comparison purposes."[240]

164. The Respondent's experts note that:

"Claimant requests an award of pre-award and post-award interest capitalized on an annual basis from 31 August 2014 until the date Argentina pays in full. BRG proposes various annual interest rates ranging between 3.3 % and 12.4 %. It should be noted that the Tribunal has made no final decision on the quantum of damages and interest to be awarded at this stage, with such decision being deferred to the final

[238] BRG's Implementations of the Directions on Quantum, ¶ 109 (Footnotes omitted).
[239] BRG's Implementations of the Directions on Quantum, ¶ 110 (Footnotes omitted).
[240] BRG's Implementations of the Directions on Quantum, ¶ 111 (Footnotes omitted).

Award following further submissions of the parties on the questions and deliberations of the Tribunal."[241]

"The compensation amount to be determined by the Tribunal will be an amount certain and risk-free as of the valuation date. The risks that Claimant faced are taken into account upon determination of the compensation amount. Once the compensation amount has been determined, it only remains to preserve the value of money over time through interest until payment of the Award is made."[242]

"Given that the Tribunal upheld Argentina's position that the risk profile of historical losses is different from future losses and that a risk-free rate for such losses is more appropriate than a risk-adjusted rate, in line with such opinion, it would be reasonable to conclude that the rate to update the compensation amount until payment of the Award is made should be a risk-free rate."[243]

"The compensation amount to be determined by the Tribunal will be an amount certain and risk-free. Therefore, Claimant should only be entitled to interest compensating it for the time value of money until payment of the Award is made, but it should not be entitled to interest compensating it for the risks it did not bear."[244]

"Since the compensation amount will be an amount certain as of the valuation date, the appropriate interest rate would be a short-term risk-free rate, such as the yield rate on 1-year US Treasury bonds, for the only purpose of preserving the value of money over time. Any risk-adjusted rate would result in a disproportionate amount of interest."[245]

"BRG proposes a 'menu' of alternative rates for the calculation of interest up to the date of the Award: (i) US Prime Rate; (ii) US Prime Rate + 4 %; (iii) PdL's average cost of debt estimated by BRG between 2006 and 2014, which is 6.76 %; (iv) 12.4 %, based on the nominal IRR implied in the 2006 LOU (equivalent to a real rate of 8.873 % in pesos as of September 1997); (v) 6 %, which is the rate used in the award rendered in 2011 in the Impregilo v. Argentina case; (vi) 7 %, which is allegedly in line with the average rates used by Argentina in commercial cases; and (vii) 8.75%, in line with one of the three bonds used for the payment of compensation under an out-of-court settlement reached in the Repsol v. Argentina case. We understand that the last three rates have been included by BRG following instructions given by Claimant's attorneys."[246]

[241] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶¶ 102-103 (Footnotes omitted).
[242] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 104 (Footnotes omitted).
[243] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 105 (Footnotes omitted).
[244] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 106 (Footnotes omitted).
[245] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 107 (Footnotes omitted).
[246] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 109 (Footnotes omitted).

"Once again, we would like to highlight our disagreement with the use of any risk- adjusted rate as an adjustment rate to update damages. Once the Tribunal determines a compensation amount as of the valuation date, the amount so determined will not be subject to risk, thus there are no economic grounds to calculate interest on such amount at a risk-adjusted rate as from the valuation date. As already explained, the risks that Claimant faced are taken into account upon determination of the compensation amount. Therefore, once the compensation amount has been determined, it only remains to preserve the value of money over time through interest."[247]

(i) BRG: US Prime Rate

"The first rate proposed by BRG for interest calculation is the annual average of the US Prime Rate, which ranges between 3.3 % and 7.6 %. This is the same rate used by BRG to update historical damages up to the valuation date. As already explained, we do not deem the US Prime Rate to be a risk-free commercial rate, thus it is not the appropriate rate to calculate pre-award interest; a rate to preserve the value of money over time should be used instead. If the damage amount is updated at the US Prime Rate, the interest amount is USD 47.2 million as of 2 June 2023, which accounts for 41.1 % of the claim amount as calculated by BRG as of August 2014."[248]

(ii) BRG: US Prime Rate + 4 %

"The US Prime Rate + 4 % that is also proposed by BRG as an alternative rate for interest calculation is an arbitrary rate that includes a premium over the US Prime Rate for no reason. According to BRG's calculation, this rate ranges between 7.3 % and 11.6 % and, for some years, it is even higher than the WACC estimated by BRG as of August 2014 (8.91 %). Since the Tribunal has held that the WACC is not an appropriate rate to update historical losses, a risk-adjusted rate that is even higher than the WACC for some years would not be appropriate either, taking into account that the compensation amount to be determined by the Tribunal will be an amount certain and risk-free as of the valuation date. Therefore, there is no economic reason to calculate interest on the compensation amount at a risk-adjusted rate. If the damage amount is updated at the US Prime Rate + 4 %, the interest amount as of 2 June 2023 is disproportionate (USD 108.5 million), since it is almost equal to the claim amount itself as calculated by BRG as of August 2014."[249]

(iii) BRG: PdL's average debt ratio as calculated by BRG (6.76 %)

[247] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 110.
[248] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 111 (Footnotes omitted).
[249] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 112 (Footnotes omitted).

"PdL's average debt ratio between 2006 and 2014 as estimated by BRG (6.76 %) was obtained by adding the industry premium (2.0 %) and the country risk premium to the risk-free rate:

Kd = Rf + 2.0 % industry premium + country risk premium

Conceptually, the cost of debt reflects the financial cost incurred by a company for acquiring debt, which in turn depends on the risk involved in the relevant activity; the company's financial position and liquidity; and the prevailing market conditions, among other factors. In addition, this rate includes a country risk premium. Again, the compensation amount to be determined by the Tribunal will be an amount certain as of the valuation date, which will not be subject to PdL's credit risk or to country risk. Therefore, there is no economic reason to calculate interest at a risk- adjusted rate. Using PdL's cost of debt is inconsistent with basic economic principles.

For example, we have been informed that, in the award rendered in the Siemens v. Argentina case, the tribunal held that the interest rate to be taken into account is not the rate associated with corporate borrowing but the interest the amount of compensation would have earned had it been paid as of the valuation date. The tribunal held that the average interest rate applicable to US six-month certificates of deposit was an appropriate interest rate.

Updating the damage amount at PdL's debt ratio results in a disproportionate amount of interest as of 2 June 2023 (USD 68.8 million), which accounts for 60 % of the claim amount as calculated by BRG as of August 2014."[250]

(iv) BRG: 12.4 % IRR

"The fourth rate proposed by BRG is a 12.4 % rate based on the nominal IRR implied in the 2006 LOU (equivalent to a real rate of 8.873 % in pesos as of September 1997)."[251]

"First, the Tribunal should bear in mind that the IRR is a measure used in the evaluation of investment projects to verify the feasibility of an investment. It allows for a comparison of investments, since it is a relative profitability measure defined as the discount rate that makes the net present value (NPV) equal to zero for a given investment project. Therefore, the IRR is not an interest rate and may not be used to calculate interest for various reasons:

a. Using the IRR to calculate interest would mean assuming that there are alternative projects providing that rate of return in

[250] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶¶ 113-116 (Footnotes omitted).
[251] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 117.

which Claimant could have invested, whereas, in reality, there may be a wide range of limitations to Claimant's ability to succeed and manage such alternative projects. In addition, a claimant investing in risky projects, some of which may fail, would receive greater profits than a claimant investing in less risky projects, which offer a lower rate of return. Ultimately, the argument that the breach deprived Claimant of the possibility of making alternative investments that would have provided yields similar to the (high) yield expected by Claimant from other activities and that, therefore, Argentina should pay compensation for such lost investment returns is incorrect. The yield obtained by Claimant from alternative investments has nothing to do with Argentina. In addition, Claimant never made such alternative investments or faced the associated risks. The alternative investments could have gone well or bad, and Claimant could have earned or lost money. Calculating interest at the IRR implied in the 2006 LOU would mean compensating Claimant for the favourable result of a hypothetical alternative investment and ignoring the possibility of it not being favourable.

b. If the alternative project had been so fantastic, Claimant should have been able to find financing sources other than the compensation amount. Therefore, using the 12.4 % IRR as an interest rate to calculate interest would not be appropriate."[252]

"Second, the Tribunal should bear in mind that no IRR was guaranteed to the successful consortium under the Contract; the Concession for the Rosario-Victoria connection was at the Concessionaire's risk, and the State did not guarantee its profitability or minimum traffic. In addition, the offer presented by the successful consortium in which Webuild (then named Impregilo S.p.A.) participated did not even mention an IRR required for the project. The IRR may not be used to calculate interest since, if it were, Claimant would obtain an equivalent yield that was explicitly not guaranteed within this regulatory framework. For instance, the project profitability could be lower if actual traffic volume was lower than the one existing at the time the offer was made and, for the purposes of calculating interest, it would not be appropriate for the Tribunal to compensate Claimant on the basis of a rate of return that had not been guaranteed."[253]

"Third, in addition to the fact that the IRR cannot be used to calculate interest, as explained above, the Tribunal should ensure that the interest rate corresponds with the compensation currency. Interest rates reflect inflation and exchange rate fluctuations that apply specifically to a given currency. Therefore, the interest rate should be based on the market rates for the currency in which compensation is granted, since applying rates in a given currency to amounts

[252] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 118 (Footnotes omitted).
[253] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 119 (Footnotes omitted).

denominated in another currency would be completely inappropriate."[254]

"As explained in our First Report, under the 2006 LOU, the IRR was pesified into constant pesos as of September 1997, among other provisions. Since in 1997 Argentina had a currency board system (a 1 to 1 parity between the Argentine peso and the US dollar), BRG simply assumes that the IRR for 1997 is equal to a real dollar rate for 2014. This assumption is incorrect, since interest is not calculated for the period in which the currency board system was in force—which ended in January 2002 upon the enactment of the Emergency Law, several years before the claim period—but-for the period beginning in August 2014, when the Argentine peso-US dollar parity was undeniably no longer in force."[255]

"BRG is making a serious mistake by claiming that an amount denominated in US dollars should be updated at a rate denominated in Argentine pesos, against the basic financial principle of consistency between the cash flow currency and the currency in which discount or adjustment rate is calculated. Determining a compensation amount in US dollars and then applying a rate in pesos to calculate interest, such as the IRR proposed by BRG, would be inappropriate because Claimant would be overcompensated. This is evidenced by the calculation of interest at the 12.4% IRR, which results in a disproportionate amount of interest as of 2 June 2023 (USD 197.3 million), which accounts for 171.9 % of the amount claimed as calculated by BRG as of August 2014. This completely distorts the concept of fair compensation, since it results in a totally disproportionate potential compensation."[256]

"On the basis of a discussion held with BRG, we understand that the following three rates for the calculation of interest were introduced following instructions given by Claimant's attorneys: the 6 % rate used in the award rendered in 2011 in the *Impregilo v. Argentina* case; the 7 % rate which, according to Claimant, is in line with the average rates used by Argentina in commercial cases; and the 8.75 % rate, which was the rate of one of the three bonds in the compensation package granted to Repsol."[257]

(v) BRG (following instructions given by Claimant's attorneys): 6 %

"It should be noted that, in the award rendered in 2011 in the *Impregilo v. Argentina* case, the tribunal held that the 15 % rate that had been requested by Impregilo to calculate interest was excessively high and it thus reduced it to 6 %, applicable as from July 2006. However, the

[254] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 120.
[255] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 121 (Footnotes omitted).
[256] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 122.
[257] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 123.

tribunal did not explain the reasons for the interest awarded. In any case, even a 6 % rate is a risk-adjusted rate, as opposed to risk- free rates as of the August 2014 valuation date. For example, we have been informed that, in the award rendered in 2021 in the *Casinos Austria v. Argentina* case, the tribunal considered that the 6 % rate in US dollars proposed by claimant to calculate interest as from August 2013 was too high taking into account the low inflation rate in the United States, and stressed that the cited awards in ICSID cases under which a 6 % rate in US dollars was awarded had been rendered at a time when interest rates in US dollars were substantially higher than during the years to follow. Therefore, the tribunal decided to apply an annual interest rate of 4 % in US dollars as from August 2013."[258]

"In any case, there is no reason to use a fixed interest rate. There is no basis to assume that any fixed rate would compensate a claimant for the time value of money, since interest rates fluctuate over time. In fact, fixing an interest rate that is similar to the risk-free rate at a given time as a basis to calculate interest over a period when rates fluctuate is inappropriate. As already explained, the compensation amount to be determined by the Tribunal will be an amount certain and risk-free as of the valuation date, thus interest should only be used to preserve the value of money over time. This may be achieved by using a variable risk-free interest rate that fluctuates over time, such as the yield on 1-year US Treasury bonds."[259]

"The unjustified use of a fixed rate of 6 % as proposed by Claimant results in an interest amount of USD 76.4 million as of 2 June 2023, which accounts for 67 % of the claim amount as calculated by BRG as of August 2014."[260]

(vi) BRG (following instructions given by Claimant's attorneys): 7 %

"As regards the average rate of 7 %, we do not know which are the commercial cases in which, according to Claimant, Argentina paid interest at a rate of 7 %, and are unaware of the context of such cases and the parties involved. First, as informed by the PTN, Argentine courts apply simple interest, as opposed to capitalized interest. Second, there are plenty of commercial cases tried by Argentine courts in which rates much lower than 7 % have been applied. In any case, a rate of 7 % is a risk- adjusted rate and is inappropriate because it is a fixed rate, as already explained. If we use this rate of 7 %, the interest amount is USD 92.8 million as of 2 June 2023, which accounts for 80.8 % of the claim amount as calculated by BRG as of August 2014."[261]

[258] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 124 (Footnotes omitted).
[259] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 125 (Footnotes omitted).
[260] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 126.
[261] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 127.

(vii) BRG (following instructions given by Claimant's attorneys): 8.75 %

"The rate of 8.75 % proposed by Claimant was the coupon rate of one of the bonds in the compensation package granted to Repsol under an agreement that provided for payment by means of Argentine sovereign bonds. The compensation package was made up of a portfolio of Argentine bonds including Bonar X (with a coupon rate of 7 %), Discount 33 (with a coupon rate of 8.28 %), and Bonar 2024 (with a coupon rate of 8.75 %). First of all, Claimant has been selective in choosing the coupon rate of the Argentine bonds used to pay Repsol, since it opted for the highest rate (8.75 %)."[262]

"In addition, the agreement between Repsol and Argentina was an out-of-court agreement, which is completely unrelated to the case at hand. For example, we have been informed that, in the award rendered in the *Teinver v. Argentina* case, the tribunal held that claimants had not proved that a connection existed between 'the 8.75 % rate that Argentina used in its (...) settlement with Repsol', which they had proposed as the applicable interest rate, and the damage sustained due to the delay in payment of the sums awarded. Indeed, respondent's cost of debt is unrelated to claimant's actual losses. After disregarding the rate proposed by claimants, the tribunal in the *Teinver v. Argentina* case finally held that the appropriate interest rate was the US six-month Treasury Bill rate."[263]

"In addition, by claiming that an interest rate equivalent to the rate of an Argentine bond should be used, Claimant is implying that its situation is similar to the situation of creditors holding Argentine bonds, which is incorrect. Claimant has not taken the same risk as investors in Argentine bonds. Investors in bonds face various types of risks, including but not limited to the following:

a. Interest-Rate or Market Risk. This is the probability of a decline in the value of a bond due to fluctuations in market interest rates, since bond prices and interest rates have an inverse relationship. If an investor has to sell a bond prior to the maturity date, an increase in interest rates will mean selling the bond below the purchase price, thus the realization of a loss.

b. Reinvestment Risk. The calculation of the IRR of a bond assumes that all interim cash flows received before the maturity date are reinvested at the same IRR.

   However, the reinvestment depends on the prevailing interest-rate levels at each time. Therefore, reinvestment risk is the risk

[262] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 128 (Footnotes omitted).
[263] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 129 (Footnotes omitted).

that the interest rate at which future cash flows can be reinvested will fall, thereby reducing the effective rate received by the investor.

c. Call Risk. Many bonds include a provision that allows the issuer to call all or part of the issue before the maturity date. From the investor's perspective, there are three disadvantages to call provisions: (i) the cash flow pattern of a callable bond is not known with certainty; (ii) because the issuer will call the bonds when interest rates have dropped, the investor is exposed to reinvestment risk; and (iii) the capital appreciation potential will be reduced, because the price of the bond will not rise much above the strike price.

d. Default or Credit Risk. This is the probability that the issuer will default (i.e., be unable to make timely principal and interest payments on the issue) which, in the case of sovereign governments, depends on tax and price stability, the availability of reserves, etc.

e. Inflation Risk. This risk arises because of the variation in the purchasing power of future cash flows (capital and coupons of a security) due to inflation, especially in the case of fixed coupon rates.

f. Liquidity Risk. The liquidity of any financial instrument is measured as the ease with which it can be sold at or near its value, which is closely related to the size of an issue or a market. The smaller the market or the smaller the amount issued, the harder will be to find a buyer. This problem may have a significant impact on the ask price of such security if potential buyers offer a price well below the ask price. The primary measure of liquidity risk is the size of the spread between the bid price and the ask price. The wider the bid-ask spread, the higher the liquidity risk.

g. Volatility Risk. The risk that a change in the expected volatility of interest rates will adversely affect the price of a bond is called volatility risk.

h. Risk Risk. Since there have been new and innovative structures introduced into the bond market, the risk/return characteristics are not always understood by investors. Risk risk is defined as not knowing what the risk of a security is."[264]

"As shown above, investors in bonds face various types of risks, but Claimant has taken no risk regarding the amount claimed. Therefore, assuming that the relevant interest rate to be used in calculating

[264] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 130.

> compensation is the rate of one of the Argentine sovereign bonds is incorrect. In contrast, in this case, the compensation amount as of the valuation date will be an amount certain and will thus not be subject to any risk."[265]
>
> "The calculation of interest at an 8.75 % rate as proposed by Claimant results in a disproportionate amount of interest as of 2 June 2023 (USD 124.5 million), which accounts for 108.5 % of the claim amount as calculated by BRG as of August 2014."[266]

165. The Tribunal is sympathetic to submissions of the Respondent that a risk-free rate is appropriate for pre-award interest after the date of valuation and post-award interest, although it appreciates that an award may not be entirely risk-free. Interest will compensate the Claimant for the time value of its money and will continue to accrue until the date of payment of the Award. Full reparation does not depend on giving a party its preferred rate of interest. Moreover, it is not persuasive to the Tribunal that other tribunals in individual cases have awarded a particular rate of interest. Nor does a figure based on IRR make any sense to the Tribunal. By the same token, however, the Tribunal has previously decided that neither the U.S. Prime rate nor the rate on U.S. Treasury bills is apposite.

166. The Tribunal is persuaded that the rates granted by the courts of Argentina are useful benchmarks. It also notes that these rates—which the Claimant has submitted are a minimum of 6% and average 7%—are consistent with PdL's estimated average debt ratio as calculated by BRG. As the Tribunal understands it, this calculation is based on a risk-free rate to which an industry and country risk premium are applied. The logic underlying this calculation thus appears to be objective, consistent with the Respondent's submission that a risk-free rate should be chosen, and adjusted for the country and industry. While the Respondent considers that this rate would result in a disproportionate amount of interest in relation to the value of the claim, the Tribunal considers that the minimum interest rate of 6% awarded by the Argentine courts, which also coincides with the rate awarded to Impregilo in its earlier case against Argentina,

[265] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 131.
[266] Post-Decision on Liability Valuation Report by Machinea & Schargrodsky, ¶ 132.

is appropriate as the interest rate applicable to the post-award period from the date of this Award to the date of payment, and so decides.

167. The Tribunal recognizes that interest rates currently are higher than they have been historically during the relevant period. For the pre-award period between the valuation date and the date of this Award, the Tribunal accepts, consistent with Argentina's submission that a single rate may not be appropriate, that a lower rate is suitable. The only lower rate put forward by the Respondent is the U.S. Treasury rate; given the Tribunal's concerns about how apposite that rate is for these circumstances, the Tribunal has determined that the rate for this period should be 4%, reducing the risk premiums included in BRG's estimate commensurately. Annual compounding should continue to apply.

IV. SUMMARY OF TRIBUNAL DECISIONS AND CALCULATIONS

168. At the outset, the Tribunal reaffirms its earlier decision that the breach of the FET standard became irrevocable on 31 August 2014 and that that date, rather than September 2006 or 2002, is therefore the appropriate valuation date for purposes of calculation of damages.

169. In terms of the answers to the Tribunal's questions from the Parties (or a Party, as indicated):

(a) *Current Legal Status of Puentes* – As set forth in paragraphs 56 to 61 above, the Parties would seem to be in agreement that PdL's dissolution has not yet been completed, liquidation proceedings are ongoing and the distribution of the liquidation remainders to the shareholders has not yet taken place. As for Puentes' lawsuit to rescind the termination of the Concession Contract, the court of first instance has issued a decision denying the claim. The Tribunal will consider in subparagraph (d) below the implications of these domestic proceedings on its Award, particularly in relation to any potential for double recovery.

(b) *Subcontractor and Other Repayments* – As discussed in paragraphs 62 to 68 above, the assumptions made by the Claimant's experts regarding the timing of

restructuring of subcontractor debt and repayment of such debt in the wake of the 2006 MOU are unduly optimistic. The Tribunal has therefore deemed it appropriate to reflect in the contributory figure of 20% an element corresponding to its assessment that in the "but-for" scenario, such debt restructuring and repayment would have taken longer. However, with the increased cash flows from the restructuring, and the reduced burdens from the shareholder and FAL loans and their likely replacement with market rate debt, the Tribunal considers it reasonable to conclude that additional cash would have been freed up. Moreover, payment of subcontractors would have been a priority in the "but-for" scenario given the outstanding ICC award.

(c) *Effect of Reduction of Interest Rate on Shareholder Loans* – As set forth in paragraphs 69 to 72 above, the Tribunal considers that the Respondent's explanation provides additional support for the "but-for" scenario's assumption that the interest rate on shareholder debt would be reduced to a market rate rather than maintained at the 15% rate in that scenario. What that market rate should be is a completely distinct question from the question of what interest rate should apply to historical damages, as well as pre- and post-Award interest. The Tribunal considers a market rate assumption regarding the interest rate on this debt in the "but-for" scenario to be reasonable and appropriate.

(d) *Double Recovery Issues* – As explained in paragraphs 73 to 78 above, in the Tribunal's view, the risk that the Award might lead to double compensation in light of the pending domestic court proceedings is relatively remote, particularly in view of the Argentine court's recent dismissal of the PdL claim for wrongful termination of the Concession Contract (the local proceeding styled "Puentes del Litoral S.A. c/EN-M Planificación IP y S s/Proceso de Conocimiento," File No. 25047/2014, pending before Federal Contentious-Administrative Trial Court No. 8). Moreover, Webuild is not the plaintiff in that case, but was involuntarily joined as an interested party and the Tribunal accepts it would not be in a position to have the case dismissed even if it were to continue following the judgment. As to the reorganization proceedings (styled "Puentes del Litoral S.A. s/ concurso preventivo," File No. 20328/2007, pending before Commercial Trial Court No. 13,

Clerk's Office No. 26), there does not seem to be any imminent risk that Webuild will receive payments from those proceedings in relation to either its debt or equity interest. In the Tribunal's view, the issues of double recovery are best dealt with at the time of payment of the Award. Webuild has repeatedly manifested itself in these proceedings to be willing to provide undertakings that would prevent any double recovery, and has in fact provided them. For these reasons, the Tribunal declines to accede to the Respondent's requests in this context.

170. In its Decision on Liability, the Tribunal instructed the Parties (or a Party, as indicated) to prepare revised calculations of damages consistent with that Decision on the basis of a set number of instructions. As the Parties partially failed to do so, the Tribunal has taken a decision on these matters on the basis of the reasons set forth in more detail earlier in this Award and summarized and cross-referenced below, resulting in an updated valuation model.

(a) *Toll Rates* – As set forth in paragraphs 102 to 106 above, the Tribunal has accepted the revised calculation, which has been agreed by the Parties, meaning that the initial toll rates in the Joint Updated Valuation Model correspond to those set forth in the 2006 LOU, and the readjustment of rates after the initial period set by the 2006 LOU has been made on an annual basis consistently with the indices and the 5% threshold specified in that LOU.

(b) *Toll Subsidy* – As previously discussed in paragraphs 107 to 110 above, the Tribunal has determined that it would be inappropriate to apply the subsidy after the evidence appears to indicate it was terminated (in 2012). Since this subsidy was granted by Argentina to toll operators for a period of time, the Tribunal considers it appropriate to include it for the period of time during which it was in force.

(c) *Elasticities* – As set forth in paragraphs 111 to 117 above, the Tribunal has found that there is agreement between the Parties regarding the existence of a differential between light and heavy traffic, but disagreement as to whether to use the lower end of the Bates study (the Respondent) or the midpoint (the Claimant). In doing so, the Tribunal considered that the Claimant has not met

its burden of persuasion on this issue and decided to adopt the lower end of the Bates study as argued by the Respondent.

(d) *Rate of return* – As set forth in paragraphs 118 to 122 above, the Tribunal has accepted the Claimant's revised calculation as consistent with its instructions. It considers the use of *ex post* data helpful in this context to avoid speculation. While it is not disputed that the Contract was a risk contract, it was also calculated based on a presumed rate of return. The revised calculations show this rate would have declined from the original offer and even from the 2006 MOU in the "but-for" scenario.

(e) *Working capital* – As reviewed in paragraphs 123 to 127 above, the Tribunal understands as a result of the Parties' submissions that they have agreed on the calculation of the working capital variation in 2006, and has accepted this agreement.

(f) *Rate of interest on the FAL* – As set forth in paragraphs 128 to 133, above, the Tribunal has decided that no further change in the FAL rate is needed and that the prior calculation put forward by the Claimant shall stand.

(g) *Rate of Interest on Shareholder Loans and Additional Shareholder Loans* – In its Decision on Liability, the Tribunal confirmed that "[t]he assumed rate of interest on shareholder loans (including the Shareholder Loans) shall be unchanged from the earlier calculations performed by those experts. No additional shareholder loans shall be assumed to have been made in the 'but-for' scenario."[267]

(h) *Effect of Debt Overhang from Pre-Operation Phase* – As explained more in depth in paragraphs 134 to 141 above, the Tribunal considers it impossible to determine with absolute precision the effect of the debt overhang on PdL upon the partial restoration of the Concession's equilibrium in 2006. The problems of that era were not all of PdL's making, but likely were a result of both PdL's actions and the deteriorating Argentine economic picture in the years prior to

[267] Decision on Liability, ¶ 439(g).

the declaration of the emergency. Had PdL not had to take out shareholder loans or the FAL, its borrowing costs would have been lower. The Tribunal has not been convinced that PdL would be in a position to eliminate subcontractor and other debts as quickly as the Claimant's experts assume. Proceedings involving PdL in relation to a petition of bankruptcy did not appear to move forward until 2007. Thus, the apparent assumption of the Claimant that it would be fully paid in short order seems unrealistic. Capitalization of interest by the Claimant on its loans resulted in the principal of the loans increasing by more than 50%. The Respondent has calculated that the shareholder debt incurred as a result of the cancellation of the IDB Loan and the economic emergency represented between 13.6 and 16.1% of Webuild's claims. All of this has led the Tribunal to conclude that 20% is the appropriate share of the Claimant's responsibility.

(i) *Other* – In its Decision on Liability, the Tribunal confirmed that "[e]xcept as set forth herein, all other assumptions in the calculation of damages in the 'but-for' scenario shall remain unchanged."[268]

(j) *Interest Rate on Historical Losses* – In its Decision on Liability, the Tribunal confirmed that "[h]istorical losses are to be calculated using a risk-free standard commercial rate of interest on or around the Valuation Date. The Tribunal invited further submissions from the Parties as to what a non-risk-based normal commercial rate around the Valuation Date in 2014 would have been."[269] For the reasons set forth in paragraphs 142 to 147 above, the Tribunal has decided that historical losses should be calculated according to the 12-month LIBOR rate for the period 1 September 2006 to 31 August 2014.

(k) *Discount Rate for future losses* – In its Decision on Liability, the Tribunal confirmed that: "[t]he discount rate for future projected losses shall continue to be the WACC […]"[270]. For the reasons set forth in paragraphs 148 to 151 above, the Tribunal has been sufficiently persuaded by the Claimant's

[268] Decision on Liability, ¶ 439(i).
[269] Decision on Liability, ¶ 439(j).
[270] Decision on Liability, ¶ 439(k).

arguments that country risk premium and the *beta* for volatility have been appropriately treated in its computation. Accordingly, the discount rate to be used in the "but-for" scenario should be the WACC of 8.9%, rather than the alternative put forward by the Respondent.

(l) *Pre- and Post-Award Interest* – As set forth in paragraphs 160 to 167 above, the Tribunal has determined that the pre-Award interest rate should be 4%, and the post-Award interest rate should be 6%.

(m) *Compounding* – In its Decision on Liability, the Tribunal confirmed that "[i]nterest shall be compounded annually […]."[271] The Parties thus appear to agree on the calculation that results from the implementation of annual compounding of interest up to the valuation date.

171. The foregoing decisions result in the following damages summary (*in USD million*):

Firm Value of PdL	**324.3**
Net Debt Value of PdL	83.1
Equity Value of PdL	**241.1**
Stake Impregilo S.p.A. in PdL	26%
Damages to Claimant's equity	**62.7**
Damages to Claimant's debt	**34.7**
Total Damages to Claimant (Aug. 2014)	**97.4**
Interest	49.6
Total Damages to Claimant (Date of Award)	**147.0**

Accordingly, the amount of damages due from the Respondent to the Claimant as of the date of this Award, inclusive of interest[272], shall be USD 147,031,036.74. Post-Award interest as noted in the preceding paragraph shall accrue at the rate of 6% per annum, compounded annually.

[271] Decision on Liability, ¶ 439(l).
[272] Note: Pre-Award interest was calculated up to 28 February 2025.

V. COSTS

A. CLAIMANT'S POSITION

172. The Claimant submits that (i) the full compensation standard, the ICSID Arbitration Rules, and the Respondent's conduct in the arbitration require that the Claimant be placed "in the same position in which it would have been had the Argentine Republic not breached its international obligations and conducted this arbitration in a more efficient manner, and that includes wiping away all of Webuild's costs and attorneys' fees incurred in this arbitration;"[273] (ii) Webuild's attorney fees are reasonable considering the complexity of the case, the Respondent's liability and its conduct during the proceeding; (iii) the Respondent's costs in this arbitration are lower because as explained in *GemPlus*, "state's billing practices with its legal representatives are different"[274]; and (iiv) the Respondent filed meritless requests in what can only be a legal strategy meant to further delay the conclusion of these proceedings,[275] and that as found in *Tethyan v. Pakistan*,[276] here too, the Respondent should bear the consequences of its legal strategy.[277]

173. In its updated Costs Submission of 31 May 2024, as further updated on 10 October 2024, the Claimant summarizes its costs as follows:

SUMMARY OF CLAIMANT'S FEES AND EXPENSES	AMOUNT (IN USD)
Legal Fees and Expenses	
• King & Spalding	
Legal Fees Jurisdiction Phase (as of December 31, 2017)	$3,501,603.50
Legal Fees Merits Phase (as of October 10, 2024)	$5,552,379.00
Legal Fees Request for Reconsideration	$233,282.50
*Expenses (*including, *inter alia*, travel, hearing expenses, translation services, copies, etc.*)*	

[273] Claimant's Updated Costs Submission, 10 October 2024, p. 5.
[274] Claimant's Updated Costs Submission, 10 October 2024, ¶ 3, citing *GemPlus S.A. v. United Mexican States*, ICSID Cases Nos. ARB (AF)/04/3 & ARB(AF)/04/4), 16 June 2010, ¶¶ 17-25-17-26 (**AL RA-281**).
[275] Claimant's Updated Costs Submission, 10 October 2024, ¶ 1.
[276] *Tethyan Copper Company Pty Limited v. Islamic Republic Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 1854-1855 (**CLA-261**).
[277] Claimant's Updated Costs Submission, 10 October 2024, ¶ 2.

Jurisdiction Phase (as of December 31, 2017)	$95,059.64
Merits Phase (as of October 10, 2024)	$138,686.31
• Marval, O' Farrell, Mairal (*Merits phase*)	$195,916.24
Experts' Fees and Expenses	
• Compass Lexecon	
Jurisdiction Phase (as of December 31, 2017)	$198,472.75
Expenses Merits Phase	$117,895.00
• Berkeley Research Group (BRG) (*Merits phase*)	$701,143.03
• Dr. Horacio Liendo (*Merits phase*)	$62,309.95
Claimant's Additional Expenses (including travel and hearing expenses)	
• *Jurisdiction Phase*	$50,360.38
• *Expenses Merits Phase*	$119,591.71
Claimant's share of Tribunal's and ICSID's Fees and Expenses	
• *Advance on Costs*	$769,885.00
• *Transfer fees*	$115.00
TOTAL	**$11,736,700.01**

174. The Tribunal notes that from the above-indicated legal fees, the Claimant incurred in USD 233,282.50 in connection with the Respondent's Application for Reconsideration.

175. The Tribunal further notes that, excluding advances to ICSID, the Claimant's legal fees and expenses amount to USD 10,966,700, which after deducting the legal fees related to the Respondent's Application for Reconsideration, amount to USD 10,733,417.51.

B. RESPONDENT'S POSITION

176. In its submission on costs, as updated from a substantive point of view on 8 November 2024, the Respondent's contentions include, among others, that (i) the Claimant has failed to justify its unreasonably disproportionate costs in this arbitration proceeding; (ii) on jurisdiction, the Respondent justifiably raised the prescription exception on the basis of the Claimant's undue delay in initiating this arbitration proceeding (in

comparison with Hochtief, its partner in the same toll road concession), as well as the 18-month domestic litigation condition for arbitration, and the contractual nature of the dispute and the risk of conflicting findings in different fora; (iii) on the merits and quantum, the Respondent has litigated in good faith in the reasonable belief that its defenses would prevail; (iv) bringing a decision such as the 27 June 2024 judgment concerning the same Concession to the attention of the Tribunal was not frivolous; (v) when measuring the Claimant's fees against the Respondent's, the Tribunal, as have other tribunals, should consider the proportionality of the costs of the Parties as a relevant element to decide on their reasonableness and their allocation; and (vi) the Tribunal should reduce the costs stated by the Claimant and determine that each Party should bear its own costs, and that the costs of the arbitration, including the fees and expenses of the members of the Tribunal and its assistant, and ICSID's costs should be borne equally by the Parties.[278]

177. In its updated Statement of Costs of 25 October 2024, the Respondent summarizes its costs as follows:

ITEMS	**Jurisdiction** (already submitted) USD	**Merits and Hearing** (already submitted) USD	**Post-Hearing Phase** (already submitted) USD	**Reconsideration** USD
Payments to ICSID	200,000.00	500,000.00	70,000.00[279]	-
Personnel of the Treasury Attorney-General's Office	112,878.77	142,383.15	84,171.44	5,480.71
Experts	-	49,339.78	15,923.01	-
Airfares, hotel and per diem	24,372.06	12,679.00	-	-
Translations	2,741.95	6,814.00	2,620.06	-
Supplies and stationary	542.86	429.00	-	-
Courier	1,689.51	2,276.36	801.58	-
Databases and IT services			6.959.52	
SUBTOTALS USD	342,225.15	713,92.29 [sic]	180,475.61	5,480.71
CUMULATIVE TOTAL USD				**1,242,102.76**

[278] Respondent's Updated Costs Submission, 8 November 2024.

[279] The Tribunal recalls that the fourth and fifth advance payments requested by the Centre by letters of 14 September 2023 and 8 November 2024 were not paid by the Respondent, and that as a result the Claimant made the default payments of the Respondent's outstanding portions of USD 70,000.00 and USD 30,000.00, respectively.

178. The Tribunal notes that excluding advances to ICSID, the Respondent's legal fees and expenses amount to USD 472,102.76.

C. THE TRIBUNAL'S DECISION ON COSTS

179. The Tribunal recalls that Article 61(2) of the ICSID Convention reads as follows:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

180. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

181. Additionally, Rule 28 of the ICSID Arbitration Rules provides:

> "Rule 28
> Cost of Proceeding
>
> (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
>
> (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
>
> (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
>
> (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding."

182. With respect to the fees and expenses (other than the costs of the arbitration), the Tribunal had previously determined, as set forth in the Decision on Reconsideration,

that Argentina should bear the Claimant's legal costs incurred in responding to the Request for Reconsideration, which amount to USD 233,282.50. As to the remaining legal fees and expenses (other than the costs of the arbitration), although the Claimant has prevailed on the merits of its FET claim, the Tribunal does not consider that it would be appropriate for the Respondent to bear 100% of the Claimant's legal fees and expenses. Although the significant disparity between the fees and expenses incurred by the Parties does not lead the Tribunal to conclude that the Claimant's claimed fees and expenses are necessarily unreasonable, the Tribunal after due deliberation has concluded that under the facts and circumstances of this case, for the Respondent to bear 100% of those fees and expenses would be disproportionate. It therefore considers that requiring the Respondent to bear 50% of those fees and expenses, that is, USD 5,366,708.75, is fair and reasonable. The Tribunal has also decided that the Respondent should bear its own fees and expenses.

183. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
James Crawford	179,179.58
Lucinda Low	168,959.85
Kaj Hobér	194,925.00
Jürgen Kurtz	200,309.90
Assistant's fees and expenses	200,742.81
ICSID's administrative fees	388,000.00
Direct expenses	255,337.36
Total	**1,587,454.50**

184. The above costs have been paid out of the advances made by the Parties. In accordance with Regulations 15(1)(c) and 15(2) of ICSID Administrative and Financial Regulations, each party shall pay one half of the payments requested by the Centre to cover the costs of the proceeding referred to in Regulation 14. The Respondent, however, has not paid its 50% share pursuant to the fourth and fifth advance payment requests in the amount of USD 70,000.00 and USD 30,000.00, respectively. Upon request, the Claimant has therefore paid in addition to its own share, the Respondent's share of these two advances. The Claimant has made payments in the total amount of

USD 899,885.00, which accrued interest of USD 23,435.57; and the Respondent in turn has made payments amounting to USD 700,000.00, which accrued interest of USD 18,229.99. The Tribunal considers that a 50/50 sharing of the costs of the arbitration is a fair and appropriate allocation in this case. A 50% share of the total costs of arbitration amounts to USD 793,727.25. The Respondent should therefore refund to the Claimant the amount of USD 75,497.26, which corresponds to the expended portion of the Claimant's advances to ICSID in excess of 50% and reflects the amount necessary to equalize the Parties' share of the costs of the arbitration.

185. Accordingly, the Tribunal decides that the Respondent should pay to the Claimant in respect of costs the sum of USD 5,675,488.52, representing the total of (a) USD 5,366,708.76 (50% of the Claimant's own fees and expenses for this proceeding other than those incurred in connection with the Request for Reconsideration); (b) USD 233,282.50 (Claimant's own fees incurred in connection with the Request for Reconsideration, the costs of which the Respondent is liable for 100%), and (c) USD 75,497.26 for the expended portion of the Claimant's advances to ICSID in excess of 50%.

VI. AWARD

186. For the reasons set forth above and in the Decision on Liability and Directions on Quantum dated 3 March 2023, and the Decision on the Respondent's Request for Reconsideration of 25 September 2024, both of which are incorporated and hereby made an integral part of this Award as if fully set forth herein, the Tribunal decides, unanimously, and orders as follows:

(1) The Claimant's claims with respect to its Shareholder Loans are admissible;[280]

(2) The Respondent has violated Article 2.2 of the BIT, first sentence, the obligation to give fair and equitable treatment to investments covered by the BIT, through its failure after the end of the economic emergency, to

[280] Decision on Liability, ¶ 438.

reestablish the economic equilibrium of the Concession within a reasonable time as required by the Concession Contract and the Emergency Law;[281]

(3) The Respondent has also violated Article 2.2 of the BIT, second sentence, by its unjustified conduct in failing to reestablish the economic equilibrium of the Concession within a reasonable time after the end of the economic emergency;[282]

(4) In light of the Tribunal's decision relating to Article 2.2 (first and second sentences), no decision need be reached by the Tribunal on the discrimination claims raised by the Claimant under Articles 2.2, 3 and 4, or the expropriation claim raised by the Claimant under Article 5, of the BIT;[283]

(5) Argentina's defense of necessity is denied;[284]

(6) In compensation for the damages caused by the Respondent's breach of its obligations under Article 2.2 of the BIT (first and second sentences), the Respondent shall pay the Claimant the sum of USD 97,400,000.00;[285]

(7) The Respondent is ordered to pay interest on historical losses at the 12-month LIBOR rate for a relevant period from 1 September 2006 to 31 August 2014, compounded annually;[286]

(8) The Respondent is ordered to pay pre-award interest on the amount awarded under sub-paragraph (6) above as of 1 September 2014 at the rate of four percent (4%) per annum until the date of this Award, compounded annually;[287]

[281] *Ibid.*
[282] *Ibid.*
[283] *Ibid.*
[284] *Ibid.*
[285] Paragraph 171 above.
[286] Paragraph 170(m) above.
[287] Paragraphs 167 and 170(l) above.

(9) The Respondent is further ordered to pay post-award interest on the amount awarded under sub-paragraph (6) above as from the date of this Award until the date of payment, at the rate of 6% per annum, compounded annually;[288]

(10) The Respondent shall bear the Claimant's legal costs incurred in responding to the Request for Reconsideration, and thus reimburse to the Claimant an amount of USD 233,282.50;[289]

(11) The Respondent shall bear 50% of the Claimant's legal fees and expenses incurred in connection with this arbitration proceeding (after deducting the Claimant's legal costs incurred in responding to the Request for Reconsideration, previously decided), and thus reimburse to the Claimant an amount of USD 5,366,708.75;[290]

(12) The Tribunal decides that each Party shall share equally the costs of the arbitration (*i.e.*, the fees and expenses of the members of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses). Accordingly, the Respondent should refund to the Claimant the amount of USD 75,497.26, which corresponds to the expended portion of the Claimant's advances to ICSID in excess of 50%;

(13) All other claims and/or requests raised by the Parties are dismissed.

[288] Paragraphs 166 and 170(l) above.
[289] Paragraph 182 above.
[290] Paragraph 182 above.

[signed]

Professor Kaj Hobér
Arbitrator

Date: April 24, 2025

Professor Jürgen Kurtz
Arbitrator

Date:

Ms. Lucinda A. Low
President of the Tribunal

Date:

[signed]

Professor Kaj Hobér
Arbitrator

Date:

Professor Jürgen Kurtz
Arbitrator

Date: April 23, 2025

Ms. Lucinda A. Low
President of the Tribunal

Date:

Professor Kaj Hobér
Arbitrator

Date:

Professor Jürgen Kurtz
Arbitrator

Date:

[signed]

Ms. Lucinda A. Low
President of the Tribunal

Date: April 23, 2025

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SALINI IMPREGILO S.P.A.
Claimant

and

ARGENTINE REPUBLIC
Respondent

ICSID Case No. ARB/15/39

DECISION ON JURISDICTION AND ADMISSIBILITY

Members of the Tribunal
Judge James R. Crawford, President
Professor Kaj Hobér, Arbitrator
Professor Jürgen Kurtz, Arbitrator

Secretary of the Tribunal
Mrs. Mercedes Cordido-Freytes de Kurowski

Date: 23 February 2018

REPRESENTATION OF THE PARTIES

Representing Salini Impregilo S.p.A.:

Mr. Roberto Aguirre Luzi
Mr. Craig S. Miles
Mr. R. Doak Bishop
Mr. David Weiss
Ms. Eldy Quintanilla Roché
Ms. Ginny Castelan
Mr. Esteban Sánchez
King & Spalding LLP
1100 Louisiana, Suite 4000
Houston, Texas, 77002
United States of America

Representing Argentine Republic:

Dr. Bernardo Saravia Frías
Dr. Juan Pablo Lahitou
Procurador del Tesoro de la Nación
Subprocurador del Tesoro de la Nación
Procuración del Tesoro de la Nación
Posadas 1641, CP 1112
Buenos Aires
Argentine Republic

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I. THE PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (**ICSID)** on the basis of the Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments which was signed on 22 May 1990, and entered into force on 14 October 1993 (the **BIT**)[1] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the **ICSID Convention**).
2. The Claimant is Salini Impregilo S.p.A. (**Salini Impregilo** or **Claimant**), an Italian industrial group specialising in large civil engineering projects, incorporated under Italian law.[2] On 26 November 2013 Salini S.p.A. merged by incorporation into Impregilo S.p.A. On 1 January 2014 Impregilo S.p.A. changed its name to Salini Impregilo S.p.A.[3]
3. The Respondent is the Argentine Republic (**Argentina** or **Respondent**).
4. In 1995, Argentina started a bidding process for the construction, operation and maintenance of a bridge and toll road in its territory.[4] Impregilo S.p.A. (now Salini Impregilo) formed a Consortium with other investors and won the concession.[5]
5. On 28 January 1998, Salini Impregilo, the other Consortium partners and Argentina executed the Concession Contract (**Concession Contract**).[6] The Concession Contract provided for an Argentine state subsidy to be paid during the project's construction, among other funding sources.[7]
6. The Concession Contract required that the Consortium partners incorporate a local Argentine company for the purpose of performing the contract. Puentes del Litoral S.A.

[1] Treaty between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments, 22 May 1990, entered into force 14 October 1993; C-0001. There are discrepancies in various versions of the English translation of the BIT exhibited in this arbitration. Translations used in this Decision are the Tribunal's; however, the Tribunal has had regard to the authentic Italian and Spanish versions of the BIT in reaching its Decision.
[2] Salini Impregilo, Request for Arbitration, para [5].
[3] Ibid, para [5].
[4] Ibid, para [14].
[5] Ibid, para [18]. The Consortium was made up of: Impregilo S.p.A., Iglys S.A., Hochtief A.G., Vorm Begr Helfmann, Techint Compañía Internacional S.A.C.e I. and Benito Roggio e Hijos S.A.: Argentina, Memorial on Objections to Jurisdiction, para [13].
[6] Salini Impregilo, Request for Arbitration, para [19].
[7] Ibid, para [21]; Argentina, Memorial on Objections to Jurisdiction, paras [13], [15].

(**Puentes**) was duly incorporated on 1 April 1998.[8] Salini Impregilo is a shareholder in Puentes, owning 26% of its stock (22% is directly owned and 4% is indirectly owned through its subsidiary, Iglys S.A.).[9] Salini Impregilo and its consortium partners gave up their rights and obligations under the contract by transferring them to Puentes on 17 June 1998.[10] On 14 September 1998, Puentes, as Concessionaire, signed the Concession Contract.[11]

7. Salini Impregilo invested US$36 million in the project, including equity and debt. Salini Impregilo alleges that Argentina failed to pay subsidies due under the Concession Contract.[12] Salini Impregilo further alleges that Argentina enacted emergency legislation on 6 January 2002, which had the effect of reducing the toll revenue from the project and the project's economic viability.[13] The measures included the de-pegging of the Argentine peso from the US dollar and converting public contract obligations denominated in US dollars into Argentine pesos (at a rate of AR$1 to US$1).[14]
8. The emergency legislation also provided that public service concessionaires had to comply with their obligations under existing agreements and further included an order that the government renegotiate public contracts affected by the emergency legislation within 180 days.[15] The Argentine government established a special agency, UNIREN,[16] to renegotiate public service and infrastructure concessions.
9. According to Salini Impregilo, Argentina officially started the renegotiation process in March 2002. Thereafter, Salini Impregilo alleges that Puentes asked Argentina to complete renegotiation at least 25 times during the following years.[17] Puentes and the Argentine

[8] Salini Impregilo, Request for Arbitration, para [20].
[9] Ibid, paras [3], [20].
[10] Salini Impregilo, Request for Arbitration, para [20]; Argentina, Reply on Jurisdiction, para [136]; Exhibit RA-004 (Deed of Transfer).
[11] Argentina, Memorial on Objections to Jurisdiction, para [14]; Exhibit RA-005 (Takeover Certificate).
[12] Salini Impregilo, Request for Arbitration, paras [3], [22], and [66]. Salini Impregilo alleges that by March 2001 Argentina owed Puentes US$65 million in unpaid subsidies.
[13] Salini Impregilo, Memorial on the Merits, para [62].
[14] Ibid; Salini Impregilo, Request for Arbitration, para [24].
[15] Salini Impregilo, Request for Arbitration, para [25] and Memorial on the Merits, para [62].
[16] This was a 'Public Works and Services Contracts Renegotiation Commission' under the purview of the Ministry of Economy and Ministry of Planning, Public Investment and Services: Salini Impregilo, Counter-Memorial on Jurisdiction, para [37].
[17] Salini Impregilo, Request for Arbitration, para [34].

government negotiated two Memoranda of Understanding and four transitory agreements between 2002 and 2012 to try to restore the economic balance of the Concession Contract.[18] According to Salini Impregilo none of these six agreements were ever put into effect by Argentina.[19]

10. On 11 June 2013, Puentes filed an administrative complaint against Argentina for breaches of the Concession Contract.[20] On 30 May 2014 Puentes filed a lawsuit in an Argentine court.[21] In June 2014 Puentes' board resolved to dissolve the company. In August 2014 Argentina issued a decree terminating the Concession Contract, citing, among other things, Puentes' bankruptcy and resolution to dissolve the company.[22]
11. The bridge now operates under a new concession granted by Argentina to a third party.[23]
12. Salini Impregilo argues that Argentina violated the BIT and destroyed the economic viability of Salini Impregilo's investment in Puentes, effectively expropriating Salini Impregilo's investment.[24] Salini Impregilo alleges that Argentina breached the standard of fair and equitable treatment, the most favoured nation clause (MFN), the standard of non-discrimination and the standard of non-expropriation contained in the BIT.[25]
13. On a preliminary basis (having not yet filed a Counter-Memorial on the Merits) Argentina argues that the concessionaire, Puentes, was in breach of its obligation to obtain the required financing to build the project and that Puentes was adversely affected by bankruptcy proceedings against it (unrelated to action by the Argentine government).[26]

II. FACTUAL BACKGROUND

14. In 1997, Salini Impregilo formed a consortium with a German construction company, Hochtief AG, and several other construction companies (the **Consortium**).

[18] Ibid, paras [34]-[43].
[19] Ibid, paras [35]-[43].
[20] Exhibit C-0049.
[21] Exhibit C-0009.
[22] Salini Impregilo, Request for Arbitration, paras [45]-[46] ; Exhibit C-0051.
[23] Salini Impregilo, Request for Arbitration, para [46].
[24] Ibid, paras [2]-[3].
[25] Ibid, para [10]; Argentina, Memorial on Jurisdiction, para [71]; Salini Impregilo, Memorial on the Merits, para [177].
[26] Argentina, Memorial on Objections to Jurisdiction, para [28].

15. That same year, the Consortium participated in a Bid for a 25-year contract for the construction, maintenance and operation of a toll road between the cities of Rosario and Victoria in Argentina (the **Project**). In November 1997, the Consortium won the Bid.[27]
16. The Consortium formed Puentes del Litoral S.A., a locally-incorporated company. The Claimant owned 26% of the shares in Puentes.
17. The Claimant alleges that several measures taken by the Argentine government starting in 2002 led to its economic asphyxiation which concluded with the termination of the Concession Contract in 2014.
18. The Respondent alleges that *first*, this was a State-funded Project and that Argentina fulfilled its obligations under the Concession Contract, and *secondly*, that it was the Claimant which breached its obligations by not complying with the requirements under the Concession Contract.

III. PROCEDURAL HISTORY

A. REGISTRATION OF THE REQUEST

19. On 1 September 2015, ICSID received a request for arbitration of the same date, from the Claimant against the Respondent (the **Request for Arbitration**).
20. On 17 September 2015, the Acting Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36 of the ICSID Convention and notified the parties of the registration. In the Notice of Registration, pursuant to Rule 7(c) of the ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (**ICSID Institution Rules**), the Acting Secretary-General invited the parties to inform the Centre of any agreed provisions as to the number of arbitrators and the method for their appointment. He further invited the parties to constitute the Tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.

[27] Salini Impregilo, Memorial on the Merits, paras [43], [46]; Argentina, Memorial on Objections to Jurisdiction, para [13].

B. CONSTITUTION OF THE TRIBUNAL

21. On 23 November 2015, the Claimant informed ICSID that the parties were unable to reach an agreement concerning the method for the Tribunal's constitution. Therefore, the Claimant requested that the Tribunal be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.
22. On 4 January 2016, the Claimant appointed Prof. Kaj Hobér, a national of Sweden as its party-appointed arbitrator. Prof. Hobér accepted his appointment on 11 January 2016.
23. On 18 January 2016, the Respondent appointed Prof. Jürgen Kurtz, a dual national of Australia and Germany as its party-appointed arbitrator. Prof. Kurtz accepted his appointment on 19 January 2016.
24. On 14 June 2016, the Claimant informed ICSID that the parties had reached an agreement regarding the appointment of the presiding arbitrator in compliance with Article 37(2)(b) of the ICSID Convention. Pursuant to this agreement, Prof. Hobér and Prof. Kurtz would make their best efforts to reach an agreement on the appointment of the presiding arbitrator.
25. On 25 June 2016, ICSID was informed about the co-arbitrators' agreement to appoint Judge James R. Crawford, a national of Australia as the presiding arbitrator.
26. On 11 July 2016, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the **Arbitration Rules**), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mrs. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

C. FIRST SESSION, THE ADMISSIBILITY OF NEW EVIDENCE, AND THE WRITTEN PHASE

27. On 6 September 2016, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the parties by teleconference.
28. Following the first session, on 21 September 2016, the Tribunal issued Procedural Order No. 1 recording the agreement of the parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural

languages would be English and Spanish, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also sets out a schedule for the jurisdictional/merits phase of the proceedings.

29. On 15 December 2016, the Claimant requested the Tribunal to decide on the admissibility of new evidence into the record, and to grant an extension to file its Memorial on the Merits.
30. On 20 December 2016, the Tribunal invited the Respondent to submit its comments concerning the Cl. Request, and granted the extension for the submission of the Claimant's Memorial on the Merits to 3 January 2017.
31. On 3 January 2017, the Claimant filed its Memorial on the Merits accompanied by the witness statements of: Mr. Guillermo Osvaldo Díaz, Mr. Martin Lommatzsch, Mr. Gabriel Omar Hernández, and the damages expert report of Compass Lexecon.
32. On 6 January 2017, the Respondent filed further comments on the Cl. Request.
33. On 10 January 2017, the Tribunal rejected the Cl. Request and invited the parties to submit any evidence in their further pleadings.
34. On 25 April 2017, the Respondent filed its Memorial on Objections to Jurisdiction. Pursuant to Section 14.9 of Procedural Order No. 1, this proceeding was bifurcated; thus, the objections to jurisdiction were to be decided as a preliminary matter and the proceeding on the merits was suspended.
35. On 5 June 2017, the Claimant proposed to the Tribunal the amendment of the procedural calendar. On June 7 2017, the Tribunal invited the Respondent to submit its comments by 13 June 2017.
36. On 13 June 2017, the Respondent rejected the Claimant's proposal of 5 June 2017. By letter of the same date, the Claimant requested the Tribunal to accept its proposal and to set a hearing date for November 2017.
37. On 14 June 2017, the Respondent requested the Claimant to confirm its schedule of submissions and asked the Tribunal to maintain the procedural calendar set forth in Procedural Order No. 1.
38. On 16 June 2017, the Tribunal invited the parties to liaise and submit an agreed revised procedural calendar for the Tribunal's consideration by 21 June 2017.

39. On 21 June 2017, the parties requested the Tribunal for an extension to submit the revised procedural calendar. As approved by the Tribunal, the parties submitted a revised procedural calendar on 23 June 2017.
40. On 24 June 2017, the Tribunal agreed to the parties' revised procedural calendar.
41. Pursuant to the parties' revised procedural calendar of 23 June 2017, the Claimant filed its Counter-Memorial on Jurisdiction on 17 July 2017, accompanied by the second witness statement of Mr. Guillermo Osvaldo Díaz.
42. On 15 September 2017, the Respondent filed its Reply on Jurisdiction.
43. On 31 October 2017, the Claimant filed its Rejoinder on Jurisdiction.

D. HEARING ON JURISDICTION

44. A hearing on Jurisdiction was held at the seat of the Centre in Washington, D.C. from 28 November to 29 November 2017 (the **Hearing**). The following persons were present at the Hearing:

TRIBUNAL	
Judge James R. Crawford	President
Professor Kaj Hobér	Co-Arbitrator
Professor Jürgen Kurtz	Co-Arbitrator

ICSID SECRETARIAT	
Mrs. Mercedes Cordido-Freytes de Kurowski	Secretary of the Tribunal

CLAIMANT	
Counsel	
Mr. Doak Bishop	King & Spalding
Mr. Roberto Aguirre Luzi	King & Spalding
Mr. Craig Miles	King & Spalding
Mr. David Weiss	King & Spalding
Ms. Eldy Quintanilla Roché	King & Spalding

Corporate Representatives	
Mr. Guillermo O. Díaz	Salini Impregilo
Mr. Eduardo Albarracín	Salini Impregilo

RESPONDENT	
Dr. Ernesto Lucchelli	Subprocurador del Tesoro de la Nación
Ms. María Teresa Gianelli	Procuración del Tesoro de la Nación
Ms. María Alejandra Etchegorry	Procuración del Tesoro de la Nación
Ms. Gisela Ingrid Makowski	Procuración del Tesoro de la Nación
Ms. Alejandra Noelia Mackluf	Procuración del Tesoro de la Nación

INTERPRETERS	
Mr. Charles Roberts	English-Spanish Interpreter
Ms. Stella Covre	English-Spanish Interpreter
Ms. Kelly Reynolds	English-Spanish Interpreter

COURT REPORTERS	
Ms. Marta Rinaldi	Spanish Court Reporter
Ms. Elizabeth Cicoria	Spanish Court Reporter
Ms. Dawn K. Larson	English Court Reporter

IV. SUMMARY OF ARGENTINA'S OBJECTIONS TO JURISDICTION AND SALINI IMPREGILO'S SUBMISSIONS

45. Argentina seeks a declaration that the dispute falls outside the jurisdiction of the ICSID and the competence of the Tribunal. Alternatively, it seeks a declaration that the *forum non conveniens* doctrine applies such that the proper venue in which to hear the dispute is an Argentine court. Argentina further seeks costs.[28]

46. Argentina presents four objections to jurisdiction:

[28] Argentina, Memorial on Objections to Jurisdiction, para [153].

(1) Extinctive prescription operates so that Salini Impregilo's claim is time-barred.

(2) The Tribunal lacks jurisdiction because Salini Impregilo has not satisfied the jurisdictional pre-conditions in relation to domestic Argentine proceedings (Article 8 of the BIT):

(i) The dispute was not submitted to local administrative process or to the local courts for eighteen months (Article 8(2) and 8(3) of the BIT). There were local proceedings but they involved a different dispute, with different parties, seeking a different remedy.

(ii) Alternatively, if domestic proceedings were brought such that Articles 8(2) and 8(3) were satisfied, Salini Impregilo did not abandon the domestic proceedings as required by Article 8(4) of the BIT.

(iii) Salini Impregilo responds that (if it did not comply with Article 8 in any respect), the BIT's MFN provision (Article 3) applies and therefore Salini Impregilo can avoid the jurisdictional preconditions in Article 8(2) and 8(3). In this respect, it relies on the earlier decision in *Impregilo v Argentina*, which upheld the operation of the MFN clause in this respect, thereby creating a *res judicata*.[29]

(3) Alternatively, if the Tribunal finds that it has jurisdiction, Argentina argues that its courts are the proper venue to hear the dispute and that the Tribunal should decline to exercise jurisdiction (in application of the *forum non conveniens* principle).

(4) Argentina (in its Reply) objects to Salini Impregilo's standing because the claim belongs to Puentes. Argentina does not identify this argument as a separate objection but raises it as part of its *forum non conveniens* argument.[30]

47. Salini Impregilo requests that the Tribunal reject all of Argentina's jurisdictional objections and proceed to decide the merits of its claims.[31]

[29] *Impregilo v Argentine Republic* (*Impregilo S.p.A. v Argentina*), ICSID Case No ARB/07/17, Award, 21 June 2011.
[30] Argentina, Reply on Jurisdiction, para [146].
[31] Salini Impregilo, Counter-Memorial on Jurisdiction, para [6].

A. APPLICABLE LAW

48. The applicable law under the BIT is set out in Article 8(7) of the BIT:

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

49. Therefore, the applicable laws are the laws of Argentina, the provisions of the BIT, the Concession Contract and the applicable principles of international law. Article 8(7) does not however determine the relationship between these different sources.

50. The interpretation of the BIT is to be carried out according to the Vienna Convention on the Law of Treaties (**VCLT**).[32] Both states were already parties to the VCLT when the BIT was concluded (Argentina ratified the VCLT in 1972 and Italy ratified it in 1974); it is thus applicable in accordance with its Article 4.

B. THE FIRST PRELIMINARY OBJECTION: EXTINCTIVE PRESCRIPTION

(1) Argentina's submissions

51. Argentina argues that Salini Impregilo initiated the arbitration proceedings after an unreasonable delay[33] and therefore Salini Impregilo's claim, based on measures adopted more than a decade ago, is time-barred.[34] Argentina initially sought to rely on 'liberative prescription' in its Memorial on Objections to Jurisdiction, which it says applies to some of the measures on which Salini Impregilo's claim is based.[35] Liberative prescription is put forward as a principle of Argentine law and also as a general principle of law, both of

[32] Argentina and Salini Impregilo acknowledge this. See also *Hochtief AG v Argentine Republic (Hochtief v Argentina)*, ICSID Case No ARB/07/31, Decision on Jurisdiction, Washington, 24 October 2011, para [26].
[33] Argentina, Reply on Jurisdiction, para [1].
[34] Ibid, para [21]; Argentina, Memorial on Objections to Jurisdiction, para [75].
[35] Argentina, Memorial on Objections to Jurisdiction, para [31].

which are applicable pursuant to Article 8(7) of the BIT.[36] Liberative prescription is said to be widely recognised by international courts and tribunals as a principle of international law.[37] According to Argentina there are two elements for liberative prescription to apply: failure by the holder of a right to exercise that right and the passage of time.[38]

52. In its Reply, Argentina adopts Salini Impregilo's terminology of 'extinctive prescription' which Argentina appears to equate to the principle of 'liberative prescription'.[39] In relation to extinctive prescription, Argentina states that its elements include:

    i. unreasonable delay,

    ii. attributable to the claimant.[40]

53. Unlike Salini Impregilo, Argentina does not recognise two further elements of extinctive prescription, namely:

    iii. inadequate record of the facts; and

    iv. prejudice (i.e. severe disadvantage) to the respondent.[41]

54. In Argentina's view a lack of evidence that places the respondent at a severe disadvantage is a potential consequence of a situation where prescription takes place, not a requirement for prescription to apply.[42] Argentina argues that it has suffered prejudice in establishing its defence:[43] The authorities involved in the measures challenged by Salini Impregilo are no longer in office and they cannot be expected accurately to recall events that happened long ago. Further, the long period of time elapsed makes it very difficult to check factual allegations.[44]

[36] Ibid, para [4]: Argentina identifies liberative prescription through the 'comparative method' (most jurisdictions recognise the principle: paras [37]-[42]) and the 'essentialist method' (the principle is fundamental in order for any legal system to exist: paras [43]-[46]).
[37] Ibid, para [47].
[38] Ibid, para [35].
[39] Argentina, Reply on Jurisdiction, para [5].
[40] Ibid, paras [7], [12].
[41] Ibid, paras [8], [13].
[42] Ibid, para [13].
[43] Ibid, para [15].
[44] Ibid, para [15].

55. Argentina notes that domestic law is a source of law under Article 8(7) of the BIT. It follows from Article 8(7) that domestic law rules may be applied in determining whether the delay in bringing a claim is unreasonable. It maintains that extinctive prescription is a matter of substantive law and that, even if domestic law is only a source of law in relation to substantive issues in the arbitration, domestic law applies to the discussion of extinctive prescription.[45]
56. Applying its domestic law, Argentina argues that the period of prescription applicable to Salini Impregilo's claim is two years from the time when Salini Impregilo became aware of the measures that allegedly violated the BIT. This is because an arbitral claim where a violation of a BIT is invoked falls within the category of a tort claim and the Argentine Civil Code provides for a period of limitation of two years in tort claims.[46]
57. From a comparative analysis of domestic time limitations, Argentina observes that 'the temporal limit on actions [for] tort claims' is generally 'short', between two and six years.[47] From a comparative analysis of treaties, Argentina concludes that there is a 'tendency' for BITs to include short periods of prescription.[48]
58. Argentina points out that by September 2015, when Salini Impregilo filed its Request for Arbitration, thirteen years had passed since the 2002 emergency legislation and twelve years since Resolution No 14/2003 of 30 June 2003.[49] Almost ten years had passed since the first renegotiation agreement (the first MOU between Argentina and Puentes) was entered into in 2006.[50] Eight years had passed since Hochtief (a German shareholder in Puentes) brought its ICSID claim.[51] Argentina concludes that the arbitral claim, based on the 2002 emergency legislation, the failure to renegotiate the economic equilibrium of the contract and resolution No 14/2003, is time-barred.[52]

[45] Ibid, paras [10]-[11].
[46] Argentina, Memorial on Objections to Jurisdiction, para [54]. At the time the arbitration was commenced on 1 September 2015, the time limit for contract claims seems to have been 5 years: Civil and Commercial Code, Art 2560 (in force 1 August 2015). Previously it was 10 years.
[47] Argentina, Memorial on Objections to Jurisdiction, para [41].
[48] Ibid, para [56]. One example given is three years, 6 months in the Trans-Pacific Strategic Economic Partnership Agreement.
[49] Ibid, para [1]; Argentina, Reply on Jurisdiction, para [23].
[50] Argentina, Memorial on Objections to Jurisdiction, para [2].
[51] Argentina, Reply on Jurisdiction, para [26].
[52] Argentina, Memorial on Objections to Jurisdiction, para [75].

59. Argentina concedes that Salini Impregilo provided notice in 2007 of its treaty claim.[53] However, it argues that Salini Impregilo did not display any intention to continue with its claim between 2007 and 2015.[54] Argentina maintains that Salini Impregilo's delay involves an abuse of process because Salini Impregilo delayed the filing of its Request for Arbitration for merely speculative purposes.[55]

60. Argentina maintains that Salini Impregilo is a regular user of the investment arbitration system and was well aware of the need to file requests for arbitration within a reasonable period after expiration of the term for amicable negotiations. If Salini Impregilo wanted to preserve its claim after 2007, the diligent course of action would have been to file a request for arbitration and subsequently stay the proceedings.[56]

61. Argentina notes that Salini Impregilo brought a claim based on the 2002 emergency measures in relation to another of its concessions.[57] It concludes from this that Salini Impregilo cannot be allowed now to abuse the right to bring a claim based on measures which were adopted over a decade ago.[58]

62. Argentina rejects Salini Impregilo's argument that the delay was reasonable because Salini Impregilo was participating in the renegotiation process and because Salini Impregilo had to sign waivers of its rights in order for Puentes to enter into interim agreements with Argentina.[59] Argentina points to the fact that the waivers were subject to each of the agreements being implemented. Salini Impregilo cannot maintain that it had committed not to initiate arbitration under the agreements (on the condition that they entered into force), and at the same time argue that Argentina never properly executed the agreements.[60] Argentina further rejects Salini Impregilo's argument that Argentina is estopped from pursuing an objection to jurisdiction based on prescription.[61] Argentina accepts that

[53] Argentina, Reply on Jurisdiction, para [41]: 'after its 2007 notice, Salini Impregilo did not display any intention to continue with its claim'.
[54] Ibid, para [41].
[55] Argentina, Reply on Jurisdiction, para [43].
[56] Ibid, para [42].
[57] Argentina, Memorial on Objections to Jurisdiction, para [74]; *Impregilo v Argentina*. That claim was in relation to Aguas del Gran Buenos Aires, a water and sewerage company.
[58] Argentina, Memorial on Objections to Jurisdiction, paras [4], [74].
[59] Argentina, Reply on Jurisdiction, para [27].
[60] Ibid, paras [29]-[30].
[61] Ibid, para [36]; Salini Impregilo, Counter-Memorial on Jurisdiction, para [73] for Claimant's argument.

Decree No 1090/2002 established that investors had to choose from two options: bringing a claim for breach of contract or renegotiating the contract.[62] If an investor filed a claim for breach of contract outside the renegotiation process it would be automatically excluded from that process.[63] However Argentina stresses that the Decree was limited to claims based upon breaches of contract and did not cover treaty claims. It maintains therefore that the Claimant was never prevented from filing an arbitration proceeding.[64]

63. Argentina further points out that the exchanges that took place within the framework of the negotiations do not rise to an estoppel because the waiver of Salini Impregilo's right to bring an action was subject to the entry into force of the agreements: according to Argentina, a statement made conditionally cannot create a binding estoppel.[65] Argentina had not shown its clear intention to be legally bound, and the draft agreements were not binding.[66]

64. Argentina appears to say that its own conduct is irrelevant to the Tribunal's prescription inquiry. Argentina points out that prescription, and doctrines related to prescription (acquiescence, estoppel, waiver), do not take into account what happens with the other party. Rather, they are doctrines with legal consequences deriving from the conduct of one party, e.g. 'the passage of time and a failure to act that lead[s] to the belief that a given situation is true'.[67]

(2) Salini Impregilo's submissions

65. Salini Impregilo points out that the BIT does not contain any time limit for bringing proceedings.[68] It argues that Article 8(7) of the BIT does not mean that Argentine law applies to jurisdictional issues. The jurisdiction of the Tribunal is created by the ICSID Convention (Article 25) and the BIT, which are treaties governed by international law

[62] Argentina, Reply on Jurisdiction, para [32] with reference to Decree No 1090/2002, Art 1.
[63] Ibid, para [32], fn 61.
[64] Ibid, paras [32], [36].
[65] Argentina, Reply on Jurisdiction, para [36], citing K Hobér, *Essays on International Arbitration*, (New York: JurisNet, LLC, 2006), 220-221.
[66] Ibid, paras [39]-[40].
[67] Ibid, para [19].
[68] Salini Impregilo, Counter-Memorial on Jurisdiction, para [2].

alone.[69] There is no basis for applying Argentina's domestic statute of limitations for tort claims to Salini Impregilo's BIT claim.[70] For the same reason the choice-of-law provision in the BIT (Article 8(7)) does not cause Argentine law to apply to jurisdictional issues in an ICSID proceeding.[71] Further Salini Impregilo argues that there is no basis to apply by analogy other treaty limitation periods to the BIT[72] nor to extract a general principle from diverse municipal laws on limitation.[73] Finally, to impose the proposed ten-year time limit chosen by Argentina would be arbitrary[74] and would unfairly surprise Salini Impregilo and other Italian and Argentine investors.[75]

66. Salini Impregilo argues that whether prescription is substantive (as Argentina maintains) or procedural is irrelevant. Prescription is a jurisdictional defence and the Tribunal's jurisdiction is governed by international law only. Argentina's characterisation of prescription as substantive – in order to argue for the application of domestic law – is to no avail.[76]

67. Salini Impregilo argues that no authority has recognised a general principle of limitation.[77] Rather, it seeks to distinguish prescription as a matter of substance, which aims at justice in every case, and limitation, which pertains to process and varies in different jurisdictions.[78] Prescription would only apply to the BIT claim if it were interpreted as a relevant rule of international law that is not displaced by any *lex specialis*. Salini Impregilo concedes that the BIT is not governed by any *lex specialis* that would displace the doctrine of extinctive prescription.[79]

[69] Ibid, para [8]. Salini Impregilo concedes that Argentine law is relevant to the merits of the case: ibid.
[70] Ibid, para [14]; Salini Impregilo, Rejoinder on Jurisdiction, para [10]. Salini Impregilo relies on Hobér's work on extinctive prescription, which is also relied upon by Argentina. See Salini Impregilo, Rejoinder on Jurisdiction, para [11], footnote 15.
[71] Salini Impregilo, Rejoinder on Jurisdiction, para [13].
[72] Salini Impregilo, Counter-Memorial on Jurisdiction, para [15].
[73] Ibid, para [58].
[74] Ibid, para [59].
[75] Salini Impregilo, Rejoinder on Jurisdiction, para [11].
[76] Ibid, para [14].
[77] Salini Impregilo, Counter-Memorial on Jurisdiction, para [60].
[78] Ibid, citing *John H. Williams v Venezuela* (1885) 29 RIAA 279, 286-288.
[79] Ibid, para [14].

68. Salini Impregilo rejects Argentina's articulation of the two elements of prescription.[80] It argues that under customary international law, to the extent that extinctive prescription exists, four cumulative[81] elements must be proven:

    i. Unreasonable delay: There is no fixed time limit under international law.[82] The assessment of reasonableness will take account of the circumstances of the case. One way to assess reasonableness is whether the delay is so long that it creates the disadvantage that it would be difficult for the respondent to develop evidence for its defence.[83] Salini Impregilo argues that it took part in the renegotiation process from 2002 to 2013 in support of Puentes and therefore its delay was reasonable.[84]

    ii. The delay must be due to the claimant's negligence:[85] Salini Impregilo says it was not negligent in presenting its claim because it participated in the Argentine renegotiation process.[86] Further, it argues that Argentina points to no evidence of Salini Impregilo's negligence other than the 13-year delay in the initiation of the arbitration.[87]

    iii. Lack of evidentiary record: Salini Impregilo says that under international law, if the factual record is well-established or undisputed, prescription may not be invoked even if long periods of time pass between the measures at issue and the bringing of the claim.[88] Salini Impregilo says that a well-established record exists in this case.[89] Argentina has extensive evidence relevant to its defence due to the domestic renegotiation process, the *Hochtief v. Argentina* arbitration[90] and the

[80] Ibid, para [57].
[81] Ibid, para [35].
[82] Ibid, para [20].
[83] Ibid, para [23].
[84] Salini Impregilo, Rejoinder on Jurisdiction, para [28].
[85] Salini Impregilo, Counter-Memorial on Jurisdiction, para [27].
[86] Salini Impregilo, Rejoinder on Jurisdiction, para [7].
[87] Ibid, para [26].
[88] Salini Impregilo, Counter-Memorial on Jurisdiction, para [49]; Salini Impregilo, Rejoinder on Jurisdiction, para [37], relying on J Wouters & S Verhoeven, 'Prescription', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008), para [6].
[89] Salini Impregilo, Counter-Memorial on Jurisdiction, para [49].
[90] Ibid, para [55]. Hochtief is a German company with a 26% share in Puentes and was a member of the concession consortium. It initiated international arbitration through ICSID and a final award was issued on 21 December 2016.

domestic court actions between Puentes and Argentina (Puentes' bankruptcy proceeding and Puentes' claim before the Argentine judiciary).[91] Further Argentina was notified of Salini Impregilo's BIT claim in 2007.[92]

iv. Respondent would be prejudiced (placed at a severe disadvantage)[93] in putting forth a defence due to the claimant's negligent delay.[94] Salini Impregilo says that Argentina cannot invoke extinctive prescription because it cannot articulate any prejudice it would suffer in establishing its defence.[95] When Argentina raised difficulties verifying factual circumstances and the fact that authorities directly involved were no longer in office, Salini Impregilo responded that these cannot be deemed prejudicial.[96]

69. Thus, not a single element of 'a time-bar defense under international law' can be proven by Argentina.[97] To identify these four elements of extinctive prescription Salini Impregilo draws on the work of Hobér on extinctive prescription (on which Argentina also relies).[98] Salini Impregilo says even if the Tribunal accepts Argentina's submission that only the first two elements apply, these cannot be proven.[99]

70. According to Salini Impregilo, Argentina misrepresents Salini Impregilo's claim by maintaining that Salini Impregilo took 13 years to bring it: Salini Impregilo clarifies that its claim is not that the 2002 Emergency Law violated the BIT, but rather it seeks compensation for Argentina's failure to renegotiate and restore the Concession's economic equilibrium under the post-Emergency Law situation,[100] and specifically by its failure to implement the first renegotiation agreement in 2006.[101]

[91] Salini Impregilo, Counter-Memorial on Jurisdiction, para [2]; Salini Impregilo, Rejoinder on Jurisdiction, para [39].
[92] Salini Impregilo, Rejoinder on Jurisdiction, para [2].
[93] Salini Impregilo, Counter-Memorial on Jurisdiction, para [33]; Salini Impregilo, Rejoinder on Jurisdiction, para [42].
[94] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [2]; [27].
[95] Ibid, para [51].
[96] Salini Impregilo, Rejoinder on Jurisdiction, para [43].
[97] Salini Impregilo, Counter-Memorial on Jurisdiction, para [2].
[98] Salini Impregilo, Rejoinder on Jurisdiction, para [16].
[99] Ibid, para [48].
[100] Ibid, para [27].
[101] Hearing on Jurisdiction, Transcript, 28 November 2017, 167.

71. Salini Impregilo states that it notified Argentina of its treaty claims in 2007 in writing[102] and therefore prescription does not apply to this arbitration. Notification renders prescription inapplicable.[103] Under international law, delay refers to the length of time taken in notifying a respondent of the claim, not the time when the claim is actually pursued.[104] This is the case because of the requirement that the delay cause prejudice; once the respondent is notified of a claim it can proceed to collect evidence in relation to the claim for its defence and will not be prejudiced by further delay.[105]
72. Salini Impregilo asserts that it did display an intention to continue with its claim between 2007 and 2015.[106] In this regard it relies on Puentes' letter of 26 April 2002 reserving its shareholders' treaty claims; the 2007 notification letter from Salini Impregilo to Argentina; the meeting between Salini Impregilo and Argentina in October 2007; the exchanges of communication between Salini Impregilo and Argentina in 2008 and the requests by Argentine officials that Salini Impregilo not pursue international arbitration.[107]
73. From 2006 to shortly before the initiation of the arbitration claim, Salini Impregilo was participating in and supporting Puentes' efforts to resolve the issues underlying the treaty claims via Argentina's domestic renegotiation process.[108] According to Salini Impregilo, participation in negotiations will effectively 'toll the time period related to extinctive prescription.'[109] Further, on 26 April 2002, Puentes notified Argentina that its participation in the renegotiation process could not be taken as its shareholders' waiver of their right to commence damage claims for Argentina's breach of the Concession Contract and violation of international treaties. Therefore, Argentina was made aware from 2002 that Salini

[102] Salini Impregilo, Counter-Memorial on Jurisdiction, para [2]; Salini Impregilo, Rejoinder on Jurisdiction, para [2]; Exhibit C-0052.
[103] Salini Impegilo, Rejoinder on Jurisdiction, paras [7], [19].
[104] Salini Impregilo, Counter-Memorial on Jurisdiction, para [24]; Salini Impregilo, Rejoinder on Jurisdiction, para [19].
[105] Salini Impregilo, Counter-Memorial on Jurisdiction, para [24].
[106] Salini Impregilo, Rejoinder on Jurisdiction, para [18].
[107] Ibid, para [20].
[108] Ibid, paras [2], [36]; Salini Impregilo, Counter-Memorial on Jurisdiction, para [2].
[109] Salini Impregilo, Counter-Memorial on Jurisdiction, para [25]. Salini Impregilo quotes *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, Judgment, ICJ Reports 1992*, in support of this proposition; Salini Impregilo, Rejoinder on Jurisdiction, para [7].

Impregilo 'may file' an international arbitration claim[110] and Argentina knew that Salini Impregilo's participation in the renegotiation process was not an abdication of its BIT claims.[111] Salini Impregilo rejects Argentina's arguments that Salini Impregilo delayed requesting an arbitration for speculative purposes and therefore Salini Impregilo committed an abuse of process.[112]

74. Salini Impregilo argues that any delay attributable to the Respondent's conduct cannot constitute the basis for extinctive prescription.[113] Here, Argentina's domestic legislation excluded a company from the renegotiation process if its shareholders initiated treaty claims.[114]

75. Further, Argentina repeatedly asked Salini Impregilo to refrain from initiating investment arbitration in deference to the domestic renegotiation process.[115] Accordingly, Salini Impregilo argues that:

> in direct recognition of Argentina's request that Salini Impregilo not initiate arbitration, Salini Impregilo did not proceed with its treaty claims, all the while hoping that Argentina would resolve the dispute…through (and as required by) its own renegotiation process.[116]

76. Salini Impregilo further points to the six renegotiation agreements signed by Argentina and Puentes, for each of which Salini Impregilo provided a written waiver of its rights to pursue its treaty claims if those agreements entered into effect.[117] Salini Impregilo says that Argentina's demand for these waivers of BIT claims belies Argentina's claims that Salini

[110] Salini Impregilo, Counter-Memorial on Jurisdiction, para [36]; Exhibit C-0024 (Impregilo – now Salini Impregilo – is listed under Puentes' logo on the letterhead).
[111] Salini Impregilo, Rejoinder on Jurisdiction, para [20].
[112] Salini Impregilo, Rejoinder on Jurisdiction, para [56].
[113] Salini Impregilo, Counter-Memorial on Jurisdiction, para [28]; Salini Impregilo, Rejoinder on Jurisdiction, paras [46]-[47].
[114] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [2], [38]; Argentina's Decree 1090/2002 mandated that all breach of contract claims against the government be resolved through the renegotiation process. According to Salini Impregilo the Decree excluded from the renegotiation process any company that brought a claim outside that process, thereby constraining parties seeking to pursue a legal remedy in relation to the emergency legislation.
[115] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [2], [39], [52]; Exhibit CWS-0004.
[116] Salini Impregilo, Counter-Memorial on Jurisdiction, para [40].
[117] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [40], [43]; the 6 agreements are two MOU in 2006 and 2007 and four transitory agreements in 2009, 2010, 2011 and 2012.

Impregilo did not display its intention to continue with the BIT claims.[118] Only after it became clear that Argentina had no intention to implement the agreements, did Puentes file an administrative complaint, one which expressly stated that Salini Impregilo was one of its shareholders.[119] Salini Impregilo says it initiated this arbitration shortly after Argentina expropriated its investment by terminating Puentes' Concession Contract.[120]

77. In relation to Argentina's argument that Salini Impregilo should have initiated the current arbitration given that it had initiated arbitration in relation to another investment, Salini Impregilo differentiates that case by saying that Argentina terminated the other concession contract in 2006 and did not execute a series of interim agreements as it did with Puentes.[121] Further, in response to Argentina's suggestion that Salini Impregilo should have requested an arbitration and then stayed the proceedings, Salini Impregilo responds that this would have been wasteful. At all times until the initiation of this arbitration Salini Impregilo had hoped that the dispute could be amicably resolved.[122]

78. Finally, Salini Impregilo argues that Argentina is estopped from asserting an objection to jurisdiction based on prescription because by words and conduct it represented that the dispute would be resolved via renegotiation.[123] Argentina caused the delay and should not be allowed to rely on that delay to object to jurisdiction.[124] In particular it should not be able to benefit from its own wrongdoing in failing to execute any of the six interim agreements with Puentes[125] and Salini Impregilo cannot be faulted for believing Argentina's promises that the dispute would be solved amicably.[126] Salini Impregilo counters Argentina's argument that the agreements were not enforceable by saying that they remained agreements and not mere negotiations.[127]

[118] Salini Impregilo, Rejoinder on Jurisdiction, para [21].
[119] Salini Impregilo, Counter-Memorial on Jurisdiction, para [44].
[120] Ibid, para [45]. Argentina terminated Puentes' contract on 29 August 2014 and Salini Impregilo filed its Request for Arbitration on 1 September 2015.
[121] Salini Impregilo, Counter-Memorial on Jurisdiction, para [46].
[122] Salini Impregilo, Rejoinder on Jurisdiction, para [22].
[123] Salini Impregilo, Counter-Memorial on Jurisdiction, para [73]; Salini Impregilo, Rejoinder on Jurisdiction, para [49].
[124] Salini Impregilo, Rejoinder on Jurisdiction, para [55].
[125] Salini Impregilo, Counter-Memorial on Jurisdiction, para [75].
[126] Salini Impregilo, Rejoinder on Jurisdiction, para [28].
[127] Ibid, paras [49]-[52].

79. In Salini Impregilo's view Argentina caused the purported delay in the filing of this arbitration by failing to implement the six agreements and other measures.[128] Argentina passed Decree 1090/2002, whereby companies were required to choose between the renegotiation process or raising BIT claims.[129] The legislation 'had a chilling effect on investors' and convinced them that participating in renegotiation was the better option.[130] Argentina was critical of Salini Impregilo's partner, Hochtief, for initiating investment arbitration rather than participating in the renegotiation process[131] and made public statement against investors who filed BIT arbitrations.[132] Further, Argentine authorities publicly promoted an 'antagonistic environment' against foreign investors who were encouraged to drop claims brought before ICSID.[133]
80. Argentina signalled to Salini Impregilo that filing for arbitration would jeopardise reaching an amicable solution[134] and repeatedly asked Salini Impregilo not to initiate investment arbitration.[135] According to Salini Impregilo, following Hochtief's filing for arbitration, UNIREN demanded that Puentes and its shareholders undertake not to file any complaints relating to the Emergency Law against the Government and sign an indemnity agreement in favour of the Government against complaints filed by its shareholders.[136] When Argentina terminated the Concession Contract it blamed Hochtief's decision to file an ICSID claim.[137]
81. Finally, Argentina 'dragged out' the renegotiation process for 12 years[138] and signed six agreements with Puentes that required the suspension and eventual withdrawal of treaty

[128] Ibid, para [29].
[129] Ibid, paras [31]-[32]. Salini Impregilo refers to the case of *BG v Argentine Republic*, Final Award, 24 December 2007, in which the court found that the Decree would have the effect of excluding from the renegotiation process any concessionaire that filed an investment arbitration, para [136]. See also Salini Impregilo, Rejoinder on Jurisdiction, para [50].
[130] Salini Impregilo, Rejoinder on Jurisdiction, para [30].
[131] Ibid, para [23]; Exhibit C-0392, para [161].
[132] Salini Impregilo, Rejoinder on Jurisdiction, para [29].
[133] Ibid, para [33].
[134] Ibid, para [29].
[135] Ibid, para [50].
[136] Ibid, para [34].
[137] Ibid, para [51].
[138] Ibid, para [7].

claims.[139] Salini Impregilo trusted Argentina throughout the 12-year negotiation process with the aim of an amicable resolution.[140]

(3) The Tribunal's conclusions

82. Argentina's first if not principal argument was that this is a matter governed by Argentine law under the applicable law clause, Article 8(7) of the BIT.[141] But Article 8(7) refers to both Argentine law and international law; it does not change their respective scope of operation. Salini Impregilo is not claiming in respect of an Argentine tort or contract but for breach of the autonomous standards of the BIT in respect of Argentina's failure to restore the economic balance of the concession following pesification.[142] That claim is at least plausible, as the *Hochtief v. Argentina* award shows. There is no basis in Article 8(7) of the BIT to apply Argentine time limits or the Argentine law of prescription, either directly or by analogy, to Salini Impregilo's international law claims.
83. Turning to international law, the Tribunal would first point out that there is a difference between limitation of actions due to lapse of time and extinctive prescription.
84. As to limitation of actions, international law lays down no general time limit. A 2012 OECD survey of investment treaties found that only a small proportion (7%) of surveyed treaties barred international arbitration if the claim was not brought within a certain time period.[143] NAFTA was one of the first to include such a provision: Articles 1116(2) and 1117(2) require a NAFTA claim to be commenced within 3 years of the date on which the claimant acquired, or should have acquired, knowledge of the breach and consequent damage. Some more recent BITs also include time limits. For example, the 2012 Canada-Czech Republic BIT applied a 3-year time limit to investors bringing BIT claims against a host state.[144] This particular BIT is silent about time-limits for bringing a claim. So is the ICSID Convention. No fixed limitation period therefore applies in the present case.

[139] Ibid, para [50].
[140] Ibid, para [36].
[141] Hearing on Jurisdiction, Transcript, 28 November 2017, 71-72; 29 November 2017, 263-264.
[142] Hearing on Jurisdiction, Transcript, 28 November 2017, 124-125.
[143] OECD, *Dispute settlement provisions in international investment agreements: A large sample survey* (2012, Paris), 18. 1660 bilateral agreements and 'selected' multilateral agreements were compared: ibid, 9.
[144] Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments, 6 May 2009, entered into force 22 January 2012, Art X(5)(c)(i).

85. Turning to extinctive prescription as a matter of international law, this is not mentioned as a separate ground for loss of the right to invoke responsibility in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts.[145] The ILC rejected the idea that lapse of time alone might entail the loss of a claim.[146] Rather, Article 45(b) specifies that the responsibility of a state may not be invoked if the injured state has validly waived the claim or is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

86. The matter was expressed in the following terms by the International Court in *Nauru v Australia*:

> The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[147]

87. Both ILC Article 45(b) and the *Nauru v Australia* dictum refer to interstate claims, but in the Tribunal's view similar principles apply to individual claims under international law, e.g. claims for expropriation or for breach of the fair and equitable treatment standard under a BIT.

88. The position has been summarised in the following terms:

> [A] case will not be held inadmissible on grounds of delay unless the respondent state has been clearly disadvantaged and tribunals have engaged in a flexible weighing of relevant circumstances, including, for example, the conduct of the respondent state and the importance of the right involved. The decisive factor is not the length of elapsed time in itself,

[145] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001/II) *Yearbook of the International Law Commission* 26. Cf C Tams, 'Waiver, Acquiescence, and Extinctive Prescription', in J Crawford, A Pellet & S Olleson (eds) *The Law of International Responsibility* (Oxford, 2010) 1035-1036.
[146] Ibid, 1046.
[147] *Nauru v Australia*, Preliminary Objections, Judgment, ICJ Reports 1992, 240, 253-254 (para [32]).

> but whether the respondent has suffered prejudice because it could reasonably have expected that the claim would no longer be pursued.[148]

89. To conclude, extinctive prescription is recognised as a principle that can affect the right to bring proceedings under international law,[149] although it involves an issue of admissibility rather than jurisdiction. It is for the Tribunal to determine whether the passage of time in this case is such as to render Salini Impregilo's claim inadmissible, having regard to all the circumstances.

90. The parties agree that, for extinctive prescription to operate, the delay must be unreasonable and be attributable to the claimant.[150] They do not agree on whether prejudice to the respondent is an element of prescription. But it appears from the sources cited above that prejudice to the respondent, in the sense of creating difficulties in answering the claimant's claim, is an element of prescription.[151] On this basis Salini Impregilo's notification of its treaty claims in 2007 is relevant because Argentina was on notice at least by that date that there might be a treaty claim forthcoming.

91. In the Tribunal's view, having regard to all the circumstances, the delay here was not unreasonable, did not entail any acquiescence by Salini Impregilo in the lapse of its claim and did not trigger the principle of extinctive prescription. Salini Impregilo's explanations for the delay include:

    i. Its participation in the renegotiation process. Some negotiations took place directly between Salini Impregilo and the Argentine government in 2007 and 2008,[152] quite apart from Puentes' repeated attempts to renegotiate.

    ii. Argentina's legislation which on the face of it excludes a company from the renegotiation process if its shareholders have initiated treaty claims.[153]

[148] J Crawford, *State Responsibility: The General Part* (Cambridge, Cambridge University Press, 2013) 563.
[149] *Ambatielos Claim (Greece v United Kingdom)*, (1956) 7 RIAA 83, 103.
[150] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [2], [19] Argentina, Reply on Jurisdiction, para [7].
[151] *Nauru v Australia*, 255. See also Tams, 1047; J Crawford, *Brownlie's Principles of Public International Law* (Oxford, Oxford University Press, 2012), 700.
[152] Salini Impregilo, Request for Arbitration, para [51]; Exhibits C-0053 and C-0055 (letters from Salini Impregilo to representatives of Argentina), Exhibit C-0054 (letter from Argentina to Salini Impregilo).
[153] CWS-0004, Second witness statement of Guillermo O. Díaz, 17 July 2017, para [4]; Exhibit C-0108, Decree No 1090/2002, 25 June 2002, Art 1.

iii. Salini Impregilo alleges that Argentine officials repeatedly asked it to participate in the renegotiation process and not to initiate international arbitration.[154] In this regard Salini Impregilo notes that the testimony of Mr. Guillermo Díaz remains unchallenged and that Argentina has not sought to submit testimony from the former leader of UNIREN in relation to the failed renegotiation process.[155]

iv. Salini Impregilo was obliged to waive its rights to litigate so that the six interim agreements could be signed by Puentes as part of the renegotiation process: none of these agreements entered into force.

v. Puentes' domestic actions in 2013 and 2014.

92. In addition, there is a very substantial documentary record as a result of the *Hochtief v Argentina* arbitration and the domestic proceedings.

93. The fact that Salini Impregilo initiated arbitration in relation to another concession[156] in July 2007 is not persuasive in relation to Argentina's argument as to delay.[157] That case also involved a claim relating to Argentina's emergency legislation of 2002. However, it involved termination of a concession contract by Argentina in July 2006 (eight years before Argentina terminated the Concession Contract in this case). The facts appear to be very different from the present case, where Salini Impregilo alleges extensive participation in the renegotiation program by Puentes and some participation of its own.

94. For these reasons, Argentina's objection based on delay in bringing the claim fails.

C. SECOND PRELIMINARY OBJECTION: ARTICLE 8: SUBMISSION OF CONTROVERSY TO DOMESTIC JURISDICTION FOR 18 MONTHS

95. Article 8 of the BIT provides:

> 1. Any dispute regarding an investment between an investor of one of the Contracting Parties and the other Party,

[154] Salini Impregilo, Rejoinder on Jurisdiction, para [35].
[155] Salini Impregilo, Rejoinder on Jurisdiction, para [20]. The Argentine witness Salini Impregilo mentioned is Mr. Simeonoff, the former leader of UNIREN. Mr. Simeonoff is mentioned in Mr. Díaz' statement as follows: 'Mr. Simeonoff also stated that filing any legal claim in connection with the issue of the Emergency Law or the renegotiation process, including an arbitration under the BIT, would mean the negotiation would automatically come to an end': CWS-0004, Second witness statement of Guillermo O. Díaz, 17 July 2017, para [13].
[156] *Impregilo v Argentina*.
[157] See Argentina, Memorial on Objections to Jurisdiction, para [3].

> regarding the issues regulated by this Agreement, shall, as far as possible, be settled through amicable consultations between the parties to the dispute.
>
> 2. If such consultations do not result in a solution, the dispute may be submitted to the competent administrative or judicial jurisdiction of the Party in whose territory the investment is made.
>
> 3. Where, after eighteen months from the date of notice of commencement of proceedings before the national jurisdictions mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration.
>
> For such purposes, and in accordance with the provisions of this Agreement, each Contracting Party hereby irrevocably consents in advance to submit any dispute to arbitration.
>
> 4. From the time arbitration proceedings are commenced, each party to the dispute shall take any such measures as may be necessary to dismiss any pending court proceedings.

96. Puentes made an administrative complaint on 11 June 2013 by letter pursuant to the Administrative Procedure Law No. 19549.[158] The administrative complaint sought a declaration of termination of the Concession Contract due to Argentina's exclusive fault.[159]
97. Puentes also filed an action with the Argentine court on 30 May 2014.[160] The court summonsed Salini Impregilo as a third party to Puentes' court action on 25 October 2016.[161]
98. Argentina argues that the following requirements 'set forth in Article 8' are part of the essential terms under which Argentina consented to submit disputes to international

[158] Exhibit C-0049 is the letter seeking to commence that action; Salini Impregilo, Counter-Memorial on Jurisdiction, para [44]; Salini Impregilo, Request for Arbitration, para [45].
[159] Argentina, Memorial on Objections to Jurisdiction, paras [27], [110]; Salini Impregilo, Request for Arbitration, para [53].
[160] Argentina appears to accept these events occurred: see Argentina, Memorial on Objections to Jurisdiction, paras [27], [105], [145].
[161] Salini Impregilo, Counter-Memorial on Jurisdiction, para [107]; Argentina, Memorial on Objections to Jurisdiction, para [148]; Exhibit C-0060.

arbitration and form a 'sequential, multiple-stage dispute settlement mechanism'[162] comprising:

i. amicable consultations;

ii. if such consultations do not provide a solution, the dispute is to be submitted to the competent administrative or judicial jurisdiction of the host state;

iii. 18 months must elapse from the initiation of proceedings before the local courts; and

iv. any domestic court proceedings that may have been initiated must be abandoned once the international arbitration is initiated.[163]

99. In the first place, it appears that the amicable consultations contemplated by Article 8(1) of the BIT have taken place. Salini Impregilo accepts that undertaking amicable consultation for six months is a requirement.[164] It points to its letter of 12 October 2007 which notifies Argentina of the existence of a dispute under the BIT, to the meeting between Argentina's Office of the Attorney-General and Salini Impregilo on 22 October 2007 and to correspondence in 2008 between Salini Impregilo and Argentina.[165] It further points to Puentes' pursuit of an amicable resolution over the twelve years prior to the arbitration proceedings.[166]

100. Argentina does not appear to allege a failure to comply with Article 8(1).[167] However, Argentina asserts non-compliance with the provisions concerning pendency of the dispute before the Argentine courts for 18 months[168] or, in the alternative, non-compliance with

[162] Argentina, Memorial on Objections to Jurisdiction, para [76]; Argentina, Reply on Jurisdiction, para [64].
[163] Argentina, Memorial on Objections to Jurisdiction, para [93].
[164] Salini Impregilo, Request for Arbitration, para [50].
[165] Salini Impregilo, Request for Arbitration, paras [51]-[52]. See letters from Salini Impregilo to Argentina, October 2007 (Exhibit C-0052), March 2008 (Exhibit C-0053) and May 2008 (Exhibit C-0055) and letter from Argentina to Salini Impregilo in April 2008 (Exhibit C-0054).
[166] Salini Impregilo, Request for Arbitration, para [53].
[167] In *Hochtief v Argentina*, Decision on Jurisdiction, Washington, 24 October 2011, the tribunal noted that the parties did not allege failure to comply with a similar obligation contained in the Argentina-Germany BIT and assumed compliance with that obligation, para [29].
[168] Argentina, Memorial on Objections to Jurisdiction, para [6].

the requirement that any domestic court proceedings be abandoned before international arbitration proceedings take place.[169]

101. Thus, as to Article 8(2)-(4), two issues arise: (a) was the dispute referred to arbitration more than 18 months after submission to the local processes referred to in Article 8(2); and (b) did Salini Impregilo comply with the withdrawal requirement in Article 8(4)? For reasons that will appear, it is necessary to analyse the two issues separately. Further questions may arise as to the operation of the MFN clause in the BIT, and the *res judicata* effect of the award in *Impregilo S.p.A. v Argentina*.

(a) Compliance with the 18-month provision (Article 8(2) & (3))

(1) Argentina's submissions

102. According to Argentina, the word 'dispute' in Article 8 should be given its ordinary meaning in its context, in accordance with the VCLT.[170] The 'dispute' submitted to the domestic jurisdiction is the 'dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, regarding the issues regulated by this Agreement'.[171] But Salini Impregilo failed to submit that dispute to the competent administrative or judicial authorities in Argentina for 18 months as required by Article 8(2) and 8(3) of the BIT.[172] Consent to arbitration required by Article 25(1) of the ICSID Convention must be express.[173] In particular Argentina argues that Salini Impregilo's interpretation of a dispute in a 'broad, subject matter' sense modifies the will expressed by the States Parties in the BIT.[174]

103. Argentina says that neither the administrative complaint brought by Puentes on 11 June 2013 nor the court action it filed on 30 May 2014 involved the claim which subsequently

[169] Ibid, para [113].
[170] VCLT, Art 31. Argentina, Reply on Jurisdiction, para [71].
[171] Argentina, Reply on Jurisdiction, para [74], using the terms of Article 8(1) of the BIT.
[172] Argentina, Memorial on Objections to Jurisdiction, paras [5]-[6], [77].
[173] Argentina, Reply on Jurisdiction, para [58].
[174] Ibid, para [67].

led to the BIT arbitration.[175] According to Argentina those local proceedings involved a different subject matter, different parties and a different remedy:

i. In relation to the parties, Argentina stresses that Puentes filed the actions in Argentina, not Salini Impregilo; Salini Impregilo cannot rely on Puentes' claim in an Argentine court to show compliance with the requirements of the BIT.[176]

ii. In relation to the dispute, Article 8 states that the dispute submitted to the arbitral body must be the same as the one submitted to the local courts.[177] The local claim must have the same subject matter as the claim underlying the arbitration, meaning that it must be based on the same legal grounds. This is because the purpose is to allow the host state to resolve the dispute internally before having access to the international jurisdiction.[178] It points to the wording of Article 8 and its reference to a single 'dispute' in each sub-paragraph.[179] Argentina says that Puentes' actions (the administrative complaint and the court action) necessarily involved a different subject matter to the treaty claims as the local proceedings were not based on the BIT[180] nor did they make any reference to any provision of the BIT or to the breach of international obligations.[181]

iii. In relation to remedies, Argentina says that Salini Impregilo is seeking different remedies through international arbitration than Puentes in the local proceedings. In the local proceedings, Puentes seeks a declaration of termination of the Concession Contract through sole fault of the 'Grantor' (Argentina) on the basis of alleged breaches by it. By contrast Salini Impregilo seeks compensation for Argentina's failure to renegotiate and restore the Concession's economic equilibrium.[182]

[175] Argentina, Memorial on Objections to Jurisdiction, paras [6], [105].
[176] Ibid, paras [108]-[109].
[177] Argentine Memorial on Objections to Jurisdiction, para [100].
[178] Ibid, para [107].
[179] Ibid, para [100].
[180] Argentina, Memorial on Objections to Jurisdiction, para [106]; Argentina, Reply on Jurisdiction, paras [76]-[77].
[181] Argentina, Memorial on Objections to Jurisdiction, para [111]; Argentina, Reply on Jurisdiction, para [77].
[182] Argentina, Memorial on Objections to Jurisdiction, para [110].

104. In response to Salini Impregilo's arguments based on the futility of submitting the claim to an Argentine court, Argentina argues that the submission to a domestic court of the claim could resolve the claim. Argentine law provides for legal actions that make a rapid decision possible. The Claimant could have opted to start an action for protection of constitutional rights (*amparo*), an expedited summary action (*acción sumarísima*), or a motion for a declaratory judgment of certainty (*acción declarativa de certeza*), or to seek precautionary measures such as an injunction to preserve the status quo (*prohibición de innovar*), among others.[183]

105. Argentina argues that the BIT foresees that no final decision may be issued within 18 months.[184] But even if that might occur, it would not justify disregard of Article 8.[185]

(2) Salini Impregilo's submissions

106. Salini Impregilo accepts that Article 8 of the BIT requires investors, before submitting a dispute to international arbitration, to submit their claims to the competent court or administrative authority of the State in whose territory the investment is made for 18 months.[186] But it argues that any administrative or judicial proceeding brought in the host state involving the same subject matter as the investment dispute under the BIT would satisfy the BIT's procedural requirement.[187] In Salini Impregilo's view this requirement has been complied with.[188] It argues that Puentes' filing of the 11 June 2013 administrative complaint (without need for reference to the later court action) in itself satisfies the BIT's 18-month requirement because the 'essence of the dispute' was before competent Argentine administrative authorities without it being resolved for at least 18 months.[189] In Salini Impregilo's view its claims in the arbitration and Puentes' claim in the administrative complaint deal with precisely the same subject matter.[190]

[183] Argentina, Reply on Jurisdiction, para [132].
[184] Argentina-Italy BIT, Art 8(3).
[185] Argentina, Reply on Jurisdiction, para [125].
[186] Salini Impregilo, Request for Arbitration, para [52]; Salini Impregilo, Counter-Memorial on Jurisdiction, para [76].
[187] Salini Impregilo, Request for Arbitration, para [53].
[188] Ibid, para [54].
[189] Salini Impregilo, Counter-Memorial on Jurisdiction, para [88]; Salini Impregilo, Rejoinder on Jurisdiction, para [3]
[190] Salini Impregilo, Counter-Memorial on Jurisdiction, para [101].

107. Salini Impregilo rejects Argentina's interpretation of Article 8 predicated on a 'triple identity' interpretation of 'dispute'.[191] In Salini Impregilo's view the 'dispute' or 'controversy' must be subjected to a 'broad, subject matter' interpretation: the controversy or dispute submitted in the local jurisdiction must have the same general subject matter as the treaty claims[192] but need not involve the same parties nor the same legal claims.[193] Furthermore, the remedy requested need not be the same.[194]
108. Salini Impregilo notes that tribunals have preferred a 'broad, subject matter' interpretation over a 'triple identity' one.[195] It argues that customary international law and the purpose of Article 8 compel the broad, subject matter interpretation of 'dispute'.[196]
109. Salini Impregilo applies its 'broad, subject matter' interpretation of 'dispute' as follows:

    i. Admittedly Salini Impregilo and Puentes are not the same party.[197] However in Salini Impregilo's view the parties to a local dispute need not be identical to the parties to the arbitration in order to satisfy the 'local-courts requirement' because the BIT requires that the 'dispute' be submitted to local authorities but does not require the claimant-investor *personally* to seek resolution through local courts.[198]

    ii. In relation to the subject matter of the dispute, Salini Impregilo agrees with Argentina that the purpose of the requirement of domestic proceedings is to allow the host state to resolve the dispute before the conduct of the host state is reviewed in an international forum. However, Salini Impregilo argues that the 'broad, subject matter' interpretation of 'dispute' serves that purpose because resolving the injury via a domestic-law claim can 'moot the international claim'.[199]

[191] Ibid, paras [78], [99].
[192] Ibid, para [82], citing *Elettronica Sicula S.p.A. (ELSI) (USA v Italy)*, ICJ Reports 1989, 15, 46 (para [59]).
[193] Ibid, paras [78], [99].
[194] Ibid, para [100].
[195] Ibid, para [91]; Salini Impregilo, Rejoinder on Jurisdiction, para [63].
[196] Salini Impregilo, Rejoinder on Jurisdiction, para [66].
[197] Salini Impregilo, Counter-Memorial on Jurisdiction, para [98].
[198] Salini Impregilo, Request for Arbitration, para [53].
[199] Salini Impregilo, Counter-Memorial on Jurisdiction, para [89].

iii. In relation to the remedy, Salini Impregilo argues that there is no authority for the requirement that the remedy requested at domestic and international level be the same.[200] In any case, Argentina mischaracterizes Puentes' administrative complaint because Puentes did seek damages in its domestic administrative complaint, as Salini Impregilo does in its treaty claim.[201]

110. Salini Impregilo argues finally that Article 8(3) in relation to local proceedings should be interpreted in light of the rule of exhaustion of local remedies under customary international law.[202] It argues that local remedies do not need to be exhausted where there are no reasonably available remedies to provide effective redress or the local remedies provide no reasonable possibility of such redress.[203] The history of Puentes' administrative complaint (which Salini Impregilo says was ignored by Argentina) and Puentes' court action (which was still pending in 2017) demonstrates that local litigation would not resolve this dispute within 18 months.[204]

111. Salini Impregilo further argues that Article 8 should be interpreted as 'subject to a futility exception' which applies based on the facts of this case. Salini Impregilo argues that the structure of Article 8 suggests that the purpose of the 18-month rule is to provide the respondent state with an opportunity to actually resolve the dispute within 18 months. Therefore, the Tribunal in applying the futility exception to this 18-month rule should analyse whether there is a realistic possibility of resolving the dispute in domestic courts within 18 months.[205]

112. Salini Impregilo argues that it would be unfair to deprive it of its right to resort to arbitration based on the 18-month requirement when the opportunity to resort to local courts was only theoretical and/or could not have led to an effective resolution of the dispute within 18 months.[206] Salini Impregilo says it would be futile for it to commence

[200] Ibid, para [100].
[201] Ibid, para [87].
[202] Salini Impregilo, Counter-Memorial on Jurisdiction, para [140]; Salini Impregilo, Rejoinder on Jurisdiction, para [63].
[203] Salini Impregilo, Counter-Memorial on Jurisdiction, para [140], quoting ILC Draft Articles on Diplomatic Protection, Art 15 (Legal Authority CL-0203).
[204] Salini Impregilo, Counter-Memorial on Jurisdiction, para [148].
[205] Ibid, paras [4], [142]; Salini Impregilo, Rejoinder on Jurisdiction, para [90].
[206] Salini Impregilo, Rejoinder on Jurisdiction, paras [90], [105].

an action before an Argentine forum and the best evidence for this is that Puentes' court proceedings have been on foot for much longer than 18 months and are still pending.[207] Argentina could also have redressed Salini Impregilo's damages through the administrative complaint Puentes initiated on 11 June 2013, but did not do so.[208]

113. Salini Impregilo notes that in its Reply on Jurisdiction Argentina offers no evidence to support its proposition that there were different mechanisms in the Argentine judicial system available to resolve the dispute effectively within 18 months.[209] It maintains that a BIT claim could not be resolved in a period of 18 months[210] and that in any case the types of expedited proceedings suggested by Argentina would not be appropriate to resolve this case.[211]

114. Further Salini Impregilo notes that the Argentine courts perform poorly in international rankings of independence and efficiency.[212] Finally Salini Impregilo would have to incur excessive and disproportionate costs in filing and prosecuting a case before Argentine domestic courts.[213]

(3) The Tribunal's analysis

115. Article 8 regulates the conditions by which arbitration proceedings under the BIT may be initiated by an 'investor' against one of the Contracting Parties. The Tribunal must therefore give careful consideration to the specific terms agreed by the Contracting Parties when extending this offer of arbitration, as mandated by the VCLT. To that end, several preliminary points should be made as to the textual construction and sequencing (and therefore contextual guidance) of the component parts of Article 8:

(1) Paragraph 8(1) refers to a 'dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, regarding the issues regulated by this

[207] Ibid, paras [3], [100].
[208] Ibid, para [89].
[209] Ibid, paras [91]-[92].
[210] Ibid, paras [94], [97].
[211] Ibid, para [96].
[212] Ibid, para [98].
[213] Ibid, paras [101]-[103].

Agreement'. It explicitly requires consultation 'between the parties to the dispute'. It appears from this language that the consultations should involve the investor and the host state, just as the arbitration will be between those parties. There is no provision in the BIT allowing the investment itself (e.g. the local investment company, here Puentes) to be a party to the arbitration.

(2) In direct contrast, Article 8(2) does not specify who may submit the dispute to the 'competent administrative or judicial jurisdiction of the Party in whose territory the investment is made'. In certain situations, it could be a third party – e.g. the investment company – which has standing to bring local proceedings or which will naturally do so.

(3) Indeed, as the *Hochtief v Argentina* Tribunal pointed out,[214] Article 8(2) (Article 10(2) of the German-Argentine BIT applicable in that case) does not in terms *require* local proceedings to be brought, it simply provides that they 'may be submitted'.

(4) As also pointed out in *Hochtief v Argentina,*[215] it would have been open to Argentina itself to have submitted the proceeding to the local courts. One might also envisage the dispute being submitted by a separate Argentine entity, whether or not an organ of the Argentine state, e.g. a state corporation which is a party to the concession agreement giving rise to the dispute.

(5) Article 8(4) only applies to 'pending court proceedings' and not to the administrative proceedings referred in Article 8(2).

(6) Article 8(4) requires each party to the dispute submitted to arbitration to take 'any such measures as may be necessary to dismiss any pending court proceedings'. This is not stated to be a precondition to submission to arbitration; rather it applies '[f]rom the time arbitration proceedings are commenced'. It could thus be regarded as a matter going to admissibility, not jurisdiction.[216]

[214] *Hochtief v Argentina*, Decision on Jurisdiction, 24 October 2011, para [36].
[215] Ibid, para [37].
[216] As counsel for Argentina all but conceded in argument: Transcript, Hearing on Jurisdiction, 29 November 2017, pages 307-308: 'if this Tribunal did not consider that to be a jurisdictional requirement, it should at least consider it as an admissibility requirement'.

116. Indeed, the Tribunal would observe that it could have been open to Salini Impregilo to accept Argentina's narrow interpretation of dispute in Article 8. On that basis it could have relied on the literal terms of Article 8(2) and (3) to argue that since no proceeding as mentioned in Article 8(2) had (on this interpretation) been commenced, neither the 18-month pendency requirement in Article 8(3) nor the withdrawal requirement in Article 8(4) had been triggered. One cannot be required to withdraw a proceeding one has never started.

117. But Salini Impregilo did not do this. It expressly accepted that the 18-month limit under Article 8(3) had to be respected, and instead argued (as noted already) for a flexible and broad interpretation of 'dispute' in Article 8.

118. Salini Impregilo's position is supported by other arbitral awards. In *Maffezini v Spain* the tribunal held that the domestic litigation provision in the Argentina-Spain BIT was a mandatory precondition to arbitration.[217] In *Impregilo S.p.A. v Argentina* the tribunal determined that pursuant to Article 8(2) of the Argentina-Italy BIT, an investor was not obliged to bring a dispute before a local court[218] but that submission to the domestic jurisdiction for 18 months pursuant to Article 8(3) of the Argentina-Italy BIT was mandatory before an ICSID tribunal could assert jurisdiction.[219]

119. In *Philip Morris v Uruguay*, the tribunal did not decide whether a similar domestic litigation requirement in the Swiss-Uruguay BIT went to jurisdiction or admissibility. However, it concluded that '[e]ven if that requirement were considered as pertaining to admissibility, its compulsory character would be evident'.[220] In that case, however, the BIT provision used 'shall' rather than 'may' in relation to submission to domestic courts.[221]

[217] *Maffezini v Kingdom of Spain* (*Maffezini v Spain*), ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para [36].
[218] *Impregilo v Argentina*, Award, 21 June 2011, para [83].
[219] Ibid, para [94]. See Separate and Dissenting Opinion of J. Christopher Thomas, Q.C. in *Hochtief v Argentina*, para [36].
[220] *Philip Morris Sàrl, Philip Morris Products S.A and Abal Hermanos S.A. v Oriental Republic of Uruguay* (*Philip Morris v Uruguay*), ICSID Case No ARB/10/7, Decision on Jurisdiction, 2 July 2013, para [142].
[221] Ibid, para [139].

120. The tribunal in *Hochtief v Argentina*[222] did not decide whether the dispute resolution clause in the Argentina-Germany BIT imposes an 18-month submission to national courts as a precondition of unilateral recourse to international arbitration. It should be noted that the Argentina-Germany BIT states that the dispute 'will' ('será') be submitted to national courts whereas the Argentina-Italy BIT states that it 'may' ('podrá') be so submitted.[223] The *Hochtief v Argentina* tribunal was doubtful that the precondition existed given that it might result in 'pointless litigation'.[224] But without deciding the point, it proceeded on the assumption that the precondition did exist.[225]

121. The tribunal in *BG Group v Argentina*[226] discussed difficulties litigating in Argentina in the period 2002-2007 in the context of the domestic litigation requirement under the Argentina-United Kingdom BIT.[227] Article 8 of the Argentina-United Kingdom BIT relevantly reads:

> ...The aforementioned disputes shall be submitted to international arbitration in the following cases:
>
> (a) if one of the Parties so requests, in any of the following circumstances:
>
> (i) Where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision…[228]

[222] *Hochtief v Argentina*.
[223] The tribunal in *Impregilo v Argentina* found that this difference in terminology did not necessarily mean that a substantive difference was intended: *Impregilo v Argentina*, Award, para [86]. In *Philip Morris v Uruguay*, the tribunal said the use of the word 'shall' evidenced that each step in the domestic proceedings provision in the Swiss-Uruguay BIT is part of a 'binding sequence'. *Philip Morris v Uruguay*, Decision on Jurisdiction, paras [139]-[140].
[224] *Hochtief v Argentina*, Decision on Jurisdiction, para [51].
[225] The tribunal interpreted the operation of the dispute resolution clause based on a broad operation of the MFN clause. It found that the MFN provision applied to the dispute resolution provision in the BIT. *Hochtief v Argentina*, Decision on Jurisdiction, paras [49]-[55].
[226] *BG Group Plc v The Republic of Argentina* (*BG Group v Argentina*), UNCITRAL Arbitration, Final Award, Washington, 24 December 2007.
[227] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, 11 December 1990, entered into force 19 February 1993.
[228] Argentina-United Kingdom BIT, Art. 8(2).

122. BG Group had not sought to litigate in the domestic courts. The tribunal found that investors acting under the Argentina-United Kingdom BIT had to litigate in the host state's courts for 18 months before they could bring an arbitral claim. However, 'as a matter of treaty interpretation' the tribunal found that it could not construe Article 8(2)(a)(i) as an absolute impediment to arbitration. The tribunal had regard to measures taken by the Argentine executive branch seeking to exclude 'litigious licensees from the renegotiation process',[229] and concluded:

> …Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation [that the domestic litigation requirement is absolute] would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication.[230]

123. Salini Impregilo does not seek to rely on any action that it has itself taken in order to satisfy Article 8(2) and 8(3) of the BIT. The question is whether Puentes' actions satisfy Article 8(2) and 8(3) in order for Salini Impregilo to bring an arbitration. If so, the further question relates to the subject matter of the dispute and the form of action taken: whether either of the two actions undertaken by Puentes satisfies the requirement of submission of the dispute to the 'competent administrative or judicial jurisdiction' of Argentina for 18 months. Those two actions are:

i. an administrative complaint brought on 11 June 2013 by letter;[231] and

ii. an action before the Argentine court commenced on 30 May 2014.

[229] *BG Group v Argentina*, Final Award, para [155].
[230] Ibid, para [147].
[231] Exhibit C-0049 is the letter seeking to commence that action; Salini Impregilo, Counter-Memorial on Jurisdiction, para [44]; Salini Impregilo, Request for Arbitration, para [45].

Interpretation of 'dispute' in Article 8

124. The term 'dispute' ('*controversia*') is not defined in the Argentina-Italy BIT. The ICSID Convention also does not define 'dispute' for the purpose of Article 25(1).

125. Salini Impregilo assigned its rights and obligations to Puentes under the Concession Contract.[232] On this basis Salini Impregilo could not have litigated in domestic courts under the Concession Contract, as Argentina notes.[233]

126. In *Impregilo S. v Argentina*, Argentina argued that Impregilo had not complied with the 18-month requirement.[234] Impregilo responded that the domestic subsidiary had 'consistently resorted to local administrative and judicial courts' in relation to the dispute. It further argued that Argentine courts had had the opportunity to decide on the facts but had failed to do so.[235] The tribunal found that the condition in Article 8(3) had not been complied with, without discussing whether AGBA's action could assist Impregilo to satisfy the condition.[236]

127. However, there are numerous cases supporting Salini Impregilo's claim to have satisfied the domestic litigation requirement here, even though the proceedings in Argentina involved Puentes and not Salini Impregilo, and contractual, not treaty claims.

128. In *USA v Italy*, a Chamber of the International Court held that local remedies had been exhausted in Italy because a claim brought to the Italian courts was 'essentially' the claim that the United States was seeking to bring as a matter of diplomatic protection. This was despite the fact that 'the parties were different'.[237]

129. In *Philip Morris v Uruguay*, Abal, one of the claimants, was a *sociedad anónima* organised under Uruguayan law. In 2010, Philip Morris Brands became the direct owner of 100% of Abal.[238] Uruguay argued that even if Abal had met the requirements of negotiation and domestic litigation, the other claimants had not. The tribunal decided that

[232] Salini Impregilo, Request for Arbitration, para [20]; Exhibit RA-004 (Deed of Transfer).
[233] Argentine Reply on Objections to Jurisdiction, para [146]. Cf *Urbaser S.A. v Argentine Republic* (*Urbaser v Argentina*), ICSID Case No ARB/07/26, Decision on Jurisdiction, 19 December 2012, para [62].
[234] *Impregilo v Argentina*, Award, para [53].
[235] Ibid, para [68].
[236] Ibid, para [90]. Ultimately the tribunal found jurisdiction based on an expansive reading of the MFN clause as applying to the dispute settlement procedures in the BIT, para [104].
[237] *USA v Italy*, Judgment, ICJ Reports 1989 p 15, 45-6 (para [58]).
[238] *Philip Morris v Uruguay*, Decision on Jurisdiction, para [2].

Abal had satisfied, on behalf of the other claimants, the BIT's requirement that the parties negotiate for six months. The Tribunal held that, while the administrative oppositions were filed by Abal alone, Abal's actions were aimed at removing the effects of measures which impacted on all the claimants. The tribunal continued that 'due to the identity of positions and interests involved, Abal's actions were to the benefit also of the other Claimants'.[239] The tribunal reached a similar conclusion in relation to the domestic litigation clause: even if the domestic proceeding was filed by Abal, Abal had 'clearly acted in the interest… of the other Claimants, considering that it is wholly owned' by Philip Morris Brands and the brands Abal sells in Uruguay are sublicensed from Philip Morris Brands.[240] In its view:

> The term 'disputes' as used [in the dispute resolution clause] is to be interpreted broadly as concerning the subject matter and facts at issue and not as limited to particular legal claims, including specifically BIT claims.[241]

130. The tribunal in *Philip Morris v Uruguay* said that an investor could satisfy the domestic litigation requirement under the applicable BIT in that case by submitting a domestic law claim to the Uruguayan courts, provided that it was based on 'substantially similar facts and subject matter as the BIT claim subsequently submitted' to arbitration.[242] The tribunal determined that if the parties to a BIT had wanted to limit investor-state arbitration to claims concerning breaches of the substantive standards in the BIT, they would have said so expressly.

131. In *Teinver v Argentina* the respondent (Argentina) argued that a domestic expropriation lawsuit brought by Argentina against the claimant company's Argentine subsidiary, Interinvest,[243] could not fulfil the domestic litigation requirement under the Argentina-Spain BIT because the domestic and international claims involved different parties and

[239] Ibid, paras [95]-[97].
[240] Ibid, para [114].
[241] *Philip Morris v Uruguay*, Decision on Jurisdiction, para [113].
[242] Ibid, para [110].
[243] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic* (*Teinver v Argentina*), ICSID Case No ARB/09/1, Decision on Jurisdiction, 21 December 2012, para [3]. Iberia, the Spanish state-owned airline, incorporated Interinvest as a fully-owned Argentine subsidiary in 1994.

different causes of action.[244] The tribunal disagreed: the fact that the domestic expropriation proceedings were brought by Argentina against Interinvest 'does not prevent those proceedings from counting for purposes of [the BIT's domestic litigation provision] when the subject matter of those proceedings was the same as that before this Tribunal'.[245]

> The Tribunal does not agree with Respondent's assertion that the subject matter of the expropriation suit in domestic court is not the same as the subject matter of this arbitration. It is true that the Argentine court proceedings only involved the determination of the value of the expropriated assets, while the ICSID proceeding raises specific issues related to the validity of the expropriation (i.e., fair and equitable treatment, arbitrary and unjustified measures, and full protection and security). As a matter of substance, however, the goal of both suits is to make the Claimants (and Interinvest, in the case of the Argentine proceeding) whole for the economic loss suffered as a result of the nationalization.[246]

132. In *Urbaser v Argentina*, the tribunal held that:

> a distinction may be made between the 'dispute' and a claim or cause of action. Article X [a rule on prior submission of disputes to the local courts of the host state] of the BIT does not require that the same cause of action must be brought before the domestic court and the subsequent international arbitral tribunal. … It also has been noted that the action brought before a local court need not allege a breach of the BIT; it is sufficient that the dispute relates to an investment made under the BIT. The claim before the local courts must be 'coextensive' with a dispute relating to investments made under the BIT. The nature of the 'dispute' brought before domestic courts may be broad. The objective of the judicial filing is indeed to provide the domestic court with an opportunity to fashion a suitable remedy that may obviate

[244] Ibid, para [85].
[245] Ibid, para [133].
[246] *Teinver v Argentina,* Decision on Jurisdiction, para [132].

> international arbitration. For such a result to be reached, it is not necessary for the domestic court to adjudicate the claim within the framework of the BIT.[247]

133. The present Tribunal agrees with the decisions on this point cited above. In its view, it is sufficient for the purposes of Article 8(2) and (3) that the substantive underpinnings of the dispute have been 'submitted to the competent administrative or judicial jurisdiction', whether by the investor or (as here) a local subsidiary. It does not matter whether the BIT claim has been in terms invoked before the administrative or judicial jurisdiction.

Was the 'dispute' submitted to the local jurisdiction

134. Consistently with this conclusion, the fact that the claims in the Argentine courts concerned the Concession Contract while Salini Impregilo's arbitration request involves claims under the BIT is not determinative.[248] The dispute submitted to Argentine forums by Puentes shared substantially similar facts with the BIT claim subsequently submitted to arbitration by Salini Impregilo. Both related to the same Concession Contract and the same sovereign acts by Argentina.

135. Salini Impregilo relies on Puentes' administrative complaint of 11 June 2013 in satisfaction of the domestic proceedings requirement in the BIT. Salini Impregilo describes the administrative complaint as 'local proceedings' initiated by Puentes.[249] The Tribunal will need to determine whether the sending of a written administrative complaint amounts to the initiation of proceedings for the purpose of Article 8 of the BIT.

136. Given the wording of the Argentina-Italy BIT when compared to other BITs signed by Argentina, it is clear that submission to an entity other than a court could satisfy the requirement of submission to the 'competent administrative… jurisdiction'. Some BITs signed by Argentina contain similar language to the Argentina-Italy BIT, without reference to courts or tribunals.

[247] Ibid, para [181].
[248] Cf also *Pantechniki v Republic of Albania* (*Pantechniki v Albania*), ICSID Case No. ARB/07/21, Award, para [61].
[249] Salini Impregilo, Rejoinder on Jurisdiction, para [89].

- The Argentina-Austria BIT requires submission to the administrative or judicial jurisdiction ('a la jurisdicción administrativa o judicial competente');[250]
- The Argentina-France BIT requires submission to arbitration or 'juridictions nationales', although the English translation of that section translates 'juridictions nationales' to 'domestic courts'.[251]

137. Other BITs signed by Argentina explicitly require submission to a court or tribunal rather than to the 'jurisdiction' of the respondent state.

- The Argentina-Germany BIT restricts submission of the dispute to 'the competent courts of the Contracting Party' ('los tribunales competentes');
- The Argentina-United States BIT requires submission to 'the courts or administrative tribunals of the Party' if an investor chooses domestic litigation;[252]
- The Argentina-Spain BIT refers to 'competent tribunals of the Party in whose territory the investment was made' ('a los tribunales competentes');[253]
- The Argentina-UK BIT refers to 'the competent tribunal of the Contracting Party in whose territory the investment was made'.[254]

138. At the Hearing, Argentina accepted that the procedure commenced by Puentes with the Argentine administrative authorities could fall within the scope of Article 8(2).[255] The Tribunal agrees.

[250] Convention between the Argentine Republic and the Republic of Austria for the Promotion and the Protection of Investments, Buenos Aires, 7 August 1992, Art. 8(2). The Spanish is the authentic text.
[251] Agreement on the reciprocal promotion and protection of investments, Paris, 3 July 1991, 3 August 1993, (1993) 1728 UNTS 297. The authentic languages are Spanish and French.
[252] Argentina-United States BIT, Art. VII(2)(a). Emphasis added. The BIT contains a 'fork' provision, e.g. a choice between domestic litigation and other forms of dispute resolution.
[253] Argentina-Spain BIT, Art X, 2.
[254] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, London, 11 December 1990, entered into force 19 February 1993, Art 8(2)(a)(i).
[255] Transcript, Hearing on Jurisdiction, 28 November 2017, 43. It maintained its arguments in relation to subject matter of the dispute and parties to the dispute.

The 18-month domestic litigation requirement: conclusion

139. Litigation in the Argentine court was commenced by Puentes on 30 May 2014. Salini Impregilo initiated its arbitration on 1 September 2015, fifteen months after Puentes' court case commenced. *Prima facie*, Salini Impregilo has not complied with the requirement to litigate in an Argentine court for 18 months. However, it would be open for the Tribunal to follow the tribunal in *Philip Morris v Uruguay* which held that it could be satisfied by actions occurring after the date the arbitration was instituted to satisfy a jurisdictional requirement.[256] In this case the litigation between Puentes and Argentina is still pending. As the tribunal said in *Philip Morris v Uruguay*, to require the claimant to start over and re-file this arbitration now that the 18 months has passed would be a waste of time and resources.[257]

140. Article 8(2) refers in the alternative to 'the competent administrative *or* judicial jurisdiction' (emphasis added). The administrative jurisdiction was triggered by Puentes more than 18 months before the arbitration was commenced, and in the Tribunal's view Article 8(2) was thereby satisfied. Indeed, aside from its argument as to the characterisation of 'dispute', Argentina does not suggest otherwise. Its claim for non-compliance with Article 8(2) and (3) accordingly fails.

(b) The issue of abandonment (Article 8(4))

(1) Argentina's submissions

141. Alternatively, Argentina complains that Salini Impregilo did not abandon the domestic proceedings, or procure their abandonment, as it should have done under Article 8(4) of the BIT. Article 8(4) reads:

> 4. From the time arbitration proceedings are commenced, each party to the dispute shall take any such

[256] See *Philip Morris v Uruguay*, Decision on Jurisdiction, para [144].
[257] Ibid, para [148], citing *Teinver v Argentina*, Decision on Jurisdiction, para [135].

> measures as may be necessary to dismiss any pending court proceedings.[258]

142. In failing to abandon pending domestic proceedings, Salini Impregilo has not accepted the terms of Argentina's offer to arbitrate under the BIT.[259]

143. Argentina claims that the failure to dismiss the pending court proceedings is a serious matter because the consent of the States Parties to the BIT was especially aligned with that purpose: Argentina only included the equivalent clause in five of its 58 BITs.[260] The purpose of the requirement is to protect the respondent state from having to litigate multiple proceedings in different forums relating to the same measure and to minimise the risk of inconsistent determination of fact and law by different tribunals and of double recovery.[261]

(2) Salini Impregilo's submissions

144. Salini Impregilo argues that it complied with Article 8(4) of the BIT. First, it points out that it relies exclusively on Puentes' 11 June 2013 administrative complaint to satisfy the 18-month rule: that proceeding is over, in its view, because Argentina failed to respond or to resolve it within the time frame provided by the law.[262]

145. Second, Salini Impregilo's interpretation of Article 8(4) is that it imposes a 'best efforts' obligation[263] and Salini Impregilo has no power to force Puentes to dismiss its claim. Salini Impregilo only owns 26% of shares in Puentes.[264] The 'broad, subject matter' interpretation of 'dispute' and the broad definition of 'investment' support a 'best efforts' interpretation because a party will not necessarily be able to dismiss claims brought by other parties in relation to the same dispute.

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[258] Argentina-Italy BIT, Art 8(4).
[259] Argentina, Reply on Jurisdiction, para [80].
[260] Argentina, Memorial on Objections to Jurisdiction, para [114].
[261] Argentina, Reply on Jurisdiction, para [79], quoting *Renco Group Inc v Peru* (*Renco v Peru*), ICSID Case No UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, 193, Legal Authority AL RA 125.
[262] Salini Impregilo, Counter-Memorial on Jurisdiction, para [103]. Exhibit C-0374 'Ley de Procedimiento Administrativo', Arts 30-31; Salini Impregilo, Rejoinder on Jurisdiction, para [67].
[263] Salini Impregilo, Counter-Memorial on Jurisdiction, para [104]; Salini Impregilo, Rejoinder on Jurisdiction, para [67].
[264] Salini Impregilo, Counter-Memorial on Jurisdiction, para [105].

146. Finally, Salini Impregilo argues that Argentina is also in breach of Article 8(4), which imposes a 'best efforts' obligation on both parties.[265] An Argentine court summoned Salini Impregilo as a third party to Puentes' court action on 25 October 2016.[266] Therefore, Argentina is estopped from arguing that Salini Impregilo is in breach of Article 8(4) whilst Argentina itself is in breach of that article by forcing Salini Impregilo to join a domestic proceeding that it did not initiate and to which it was not a party.[267]

(3) The Tribunal's analysis

147. In *Ambiente v Argentina*, the tribunal identified two aspects of Article 8(4) which assist Salini Impregilo.

i. Article 8(4) imposes an obligation on both parties. It 'commits a Party to take the necessary steps to allow the other Party to desist from the domestic proceedings'. This is relevant in this case because Argentina joined Salini Impregilo to domestic proceedings in 2016, long after the initiation of the arbitration.[268]

ii. Once the 18-month term has expired and a party decides to proceed to international arbitration, 'the other Party must, *to the extent possible*, adopt the necessary measures so that no additional costs will arise for the former Party due to the mere fact of exercising a right expressly granted to it by the BIT'.[269] The tribunal evidently considered that Article 8(4) involves a 'best efforts' requirement.

148. The Tribunal agrees. The law does not require the impossible, and Salini Impregilo was not in a position to withdraw proceedings to which it was not a party. A 'best efforts' interpretation of Article 8(4) is consistent with the Tribunal's conclusion as to the flexible

[265] Salini Impregilo, Rejoinder on Jurisdiction, para [67].
[266] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [106]-[107] ; Argentina, Memorial on Objections to Jurisdiction, para [148]; Exhibit C-0060.
[267] Salini Impregilo, Counter-Memorial on Jurisdiction, para [108].
[268] *Ambiente v Argentine Republic* (*Ambiente v Argentina*), ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para [623].
[269] Ibid (emphasis added).

characterization of 'dispute'. To hold otherwise would place minority shareholders at a serious disadvantage in seeking to uphold their rights under the BIT. Finally, there is no danger of double recovery, having regard *inter alia* to the express assurances given by the Claimant in oral argument.[270]

(c) The Tribunal's Conclusions on Article 8

149. For these reasons, the Tribunal concludes that Article 8(2) and (3) of the BIT were complied with, and that Salini Impregilo's claim is not inadmissible under Article 8(4) by reason of the non-withdrawal of the Argentine court proceedings following the commencement of the present arbitration. Argentina's second preliminary objection fails.

150. In the light of these conclusions, the Tribunal has no need to consider the parties' arguments with respect to the MFN and *res judicata* issues. Nor is it necessary to address Salini Impregilo's arguments with respect to futility and estoppel.

D. THIRD PRELIMINARY OBJECTION: ARGENTINE COURTS AS THE PROPER VENUE

151. As noted, Puentes is currently litigating its claim against Argentina (commenced on 30 May 2014) in an Argentine court.[271] Salini Impregilo has been summonsed as a third party.[272]

(1) Argentina's submissions

152. Argentina argues that, should the Tribunal find that it possesses jurisdiction, the *forum non conveniens* doctrine applies in this case. Argentina maintains that there are reasons of sound administration of justice that lead to the conclusion that Argentine courts are the most appropriate forum to resolve Salini Impregilo's claim.[273] Therefore, the Tribunal should refuse to exercise its jurisdiction.

[270] Transcript, Hearing on Jurisdiction, 29 November 2017, 355-356.
[271] Salini Impregilo, Counter-Memorial on Jurisdiction, para [5].
[272] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [106]-[107] ; Argentina, Memorial on Objections to Jurisdiction, para [148].
[273] Argentina, Memorial on Objections to Jurisdiction, para [8].

153. Argentina discusses authorities which identify a general legal principle of *forum non conveniens* and concludes that the Tribunal must take into account the existence of a more appropriate forum with jurisdiction to hear the case.[274] Argentina argues that its courts have jurisdiction to decide disputes between an Italian investor and Argentina, including claims for non-compliance with the BIT, and that they are the most appropriate forum for Salini Impregilo's claim.[275]

154. Further, Argentina refers to the reasons given by the domestic judge for issuing a summons for Salini Impregilo to appear in Puentes' pending case. These include that the claim in the arbitration proceedings and Puentes' claim are closely related and that if the claim is granted there would be an overlap in terms of compensation because it is not possible for a recovery action to be filed against the investing companies (Salini Impregilo and Hochtief).[276]

155. Argentina argues that Salini Impregilo cannot invoke an alleged violation of the Concession Contract as though it was a breach of the BIT.[277] The standards in the BIT should not be applied to contractual relations governed by Argentine law.[278] Argentina argues that Salini Impregilo's claim is contractual because Puentes seeks compensation for the consequences allegedly arising from the termination of the Concession Contract in the domestic proceedings.[279]

156. Argentina argues that its domestic courts are the forum in which contractual claims must be decided because the Concession Contract provides that it is governed by Argentine law. The contract also provides that any issue or conflict that may arise from the contract shall be submitted to the Federal Administrative Courts for the City of Buenos Aires.[280]

157. In relation to Salini Impregilo's fear of criminal prosecution of its legal counsel (should Salini Impregilo's claim be heard in Argentina), Argentina indicates that the original complaint in question was filed because of 'genuine concern for the potential commission

[274] Ibid, paras [134]-[144].
[275] Argentina, Reply on Jurisdiction, paras [77], [125].
[276] Argentina, Memorial on Objections to Jurisdiction, para [150].
[277] Argentina, Reply on Jurisdiction, para [147].
[278] Ibid, para [148].
[279] Argentina, Reply on Jurisdiction, para [163].
[280] Ibid, para [162].

of attempted fraud'.[281] Further Argentina points out that in the same case in which the possible prosecution was raised, the US judge recognised that American courts generally have found Argentina to be an adequate 'alternative forum' to decide disputes.[282] Finally, Argentina points to Salini Impregilo's long history of investment in Argentina and its current projects in Argentina to demonstrate that Salini Impregilo does not genuinely feel 'harassed' there.[283]

(2) Salini Impregilo's submissions

158. Salini Impregilo argues that the *forum non conveniens* doctrine is not set out in the BIT's text,[284] is not a recognised principle of international law[285] or a general principle of law.[286] Furthermore the BIT is a *lex specialis* that displaces any considerations of *forum non conveniens*.[287] Salini Impregilo argues that *forum non conveniens* conflicts with ICSID's exclusive jurisdiction, the *lex specialis* in the BIT,[288] basic principles of international law and international investment law.[289] If a tribunal held that it would not rule upon treaty claims over which it had jurisdiction because it believed that it was more appropriate for a local court to dispose of the dispute, an investor's right to arbitration would be negated.[290] Finally, and in any event, Argentina cannot satisfy the elements of *forum non conveniens*.[291]

159. Argentine courts are not a more appropriate forum because Salini Impregilo's treaty claims are not before those courts.[292] Salini Impregilo is only before the Argentine Courts because it was summonsed to appear.[293] It is improper for Argentina to force Salini

[281] Argentina, Reply on Jurisdiction, para [166].
[282] Ibid, para [167].
[283] Ibid, para [171].
[284] Salini Impregilo, Counter-Memorial on Jurisdiction, para [152].
[285] Ibid, paras [5], [153]; Salini Impregilo, Rejoinder on Jurisdiction, para [4].
[286] Salini Impregilo, Counter-Memorial on Jurisdiction, para [156].
[287] Ibid, para [160].
[288] Salini Impregilo, Rejoinder on Jurisdiction, para [4].
[289] Salini Impregilo, Counter-Memorial on Jurisdiction, para [157].
[290] Salini Impregilo, Rejoinder on Jurisdiction, para [122].
[291] Salini Impregilo, Counter-Memorial on Jurisdiction, para [152].
[292] Ibid, para [162].
[293] Ibid, para [163].

Impregilo to join domestic proceedings and then argue that Salini Impregilo's presence in the proceedings justifies the dismissal of its treaty claim in the arbitration.[294]

160. Salini Impregilo argues that the pending domestic litigation concerns domestic-law claims by Puentes whereas the arbitration involves treaty claims by Salini Impregilo.[295] Its treaty claims are not before the Argentine court which will not rule upon them, whatever other holdings it may make.[296] Finally Salini Impregilo 'did not and will not assert its treaty claims in that forum'.[297]

161. In Salini Impregilo's view the forum-selection clause in the Concession Contract is wholly irrelevant to determine the forum for Salini Impregilo's BIT claims.[298] Its claims are not contractual because, among other things, the acts complained of are sovereign acts.[299]

162. Salini Impregilo opposed joining Puentes' local proceedings because in its view this would violate Article 8(4) of the BIT. Further, it would force Salini Impregilo to litigate a matter that Argentina has been refusing to resolve for years. Finally, in Salini Impregilo's view, it is not a proper party to the domestic litigation because under the Concession Contract and Argentine law, it is not a party to the contract.[300]

163. Salini Impregilo states that even if it were required to continue waiting before requesting this arbitration (by the application of Article 8 of the BIT) it would, at this stage, be futile to make further attempts at amicable settlement or submission of the dispute to an Argentine court. In its view this would amount to an abuse of rights by Argentina.[301]

164. Finally, there is a fear that counsel for Salini Impregilo would be criminally prosecuted before Argentine Courts because in September 2015 Argentina announced the initiation of criminal proceedings against several of King & Spalding's attorneys (Salini Impregilo's lawyers), accusing them of having defrauded the country by participating in unrelated

[294] Salini Impregilo, Rejoinder on Jurisdiction, para [122].
[295] Salini Impregilo, Counter-Memorial on Jurisdiction, para [162].
[296] Ibid, para [162].
[297] Ibid, para [163].
[298] Salini Impregilo, Rejoinder on Jurisdiction, para [120].
[299] Ibid, para [118].
[300] Salini Impregilo, Counter-Memorial on Jurisdiction, para [107].
[301] Salini Impregilo, Request for Arbitration, para [60].

international arbitration.[302] The *Teinver v Argentina* tribunal rejected all of Argentina's underlying contentions regarding the criminal proceedings.[303]

(3) The Tribunal's analysis

165. In general terms the principle of *forum non conveniens* involves the exercise of a discretion to stay or dismiss proceedings over which a court or tribunal has jurisdiction, on the basis that some other forum is clearly more appropriate for the determination of the dispute.[304] Pursuant to the principle a court or tribunal 'has to consider how best the ends of justice in the case in question and on the facts before it, so far as that can be measured in advance, can be respectively ascertained and served'.[305]

166. Salini Impregilo argues that 'no investment tribunal has ever recognized the doctrine as a principle of international law or applied it to dismiss a claim over which it had jurisdiction',[306] and Argentina cites none in its pleadings. In *Hochtief v Argentina* the tribunal in its Decision on Jurisdiction said that '[a] tribunal might decide that a claim of which it is seised and which is within its jurisdiction is inadmissible (for example, on the ground of *lis alibi pendens* or *forum non conveniens*)'.[307] This appears to recognize the existence of a *forum non conveniens* discretion but there was no further discussion of the concept, still less was it applied in that case.

167. In *GAMI v Mexico* the tribunal rejected the argument that the claimant could not seek redress because the domestic holding company had sought redress in Mexican courts, holding that:

> ultimately each jurisdiction is responsible for the application of the law under which it exercises its mandate.[308]

168. The tribunal in *GAMI* quoted with approval the umpire in the *Selwyn* case who said that:

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[302] Salini Impregilo, Counter-Memorial on Jurisdiction, para [165].
[303] Salini Impregilo, Rejoinder on Jurisdiction, para [123] with reference to *Teinver v Argentina*, Award, 21 July 2017.
[304] 'The Principles for Determining When the Use of the Doctrine of Forum Non Conveniens and Anti-Suit Injunctions is Appropriate', in *Institute of International Law Yearbook* (2002-2003) Vol 70, Part I, Bruges, 22.
[305] Ibid, 23, quoting *Société du Gaz de Paris v Armateurs Français* 1926 SC (HL) 13, 22.
[306] Salini Impregilo, Counter-Memorial on Jurisdiction, para [153].
[307] *Hochtief v Argentina*, Decision on Jurisdiction, 24 October 2011, para [90].
[308] *GAMI Investments v United Mexican States (GAMI v Mexico)*, Final Award, 15 November 2004, para [41].

> International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto…[309]

169. However, that dictum was concerned with jurisdiction, not admissibility.

170. In *Impregilo v Argentina*, Argentina's argument based on double recovery (through domestic proceedings and international arbitration) was held to be a mere 'theoretical' argument because the granting of compensation in either sphere would impact on the granting of compensation in the other.[310]

171. In favour of deference to domestic proceedings, Douglas states that 'there must be a limiting principle of admissibility of shareholder claims'.[311] He gives the example of a major oil company with thousands of shareholders affected by state action who might have recourse under a BIT with the host state. He concludes that the investment treaty regime would be 'doomed as a sustainable systems of investment protection' if each shareholder could bring an admissible claim under the BIT.[312] Douglas' comments go to admissibility, not jurisdiction. Further, Salini Impregilo is one of only six shareholders which could seek to litigate this claim (the seventh shareholder, Iglys, being a subsidiary of Salini Impregilo). In the Tribunal's view, concerns in relation to the sustainability of investment protection have no relevance to Salini Impregilo's claim.

172. Hobér discusses the possibility of a tribunal declining jurisdiction on the basis of *forum non conveniens* in favour of a parallel proceedings involving the same dispute.[313] He suggests that arbitrators should not act in a manner that contradicts international public policy and that they might decline jurisdiction where parallel proceedings are deemed to be unacceptable because of the great injustice they cause the respondent.[314]

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[309] *GAMI v Mexico*, para [39], quoting J. H. Ralston, *Venezuelan arbitrations of 1903* (Washington, Government Printing Office, 1904) 322, 327.
[310] *Impregilo v Argentina*, Award, 21 June 2011, para [139].
[311] Z Douglas, *The International Law of Investment Claims*, (Cambridge University Press, 2009), 399.
[312] Ibid, 399.
[313] K Hobér, *Res Judicata and Lis Pendens*, in (2013) 366 Académie de Droit International, Collected Courses 99, 250.
[314] Ibid, 252.

173. For its part, the Tribunal does not need to decide in the abstract whether a BIT tribunal has discretion to stay an arbitration proceeding on account of parallel proceedings pending before a national court. Salini Impregilo never committed to bringing its BIT claims (which are not contractual claims) to the Argentine courts and never did so. It only became a party to the pending Argentine court proceeding against its will, over a year after it had exercised its procedural right as an investor to bring the present arbitration. No new issue of public policy arises with respect to the bringing of a claim by a qualified investor under a BIT. The Tribunal again notes that there is no danger of double recovery, having regard *inter alia* to the express assurances given by the Claimant in oral argument.[315] Even if the Tribunal has the power to stay the present proceedings, it has not been shown that it is *forum non conveniens* and it would decline to exercise that power. The Respondent's third preliminary objection accordingly fails.

E. SALINI IMPREGILO'S LACK OF STANDING

(1) Argentina's submissions

174. Late in the pleadings Argentina raised the issue of Salini Impregilo's standing.[316] In its view Salini Impregilo cannot bring an arbitral claim as a shareholder in relation to the contractual rights of Puentes. This objection was not formally raised by Argentina as such nor was it addressed by Salini Impregilo as a separate objection to jurisdiction. Nonetheless the Tribunal will deal with it.

175. Salini Impregilo and its consortium partners gave up their rights and obligations under the Concession Contract by transferring them to Puentes.[317] Therefore, in Argentina's view Salini Impregilo ceased to be a party to the contract and Puentes stepped in to replace it.[318] In Argentina's view Salini Impregilo is not a party to the substantial legal relationship that

[315] Transcript, Hearing on Jurisdiction, 29 November 2017, 355-356.
[316] Argentina, Reply on Jurisdiction, para [139].
[317] Salini Impregilo, Request for Arbitration, para [20]; Argentina, Reply on Jurisdiction, para [136].
[318] Argentina, Reply on Jurisdiction, para [136].

gave rise to the claim filed against Argentina in the arbitration and is precluded from bringing any claim to the Tribunal in respect of that relationship.[319]

(2) Salini Impregilo's submissions

176. Salini Impregilo responds that the BIT specifically grants Salini Impregilo standing to bring BIT claims against Argentina and that this is 'established investment arbitration practice'.[320] Salini Impregilo and its investment in Puentes qualify respectively as investor and investment under the BIT.[321] Salini Impregilo did not relinquish its substantial investment in Argentina by signing the Concession Contract.[322]

177. In response to Argentina's claim that Salini Impregilo is bringing claims that are derivative and 'contractual', Salini Impregilo responds that this is not the case: Salini Impregilo, as investor, is bringing BIT claims on its own behalf against Argentina.[323] Further, its claim is not contractual because the origin of the action that Salini Impregilo complains of is a sovereign act of Argentina. It was not conduct by Argentina in the exercise of a contractual power.[324]

(3) The Tribunal's analysis

178. There is substantial authority to the effect that claims such as those presented by Salini Impregilo enjoy protection under the applicable BIT. There is no reason for this Tribunal to take a different view.[325] In particular ICSID decisions show that (absent some express provision in the BIT) there is no material distinction between majority and minority shareholders for jurisdictional purposes[326] and that this right to claim compensation is independent from that of the local subsidiary directly affected by the actions of the host state.[327]

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[319] Ibid, para [139].
[320] Salini Impregilo, Rejoinder on Jurisdiction, para [113].
[321] Ibid, paras [109], [113].
[322] Ibid, para [110].
[323] Ibid, para [111].
[324] Salini Impregilo, Rejoinder on Jurisdiction, paras [118]-[119].
[325] Cf *Impregilo v Argentina*, Award, 21 June 2011, para [140].
[326] M Valasek & P Dumberry, *Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes* (2011) 26 Foreign Investment Law Journal 47.
[327] Ibid, 49-50.

179. In *Maffezini v Spain,* Spain argued that the Argentine claimant company was a mere shareholder in a Spanish company and had no standing to sue in his own capacity.[328] The tribunal rejected this argument. It referred to the broad definition of 'investment' in the Argentina-Spain BIT[329] and concluded that the claimant was 'an Argentine investor in a Spanish company' with *prima facie* standing.[330]

180. In *CMS v Argentina,*[331] the tribunal discussed Argentina's argument that the claimant lacked standing to proceed with a claim against Argentina because CMS was a minority shareholder in an Argentine company.[332] It observed that Article 25 of the ICSID Convention did not attempt to define 'investment'[333] and that a broad definition of 'investment' was standardly adopted in BITs. It noted that ownership of shares was one of the specific examples of investment given during the negotiations of the ICSID Convention.[334] It concluded that there was no bar to jurisdiction for a minority shareholder in *CMS v Argentina*.[335]

181. In *SAUR v Argentina*[336] the tribunal focused on the wording of the definition of 'investment' in the Argentina-France BIT which explicitly included shares held by minority shareholders. An interpretation which did not give access to arbitration to a minority shareholder would not only be contrary to the wording of the treaty but also to the aim of the contracting parties, which was to extend the protection of the BIT to all kinds of shareholders.[337]

182. In *Hochtief v Argentina,* Argentina argued that Hochtief had no standing as it was attempting to bring a claim to enforce the rights of Puentes.[338] The tribunal held that Hochtief had standing to bring the action as an investor in Argentina under the Argentina-

[328] *Maffezini v Spain*, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para [65].
[329] Ibid, para [67].
[330] Ibid, para [70].
[331] *CMS Gas Transmission Company v The Republic of Argentina (CMS v Argentina)*, ICSID Case No ARB/01/8, (2003) 42 ILM 788, Decision of the Tribunal on Objections to Jurisdiction.
[332] Ibid, para [36].
[333] Ibid, para [49].
[334] Ibid, para [50].
[335] Ibid, paras [53]-[56].
[336] *SAUR International v Argentine Republic (SAUR v Argentina)*, ICSID Case No ARB/04/4, Decision of the Tribunal in relation to Objections to Jurisdiction, 27 February 2006.
[337] Ibid, paras [87]-[90].
[338] *Hochtief v Argentina*, Decision on Jurisdiction, 24 October 2011, paras [10], [112].

Germany BIT.[339] In particular, it noted the wide definition of 'investment' in the BIT, including 'shares, stocks in companies, and other forms of participation in companies.'[340] The tribunal also noted that the conditions of bidding for the project (the bridge and tollway) included operation through a local company.[341] The fact that Hochtief had assigned its rights to Puentes (as has Salini Impregilo) confirmed the view that Hochtief's investment consisted in its shares in Puentes and other forms of investment recognised under the Argentina-Germany BIT.[342]

183. In *Impregilo. v Argentina*, Argentina argued that Impregilo was bringing a derivative claim on behalf of the company in which it held shares, and that the tribunal lacked jurisdiction to hear this indirect claim.[343] The tribunal found that Impregilo's shares in the Argentine company were protected under the BIT because they were included in the BIT's definition of 'investment'.[344] If it was shown that the Argentine company was subjected to expropriation or unfair treatment in respect of the concession contract, Impregilo's rights as an investor would have been affected.[345]

184. In this case Salini Impregilo, with its consortium partners, formed an Argentine company as required by the terms of the bidding for the Concession Contract. It then transferred its rights and obligations under the Concession Contract to Puentes.[346] While Argentina argues that Salini Impregilo is not a party to the legal relationship that gave rise to the claim filed in the arbitration,[347] at this jurisdictional stage the Tribunal must have regard to the legal relationship between the parties to the arbitration.

185. Article 25 of the ICSID Convention extends the Centre's jurisdiction to any legal dispute arising directly out of an investment, between a Contracting State and a national of another

[339] Ibid, para [119].
[340] Ibid, para [115]; Argentina-Germany BIT, Art. 1(1)(b).
[341] Ibid, para [116].
[342] Ibid, para [117].
[343] *Impregilo v Argentina*, Award, 21 June 2011, para [111].
[344] Ibid, para [138]. The tribunal referred to Argentina-Italy BIT, Art. 1(1)(b) which defines 'Investment' to include 'shares of stock, interests or any other form of participation…in a company'.
[345] *Impregilo. v Argentina*, Award, 21 June 2011, para [138].
[346] Salini Impregilo, Request for Arbitration, para [20].
[347] Argentina, Reply on Jurisdiction, para [136].

Contracting State.[348] Article 25 must be read together with the terms of the BIT, with its broad definition of 'investment'.[349]

186. As in the BIT applicable in *Hochtief v Argentina* the definition of 'investment' is unequivocal in stipulating that the BIT defines investments to include 'shares of stock… including minority or indirect interests'.[350] Salini Impregilo, like Hochtief, owns 26% of the shares in Puentes (though Salini Impregilo owns 4% of those shared indirectly through Iglys). Salini Impregilo's shares in Puentes are an investment pursuant to the BIT. Salini Impregilo is an investor in Puentes, a company incorporated in Argentina and Salini Impregilo is an Italian national. It therefore has standing to bring this claim.

[348] ICSID Convention, Art. 25(1).
[349] Argentina-Italy BIT, Art. 1(b).
[350] Argentina-Italy, BIT, Art 1 (b); see *Hochtief v Argentina*, Decision on Jurisdiction, para [115].

V. DECISION

187. For the reasons set forth above, the Tribunal decides as follows:

(1) To reject the Respondent's preliminary objections to its jurisdiction and to the admissibility of the claims;

(2) To reserve all questions of costs to a later stage of the proceedings.

[signed]

Professor Kaj Hobér
Arbitrator

[signed]

Professor Jürgen Kurtz
Arbitrator

[signed]

Judge James R. Crawford
President of the Tribunal

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

WEBUILD S.P.A. (FORMERLY SALINI IMPREGILO S.P.A.)
Claimant

and

ARGENTINE REPUBLIC
Respondent

ICSID Case No. ARB/15/39

DECISION ON LIABILITY AND DIRECTIONS ON QUANTUM

Members of the Tribunal
Ms. Lucinda A. Low, President
Professor Kaj Hobér
Professor Jürgen Kurtz

Secretary of the Tribunal
Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to the Tribunal
Professor Freya Baetens

Date of dispatch to the Parties:3 March 2023

REPRESENTATION OF THE PARTIES

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Mr. David Weiss
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Dra. Mariana Mabel Lozza
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TABLE OF ABBREVIATIONS/DEFINED TERMS

Acta acuerdo	Agreement between Puentes and Argentina of 20 October 2000
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
Argentina or the Respondent	The Argentine Republic
Bidding Terms	Pliego de Bases y Condiciones del Concurso y sus Circulares
BIT or the Treaty	Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments which was signed on 22 May 1990 and entered into force on 14 October 1993
Boskalis Ballast	Boskalis-Ballast Nedam Baggeren, one of Puentes' principal subcontractors and the claimant in an ICC arbitration brought against Puentes for unpaid services that resulted in an award of approximately US$ 30 million and was the basis of a 2007 bankruptcy petition against Puentes
C-[#]	Claimant's Exhibit
Claimant's Memorial	Claimant's Memorial on the Merits dated 3 January 2017
Claimant's Reply	Claimant's Reply on the Merits dated 16 November 2018
CL-[#]	Claimant's Legal Authority
Claimant	Webuild S.p.A. (formerly known as Salini Impregilo S.p.A.)
Concession	Concession for the Project set out in the Bidding Terms
Concession Contract	Concession Contract executed between the Claimant's local Argentine incorporated

	company, Puentes del Litoral S.A., and the Argentine Republic on 28 January 1998
Consortium	The Claimant, Hochtief Aktiengesellschaft, and several Argentine construction companies
Convertibility Law	Law No. 23,928
CPI	U.S. Consumer Price Index
DCF	Discounted Cash Flow
Decision on Jurisdiction	Decision on Jurisdiction and Admissibility issued by the Arbitral Tribunal on 23 February 2018
Emergency Law	Law No. 25,561
FAL or Financial Assistance Loan	Financial Assistance Loan agreement executed 21 February 2003 and 4 March 2003
FET	Fair and Equitable Treatment
FIFA	Firm and Irrevocable Financing Agreement
First LOU	Letter of Understanding of 16 May 2006
First Transitory Agreement	Transitory Agreement of 17 December 2009
Foreign Investment Act	Decree No. 1853/93
Fourth Transitory Agreement	Transitory Agreement of 6 March 2012
Hearing on the Merits or Hearing	Hearing on the Merits held on 2 February 2021 and from 11 to 19 February 2021 by video conference
Hochtief	German international construction group Hochtief Aktiengesellschaft
Hochtief Arbitration	*Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31
Hochtief Shareholder Loans	Shareholder Loans made by Hochtief

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IDB	Inter-American Development Bank
IDB Loan or Loan	Loan agreement between Puentes and the Inter-American Development Bank of 1 August 2000
IRR	Internal Rate of Return
MEyOSP	Argentine Ministry of Economy and Public Works and Services
MFN	Most-Favored-Nation Clause
NCC	Net Capital Contributions
OCCOVI	Órgano de Control de Concesiones Viales
Project	The construction of several roads and a series of bridges and embankments, including a 608-meter long cable-stayed main bridge, which would connect the cities of Victoria and Rosario in the provinces of Entre Ríos and Santa Fe, Argentina
Puentes, PdL or Concessionaire	Puentes del Litoral S.A.
R-[#]	Respondent's Exhibit
Renegotiation Protocol	Protocol for the renegotiation of the Concession agreed on 6 April 2005
Renegotiation Report	Report on the Merits of the Memorandum of Understanding UNIREN – PUENTES DEL LITORAL SA of 19 January 2007
Request	Request for Arbitration from Salini Impregilo S.p.A. against the Argentine Republic dated 1 September 2015

Resolution 14	Resolution SOP No. 14/03
Respondent's Counter-Memorial	Respondent's Counter-Memorial on the Merits dated 21 June 2018
Respondent's Rejoinder	Respondent's Rejoinder on the Merits dated 7 March 2019
Respondent	The Argentine Republic
RL-[#]	Respondent's Legal Authority
Second LOU	Letter of Understanding of 16 May 2006
Second Transitory Agreement	Transitory Agreement of 14 June 2010
Shareholder Loans	Loans made by Claimant and Hochtief to Puentes
SOP	Secretariat of Public Works
State Reform Law	Law No. 23,696
Termination Resolution	Argentine resolution of 26 August 2014, terminating the Concession Contract
Third Transitory Agreement	Transitory Agreement of 13 October 2011
Tr. Day [#]: [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on 11 July 2016 and reconstituted on 15 July 2021
UNIREN	Unit of Renegotiation and Analysis of Public Utility Contracts
Valuation Date	Date of the Termination Resolution (31 August 2014) in Claimant's damages calculations
Webuild	Webuild S.p.A. (formerly, Salini Impregilo S.p.A.), an Italian industrial group incorporated under Italian law
Webuild Shareholder Loans	Shareholder Loans made by Webuild

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments which was signed on 22 May 1990 and entered into force on 14 October 1993 (the "**BIT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 (the "**ICSID Convention**").

2. The Claimant is Webuild S.p. A. (previously Salini Impregilo S.p.A.) ("**Webuild**" or "**the Claimant**"), an Italian industrial group specialising in large civil engineering projects, incorporated under Italian law. On 20 May 2020, the Claimant informed the Tribunal that on 4 May 2020, the shareholders of Salini Impregilo S.p.A. held an extraordinary meeting during which they passed a resolution to change the company's name to Webuild S.p.A.[1] Previously, on 26 November 2013, Salini S.p.A. had merged by incorporation into Impregilo S.p.A. On 1 January 2014, Impregilo S.p.A. changed its name to Salini Impregilo S.p.A. Depending on the date of the Parties' submissions, the names of **Salini**, **Salini Impregilo** or **Webuild** are used without distinction to designate the Claimant.

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

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i). The Tribunal also recalls that during the Hearing on the Merits, the Claimant explained that since it "needed a local presence on the ground, and Marval, O'Farrell, Mairal has been advising on other issues involving the case for some time, and is one of the most respected firms in the country, and

[1] Following several submissions from the Parties with reference to the Claimant's change of its corporate name from Salini Impregilo S.p.A. to Webuild S.p.A., on 5 November 2020, the Tribunal issued Procedural Order No. 4, in which the Tribunal concluded that it was satisfied with the documents and explanations that had been provided by the Claimant, and would not require further submissions from either Party.

we asked them to help us for the Hearing. So, they are making an appearance on the record for the first time for this Hearing."[2]

5. The Claimant and other investors formed a Consortium to participate in a bid for the construction of several roads and a series of bridges and embankments, including a 608-meter-long cable-stayed main bridge, which would connect the cities of Victoria and Rosario in the provinces of Entre Ríos and Santa Fe in Argentina (hereinafter defined as "**the Project")**. The Consortium won the bid, and on 28 January 1998, executed a Concession Contract with the Respondent for the performance of the Project.[3] A locally incorporated Argentine company, Puentes del Litoral S.A. ("**Puentes**" or the "**Concessionaire**"), was created as required by the Concession Contract and began construction in late 1998.[4] The Claimant submits that it owns 26% of Puentes' stock and confirms having invested US$ 33.2 million in the Project.[5]

6. The Claimant alleges that Argentina has failed to restore Puentes' "Concession Contract's economic balance [following the enactment of the Emergency Law,] has hindered Claimant's investment to the point of complete loss, has ended the Concession Contract by using pretextual reasons and has failed to compensate Claimant and Puentes for the adverse economic effects of its unlawful conduct".[6] As a result, the Claimant contends that the Respondent breached several provisions under the BIT, in particular: (i) the fair and equitable treatment ("**FET**") standard (Article 2.2); (ii) the non-discrimination standard (Articles 2.2 and 3); and (iii) the obligation not to unlawfully expropriate an investment (Article 5).[7] The Claimant also invokes Article 7 of the U.S.-Argentina BIT by way of the most-favored nation clause ("**MFN**") under the BIT (Article 3.1).[8]

[2] Tr. Day 1: 21:20 – 22:4.
[3] Claimant's Memorial, ¶ 47.
[4] Claimant's Memorial, ¶ 4.
[5] Claimant's Memorial, ¶ 170.
[6] Request for Arbitration, ¶ 4; Claimant's Memorial, ¶ 168. Tr. Day 2: 142:18-22, 150:5-14.
[7] Claimant's Memorial, ¶ 177.
[8] Claimant's Memorial, ¶¶ 161-162. The Request for Arbitration identified a larger number of claims than were ultimately set forth in the Memorial (¶ 10): "Argentina has breached at least the following obligations and standards of conduct with respect to Salini Impregilo's investment: Investments by investors of one of the Contracting Parties shall not be nationalized, expropriated, seized or otherwise appropriated, either directly or indirectly, through

7. The Respondent argues that its "actions showed full support and commitment to the works for the Rosario-Victoria physical connection […]. In spite of Concessionaire's breaches, the State maintained the Concession, until the time where PdL's shareholders decided to terminate such concession upon dissolution of Concessionaire. The abrupt alteration in the economic and financial balance of the Contract was a result of financing problems faced by Concessionaire and its shareholders, not attributable to the State, prior to the outbreak of the crisis in late 2001 and the adoption by the State of emergency measures to counteract such crisis […]. Also, the financing difficulties faced by Concessionaire and its shareholders, prior to the crisis and the emergency measures, were the factor leading PdL to file for insolvency proceedings in order to avoid being adjudged bankrupt as petitioned by its subcontractors".[9] As a result, the Respondent asks the Tribunal to reject the Claimant's claims.

II. PROCEDURAL HISTORY

A. REGISTRATION OF THE REQUEST

8. On 1 September 2015, ICSID received a request for arbitration of the same date from the Claimant against the Respondent (the "**Request**").

9. On 17 September 2015, the Acting Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the

measures having an equivalent effect in the territory of the other Party, unless the following conditions are complied with: the measures are taken for a public purpose, in the national interest or for security; they are taken in accordance with due process of law; they are non-discriminatory or not contrary to any commitments undertaken; and they are accompanied by provisions for the payment of prompt, adequate and effective compensation; Each Contracting Party shall always accord fair and equitable treatment to the investments made by the investors of the other Contracting Party; Each Party shall observe any obligations it may have entered into with regard to investments; Neither Party shall impair by unjustified or discriminatory measures, the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other Contracting Party's investors; [SEP] Each Contracting Party shall, in its own territory, accord to investments made by investors of the other Contracting Party, to the returns and activities related thereto and to any other matter regulated by this Agreement, a treatment not less favorable than that accorded to its own investors or to investors of third countries; Investment shall at all times ... enjoy full protection and security and shall in no case be accorded treatment less than that required by international law; and Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations." (footnotes omitted)

[9] Respondent's Counter-Memorial, ¶ 8.

registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

B. THE ARBITRAL TRIBUNAL

10. The Tribunal was originally constituted on 11 July 2016 in accordance with Article 32(7)(b) of the ICSID Convention, and was composed as follows:

    (i) Professor Kaj Hobér, a national of Sweden, appointed by the Claimant;

    (ii) Professor Jürgen Kurtz, a national of Australia and Germany, appointed by the Respondent; and

    (iii) Judge James R. Crawford, a national of Australia, appointed by his co-arbitrators in consultation with the Parties.

11. On 31 May 2021, the Parties were informed that Judge James R. Crawford had passed away on that day. In accordance with ICSID Arbitration Rule 10(2), the proceeding was suspended until the vacancy resulting from Judge Crawford's passing had been filled. The Parties were also informed that pursuant to ICSID Arbitration Rule 11(1), the vacancy should be promptly filled by the same method by which Judge Crawford's appointment had been made.

12. On 8 July 2021, Ms. Lucinda A. Low, a national of the United States, accepted her appointment as President of the Tribunal by the co-arbitrators in consultation with the Parties.

13. On 15 July 2021, the Tribunal was reconstituted with Ms. Lucinda A. Low (U.S.), as President, appointed by the co-arbitrators, in consultation with the Parties; Professor Kaj Hobér (Swedish), as co-arbitrator, appointed by the Claimant; and Professor Jürgen Kurtz (Australian/German), as co-arbitrator, appointed by the Respondent. As required under

ICSID Arbitration Rule 6(2), Ms. Low provided a declaration and a statement, which was circulated to the Parties and the co-arbitrators.

C. THE DECISION ON JURISDICTION AND ADMISSIBILITY

14. On 23 February 2018, the Tribunal issued a Decision on Jurisdiction and Admissibility (the "**Decision on Jurisdiction**"). The Tribunal refers to section III of the Decision on Jurisdiction for the prior procedural history.

15. The Respondent raised three preliminary objections to jurisdiction and, additionally, contended that the Claimant lacked standing. Each objection will be addressed here, as a way of summary.

16. Extinctive prescription was the first preliminary objection raised by Argentina. In the Respondent's view, the Claimant's claims were a matter to be dealt with under Argentine domestic law as provided for in Article 8.7 of the BIT. Since such claims referred to measures taken over a decade ago, they were time-barred.[10] On the other hand, the Claimant contended that, to the extent that extinctive prescription existed under international law, Argentina had failed to prove its four cumulative elements.[11]

17. The Tribunal held that the Claimant's international law claims were not to be decided under Argentine domestic law, and it further made a distinction between the limitation of actions due to the passage of time and extinctive prescription. Under international law, the BIT and the ICSID Convention were silent in regard to the time limits for bringing a claim. With respect to extinctive prescription, the Tribunal concluded that the delay in bringing the claim was not attributable to the Claimant and that it was a matter of admissibility rather than jurisdiction.[12] The Respondent's first preliminary objection thus failed.

18. The second jurisdictional objection raised by the Respondent was the alleged failure by the Claimant to comply with the 18-month local litigation requirement under Article 8 of the

[10] Decision on Jurisdiction, ¶¶ 50, 55, 58.
[11] *Ibid*., ¶ 68.
[12] *Ibid*., ¶¶ 82-94.

BIT. Both Parties agreed that the BIT required the foreign investors to submit any dispute to the competent administrative or judicial local courts before resorting to international arbitration. Puentes had filed an administrative complaint on 11 June 2013 and had initiated local court proceedings in Argentina on 30 May 2014. However, the Respondent contended that Puentes' claims were different than those presented by the Claimant before this Arbitral Tribunal,[13] or alternatively, that the Claimant had failed to abandon the domestic proceedings as required by Article 8.4 of the BIT.[14] The Claimant refuted the Respondent's position and held that Puentes' proceedings in Argentina had satisfied the local litigation requirement as they dealt with the same subject matter.[15]

19. The Tribunal, after careful consideration of each of the components of Article 8 of the BIT, concluded: first, that the "substantive underpinnings" of the dispute had been correctly submitted to the local jurisdiction as required by Articles 8.2 and 8.3 of the BIT;[16] and second, that as to the requirement to abandon domestic proceedings under Article 8.4 of the BIT, the Claimant was not in a position to "withdraw proceedings to which it was not a party".[17] Therefore, the Respondent's second jurisdictional objection equally failed. Moreover, in the light of these conclusions, the Tribunal found it had "no need to consider the parties' arguments with respect to the MFN and *res judicata* issues. Nor is it necessary to address Salini Impregilo's arguments with respect to futility and estoppel."[18]

20. Thirdly, the Respondent requested that if the Tribunal were to assert its jurisdiction, it should apply the *forum non conveniens* doctrine as the Argentine courts were the most appropriate forum to address the Claimant's contractual claims.[19] The Claimant contended that its claims referred to breaches of the BIT by the Respondent and, as such, should not be resolved by such forum.[20] The Tribunal concluded that the Claimant never "committed

[13] *Ibid*., ¶ 103.
[14] *Ibid*., ¶ 100.
[15] *Ibid*., ¶ 106.
[16] *Ibid*., ¶ 133.
[17] *Ibid*., ¶ 148.
[18] *Ibid*., ¶ 150.
[19] *Ibid*., ¶¶ 152, 155.
[20] *Ibid*., ¶ 159.

to bringing its BIT claims…to the Argentine courts".[21] In conclusion, Argentina's third jurisdictional objection failed.

21. Finally, the Respondent raised the issue of the Claimant's lack of standing. The Respondent contended that the Claimant gave up its rights under the Concession Contract by transferring them to Puentes, and by ceasing to be a party was precluded from bringing a claim before the Tribunal.[22] The Claimant argued that it was bringing a claim as an investor in relation to its investment, Puentes, under the BIT. The Tribunal agreed with the Claimant's position. Salini/Webuild is an Italian investor whose 26% stock ownership in Puentes qualified as an investment under the provisions of Article 25 of the ICSID Convention.[23]

22. In conclusion, in its Decision on Jurisdiction, the Tribunal decided:

> *(1) To reject the Respondent's preliminary objections to its jurisdiction and to the admissibility of the claims;*
>
> *(2) To reserve all questions of costs to a later stage of the proceedings.*[24]

D. PROCEDURAL HISTORY OF THE MERITS PHASE

23. On 3 January 2017, the Claimant filed its Memorial on the Merits accompanied by the witness statements of Messrs. Guillermo Osvaldo Díaz, Martin Lommatzsch and Gabriel Omar Hernández, as well as the damages expert report of Compass Lexecon ("**Claimant's Memorial**").

24. On 18 April 2018, after previous exchanges between the Parties and the Tribunal, the Tribunal confirmed the procedural calendar and the hearing reserved dates for the merits phase of the proceedings.

[21] *Ibid.*, ¶ 173.
[22] *Ibid.*, ¶ 175.
[23] *Ibid.*, ¶¶ 185-186.
[24] *Ibid.*, ¶ 187.

25. On 21 June 2018, the Respondent filed its Counter-Memorial on the Merits accompanied by the witness statements of Messrs. Martín Bes, Eduardo Ratti and Alfredo Eduardo Villaggi, as well as the valuation expert report prepared by Ms. Melani Machinea and Mr. Ernesto Schargrodsky ("**Respondent's Counter-Memorial**").

26. On 31 October 2018, the Claimant informed the Tribunal of the Parties' agreement to extend the procedural calendar for the submission of the subsequent pleadings. After receiving the Respondent's confirmation, the Tribunal granted the Parties' extension.

27. On 16 November 2018, the Claimant filed its Reply on the Merits accompanied by the second witness statements of Messrs. Gabriel Omar Hernández and Martin Lommatzsch, the third witness statement of Mr. Guillermo Osvaldo Díaz, the expert report of Dr. Horacio Liendo, and the expert report of Berkeley Research Group ("**Claimant's Reply**").

28. On 7 March 2019, the Respondent filed its Rejoinder on the Merits accompanied by the second witness statements of Messrs. Martín Bes and Alfredo Eduardo Villaggi, the witness statements of Ms. María Paulina Segovia and Mr. Juan Carlos Isi, the second valuation expert report prepared by Ms. Melani Machinea and Mr. Ernesto Schargrodsky, the expert report of Mr. Julio Pablo Comadira, and the expert report of Mr. Pablo Gerchunoff ("**Respondent's Rejoinder**").

29. On 14 March 2019, the Tribunal confirmed that the Hearing on the Merits would be held in Washington, D.C. from 8 July 2019 to 14 July 2019 (excluding 13 July 2019), as agreed by the Parties.

30. On 11 June 2019, the Tribunal decided to postpone the Hearing on the Merits for reasons explained to the Parties; and announced that it would propose new dates for the Parties to hold the Hearing, ideally during the second half of 2019 at The Hague or elsewhere in Europe.

31. The Hearing on the Merits was subsequently rescheduled to be held from 17 February to 23 February 2020, at the ICC Paris Centre. On 18 September 2019, the venue was changed to The Hague Hearing Centre.

32. On 18 November 2019, the Tribunal informed the Parties that, due to an unforeseen scheduling conflict, the Hearing on the Merits would have to be rescheduled.

33. On 6 December 2019, the President of the Tribunal held a conference call with the Parties regarding the rescheduling of the Hearing on the Merits.

34. Following several exchanges between the Parties and the Tribunal, on 8 January 2020, the Tribunal confirmed that the Hearing on the Merits would be held from 19 to 25 October (excluding Saturday, 24 October) 2020 at The Hague Hearing Centre.

35. Between 24 June and 15 July 2020, the Parties submitted several communications to the Tribunal concerning the implications of the Covid-19 pandemic for the Hearing on the Merits in the present case.

36. On 17 July 2020, the Tribunal, after considering the arguments advanced by both Parties, decided to postpone the Hearing on the Merits until February 2021, and proposed that the Hearing be held remotely on a secure platform. The Tribunal Members could be available on 9-21 February 2021, and invited the Parties to confirm their availability (including witnesses/experts) during the entire period.

37. On 18 August 2020, following consultation with the Parties, the Tribunal issued Procedural Order No. 3, confirming among others, its decisions: (i) to postpone the Hearing on the Merits that was scheduled to be held in October 2020 at The Hague; (ii) that the rescheduled Hearing would be held remotely; and (iii) that in due course, the Tribunal, in consultation with the Parties, would fix the date for the Organizational Meeting.

38. Following several exchanges between the Parties and the Tribunal, on 9 September 2020, the Tribunal confirmed that the Hearing on the Merits would be held remotely, with (i) a seven-day hearing on 11-17 February 2021 and (ii) two reserved days, 18 and 19 February 2021. Given that the Respondent's witness, Ms. Paulina Segovia, would not be available during those dates, her examination was subsequently scheduled to take place on 2 February 2021.

39. On 6 December 2020, the Tribunal circulated, for the Parties' comments, draft Procedural Order No. 5 concerning the organization of the Hearing on the Merits.

40. On 6 January 2021, following consultation with the Parties, the Tribunal appointed Professor Freya Baetens as Assistant to the Tribunal in this case. On 15 July 2021, the Parties were informed that the Tribunal had re-confirmed her appointment as Assistant to the reconstituted Tribunal.

41. On 18 January 2021, the Tribunal, after considering the Parties' positions on the various items, issued Procedural Order No. 5, with the procedural rules that the Parties had agreed upon and/or the Tribunal had determined would govern the conduct of the Hearing on the Merits.

E. HEARING ON THE MERITS

42. The Hearing on the Merits was held on 2 February 2021 and from 11 February to 19 February 2021 by video conference ("**the Hearing**"). The following persons participated in the Hearing:

Tribunal:

Judge James R. Crawford	President
Professor Kaj Hobér	Arbitrator
Professor Jürgen Kurtz	Arbitrator

ICSID Secretariat:

Ms. Mercedes Cordido-F. de Kurowski	Secretary of the Tribunal
Ms. Marisela Vázquez	Paralegal

Assistant to the Tribunal:
Professor Freya Baetens

***For the Claimant*:**

Counsel:

Mr. Doak Bishop	King & Spalding
Mr. Roberto Aguirre Luzi	King & Spalding
Mr. Craig Miles	King & Spalding
Mr. David Weiss	King & Spalding
Ms. Eldy Roché	King & Spalding

Mr. Eduardo Bruera	King & Spalding
Mr. Arturo Oropeza	King & Spalding
Mr. Alonso Gerbaud	King & Spalding
Ms. Pam Anders	King & Spalding
Mr. Giles Kwei	King & Spalding
Mr. Enrique V. Veramendi	Marval, O'Farrell, Mairal
Mr. Héctor Mairal	Marval, O'Farrell, Mairal
Mr. Francisco J. Sama	Marval, O'Farrell, Mairal

Party Representatives:

Mr. Guillermo Díaz	Party representative and witness
Ms. Marcela Gabrielli	Party representative
Ms. María Irene Perruccio	Party representative

Witnesses:

Mr. Martin Lommatzsch
Mr. Gabriel Hernández

Experts:

Dr. Horacio Liendo	Liendo & Asociados
Ms. María Laura Deluca (Support)	Liendo & Asociados
Mr. Santiago Dellepieane	BRG
Ms. Daniela Bambaci	BRG
Mr. Ian Friser-Frederiksen (Support)	BRG
Ms. Agustina Gallo (Support)	BRG
Mr. Agustín Paul (Support)	BRG
Ms. Angie Ocampo Giraldo (Support)	BRG

***For the Respondent*:**

Counsel:

Mr. Carlos Alberto Zannini	Procuración del Tesoro de la Nación
Mr. Sebastián Soler	Procuración del Tesoro de la Nación
Ms. Mariana Lozza	Procuración del Tesoro de la Nación
Ms. M. Alejandra Etchegorry	Procuración del Tesoro de la Nación
Ms. Inda Valeria Etchechoury	Procuración del Tesoro de la Nación
Ms. M. Soledad Romero Caporale	Procuración del Tesoro de la Nación
Ms. Cintia Yaryura	Procuración del Tesoro de la Nación
Ms. Natalia Paola Guillén	Procuración del Tesoro de la Nación
Mr. Julián Rivainera	Procuración del Tesoro de la Nación
Ms. Adriana Cusmano	Procuración del Tesoro de la Nación
Mr. Emiliano Leanza	Procuración del Tesoro de la Nación
Mr. Nicolás Duhalde	Procuración del Tesoro de la Nación
Mr. Braian Joachim	Procuración del Tesoro de la Nación
Mr. Guillermo Olivares	Procuración del Tesoro de la Nación

Witnesses:
Ms. Paulina Segovia
Mr. Martín Bes
Mr. Alfredo Villaggi

Experts:
Mr. Julio Pablo Comadira
Ms. Melani Machinea — UTDT
Mr. Ernesto Schargrodsky — UTDT
Mr. Juan Napoli (Support) — UTDT

Court Reporters:
Ms. Dawn Larson — WW Reporting – English
Ms. Elizabeth Cicoria — D-R Esteno – Spanish
Mr. Paul Pelissier — D-R Esteno – Spanish
Ms. Marta Rinaldi — D-R Esteno – Spanish

Interpreters:
Ms. Silvia Colla
Mr. Charles Roberts
Mr. Daniel Giglio

43. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Mr. Martin Llommatzch
Mr. Guillermo Díaz
Dr. Horacio Liendo
Mr. Santiago Dellepieane
Ms. Daniela Bambaci

On behalf of the Respondent:

Ms. Paulina Segovia
Mr. Martín Bes
Mr. Alfredo Villaggi
Mr. Julio P. Comadira
Ms. Melani Machinea
Mr. Ernesto Schargrodsky

44. The Parties filed their statements of costs on 12 March 2021.

45. As previously indicated, following the passing away of Judge James R. Crawford, pursuant to ICSID Arbitration Rule 11(1), the co-arbitrators, in consultation with the Parties, appointed Ms. Lucinda A. Low, a national of the United States, as President of the Tribunal, and the Tribunal was reconstituted on 15 July 2021.

46. On 26 January 2022, the Tribunal requested either of the Parties to provide the Tribunal with an electronic copy in legible form of Annexes II (Financial Plan) and V (Financial Assistance) to Exhibit C-0171 ["*First memorandum of Understanding, May 16, 2006 (attached to Letter from Puentes del Litoral to UNIREN, May 16, 2006)*"].

47. On 27 January 2022, the Claimant provided the documents requested by the Tribunal on 26 January 2022. The Claimant also noted that Annex II had been reproduced in Excel Format as Exhibit BD-35 to Ms. Daniela M. Bambaci and Mr. Santiago Dellepiane's Assessment of Damages to Salini Impregilo S.p.A.'s Investments in Argentina, dated 2 January 2017, which they also attached for ease of reference. The Claimant directed the Tribunal in this regard to the hearing transcripts.[25]

48. By communication of 1 February 2022, the Respondent provided the Tribunal with a clarification regarding the Claimant's communication of 27 January 2022. The Respondent submitted that Exhibit BD-35 is not a reproduction of the information contained in the 2006 *Acta Acuerdo* and its Annexes, but that it contains additional information. As a result, the Respondent requested the Tribunal to take this into account when considering Exhibit BD-35.

49. On 2 February 2022, the Respondent informed the Tribunal that "following the discontinuance of the proceeding for partial annulment of the award requested by Hochtief Aktiengesellschaft ("**Hochtief**"), the award became final and the Argentine Republic fulfilled the obligations thereunder".

[25] Tr. Day 9: 1175:11-1176:10.

50. On 23 April 2022, the Secretary of the Tribunal, on instructions of the President of the Tribunal, provided the Parties with an update on the status of the Tribunal's work.

51. On 28 June 2022, the Tribunal requested the Parties' authorization for the Assistant to the Tribunal to be reimbursed for travel and other expenses within the limits prescribed by the ICSID Administrative and Financial Regulation, which the Parties did on 30 June 2022.

III. FACTUAL BACKGROUND

52. Based on its consideration of all the evidence produced in this case, the Tribunal provides below a non-exhaustive summary of the factual background to the dispute.

A. ARGENTINA'S PRIVATIZATION REFORMS

53. In the 1990s, with the aim of attracting foreign investment and addressing its hyperinflation, Argentina developed a set of privatization reforms and initiatives.

54. The most important reforms were the enactment of Law No. 23,928 (the "**Convertibility Law**"), Decree No. 1853/93 (the "**Foreign Investment Act**") and Law No. 23,696 (the "**State Reform Law**"). Pursuant to the Convertibility Law, the Argentine peso (AR$) was pegged to the United States Dollar (US$) at a rate of US$ 1 to AR$ 1. The Convertibility Law allowed contracts to be denominated in US$.[26] According to the Claimant, the fact that a creditor would be paid in US$ and the risk of a declining AR$ would be shifted to the contractual debtor made the Convertibility Law an attractive incentive for foreign investment.[27] For its part, the Foreign Investment Act disposed of the obligation on foreign investors to register or seek governmental approval prior to investing in Argentina, and permitted them to repatriate capital and send earnings abroad.[28]

55. According to the Claimant, these reforms were advertized in industry publications with the aim of fostering foreign investment and were promoted by State officials. For instance, in

[26] **Exhibit C-0005**, Law No. 23, 928, Convertibility Law.
[27] Claimant's Memorial, ¶ 24.
[28] **Exhibit C-0064**, National Decree No. 1853-1993.

November 1993 the Argentine Undersecretariat of Investment published a compendium for foreign investors entitled "Argentina, a Growing Country", where the new investor-friendly reforms were advertised.[29]

56. At the same time, Argentina negotiated several bilateral investment treaties. The first one to be signed was the "Agreement between the Argentine Republic and the Italian Republic on the Promotion and Protection of Investments" on 22 May 1990 (the "**BIT**" or "**Treaty**"), the Treaty at issue in these proceedings.[30] The signature of these bilateral investment treaties was followed by an amendment to the Argentine Constitution which placed them at a higher rank than Argentina's internal law.[31]

B. THE BIDDING PROCESS AND THE BRIDGE-AND-TOLL-ROAD CONCESSION

57. The Project was proposed with the aim of providing a better connection between the provinces of Entre Ríos and Santa Fe.[32] It was part of a larger goal of improving the East-West connection that joins Brazil, Uruguay, Argentina and Chile, which would allow more efficient exchanges between these countries and greater access to the ports of the Atlantic and Pacific coasts.[33]

(1) The Bidding Process

58. On 6 December 1995, Argentina started the bidding process for the Project by enacting Presidential Decree No. 855/95. The Decree appointed the Argentine Ministry of Economy and Public Works and Services ("**MEyOSP**") through the Secretariat of Public Works ("**SOP**") as the enforcement authority.[34]

[29] Claimant's Memorial, ¶¶ 27-29.
[30] **Exhibit C-0001**, Agreement between the Argentine Republic and the Italian Republic on the Promotion and Protection of Investments.
[31] **Exhibit C-0242**, Law No. 24,430, Argentina Constitution, Art. 75(22), 10 January 1995.
[32] **Exhibit C-0006**, National Decree No. 855/1995, 12 June 1995, Fourth Whereas; **Exhibit C-0076**, Bidding Terms, July 1997, Annex I, Art. 2.
[33] **Exhibit C-0076**, Bidding Terms, July 1997, Annex I: Project Description, Section 1.
[34] **Exhibit C-0006**, Presidential Decree No. 855/95, Art. 6.

59. The bidding process opened on 15 July 1997 with Argentina's enactment of the *Pliego de Bases y Condiciones del Concurso y sus Circulares* (the "**Bidding Terms**").[35]

60. The concession for the Project set forth in the bidding documents (the "**Concession**") would operate for 25 years from the date on which the winner of the bid took possession of the Concession. It was a subsidized Concession, meaning that a substantial portion of the construction costs would be funded by the State. There would be no guaranteed minimum revenues or traffic volume and the Concession would be for all purposes a risk contract, except for the subsidy to be granted to the Concessionaire. The Concession would be awarded to the bidder requesting the lowest subsidy.[36]

61. Together with the German international construction group Hochtief and several Argentine construction companies, the Claimant formed a consortium (the "**Consortium**") and submitted its bid. As part of its offer, the Consortium presented a Business Plan estimating costs and traffic, as well as a proposal for a subsidy based on the promised toll rates, and which estimated initial construction costs at US$ 350,202,193 and operating expenses over a 21-year period at US$ 410,147,286. According to the Concession's Business Plan, the projected internal rate of return ("**IRR**") amounted to 12.94%.[37]

62. Argentina notes that there were two bidding processes, and that in the second bidding process the participating consortia were requested to improve their bids.[38]

63. By Resolution MEyOSP No. 1039 of 13 November 1997, the Consortium was declared the successful bidder.[39]

(2) The Concession Contract

64. On 28 January 1998, Argentina and the Consortium executed the 25-year Concession Contract, which was approved by Decree No. 581/1998 on 14 May 1998.[40] According to

[35] **Exhibit C-0076**, Bidding Terms, July 1997, Annex I: Project Description.
[36] **Exhibit C-0007**, National Decree No. 650/1997, 15 July 1997.
[37] **Exhibit C-0079**, Consortium's Bid.
[38] Respondent's Counter-Memorial, ¶¶ 11-34.
[39] **Exhibit C-0328**, Resolution MEOySP No. 1309/97, 13 November 1997, section 2.
[40] **Exhibits RA 111 / C-0010**, Decree No. 581/98, 14 May 1998, Arts. 1-2.

the Claimant, the Bid and the Business Plan submitted by the Consortium are integrated into the Concession Contract as binding documents.[41]

65. As required under the Contract, the Consortium incorporated Puentes on 1 April 1998.[42] The shareholding structure of Puentes is or was during the relevant period of time divided among Salini S.p.A. (22% held directly and 4% held indirectly via Iglys S.A. for a total of 26%), Hochtief (26%), Techint Compañía Técnica Internacional S.A.C.I. (8%), Benito Roggio e Hijos S.A. (20%), Sideco Americana S.A. (19%) and IECSA S.A. (1%). Sideco and IECSA joined after the Consortium was constituted.[43]

66. On 17 June 1998, all rights and obligations arising from the Concession Contract were assigned by the Consortium to Puentes.[44]

67. Under the Concession Contract, Puentes' equity had to be at least US$ 30 million. The Consortium was required to contribute US$ 7.5 million initially, with the remainder to be contributed within two years.

68. On 14 September 1998, Puentes took over the Project by signing the *Acta de Toma de Posesión*.[45]

69. Under the Concession Contract, Puentes was to undertake construction and operation of the bridges and roads. A few months after construction commenced, the Provinces of Santa Fe and Entre Ríos asked Puentes to add a fourth lane to the main bridge, which entailed a review of the Project's construction costs. The expansion was approved by Argentina's Secretary of Public Works and the State's transitory commission overseeing the Project. The construction costs were updated to US$ 384,702,193 and Argentina agreed to pay for the added costs.[46]

[41] Claimant's Memorial, ¶ 47.
[42] **Exhibit C-0008**, Concession Contract; **Exhibit C-0011**, Puentes' Certificate of Incorporation and Amendments.
[43] Claimant's Memorial, ¶ 53; Respondent's Counter-Memorial, ¶ 33.
[44] **Exhibit RA-004**, Deed of Transfer of Rights and Duties.
[45] **Exhibit C-0126**, Certificate of Puentes Taking Possession of the Concession.
[46] Claimant's Memorial, ¶ 54; Respondent's Counter-Memorial, ¶ 41.

70. Argentina notes that Puentes had to comply with two obligations within 90 days of the Contract's execution, namely: (i) to submit Firm and Irrevocable Financing Agreements ("**FIFAs**"), evidencing that it had the necessary funds to perform its contractual obligations; and (ii) the filing of a stand-by letter of credit.[47] This submission deadline was set for 30 October 1998.[48]

71. On 15 October 1998, the Claimant secured a letter of credit in favor of Argentina in the amount of US$ 143.1 million.[49]

72. On 29 January 1999, the State granted an extension to the Concessionaire until 28 February 1999 to submit the FIFAs and provisionally accepted the commitment letters from the shareholders.[50]

73. On 9 December 1999, upon expiration of the extension granted by Resolution MEyOSP No. 86, the State demanded the submission of the FIFAs within 15 business days.[51]

(3) Funding of the Project

74. The main source of funding for the Project was the subsidy to be paid by the Argentine Government in the amount of US$ 207,100,000. The remaining two sources were the US$ 30 million in equity to be contributed by the Consortium and the Consortium's own funding after the subsidy was paid in full, including third-party loans.[52]

75. For payment of the subsidy, Puentes had to submit a monthly certificate of work progress specifying the incurred costs, the works performed and a total amount due for that certificate. Once certified, Argentina was to disburse payment.[53]

[47] Respondent's Counter-Memorial, ¶ 42; **Exhibit C-0008**, Concession Contract, Section 22.1.
[48] **Exhibit RA-066**, Record of Transfer of Possession, item 3, 14 September 1999.
[49] **Exhibit C-0083**, Letter from Puentes del Litoral to the Coordinator of the Transitory Commission of the Rosario-Victoria Highway, 30 October 1998.
[50] **Exhibit RA-112**, Resolution MEyOSP No. 86, 29 January 1999, recits.
[51] **Exhibit RA-234**, Letter from Interim Commission ROS-VOC No. 530/99, 9 December 1999 (free translation).
[52] **Exhibit C-0008**, Concession Contract, Sections 5, 7.
[53] **Exhibit C-0008(A)**, Annex I, Final Technical Document, Section 36.

76. The Concession Contract also required a performance guarantee and a bond. The performance guarantee would remain in place until a year after the Project was opened to the public. Its value would be equal to the difference between the construction costs as estimated in the Consortium's bid and the subsidy, plus twenty percent. Argentina had to approve the type and wording of the guarantee. The posting of a US$ 1 million bond was required before the Project opened to traffic to ensure the maintenance and operation of the Concession – this requirement was duly fulfilled.[54]

77. It is undisputed between the Parties that Argentina was delayed in some subsidy disbursements. According to the Respondent, the delay resulted from Puentes' breach of its obligation to submit FIFAs and from Puentes' delay in submitting work certificates.[55] On 4 July 2000, Argentina temporarily suspended disbursement of the subsidy through Resolution SOP No. 723/00.[56]

78. On 1 August 2000, Puentes and the Inter-American Development Bank (the "**IDB**") concluded a US$ 73,751,000 loan agreement (the "**IDB Loan**" or the "**Loan**").[57] The first Loan disbursement was scheduled for 1 March 2001. Disbursement was subject to certain conditions precedent.

79. The conditions required by the IDB under the Loan as well as the reasons for its non-disbursement by the IDB are disputed between the Parties. According to the Claimant, the IDB's refusal to disburse was caused by Argentina's failure to pay 90% of the Subsidy by 1 March 2001 and Argentina's then-looming economic crisis.[58] For its part, the Respondent contends that the IDB Loan was not a FIFA as required by the Concession Contract, and that a fundamental reason for the IDB's failure to disburse the Loan was the negative result

[54] **Exhibit C-0008**, Concession Contract, Section 8.
[55] Respondent's Rejoinder, ¶¶ 177-180.
[56] **Exhibit RA-068**, Resolution SOP No. 723/00.
[57] **Exhibit C-0013**, Loan Agreement between IDB and Puentes, 1 Aug. 2000.
[58] Claimant's Reply, ¶ 24.

of an updated traffic study of June 2001 that the Consortium had commissioned at the IDB's request.[59]

80. On 20 October 2000, Puentes and Argentina entered into an agreement, the nature of which is disputed between the Parties ("***Acta Acuerdo***").[60]

81. The Claimant contends that *Acta Acuerdo* was a settlement agreement concluded between the Parties to prevent the IDB from refusing to disburse the Loan. According to the Claimant, the *Acta Acuerdo* (i) included the Parties' understanding that timely payment of the subsidy was an essential condition for the disbursement of the Loan, (ii) recognized that Puentes had complied with its contractual requirements to ensure sufficient funding for the Project, (iii) bound Argentina to make subsidy payments in the total amount of US$ 29,989,274 by 15 December 2000, and (iv) obliged Argentina to make future payments according to a payment schedule. Under the *Acta Acuerdo*, Puentes would dismiss all administrative appeals it had filed against Argentina, open the Project to traffic by 15 September 2002 and stop the accrual of interest on past due payments.

82. In the Respondent's view, the *Acta Acuerdo* (i) never amended the Concession Contract, (ii) was not backed by any precedents nor ratified by any resolution or decree, and (iii) was contingent upon Puentes' commitment to invest all the proceeds of the IDB Loan in the works and increase its capital stock, which did not occur.[61]

83. On 26 February 2001, Puentes informed the IDB that Argentina had not paid 90% of the subsidy as required by the conditions precedent to Loan disbursement. Puentes requested a waiver to meet this condition by September 2001. According to the Claimant, the IDB did not respond.[62]

[59] Respondent's Counter-Memorial, ¶ 50.
[60] **Exhibit C-0086**, Agreement between Puentes and Argentina (*Acta Acuerdo*).
[61] Respondent's Rejoinder, ¶ 80.
[62] **Exhibit C-0089**, Letter from Puentes to the IDB, 26 February 2001; Claimant's Memorial, ¶ 58.

84. By May 2001, Argentina had paid 90% of the subsidy and Puentes, its shareholders and Argentina engaged in communications and meetings with the IDB urging it to disburse the first part of the Loan.[63]

85. According to the Claimant, one of the IDB Loan's conditions precedent obliged Puentes' shareholders to increase their equity by US$ 13,650,000 prior to the first disbursement. The Claimant asserts that, in December 2000, the shareholders were forced to inject this equity to cover the deficit caused by Argentina's late payments.[64]

86. On 25 July 2001, Puentes wrote to Argentina asking it to rebalance the Concession.[65] The reasons for the request are disputed between the Parties. While the Claimant asserts that it requested the rebalancing due to Argentina's changed economic circumstances,[66] the Respondent submits that Puentes' request was motivated by its own financial situation.[67]

87. The Claimant asserts that it decided to provide more funding in the form of inter-company loans to ensure continuation of the construction works. According to the Claimant, from September to December 2001, it loaned Puentes US$ 6,481,667.00.[68]

C. ARGENTINA'S ECONOMIC CRISIS

(1) The Enactment of the Emergency Law

88. In Argentina's view, its economy began to slow down at the end of 1998 due to the drying up of capital flows to emerging markets. The recession prolonged and deepened into the worst economic and social crisis that Argentina had ever faced, affecting severely the

[63] Claimant's Memorial, ¶ 58; Respondent's Counter-Memorial, ¶¶ 126-129.
[64] Claimant's Memorial, ¶ 57.
[65] **Exhibit R-071**, Letter from Puentes to the Chief of Cabinet, 25 July 2001.
[66] Claimant's Reply, ¶ 40.
[67] Respondent's Counter-Memorial, ¶¶ 122-124.
[68] **Exhibit C-0095**, Loan Agreement between Salini Impregilo S.p.A. and Puentes del Litoral (for US$ 880,000), 8 December 2001; **Exhibit C-0096**, Loan Agreement between Salini Impregilo S.p.A. and Puentes del Litoral (for US$ 2,691,000), 8 December 2001; **Exhibit C-0097**, Loan Agreement between Salini Impregilo S.p.A. and Puentes del Litoral (for US$ 1,010,667), 8 December 2001; **Exhibit C-0098.**

provinces of Entre Ríos and Santa Fe. The Respondent further states that the unsustainability of the convertibility regime became apparent by the end of 2001.[69]

89. On 6 January 2002, Argentina enacted Law No. 25,561 (the "**Emergency Law**"), which declared a public emergency in its economic, financial, and currency exchange sectors. The Emergency Law (i) repealed the AR$ 1 to US$ 1 ratio established by the Convertibility Law, (ii) converted public-contract obligations denominated in U.S. Dollars into Argentine pesos at the rate AR$ 1 to US$ 1, (iii) set aside the contractual indexation clauses based on price indices of other countries; and (iv) ordered the Argentine Government to renegotiate contracts affected by the Emergency Law within 180 days.[70]

90. The Parties do not dispute that the Emergency Law affected the Concession Contract. Puentes would no longer be entitled to collect the toll rate at the actual currency exchange rate and future toll rates would no longer be adjusted to the U.S. Consumer Price Index.

91. On 25 June 2002, Argentina enacted Decree No. 1090/2002, dictating that all claims against the Government for breach of contract had to be resolved within the renegotiation process and that any company filing a claim for breach of contract against Argentina after the enactment of the Decree would be automatically excluded from the renegotiation process.[71]

92. According to the Claimant, due to the enactment of the Emergency Law, the IDB determined that it would re-evaluate the Loan after Argentina and Puentes had renegotiated the Concession Contract. On 28 June 2002, the IDB terminated the Loan Agreement. The Claimant submits the IDB did so because of the economic crisis, and the enactment of the Emergency Law and its effect on the tariff structure.[72]

[69] Respondent's Counter-Memorial, ¶¶ 195-207.
[70] **Exhibit C-0014**, the Emergency Law.
[71] **Exhibit C-0108**, Decree No. 1090/2002, 25 June 2002, Art. 1.
[72] Claimant's Memorial, ¶ 66.

(2) Shareholder Loans and the Financial Assistance Loan

93. According to the Claimant, on 17 January 2002, Salini and Hochtief loaned Puentes US$ 5,500,000 and US$ 4,370,000, respectively, to enable Puentes to finalize the nearly complete main bridge, which was finished in its entirety on 5 February 2002.[73] (In this Decision, loans from Salini and Hochtief will be referred to collectively as the **"Shareholder Loans";** Shareholder Loans made by Salini will be referred to as the **"Webuild Shareholder Loans",** and Shareholder Loans made by Hochtief will be referred to as the **"Hochtief Shareholder Loans"**.)

94. On 21 March 2002, the Argentine Government asked Puentes to attend a meeting and submit a presentation explaining how the Emergency Law was affecting the Concession.[74] Puentes provided the requested presentation on 26 April 2002, in which it estimated damages due to the Emergency Law in the amount of US$ 130,854,000 and explained that the Emergency Law had (i) slowed down construction due to a lack of funding, and (ii) prevented third-party funding. Puentes informed Argentina that it could no longer unilaterally finance the Project and that to resume work as well as finish construction Argentina would need to provide AR$ 60 million.[75]

95. On 22 October 2002, the Government and the provinces of Entre Ríos and Santa Fe entered into an agreement to complete the works pursuant to which Argentina would provide the required funds.[76]

96. On 26 November 2002, Argentina notified Puentes that it would provide funding as an advance payment of future compensation for the reduction in the toll fee.[77]

97. On 3 February 2003, Argentina enacted Presidential Decree No. 172 approving the model for a loan agreement in the amount of AR$ 51,648,352. Under the loan agreement, Puentes

[73] **Exhibit C-0416**, Minutes of Puentes' Board of Directors, 17 January 2002.
[74] **Exhibit C-0023**, Letter from the Ministry of Economy to Puentes, 21 March 2002.
[75] **Exhibit C-0024**, Letter from Puentes to the President of the Renegotiation Contract Commission, 26 April 2002.
[76] **Exhibit RA-076**, Agreement between the Argentine State and the provinces of Entre Ríos and Santa Fe, 22 October 2002.
[77] **Exhibit C-0118**, Letter from the Undersecretary of Coordination for the Secretary of Public Works to Puentes, 26 November 2002.

would use future toll revenue to repay the loan, net of its operating and maintenance expenses. The interest rate would be set in accordance with rates published by the Argentine Central Bank for loans with similar characteristics. The agreement indicated that the Argentine Secretary of Public Works would determine the specific repayment process at a later stage.[78]

98. According to the Claimant, Puentes "had no choice but to accept the offered loan" since Argentina informed Puentes that if it did not accept it, Argentina would declare Puentes in default, terminate the Concession and draw on the guarantees of Puentes' shareholders.[79]

99. The loan agreement was executed on 21 February 2003 and on 4 March 2003, Argentina disbursed the initial tranche of the loan (the "**Financial Assistance Loan"** or "**FAL"**). The FAL was secured: Under section 3 of the FAL Agreement, Puentes assigned the right to collected tolls (net of operating and maintenance costs) to the Road Infrastructure Trust Fund (*Fondo Fiduciario de Infraestructura Vial*).[80]

100. As a result of the Agreement, construction resumed, and the Project was opened to the public on 23 May 2003.[81]

101. According to the Respondent, after the Project opened to traffic, several failures were detected in the road and Puentes' repair works were never completed.[82]

102. After disbursing AR$ 39.6 million of the FAL on 4 March 2003, Argentina made no further payments of the agreed AR$ 51,648,352.[83] According to the Claimant, this forced Salini and Hochtief to provide additional Shareholder Loans to Puentes to allow it to complete the construction of the Project. In particular, the Claimant provided US$ 3,439,390.37 in Webuild Shareholder Loans in 2003.[84]

[78] **Exhibit C-0015**, Decree No. 172/2003, 3 February 2003.
[79] Claimant's Memorial, ¶ 79.
[80] **Exhibit C-0119**, Agreement between the Ministry of Economy and Puentes, 21 February 2003.
[81] Claimant's Memorial, ¶ 81.
[82] Respondent's Rejoinder, ¶¶ 133-140.
[83] Claimant's Memorial, ¶ 82.
[84] *Ibid*.

(3) Resolution 14

103. On 30 June 2003, Argentina issued Resolution SOP No. 14/03 ("**Resolution 14**"),[85] which (i) increased the interest rate on the FAL to the one used for short-term (30-day), unsecured loans, (ii) provided that interest on the Financial Assistance Loan was to be compounded daily, (iii) pesified the maintenance and operating expense allowances contained in the Bid at 1997 values without updating the amounts to account for inflation, (iv) provided that toll revenue would be allocated to repayments of the Financial Assistance Loan on a daily basis, and (v) provided that the amounts that Puentes could not pay would be added to the Financial Assistance Loan's principal on a daily basis. While the Claimant asserts that Resolution 14 increased the interest rate (which the FAL had pegged at the rate set by the Argentine Central Bank for loans with similar characteristics), the Respondent rejects such assertion and submits that the Resolution alone determined the applicable rate.[86]

104. On 26 August 2003, Puentes challenged Resolution 14 before the competent administrative authorities and requested an immediate stay pending determination of the challenge.[87]As the tribunal in the *Hochtief v. Argentina* ICSID arbitration (the "***Hochtief* Arbitration**") noted: "neither the appeal nor the stay were acted upon by the Public Administration",[88] so Puentes was forced to comply with Resolution 14.

105. To cover Puentes' operating expenses, Salini and Hochtief provided additional Shareholder Loans. From 2003 to 2005, the Claimant loaned Puentes US$ 9,051,804.37 in Webuild Shareholder Loans.[89]

[85] **Exhibit C-0018**, Resolution 14, 30 June 2003.
[86] Claimant's Memorial, ¶ 83; Respondent's Counter-Memorial, ¶ 245.
[87] **Exhibit C-0016**, Puentes' Administrative Challenge.
[88] **CL-0013**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, ("***Hochtief***, **Decision on Liability**"), ¶113.
[89] Claimant's Memorial, ¶ 104.

D. THE RENEGOTIATION OF THE CONCESSION CONTRACT AND PUENTES' INSOLVENCY PROCEEDINGS

106. Under the Emergency Law, as noted earlier, Argentina was ordered to renegotiate all public works contracts.

107. Through Presidential Decree No. 311/03, Argentina created the Unit of Renegotiation and Analysis of Public Utility Contracts ("**UNIREN**") within the Ministry of Economy and Production and the Ministry of Federal Planning, Public Investment and Services. UNIREN was put in charge of coordinating the renegotiation proceedings under the Emergency Law.[90]

108. According to Presidential Decree No. 311/03, once the public hearing and public consultation processes encouraging citizen participation had taken place, the Office of the Treasury Attorney General would issue an opinion. Assuming the new terms were approved in this opinion, the renegotiation agreements would then be jointly signed by the Ministry of Economy and Production and the Ministry of Federal Planning, Public Investment and Services, and *ad referendum* of the Argentine Executive Branch.[91]

109. On 18 March 2002, the Ministry of Economy issued Resolution 20, which approved the regulations and procedures for the renegotiation of public works contracts.[92]

110. On 6 April 2005, Puentes, UNIREN and the *Órgano de Control de Concesiones Viales* ("**OCCOVI**"), the entity in charge of regulating road concession projects, agreed on a protocol for the renegotiation of the Concession (the "**Renegotiation Protocol**"). The Renegotiation Protocol called for Argentina and Puentes to approve the terms for a renegotiated agreement within 45 days.[93]

[90] **Exhibit C-0137**, Presidential Decree No. 311/03, 3 July 2003.
[91] Respondent's Counter-Memorial, ¶ 278.
[92] **Exhibit C-0140**, Resolution No. 20/2002, 18 March 2002.
[93] **Exhibit C-0169**, Minutes of Meeting to discuss Renegotiation Protocol, 6 April 2005.

111. On 16 May 2006, the Parties subscribed to a letter of understanding (the "**First LOU**" or "**2006 LOU**").[94] The First LOU provided for an increase in toll rates to "partially re-establish the economic-financial balance of the concession which was affected by the economic emergency", through, among other provisions:

- Increasing the toll rate for two-axle vehicles from AR$ 9.00 to AR$ 12.87 (the average increase across all the toll rate segments was 104.46%);[95]

- Providing that Argentina would subsidize this rate increase via a Government trust so that users would not absorb any of the rate increase;[96]

- Allowing for further toll rate increases at the end of 2007 if certain costs increased by 5% according to an Argentine inflation index;[97]

- Amending Resolution 14 by reducing the applicable interest rate (from rates applied to unsecured 30-day loans to rates applied to first-rate companies or 9.5%, whichever was higher);[98]

- Providing that a full and final renegotiation to completely restore the Concession's economic equilibrium would take place within twelve months;[99]

- Pesifying the shareholders' performance bonds and letters of credit at a rate of US$ 1 = AR$ 1),[100] and;

- Requiring the Government to hold a public hearing for the First LOU to become enforceable.[101]

[94] **Exhibit C-0171**, First Letter of Understanding (LOU), 16 May 2006. This document is also referred to in the Parties' and Experts' submissions as an MOU.
[95] *Ibid.*, ¶ V and Annex IV.
[96] *Ibid.*, ¶ XII.
[97] *Ibid.*, ¶ VI.
[98] *Ibid.*, ¶ IX.
[99] *Ibid.*, ¶ IV.
[100] *Ibid.*, ¶ VII.
[101] *Ibid.*, ¶ XIII.

112. According to the Respondent, the First LOU changed the conditions for the repayment of amounts granted under the Financial Aid Agreement.[102] Argentina also argued that the First LOU did not become effective due to Puentes' failure to regularize the situation with its creditors.[103]

113. On 19 January 2007, Argentina issued the "Report on the Merits of the Memorandum of Understanding UNIREN – PUENTES DEL LITORAL S.A." (the "**2007 Renegotiation Report**").[104] According to the Claimant, the report explained why the first letter of understanding was justified and why Argentina should give it effect. The Claimant further asserts that Puentes did not learn about the 2007 Renegotiation Report until after signing the second letter of understanding (the "**Second LOU**" or "**2007 LOU**").[105]

114. On 27 February 2007, the Parties entered into the Second LOU, which changed some of the key provisions of the First LOU. Under the new letter, the balance of the Financial Assistance Loan would be converted into equity and Salini and Hochtief had to increase their shareholdings in Puentes by converting into equity the unpaid balance of their Shareholder Loans up to the amount necessary to stabilize Puentes' financial condition.[106]

115. On 24 April 2007, Boskalis-Ballast Nedam Baggeren ("**Boskalis-Ballast**"), one of Puentes' principal subcontractors, petitioned to place Puentes into bankruptcy in an effort to collect an unpaid arbitration award ("the **ICC Arbitration")**.[107] From 1998 until 2001, Puentes had paid Boskalis-Ballast US$ 64 million, after which Puentes owed Boskalis approximately US$ 32 million.[108]

[102] Respondent's Counter-Memorial, ¶ 293.
[103] Respondent's Counter-Memorial, ¶ 294.
[104] **Exhibit C-0103**, Renegotiation Report.
[105] Claimant's Memorial, ¶¶ 111-113.
[106] **Exhibit C-0175**, Second Letter of Understanding, 27 February 2007.
[107] **Exhibit C-0184**, Letter from Puentes to UNIREN informing it of Boskalis-Ballast's request.
[108] **Exhibit CWS-0001**, Witness Statement of Guillermo O. Díaz, 27 December 2016, ¶ 24.

116. To avoid liquidation, Puentes initiated reorganization proceedings on 2 May 2007. The Claimant asserts that it informed Argentina about the commencement of the proceedings on 8 May 2007.[109]

117. On 10 May 2007, Argentina repudiated the Second LOU, alleging that Boskalis-Ballast's claim and the reorganization proceedings had changed the circumstances upon which it had been negotiated. According to the Respondent, over the course of the hearing in the *Hochtief* Arbitration,[110] it learned that Hochtief held a 48% interest in Ballast Nedam, one of the joint venture partners in Boskalis-Ballast, and that Puentes failed to inform OCCOVI that it would hire a third party related to Puentes.[111] To the contrary, the Claimant asserts that Puentes did inform Argentina of its contract with Boskalis-Ballast[112] and that, in any event, Hochtief did not have a shareholding interest in the joint venture itself.[113]

118. According to the Claimant, in June 2008 the court overseeing the reorganization proceedings ordered UNIREN to continue the renegotiation of the Concession Contract.[114]

119. Argentina notes that it held a claim in the reorganization proceedings for the financial aid granted to Puentes under the FAL. The reorganization court allowed Argentina's claim in the amount of AR$ 38,915,075.68.[115]

E. THE TRANSITORY AGREEMENTS

120. On 17 December 2009, the Parties agreed on a transitory agreement (the "**First Transitory Agreement**").[116] The Claimant notes that the First Transitory Agreement did not require a public hearing for its ratification.[117]

[109] Claimant's Memorial, ¶ 123.
[110] *See* ¶¶ 205 *et seq. infra*.
[111] Respondent's Counter-Memorial, ¶ 150.
[112] Claimant's Reply, ¶ 84.
[113] Claimant's Reply, ¶ 85.
[114] **Exhibit C-0040**, Court Order in Puentes del Litoral S.A. s/insolvency proceedings, 11 June 2008, p. 1508.
[115] Respondent's Rejoinder, ¶¶ 248-249.
[116] **Exhibit C-0042**, First Transitory Agreement, 17 December 2009.
[117] Claimant's Memorial, ¶ 128.

121. The Claimant notes that the First Transitory Agreement provided for, *inter alia*, (i) an internal rate of return on the Project of 8.87% calculated in constant pesos from September 1997; (ii) renegotiation of the Concession Contract within twelve months from the date of signing the transitory agreement; and (iii) denunciation by either party of the agreement leaving it without effect in the event that it did not enter into force within 60 days from the date of signature.

122. On the basis of Puentes' consent to the First Transitory Agreement, Puentes requested the court overseeing its reorganization proceedings to approve a settlement agreement with its creditors.[118] The settlement agreement became enforceable when it was approved by the bankruptcy court. According to the Claimant, Puentes paid several instalments under the creditor settlement agreement, including US$ 8.3 million to Boskalis-Ballast and US$ 4,089,561 to the State for the Financial Assistance Loan.[119]

123. Argentina proposed a second transitory agreement, which was signed by Puentes on 14 June 2010 (the "**Second Transitory Agreement**").[120] Argentina issued the required notices in March 2011 and held the required hearing on 17 June 2011, during which an amendment to the transitional tariff regime was discussed.[121]

124. As a result, a new transitory agreement (the "**Third Transitory Agreement**") was proposed, which was signed by Puentes on 13 October 2011.[122]

125. In February 2012, the Office of the *Procurador del Tesoro de la Nación* issued a series of recommendations including formalistic changes and recommended that a new agreement be signed.[123]

[118] Claimant's Memorial, ¶ 131; **Exhibit C-0206**, Court Order in Puentes del Litoral S.A. s/insolvency proceedings, 30 December 2009.
[119] Claimant's Reply, ¶ 134.
[120] **Exhibit C-0044**, Second Transitory Agreement, 14 June 2010.
[121] **Exhibit C-0214**, UNIREN's Final Report on Public Hearing, 30 June 2011.
[122] **Exhibit C-0047**, Third Transitory Agreement, 13 October 2011.
[123] **Exhibit C-0210**, Report by Argentina's Office of the Treasury Attorney General, 29 February 2012.

126. On 6 March 2012, Puentes agreed to and signed a new transitory agreement (the "**Fourth Transitory Agreement**").[124]

F. TERMINATION OF THE CONCESSION CONTRACT

127. By 2012, Puentes' accumulated losses exceeded its equity value.[125] According to the Claimant, to avoid dissolution under Argentine law, Puentes' shareholders agreed to increase its equity by AR$ 1 million (approximately US$ 350,000). The Claimant asserts that Puentes' shareholders conditioned the new equity contribution on Argentina approving the amended bylaws, including the increase in Puentes' equity, and ratifying the Fourth Transitory Agreement.[126]

128. Subsequently, Puentes asked the Government for approval to amend its bylaws and increase its social capital or equity on several occasions. According to the Respondent, the Claimant's request would have effectively decreased the capital stock provided for in the Concession Contract, and it did not grant the requested approval.[127]

129. On 10 June 2013, Puentes denounced the Fourth Transitory Agreement.[128] The next day, it filed an administrative complaint against Argentina for breach of the Concession Contract alleging that Argentina had failed to restore the Concession's economic equilibrium and claiming damages.[129]

130. On 30 May 2014, Puentes filed a lawsuit in Argentine courts. The suit sought the Concession Contract's rescission due to Argentina's failure to re-establish its economic equilibrium, as well as damages. The action was pending before the Argentine courts at the time of the submissions in this case;[130] the Tribunal does not know its current status.

[124] **Exhibit C-0048**, Fourth Transitory Agreement, 6 March 2012.
[125] Claimant's Memorial, ¶ 144.
[126] *Ibid*.
[127] Respondent's Counter-Memorial, ¶ 336.
[128] **Exhibit C-0233**, Letter from Puentes to Ministry of Federal Planning, Public Investment and Services, 10 June 2013.
[129] **Exhibit C-0049**, Administrative Complaint filed by Puentes, No. 46/13, File SO1 0123098/2013, 11 June 2013.
[130] **Exhibit C-0009**, Complaint *in Puentes del Litoral S.A. v. Argentina*, 30 May 2014.

131. On 30 June 2014, Puentes' board decided to dissolve the company.[131] The Tribunal does not know at this writing whether it has in fact since been dissolved.

132. On 26 August 2014, Argentina issued a resolution terminating the Concession Contract (the "**Termination Resolution**").[132] The reasons for the Termination Resolution are disputed between the Parties. According to the Claimant, the Termination Resolution cites four grounds to justify attributing fault to Puentes: (i) the reorganization proceedings of Puentes; (ii) the *Hochtief* Arbitration; (iii) Puentes' board's decision to dissolve the Company due to its loss of equity; and (iv) Puentes' administrative complaint.[133] The Respondent, on the other hand, asserts that the only reason it terminated the Contract was the dissolution of Puentes, which constituted grounds for automatic termination per Article 30.9 of the Concession Contract.[134]

133. The Termination Resolution also called for the drawing down of Puentes' performance bond and for Puentes to pay any outstanding fines. Argentina cashed the performance bond, which by then had a value of AR$ 1,385,320.

134. After terminating the Concession Contract, Argentina granted the Concession to a new operator, Caminos del Río Uruguay, S.A.[135] On 1 September 2014, Puentes formally handed over the Concession and in March 2016, Argentina increased the Concession's toll rate.[136]

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

135. The Claimant seeks the following relief:

> *a. A declaration that Argentina violated the BIT and international law with respect to Salini Impregilo's investments;*

[131] **Exhibit C-0234**, Minutes of Puentes' Board of Directors' Meeting, 30 June 2014.
[132] **Exhibit C-0051**, Resolution No. 1994/14, 29 August 2014.
[133] Claimant's Memorial, ¶ 149.
[134] Respondent's Counter-Memorial, ¶ 332.
[135] **Exhibit C-0237**, Resolution No. 2012/2014, 29 August 2014.
[136] **Exhibit C-0428**, Resolution No. 1114/2016, 4 August 2016.

> *b. Compensation to Salini Impregilo for all damages that it has suffered, as set forth herein and as may be further developed and quantified in the course of this proceeding;*
>
> *c. All costs of this proceeding, including Salini Impregilo's attorneys' fees and expenses; and*
>
> *d. Pre-and-post award compound interest until the effective date of payment of the award.*[137]

The specifics of the claimed violations and asserted damages are set forth *infra*.

136. For its part, the Respondent requests the Tribunal:

> *(a) that each and every claim made by Claimant be rejected; and*
>
> *(b) that Claimant be ordered to pay all the costs and expenses arising out of this arbitration proceeding.*[138]

V. LIABILITY

137. The Claimant relies on several provisions of the Treaty and alleges that, in particular, Argentina has violated (i) the FET standard (Article 2.2); (ii) the non-discrimination (MFN) standard (Articles 2.2 and 3); and (iii) the obligation not to unlawfully expropriate an investment (Article 5).

138. The Respondent contends that it has not breached any of its international obligations under the BIT and that, in any event, the defense of necessity would preclude wrongfulness of its acts.

[137] Claimant's Reply, ¶ 391.
[138] Respondent's Rejoinder, ¶ 636.

A. ADMISSIBILITY OF THE CLAIMS FOR LOANS

(1) The Parties' Positions

a. The Respondent's Position

139. The Respondent posits that Webuild's claims raised in this arbitration are partly related to certain loans made by the Claimant to Puentes ("**Webuild Shareholder Loans**").[139] According to the Respondent, to the extent such claims relate to those Shareholder Loans, they are inadmissible in light of the bidding documents' terms and the Concession Contract, which is part of the applicable law to the dispute. The Respondent contends that these documents and the Contract state that, once the subsidy was paid, Argentina had no further liability regarding financing. Consequently, claims to which Webuild may be entitled as creditor of Puentes are excluded, as already established by the tribunal in the *Hochtief* Arbitration.[140]

140. The Respondent further submits that it would be absurd to allow Webuild to bring claims against Argentina on account of the Webuild Shareholder Loans when the Claimant alleges that these Loans were made to cover part of Puentes' financial deficit caused by Puentes' and Webuild's failure to obtain financing.[141]

141. The Respondent also contends that the claims asserted by the Claimant arising out of the Webuild Shareholder Loans are already being repaid in Puentes' reorganization proceedings. According to the Respondent, this would amount to a double recovery.[142]

142. Lastly, Argentina contends that the tribunal in the *Hochtief* Arbitration interpreted Article 22.2 of the Concession Contract correctly when holding that Webuild's claims as lender to Puentes should be rejected.[143]

[139] *See* Table 3, Loans from Impregilo to PdL, Bambaci/Dellapiane First Report, ¶ 101.
[140] Respondent's Counter-Memorial, ¶¶ 355-363; Respondent's Rejoinder, ¶ 335.
[141] Respondent's Rejoinder, ¶ 358.
[142] Respondent's Counter-Memorial, ¶¶ 364-366; Respondent's Rejoinder ¶¶ 370-373.
[143] Respondent's Rejoinder, ¶¶ 360-369.

b. The Claimant's Position

143. The Claimant argues that the Respondent's conclusion regarding Article 22.2 of the Concession Contract is incorrect, and that Section 3(j) of the Bidding Terms, which are binding, expressly provides that investment treaty rights (which in this case include Shareholder Loans) apply to investments in Puentes.[144]

144. It further posits several reasons for its position that Article 22.2 of the Concession Contract does not bar claims under applicable investment treaties: (i) its text does not mention treaties or international law; (ii) its grammar and structure emphasize that it is limited only to certain kinds of claims; and (iii) such an interpretation would be harmonious with Section 3(j) of the Bidding Terms.[145] The Claimant contests Argentina's allegation that Article 22.2 bars claims it has made based on the Webuild Shareholder Loans. It claims that the text as well as the structure of the provision indicate otherwise, and that the conduct of the Parties reinforces the interpretation that Article 22.2 was solely concerned with third-party financing.[146]

145. According to the Claimant, any waiver of treaty rights with respect to the Shareholder Loans would require compliance with the standards for waiver set out in Argentine and international law. Under the former, the waiver must be clear, unequivocal and specific. Waivers of rights are not presumed, and the interpretation of acts to prove any such waiver needs to be restrictive. Pursuant to the latter, a waiver of rights needs to be clear and unambiguous and a *jurisprudence constante* requires that waivers of jurisdiction or claims under an investment treaty may not be implied.[147]

146. Moreover, the Claimant submits that, despite Article 22.2 having freed Argentina from bearing commercial risks, the provision was not designed to force Webuild to accept the

[144] Claimant's Reply, ¶¶ 158-164.
[145] *Ibid*., ¶¶ 165-172.
[146] *Ibid*., ¶¶ 173-187.
[147] *Ibid*., ¶¶ 194-208.

political risks underlying the Concession, including the risk that Argentina might engage in treaty-breaching conduct.[148]

147. Relating to the proceedings in the *Hochtief* Arbitration, the Claimant argues that the majority holding is unpersuasive and flawed in several ways: (i) inasmuch as the Parties did not present detailed arguments regarding the proper interpretation of Article 22.2, the majority was not able to fully consider its interpretation; (ii) the majority did not consider Section 3(j) of the Bidding Terms, which expressly reserve treaty protections for Puentes; (iii) it failed to consider other arguments regarding Article 22.2's scope; and (iv) it did not properly account for Article 22.2's historical and policy basis.[149]

148. Lastly, regarding Argentina's contention that the Tribunal cannot admit Webuild's position because Argentina filed claims in Puentes' bankruptcy proceedings, the Claimant alleges that this Tribunal in its Decision on Jurisdiction already confirmed the lack of any risk of double recovery.[150]

(2) The Tribunal's Analysis

a. Preliminary Observations

149. At the outset, the Tribunal observes that the Respondent has not raised a jurisdictional objection with respect to the Webuild Shareholder Loans, only an admissibility issue.

150. As a result, the Respondent's inadmissibility argument regarding the Webuild Shareholder Loans is not grounded in the BIT, but in the provisions of the Concession, in particular Article 22.2 (to which the Tribunal will return in the discussion below). In this regard, the present Tribunal agrees with the tribunal in the *Hochtief* Arbitration when it ruled that: "[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an

[148] *Ibid*., ¶¶ 191-192.
[149] *Ibid*., ¶¶ 209-219.
[150] *Ibid*., ¶ 220.

attribute of a claim but not of a tribunal"[151] and "[d]efects in admissibility can be waived or cured by acquiescence: defects in jurisdiction cannot."[152]

151. In the present case, because the Respondent has only raised an admissibility issue regarding the Webuild Shareholder Loans, the Tribunal still has to assess its jurisdiction *proprio motu* as well as the admissibility of the claims themselves.

152. Article 1.1 of the BIT stipulates that: [153]

> *El término 'inversión' designa, de conformidad con el ordenamiento jurídico del país receptor e independientemente de la forma jurídica elegida o de cualquier otro ordenamiento jurídico de conexión, todo aporte o bien invertido o reinvertido por personas físicas o jurídicas de una Parte Contratante en el territorio de la otra, de acuerdo a las leyes y reglamentos de esta última. En este marco general, son considerados en particular como inversiones, aunque no en forma exclusiva: […]*
>
> *d) créditos directamente vinculados a una inversión, regularmente contraídos y documentados según las disposiciones vigente en el país donde esa inversión sea realizada.*

In its unofficial English translation:

> *'Investment' means, in accordance with the host country laws and regardless of the selected legal form or any other connected law, any contribution invested or reinvested by an individual or a legal entity of one Contracting Party in the territory of the other Party, in accordance with the laws and regulations of the latter. Within this general framework, it includes in particular, though not exclusively: […]*

[151] **CL-0011**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011("***Hochtief*, Decision on Jurisdiction**"), ¶ 90.
[152] **CL-0011**, *Hochtief*, Decision on Jurisdiction, ¶ 95.
[153] The official languages of the BIT are Spanish and Italian. Given that the official languages of this Decision are Spanish and English, this Decision only refers to the official Spanish version and the unofficial English translation.

> *d) claims of money directly related to an investment, properly executed and evidenced in accordance with the laws in force in the country where such investment is made.*

153. On the basis of this Article, including the specific reference to "loans" in paragraph d), it would seem *prima facie* that the claims based on the Webuild Shareholder Loans are covered by this Tribunal's scope of jurisdiction. It remains for the Tribunal to consider, however, the meaning and role of the 'in accordance with laws and regulations' language of the BIT, both in the *chapeau* of this Article, where it is referenced not once but twice, and again in subparagraph d), dealing specifically with loans, where it modifies the language "properly executed and documented".

154. Inasmuch as these references qualify the terms "investments" and "loans", they operate to limit the universe of what the BIT can recognize as an investment, to the extent of their scope. In this manner, the term 'in accordance with laws and regulations' can be seen to function as a local law portal through which investments must pass in order to qualify for protection under the BIT. The question is what the parameters of that portal (or in this case, portals) are.

155. The Claimant has submitted that these provisions function as a legality clause.[154] And indeed, the Tribunal is aware that a number of tribunals have treated language of this type (*i.e.*, 'in accordance with law' language) as creating a legality requirement, that would not just encompass investment formalities (indeed, some have argued that the illegality must be substantial and would exclude minor violations), but would preclude, for example, corrupt or fraudulent investments.

156. This BIT is more complex, however. Its multiple and slightly diverse references to an "in accordance with law" requirement, as referenced above, require the Tribunal to consider whether the multiple references are intended to have the same or different meanings. The

[154] *See*, e.g., Claimant's closing argument, Tr. Day 10: 1338-1342.

Respondent did not submit any arguments that materially advance the interpretation on this basis; instead, the Respondent's submissions are focused on the Concession Contract.

157. The Tribunal's analysis begins with the clause in subsection d) of Article 1.1 of the BIT on loans. This clause appears to the Tribunal, on a textual analysis, to be the clearest of the three references regarding its scope and function. The language "properly executed and documented" modifies the "in accordance with" language. The use of the specific terms "executed and documented", coupled with "properly", indicate to the Tribunal that this clause is concerned with the formalities required by Argentine law for loans to be properly entered into. This clause, therefore, appears to state a formalities requirement for investments taking the form of loans; for loans (such as the Shareholder Loans) made in Argentina, its legal requirements regarding such formalities would be controlling.

158. This leaves the question about the meaning of the two references to "in accordance with" in the *chapeau* to Article 1.1 of the BIT. The *chapeau* is of course more general and structured so as to encompass a variety of legal forms of investment. Standard canons of construction would suggest that distinct meanings should be found for all of its language, even if repetitive, to avoid surplusage. But it is difficult to discern any distinct meaning for the two "in accordance with" references in the *chapeau*. In its second iteration in the *chapeau*, the 'in accordance with' language explicitly modifies "invested" ("any kind of contribution or asset invested…in accordance with the laws and regulations…"). The *chapeau*'s first iteration of "in accordance with", although a separate clause in the original Spanish as well as the translation, only makes sense if it is also read to modify 'invested'. Although such a reading would arguably make this clause redundant, otherwise it becomes simply a floating clause that modifies nothing, which makes no sense whatsoever. Both clauses seem to emphasize the primacy of the laws and regulations of the country that receives the investment; indeed, the first clause emphasizes the need for conformity with

the laws of the host country notwithstanding the legal form of the investment or the presence of "any other connected law".[155]

159. Thus, both clauses in the *chapeau* are focused on the need for the investment's compliance with the laws of the host country. The Tribunal cannot discern any different meaning for the two clauses. However, again from a textual reading, it is not clear they are aimed, as the loan-specific provision in d) seems to be, at formalities. The absence of any formalities-focused language in the *chapeau*, in contrast to that in d), suggests to the Tribunal that a different meaning should be given to those terms. To invest them with content that is distinct from that in subsection d), the loan-specific provision, the Tribunal considers that, at least for investments taking the form of loans, the BIT may incorporate both a legality requirement (by virtue of the *chapeau*'s two references) under Argentine law, and a formalities requirement (by virtue of subsection d)) that is based, in this case, on Argentine law.[156]

160. No evidence has been put before the Tribunal either of illegality or of improper formalities in connection with the Webuild Shareholder Loans. If there were, then presumably the Respondent would have put forward such evidence and argued that these Loans were not within the Tribunal's jurisdiction. The Respondent made a number of jurisdictional arguments, but not this particular argument. Moreover, if there were issues in connection with the propriety of the manner in which any of the Shareholder Loans were entered into or with their legality, it seems highly likely that the Argentine court seized with the Puentes reorganization proceeding would have so found. But it did not; indeed, the evidence is that

[155] Although the first reference in the *chapeau* uses the prepositional phrase (in the Spanish) "*de conformidad con" ["conformemente"* in the Italian version], while the second uses "*de acuerdo a" ["in conformita alle"* in the Italian version], these different phrases hardly suggest a distinct meaning. Indeed, both are translated as "in accordance with" in the unofficial English version.

[156] This approach is in keeping with the governing law of the BIT, Article 8.7 of which provides "*El tribunal arbitral decidirá sobre la base del derecho de la Parte Contratante parte en la controversia –incluyendo las normas de esta última relativas a conflictos de leyes--, las disposiciones del presente Acuerdo, los términos de eventuales acuerdos particulares concluidos con relación a la inversión, como así también los principios de derecho internacional en la materia*." In the unofficial English translation: "*The arbitral tribunal shall decide the dispute in accordance with the laws of the Contracting Party involved in the dispute —includes its rules on conflict of laws—, the provisions of this Agreement, the terms of any possible specific agreement concluded in relation to the investment as well as with the applicable principles of international law*."

the court admitted the Shareholder Loans, providing further strong evidence of their proper form and legality.[157]

161. In sum, even giving wide effect to the "in accordance with laws" portals in Article 1.1 requiring consideration of the requirements of Argentine law and regulations, there is no indication that the Webuild Shareholder Loan claims do not meet the requirements of Article 1.1(d) of the BIT by virtue of Article 22.2 of the Concession Contract or otherwise. They must therefore constitute "investments" under the BIT and there would appear to be no jurisdictional bar to those claims.

b. Admissibility

162. The issue of admissibility of the Webuild Shareholder Loan claims turns on the interpretation of Article 22.2 of the Concession Contract. This provision stipulates that:

> *Los préstamos que contraiga el Postulante Ganador y la Concesionaria, según corresponda, para la financiación de la construcción, mantenimiento y explotación de las obras no gozarán de ninguna garantía del Concedente, ni los financistas podrán efectuar reclamación alguna contra el mismo ni contra las Provincias, lo que se hará constar en los convenios respectivos. [emphasis added]*

In its unofficial English translation:

> *Loans entered into by the Successful Bidder and Concessionaire, as the case may be, to finance the construction, maintenance and operation of the project shall not be secured by the Grantor, nor shall the lenders be entitled to any claim against the Grantor or the Provinces, all of which shall be indicated in the relevant agreements. [emphasis added]*

163. The Parties' respective arguments with respect to this provision have been summarized earlier.[158] Whether this clause should be interpreted as an exclusion of any claims based on Shareholder Loans, or a waiver by the Claimant of any rights to pursue BIT claims

[157] Tr. Day 2: 236:6-15; Tr. Day 2: 247:2-15; Tr. Day 10: 1340:20-22; Tr. Day 10: 1341:1-14.
[158] *See* ¶¶ 139-148 *supra*.

based on such Loans, is a matter of contract interpretation and the application of the governing law in relation to the Concession Contract. Accordingly, the resolution of these particular questions requires the application of Argentine law.

164. Both Parties made extensive submissions on the Argentine law they considered to be relevant to this issue, including expert opinions—Dr. Liendo for the Claimant and Mr. Comadira for the Respondent—and testimony at the Hearing on the Merits. The Tribunal has given careful consideration to their testimony and sought to reconcile the divergent views (set out in detail below) they expressed on particular points of importance.

165. The Tribunal has organized its consideration according to the following sub-topics which have been the object of submissions by the Parties: first, the textual and contextual analysis of Article 22.2 of the Concession Contract; second, the relevance of the Bidding Terms, and particularly Section 3(j), to the interpretation of Article 22.2; third, the standards for waiver if Article 22.2 is to be construed as containing a waiver of BIT rights; fourth, the question whether the scope of Article 22.2 extends to political as well as commercial risks or is limited to commercial risks; and finally, the persuasive value of the *Hochtief* tribunal's analysis of this issue.

166. As will be explained below, the Tribunal concludes that Article 22.2 does not operate to exclude or waive claims based on loans that qualify as investments under the BIT, as these Shareholder Loans do.

(i) Textual and contextual analysis of the scope of Article 22.2 of the Concession Contract

167. Article 22.2 of the Concession Contract, quoted earlier, contains two restrictive clauses on its face: the first prevents the successful bidder or concessionaire from securing any loans entered into to finance the construction, maintenance and operation of the project with the Grantor [*i.e.*, Argentina]; the second prevents "lenders" from having any claim against either "the Grantor or the Provinces". It also requires that such restrictions be indicated in the "relevant agreements".

168. It is the interpretation of the second restrictive clause that concerns the Tribunal here. In particular, the question is whether this clause covers third-party project financing loans only, as the Claimant contends, or also covers the Webuild Shareholder Loans, as the Respondent contends. According to the Claimant's expert, Dr. Liendo, the purpose of Article 22.2 is "[t]o specify that the Republic was not contractually liable to the Concessionaire's lenders",[159] describing the absence of a surety contract under which "one of the parties secures a third party's debt and the third party's creditor accepts that ancillary obligation".[160] Moreover, "given the experience in previous years and the absence of prior concessions for the construction and operation of highways awarded in bidding processes without Treasury guarantees, the Republic deemed it necessary to warn and inform potential bidders that these processes would be different from all bidding processes previously held in the country".[161]

169. Dr. Liendo maintained that the private funding of large infrastructure works *without Treasury guarantees* was only possible if the economic rules that had eliminated structural inflation, restored public credit, and adopted adequate rules of risk distribution between the public and private sectors were upheld. Or, alternatively, such a result could be possible if the State had committed to "'restoring the Agreement to its original condition' existing prior to any '[g]overnment action defined as such by laws, decrees or any other provisions issued by any government body [...] affecting the financing, studies, construction or operation of the Concession.'"[162] As a result, "the Republic's liability arises from the fact that it prevented Puentes from using the revenues collected from the concession on the terms and conditions set forth in the Contract due to acts and omissions exclusively attributable to the [State]".[163]

[159] Liendo Report, ¶ 53.
[160] *Ibid*., ¶ 56.
[161] *Ibid*., ¶ 59. The Tribunal notes that Dr. Liendo has served as a public official in the Argentine Government from 1991 to 1996 and appears to have personal knowledge of and experience with Argentine Government policies in this regard.
[162] *Ibid*., ¶ 65.
[163] *Ibid*., ¶ 68.

170. The Respondent's expert, Mr. Comadira, does not address this point. His expert opinion focused on the legal framework in which Article 22.2 of the Concession Contract operates. He considers the Concession Contract to be an administrative contract. Under his submissions, the Argentine law governing administrative contracts is an "exorbitant" legal system, defined as residual or by exclusion of private law, composed of substantive and procedural prerogatives of the Government, balanced against guarantees of private persons.[164] Supported by an analysis of Argentine Supreme Court jurisprudence, Mr. Comadira argued that an "administrative contract" is a meeting of the minds generating subjective legal situations, in which one of the intervening parties is a Government entity, whose subject-matter comprises a public purpose or a purpose inherent to the Administration, and contains explicitly or implicitly, exorbitant clauses of private law.[165]

171. Furthermore, Mr. Comadira engaged in a discussion of general principles governing administrative contracts: the principle of mutability and administrative *ius variandi*,[166] the continuity principle,[167] the power of direction and control,[168] the power of imposing penalties,[169] the revocation for reasons of opportunity, merits or convenience,[170] annulment due to illegitimacy, [171] and an act of God or *force majeure* and breaches of the contractor.[172] He also set out the interpretation of Bidding Terms and conditions, whereby the latter constitute the law of the bid or the contract specifying the purpose of the procurement and the rights and duties of the bidders and the awardee. These are to be interpreted restrictively to safeguard equality of participants, and, in case of doubt, the interpretation has to go against the private person and in favor of the State (and is even more stringent if the contractor has technical and legal skills).[173] In his view, the interpretation of administrative concession contracts is to be construed restrictively: "nothing is to be taken as conceded

[164] Comadira Report, ¶ 25-28.
[165] *Ibid*., ¶ 29.
[166] *Ibid*., ¶¶ 39-42.
[167] *Ibid*., ¶¶ 43-54.
[168] *Ibid*., ¶¶ 55-56.
[169] *Ibid*., ¶¶ 57-63.
[170] *Ibid*., ¶¶ 64-69.
[171] *Ibid*., ¶¶ 70-72.
[172] *Ibid*., ¶¶ 73-75.
[173] *Ibid*., ¶¶ 76-83.

but what is given in unmistakable terms, or by an implication equally clear".[174] The principle of equality in bidding processes is projected into the contract which has to be consistent with applicable bidding terms and conditions: there can be no modifications unless to address objective needs of public interest.[175] Finally, Mr. Comadira discussed the administration's power to impose penalties: whether, upon occurrence of an event that is a ground for termination of the contract, such decision is a duty of the administration or at its discretion. He put forward that, in case of dissolution or liquidation of the company, it must be the former, otherwise the personal liability of officials might be engaged. [176]

172. Based on this interpretive approach, Mr. Comadira considered that the second restrictive clause of Article 22.2 had to be taken at face value as an unqualified and unlimited restriction that applied to any project lender, whether or not a shareholder, and to conclude otherwise would violate the governing principle of restrictive interpretation in favor of the State.[177]

173. Dr. Liendo disagreed with Mr. Comadira's analysis of the application of the restrictive principle to this specific provision. During the Hearing, Dr. Liendo specifically disagreed with the interpretation by Mr. Comadira of the Argentine Supreme Court's jurisprudence on a principle put forth by the U.S. Supreme Court that "nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear." In accordance with such a principle, any affirmation must be shown: "[s]ilence is negation, and doubt is fatal to the Concessionaire's right."[178] Dr. Liendo argued that:

> *[t]his statement only refers to those instances in the Concession Agreement where privileges and licenses and rights are granted to the Concessionaire. Precisely, because in the Concession Agreement, we have a private party exercising public functions. So,*

[174] *Ibid*., ¶¶ 84-92.
[175] *Ibid*., ¶¶ 92-97.
[176] *Ibid*., ¶¶ 98-113 referring to Puentes – Article 30.9, second paragraph of the Contract.
[177] *Ibid*., ¶¶ 186-194.
[178] Hearing: Response to Mr. Comadira on administrative principles (Tr. Day 6: 750:16-18).

> *the scope of the powers granted to a third party that's going to cooperate with the administration needs to be quite restricted.*[179]

However, he continued,

> *when we look at Article 22.2, we do not see that 22.2 includes any kind of franchises, privileges, or rights to the Concessionaire. To the very contrary, Argentina made it clear in that contractual provision that no guarantee had been given to a third party under that contract--that is to say, the lender of the Concessionaire.* [180]

174. When questioned further on this point, Dr. Liendo responded that when the right of the private person "does not arise from the Concession but, rather, from its own property rights which are guaranteed in our system by the national constitution, it doesn't require that it be given in concession by the Administration. It is its own right."[181] In these cases, he maintained, there is no need for a restrictive interpretation of the Contract in favor of the Grantor and against the Concessionaire, but rather the opposite. The interpretation would be favorable to the property right holder, whose rights can only be impaired by statutory provisions, *i.e.,* provisions adopted by Congress imposing restrictions on property rights.

175. According to Dr. Liendo, when there is a question of a waiver of rights, as is presented by the second restrictive provision of Article 22.2, the interpretation should not be in favor of the Grantor but rather in favor of the Concessionaire. To support this argument, he referred to the *Edenor* case.[182] Edenor is a company that distributes electricity in Buenos Aires under a Public Services Concession. In connection with the renegotiations after the adoption of the Emergency Law, an Agreement was reached in which the State waived collecting fines for breaches prior to a given date. Edenor had engaged in conduct that would have attracted sanctions after the date of the Agreement but before its ratification by the Executive Branch. The company argued that the Agreement would not be applicable until such time as it was ratified by the Executive, so it considered that these breaches,

[179] *Ibid*., pp. 750:21-751:6.
[180] *Ibid*., pp. 751:7-13.
[181] Tr. Day 6: 824:1-4; 824:7-831:18.
[182] *See also* Liendo report, ¶ 41.

which were the basis for the Grantor to impose fines, were exempted from payment. The Court held that the waiver on the part of the State (not to collect fines) should be interpreted restrictively, finding that the waiver corresponded to the period after the Agreement had been concluded, even if it had not been ratified. It was understood that the Parties had taken into account those acts that would be the motive for sanctions that existed at the time that the Renegotiation Agreement was entered into. In other words, the Court adopted a restrictive approach to interpreting the waiver.

176. As a result, Dr. Liendo concluded that the parameters for when interpretation should be restrictive are clear: when the granting of a public power, a franchise or a concession of privileges is concerned, the interpretation should be restrictive in favor of the Grantor. But when the exercise of property rights is concerned, the interpretation should be favorable to the holder of the property rights, unless the opposite has been agreed upon in a clear, unequivocal, and express manner.

177. Mr. Comadira disagreed with Dr. Liendo on this point, saying that while some cases he referred to, did involve privileges, others were simple administrative contracts.[183]

178. Dr. Liendo further argued that Article 22.2 should be construed as referring solely to third-party loans, not shareholder loans: "the Argentine State's interest in specifying that it was not a guarantor of said loans and that, therefore, those agreements were *res inter alios acta* with respect to it are addressed to third-parties to the contractual relationship between the Republic, the Successful Bidders and the Concessionaire, because, clearly, Article 22.2 was agreed upon by them and, therefore, both parties already knew what they had stipulated."[184] Moreover, "it is inconsistent with the structure of the Contract to consider that the provisions on third-party financing contemplate a limitation on the Grantor's liability to the Successful Bidder and the Concessionaire, which are matters addressed elsewhere in the Contract."[185]

[183] Tr. Day 7, 856:13-21.
[184] Liendo Report, ¶ 75.
[185] Liendo Report, ¶ 79.

179. Furthermore, according to Dr. Liendo, "acts of God and force majeure events are regulated in Article 31 of the Contract, setting forth the Grantor's obligation to restore any conditions that may be affected by acts of government if, on account of their magnitude, they 'alter the economic-financial balance' of the Contract, expressly mentioning the item 'financing' among those subject to disturbance and restoration, together with studies, construction, and operation."[186] In his view, "[t]he Contract clearly states, specifically in Articles 22.1, 22.3, and 22.4, that the Successful Bidders and the Concessionaire were responsible for dealing with the funding of the portion of the work under their charge, either by means of third-party financing or through self-financing."[187]

180. Mr. Comadira again disagreed with Dr. Liendo, particularly insofar as the scope of the terms 'lenders' and 'claims' in Article 22.2 of the Concession Contract is concerned. In his view, Article 22.2:

> *reflects the clear objective of restricting the liability of Grantor to the payment of the subsidy agreed-upon, thus releasing it from any liability to anyone who grants loans to Concessionaire. Accordingly, the risks of such financing agreements lie on the borrower, exclusively -whether it is the Successful Bidder or Concessionaire. For the purposes of this article, it is irrelevant who has extended the loan, since irrespective of who the lender is, Grantor does not assume any obligations towards the lender.*[188]

Citing Argentine court decisions on the interpretation of administrative contracts, he put forward that any exception extending the rights of the Concessionaire, or its shareholders would be "contrary to the hermeneutics of administrative contracts."[189]

181. Moreover, Mr. Comadira argued that "[i]f Claimant's position regarding article 22.2 were accepted, *i.e.*, if it were accepted that such article is not applicable to loans granted by Concessionaire's shareholders, the possibility of extending Grantor's liability would be in the hands of Concessionaire and its shareholders exclusively, to the extent that the

[186] Liendo Report, ¶ 81.
[187] Liendo Report, ¶ 82.
[188] Comadira Report, ¶ 189.
[189] *Ibid*., ¶ 191.

limitation of liability expressly contemplated in such article could be rendered ineffective and the risks of financing would be transferred to Grantor."[190] He is of the opinion that "Article 22.2 is clear and categorical when it bars any claim ("any claim") by lenders against Grantor and the Provinces involved, and such a restriction should be expressly indicated in the agreements –an obligation that, as stated in the preceding paragraphs, was imposed on the Successful Bidder or Concessionaire exclusively, in their capacity as borrowers."[191]

182. Finally,

> *[w]hile article 7 and related provisions set forth the obligations and responsibilities towards Concessionaire, article 22.2 refers to the position assumed towards lenders. When the Concessionaire's shareholders assume the role of Concessionaire's lenders, they deliberately agree to abide by the provisions of article 22.2, knowing that such article restricts the risks and responsibility assumed by Grantor.*[192]

As a result,

> *[t]he limitation of the Government's liability under the terms of article 22.2 should be expressly stated by the borrower in the loan agreement, as expressly provided for in such article. It is clear that the failure to indicate expressly such a restriction in the loan agreements executed between Concessionaire and the Claimant cannot remove the limitation of liability of the Government. Even more so in the case of a loan agreement executed by Concessionaire and its own shareholder. If this possibility was accepted, it would have been sufficient that Concessionaire failed to include such clause in all the loan agreements executed to render the provisions of article 22.2 of the Contract ineffective.*[193]

183. With regard to financing, Dr. Liendo argued that Article 31.2 of the Concession Contract was relevant to the issue as this provision recognizes the Concessionaire's right to

[190] *Ibid*., ¶ 192.
[191] *Ibid*., ¶ 199.
[192] *Ibid*., ¶ 201.
[193] *Ibid*., ¶ 202.

restoration of the economic and financial equation of the Concession if it is affected by acts of government "directly or indirectly affecting the financing, studies, construction or operation of the Concession," highlighting in particular the explicit reference to financing in this clause.[194] He argued that the Parties' subsequent actions confirm his interpretation, whereby he referred to the LOUs and Transitory Agreements whose investment plan updates included both equity and debt as part of the re-establishment of the equilibrium as required by Article 31.2.[195]

184. At the Hearing on the Merits, Mr. Comadira disagreed with this position, saying that financing under Article 31.2 of the Concession Contract is different from financing under Article 22.2.[196]

(ii) Consideration of the role of the Bidding Terms

185. In considering the scope of Article 22.2 of the Concession Contract, the Parties' submissions, including expert submissions, discussed the relevance of the Bidding Terms.

186. Section 3(j) of the Bidding Terms deals with BIT rights:

> *In the cases contemplated by the relevant rules, the investment promotion and protection arrangements entered into by the ARGENTINE REPUBLIC shall be applicable.*

187. Both the Claimant and the Respondent used *lex specialis* to support their respective positions on the role of the Bidding Terms in the construction of Article 22.2. The Claimant argued in its written submissions that the Bidding Terms are more specific and therefore should prevail over the Concession Contract.[197] Equally, at the Hearing on the Merits, the Claimant submitted that the Bidding Terms provision is more specific because it deals with investment treaties and contains no exceptions for debt.[198] The Respondent, on the other

[194] Liendo Report, ¶¶ 43-44.
[195] Liendo Report, ¶¶ 47-51.
[196] Tr. Day 7: 944:19-949:3.
[197] Claimant's Reply, ¶ 171.
[198] Claimant's Opening Statement, slides 212-213.

hand, argued in its written submissions that the Concession Contract provision is specific in dealing with loan claims and therefore should prevail over the Bidding Terms.[199]

188. The question is whether there is a hierarchy between the Bidding Terms and the Contract provisions. At the Hearing on the Merits, the Claimant cited to Article 2 of the Concession Contract, under which, it asserted, the Bidding Terms prevail in the event of a conflict between the Bidding Terms and the provisions of the Concession Contract.[200] But the Claimant also argued that the Terms can be interpreted harmoniously if Article 22.2 is read as being limited to third-party lenders. This is also supported by Dr. Liendo when he states that "a contextual and harmonic interpretation of the documents that make up the Contract," *i.e.* including the Bidding Terms in accordance with Section 2 (applicable provisions and documents) of Annex 1 to the Concession Contract, which "allows us to conclude that Article 22.2 […] would only apply to the action or right arising from the loan agreement signed by the lender and the Concessionaire, but this does not preclude, limit, or exclude the right to invoke the BIT's protection if that 'investment' is affected by the host State."[201] For this reason, he continues, "interpreting Article 22.2 of the Contract calls for a harmonization that gives all other contract provisions value and meaning and, to that effect, we must especially consider what the BIT provides regarding the scope of the protection it accords to investments by nationals of the Treaty's signatory States." [202]

189. In other words, Dr. Liendo would seem to regard the Bidding Terms as part of the Contract, so any conflict between the Bidding Terms and the main terms of the Contract would be a conflict between two contractual clauses. In such event, "the appropriate interpretation of those provisions must give value and meaning to all of them, making sure that no provision annuls or hinders the effects of the other(s)."[203]

190. Neither the Respondent, nor its expert, Mr. Comadira, seem to explicitly deny or confirm the existence of a hierarchy between the Bidding Terms and the Contract provisions. Mr.

[199] Respondent's, Rejoinder, ¶¶ 343 et seq.
[200] Claimant's Opening Statement, slides 212-213.
[201] Liendo Report, ¶ 45.
[202] Liendo Report, ¶ 46.
[203] Liendo Report, ¶ 44.

Comadira emphasises that the Bidding Terms as well as the Concession Contract itself must all be construed restrictively, and in case of doubt, interpreted against the concessionaires, to safeguard the principle of equality as applied in the Argentine legal system.[204]

(iii) Waiver arguments

191. In addition to making arguments regarding the scope of Article 22.2 of the Concession Contract and the Bidding Terms, the Claimant, relying on its Argentine law expert, made a waiver argument: namely, that if Article 22.2 were construed as applying to the Webuild Shareholder Loans and therefore excluding claims made on the basis of such Loans, it did not contain a valid waiver of rights to make claims involving investments protected by the BIT.

192. In his Report, Dr. Liendo stated that under both Argentine and international law, waivers of rights of actions must be clear, unequivocal and specific, because they cannot be presumed "and the interpretation of acts in order to prove any such waiver shall be restrictive."[205] Article 22.2 of the Concession Contract, he argued, does not contain such a waiver. However, even if a clear, unequivocal, and specific waiver were to exist, "it should not run counter to other provisions of the Contract under which the treaty right or action considered waived is upheld."[206] He also submitted that, "[i]n the event of a conflict between two or more contract clauses, the appropriate interpretation of those provisions must give value and meaning to all of them, making sure that no provision annuls or hinders the effects of the other(s)." [207]

193. Pursuant to Section 874 of the Argentine Civil Code, which was in force when the events took place, "[t]he intention to waive cannot be presumed, and the interpretation of acts in order to prove any such waiver shall be restrictive, pursuant to Section 874 of the Civil

[204] Comadira Report, ¶¶ 83 and 92.
[205] Liendo Report, ¶ 41, citing Exhibit HL-02.
[206] Liendo Report, ¶ 42.
[207] Liendo Report, ¶ 44.

Code." [208] According to Dr. Liendo, the Argentine Supreme Court reiterated this principle in several decisions.[209]

194. Dr. Liendo emphasised the need to give value and meaning to all contract provisions, making sure that no provision annuls or hinders the effects of the others.[210] In his view, Article 22.2 is a clause that only addresses the effects of the absence of safeguards by the State in favor of the Concessionaire's creditors "without even contemplating the potential lenders' nationality […] and, thus, neither that article nor any other provision of the Contract includes a direct, indirect, or implied reference to a waiver of the protection accorded by the BIT."[211] The generic reference to "any claim" contained in that contract provision should be read as an exclusive reference to claims arising from "[l]oans entered into by the Successful Bidder and Concessionaire," not the other claims which the Successful Bidder or the Concessionaire may bring against the Grantor for any other reason. [212]

195. Mr. Comadira addressed this issue indirectly in his Report through his position on the interpretation of administrative contract provisions (discussed above).[213] When asked about the waiver argument during the Hearing, he explained that such waiver may not be presumed in private law but, referring to his arguments regarding administrative contracts, this was different in public law: if the right is clear and unequivocal, no waiver can be considered.[214] Mr. Comadira did seem to concede that none of cases he cited discussed the issue of waivers, but he sought to distinguish between State waivers (not presumed) and waivers by private persons on the basis of Section 874 of the Civil Code jurisprudence.

196. The arguments of the Respondent's expert, Mr. Comadira, thus appeared to seek to dismiss the waiver issue more than address it, by focusing on the narrow interpretation of

[208] Liendo Report, ¶ 94 (referring to Exhibit HL-02).
[209] *Ibid*., see fn. 9.
[210] Liendo Report, ¶ 44.
[211] Liendo Report, ¶ 39.
[212] Liendo Report, ¶ 40.
[213] Comadira Report, ¶¶ 195-204 (meaning of "claim").
[214] Tr. Day 7: 956:4-966:2.

concession contracts instead of the reconciliation of the Bidding Terms and the Contract.[215] Mr. Comadira's report does not appear to deal with the effect of the Bidding Terms beyond generalities, arguing that the Bidding Terms should be interpreted restrictively to protect the equality of bidders and the public interest. However, at the Hearing, he appeared to agree that contract provisions should be interpreted harmoniously and that there is a relationship of subordination between the Concession Contract and the Bidding Terms.[216]

(iv) Commercial versus political risks

197. Finally, the Parties' respective experts discussed the issue of whether Article 22.2 of the Concession Contract should be interpreted as negating claims against the State based on both commercial and political risks, or only commercial risks.

198. Dr. Liendo maintained that there are two types of actions to which the Claimant is entitled in relation to the Webuild Shareholder Loans: (i) contractual performance actions arising from the loan agreements it signed with the Concessionaire; and (ii) actions arising from the Republic's failure to comply with its obligations under the BIT. The former can only be brought against the Concessionaire; the latter can only be brought against the State because it granted the rights to collect tolls during the Concession, which it then altered without restoring the economic and financial balance of the Contract, which it ultimately terminated.[217] None of these rights, he submitted, were waived in Article 22.2 of the Contract and, therefore, that Article does not preclude taking into account, for the purposes of compensation, all of the invested assets or contributions, irrespective of the legal form chosen to make the investment.[218] Each individual or legal entity has only one personality,

[215] Comadira Report, ¶¶ 76-83.
[216] Tr. Day 7: 942:11-943:5.
[217] Liendo Report, ¶ 100 referring to Exhibit HL-15, Bielsa, Rafael, Derecho Administrativo*,* Vol. II, page 1121, published by Thomson Reuters LA LEY, 7th Edition updated by Roberto Luqui, Buenos Aires, 2017; Exhibit HL-14, Marienhoff, Miguel, Tratado de Derecho Administrativo*,* Vol. III-A, page 363, published by Abeledo Perrot, Buenos Aires, October 2011.
[218] Liendo Report, ¶ 106.

which is why the splitting of the investor entailed by the *Hochtief* tribunal's interpretation is inappropriate.[219]

199. Mr. Comadira was of the opinion that Article 22.2 completes the definition of the obligations and responsibilities assumed by Grantor: financing is a commercial risk.[220] In his analysis, however, he did not discuss the equilibrium provisions (Contract Art. 31.2 or the Emergency Law). He considered that under Article 9, the State has the power but not the obligation to renegotiate.[221]

(v) The Tribunal's preliminary analysis

200. Given that the Parties' respective expert's conclusions are based on fundamentally different points of departure—for Mr. Comadira, the position that Shareholder Loans are categorially excluded flows directly from the principle of restrictive interpretation of administrative contracts, while for Dr. Liendo, the principle has no application to this particular issue but is instead an issue of proper construction of the Concession Contract and the application of waiver principles to the rights at issue--the Tribunal has been faced with diverging positions that are difficult to reconcile. After detailed consideration, however, the Tribunal has concluded that Dr. Liendo's view on the scope of Article 22.2 is the more persuasive. Despite the fact that Article 22.2 of the Concession Contract is written in broad terms and does not include any exceptions, it makes sense in the overall context to read Article 22.2 as precluding any recourse to the State for commercial claims based on loans by third Parties entered into for project-financing purposes, but not any BIT-qualifying claims. In the Tribunal's view, this is the better view even without consideration of the Bidding Terms, but becomes an even stronger conclusion if the Bidding Terms are taken into account.

[219] Liendo Report, ¶ 109. In Dr. Liendo's view, compensation has to include all of its constituting elements, and it is inadmissible to subordinate the foregoing to the personality of the Claimant, *i.e.*, whether it is acting in its capacity as successful bidder, concessionaire, shareholder, or lender. *See also* Liendo Report, ¶ 112.
[220] Comadira Report, ¶¶ 206-212.
[221] Tr. Day 7: 859:12-860:5.

201. The first clause of Article 22.2 essentially stipulates that the State will not provide any security for any loans. The Tribunal agrees with Dr. Liendo that when viewed in context this clause seems implicitly to assume a third-party lender. The second clause, by starting with 'nor', would seem to be expressing a similar concept but adding that even with unsecured loans, the Successful Bidder and Concessionaire (*i.e.*, the consortium members originally, and later Puentes as assignee) have an obligation to ensure that the loan agreements entered into with third parties contain non-sovereign-recourse provisions. The use of the term 'lenders' in the second clause, in contrast to the use of the term 'Successful Bidder and Concessionaire' in the first, also suggests dealings with third parties and not shareholder-lenders, as Dr. Liendo submits.

202. With regard to the Bidding Terms, it appears to the Tribunal that Article 2 of the Concession Contract, stipulating that the Bidding Terms *"rigen este Contrato",* establishes that the Bidding Terms dictate the scope of the Contract. "*Regir*" in Spanish means to govern or rule, indicating a superior hierarchical position.[222] Given the terms of the BIT, as noted earlier, the Webuild Shareholder Loans qualify as covered "investments" and can therefore be the subject of claims, unless excluded or waived. If Article 22.2 were to be read to constitute a waiver of such claims, it would not only violate waiver principles that seem not to be in serious dispute between the Parties' experts, but would also create a conflict between the Bidding Terms and the Contract. While the Tribunal is satisfied that the Respondent did not intend to provide a sovereign guarantee of the project financing, both the Bidding Terms and the equilibrium provisions of the Contract require a different conclusion with respect to political risk.[223]

203. The Tribunal therefore concludes that even though Article 22.2 may not be as clear and unequivocal as the Claimant has argued, following the principle of harmonious interpretation, which both experts appear to agree is part of Argentine law, and taking into account the other submissions of the Parties and their experts regarding the interpretation

[222] "To govern (sth.) (over so. / sth.); to reign; to rule; to dominate", Leo Online Dictionary: https://dict.leo.org/spanish-english/regir.
[223] The Tribunal is of the view that the Respondent's argument that once a subsidy has been paid, the State does not bear any further financing liability, conflates the distinction between commercial and political risk.

of Article 22.2 of the Concession Contract in its full context, the better view is that while it may exclude third-party loan claims, it does not exclude claims that qualify as "investments" under the relevant BIT, whether they take the form of shares or loans.

204. Argentina's criticism of Webuild for providing support to the Concessionaire in the form of loans rather than additional equity contributions does not advance its case. As the Tribunal understands it, the winning bidder was required to invest a certain level of equity in Puentes and the Consortium did so. There was no requirement that additional contributions take the form of equity rather than debt. Had Webuild invested additional equity in Puentes, over the apparent objections or unwillingness of the minority shareholders to make further contributions, presumably with the result that the minority shareholders would have been diluted, its resultant increased equity stake would be subject to recovery in these proceedings in the same way as its 26% equity stake. But its additional investments took the form of debt instead. The issue here is not that the Webuild Shareholder Loans were impermissibly granted, or should have taken the form of equity, but whether they can be admitted as claims in these proceedings or are precluded by Article 22.2.

(vi) Limited persuasive value of the *Hochtief* decision

205. The Tribunal turns finally to the decision of the tribunal in the *Hochtief* Arbitration in relation to claims based on the Webuild Shareholder Loans, which the Tribunal finds upon close examination has limited persuasive value in this case, notwithstanding the parallel posture (albeit in the context of a different treaty) of the two cases in relation to this issue.

206. The *Hochtief* tribunal's decision (by majority) relied heavily on the language of Article 22.2 of the Concession Contract and its lack of any exception for BIT claims to hold that claims based on the Hochtief Shareholder Loans were precluded by the terms of Article 22.2.[224] The tribunal did not, however, engage in a detailed textual or contextual analysis to reach that conclusion,[225] although it did note that "other sections of the Concession

[224] **CL-0013,** *Hochtief*, Decision on Liability, ¶ 194.
[225] *Ibid*., *see Hochtief*, Decision on Liability, (Annex A) ¶¶ 187-194 for full discussion.

Contract, such as Sections 11.1 and 11.3, do expressly provide for the position of third parties".[226] However, Article 11 does not deal with financing, but essentially makes the Concessionaire liable for its management of the Concession properties and execution of the work, including for damage it causes to third parties. Its references to third parties, using different terminology, are therefore not particularly probative.

207. The *Hochtief* tribunal did not consider the more relevant provisions of Article 31 of the Contract, and the fact that the equilibrium provisions both there and under the Emergency Law appear to include financing matters and debt within their scope.

208. Nor did the *Hochtief* tribunal reference Section 3(j) of the Bidding Terms, or discuss its implications for the interpretation of Article 22.2, in its analysis of the issue, as the Claimant in the present case has noted. Indeed, the *Hochtief* Decision on Liability states that "[n]either the Concession Contract nor the BIT contains any provision that expressly nullifies Article 22.2 or subordinates it to the protections afforded by the Treaty."[227] This ignores Section 3(j) of the Bidding Terms as well as Article 2 of the Concession Contract which make the Bidding Terms (among others) governing of the Concession Contract.

209. It appears to the Tribunal that the limited treatment of the issue of the Hochtief Shareholder Loan claims' admissibility by the *Hochtief* tribunal may be a function of the fact that the parties in the *Hochtief* Arbitration did not focus on it in detail. The *Hochtief* Decision on Liability does not contain any citations to parties' submissions in this regard, except in para. 187, where the tribunal cites the Respondent's objection. Nor did the *Hochtief*

[226] **CL-0013,** *Hochtief,* Decision on Liability, fn 184. Both of these provisions are part of *Article 11, Responsabilidades).* Article 11.1 states that: "*La Concesionaria será responsable, ante el Concedente y terceros por todos los actos que por sí o por intermedio de contratistas y subcontratistas ejecute para la correcta administración de los bienes afectados a la concesión, y por todas las obligaciones y riesgos inherentes a su adquisición, construcción, operación, administración y mantenimiento. Asimismo la Concesionaria será civilmente responsable por los perjuicios o daños que pueda ocasionar a personas o bienes. Ella, su personal y las empresas con las que contrate trabajos serán responsables, además, por el cumplimiento de todas las leyes, ordenanzas y disposiciones emanadas de las autoridades con jurisdicción en la zona de la obra."*Article 11.3, second paragraph, states that "(...) *Deberá hacerse cargo, asimismo, de las acciones que surgieren por daños causados a terceros o a sus bienes, como consecuencia en ambos casos del obrar de la Concesionaria o de las responsabilidades que le son propias en su carácter de concesionaria de una obra pública (...)*."

[227] **CL-0013,** *Hochtief*, Decision on Liability, ¶ 192.

tribunal appear to have the benefit of the type of detailed expert opinions on Argentine law that have been submitted in this case.[228]

210. Overall, therefore, the limited extent of the submissions and analysis concerning the admissibility of Hochtief Shareholder Loan claims does not materially assist this Tribunal in reaching a decision on the Shareholder Loan claims before it. This significantly undercuts the persuasive value of the *Hochtief* decision for the present Tribunal. While consistency is an important value in these types of proceedings, this Tribunal must consider the totality of the submissions before it in this case, including the detailed expert opinions on Argentine law, and reach its decision based on its analysis of those submissions. Having concluded that the tribunal's decision in the *Hochtief* Arbitration has limited persuasive value for the present Tribunal, likely due to the scarce record available to it, the Tribunal affirms its considered decision that the Webuild Shareholder Loan claims are admissible.

(vii) Conclusion and Implications for Damages

211. Having considered in depth the submissions of the Parties and their experts on the proper interpretation of Article 22.2 of the Concession Contract, including the relevance of the *Hochtief* tribunal's decision, the Tribunal has determined that the claims of Webuild predicated on its Shareholder Loans are admissible. The Respondent's request that the Tribunal declare these claims inadmissible is therefore denied. While this determination means that Webuild Shareholder Loans will be part of any damages calculation should any of the Claimant's merits claim succeed, how precisely they should be factored into that calculation is a question that will require further consideration under that scenario. The Tribunal is mindful of the need to avoid double recovery, as well as the potential need to address other issues that might affect the proper calculation of damages. This may include, for example, in the event this Tribunal finds a violation on the merits, a determination of

[228] The *Hochtief* tribunal's decision on the Shareholder Loan claims was an issue raised in the Application for Annulment of the Claimant; however, those proceedings were terminated based on an apparent settlement reached by the parties prior to any decision on the Application. On 9 August 2021, the ICSID *ad hoc* Committee issued a procedural order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1). *See also* ¶ 49 *supra* (reflecting notification to this Tribunal of the discontinuance).

the extent to which the failure timely to reestablish the Concession Contract's equilibrium prevented the repayment of the Webuild Shareholder Loans.[229]

B. FAIR AND EQUITABLE TREATMENT

(1) The Parties' Positions

a. The Claimant's Position

(i) The Standard of Fair and Equitable Treatment

212. The Claimant submits that under the FET standard included in Article 2.2 of the BIT, Argentina has a positive obligation to accord fair and equitable treatment to covered investments and a negative obligation to refrain from unjustified or discriminatory treatment. Therefore, according to the Claimant, unjustified or discriminatory treatment breaches the FET standard, but the Government's conduct can also violate the FET standard without being unjustified or discriminatory.[230]

213. The Claimant argues that the following actions are comprised under the FET standard: (i) actions that frustrate an investor's legitimate expectations in relation to its investments; (ii) actions that treat an investor or an investment with a lack of transparency; (iii) conduct that creates an unstable and unpredictable legal framework or business environment for the investment; (iv) conduct that violates due process or results in a denial of justice including – but not limited to – improper judicial or administrative proceedings as well as governmental interference in such proceedings; (v) discriminatory actions; and (vi) actions taken in bad faith.[231]

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[229] As the Claimant's expert Dr. Liendo opined, the scope of the compensation as regards the intercompany loans would therefore be "*limited to the portion that was not paid by the Concessionaire […] due to the disruption of the concession's economic and financial equation*." Liendo Report, ¶ 71.
[230] Claimant's Memorial, ¶¶ 178-180.
[231] *Ibid*., ¶ 184 and the extensive case law cited therein: **CL-0013**, *Hochtief v. Argentina,* Decision on Liability ¶ 219 ; **CL-0003***, Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award ("***Impregilo*, Award**"), ¶¶ 291, 297, 331; **CL-0014**, *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A v. Argentine Republic.* ICSID Case No. ARB/03/16*, and AWG Grp. v. Argentine Rep.,* UNCITRAL*,* Decision on Liability, 30 July 2010, ¶¶ 222-225; **CL-0029**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶ 147; **CL-0030**, *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Final Award, 8 June 2009, ¶ 621; **CL-0027**, *Waste Management, Inc. v. United Mexican*

214. The Claimant further emphasizes that the FET standard is particularly linked to the notion of legitimate expectations, which has been established as a dominant and central element by various arbitral tribunals.[232]

(ii) Argentina Violated the Claimant's Legitimate Expectations

215. The Claimant alleges that Puentes had a legitimate expectation that the Concession's economic equilibrium would be restored if Governmental action had affected it negatively. Puentes' right, it posits, is protected by the right to property embodied in the Argentine Constitution, which cannot be altered by Argentina without fair compensation.[233]

216. The Claimant asserts that even though Puentes did assume some risks in connection with the Concession Contract, it did not assume potential risks generated by the Government's conduct. This was reflected in the Concession Contract, which entitled Puentes to request a review and the restoration of the economic equilibrium if negatively affected by Argentina's conduct. The Claimant contends that it was therefore reasonable for Puentes to expect Argentina to restore the Concession's economic equilibrium and provide compensation for the negative impact of Argentina's conduct.[234]

States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 ("***Waste Management II**"),* ¶ 98; **CL-0008**, *LG&E Energy Corp. et al. v. Argentine Republic,* ICSID Case No. ARB/02/01, 3 October 2006, Decision on Liability ("***LG&E*, Decision on Liability**"), ¶ 128; **CL-0031**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 70, 76, 88 (30 Aug. 2000); **CL-0008**, *LG&E,* Decision on Liability, ¶ 131; **CL-0005**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ("***CMS*, Award**") ¶ 284; **CL-0032**, *Occidental Exploration and Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 183; **CL-0033**, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340; **CL-0034**, *Técnicas Medioambientales TECMED, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 153, n.189; **CL-0035**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ("***Rumeli*, Award**"),¶ 609; **CL-0009**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ("***Vivendi I*, Award**"), ¶ 7.4.11(; **CL-0036**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award ¶ 188 (6 Nov. 2008); **CL-0037**, *Oostergetel and Laurentius v. Slovak Republic*, Final Award, 23 April 2012 ¶ 272; **CL-0039**, *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, 29 Mar. 2005, p. 75; **CL-0040**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 450; **CL-0041**, *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 Nov. 2010, ¶¶ 297, 301.

[232] *Ibid*., ¶¶ 184-185.

[233] *Ibid*., ¶ 186.

[234] *Ibid*., ¶¶ 187-188.

217. In the Claimant's view, the Emergency Law created an economic imbalance by causing the conversion of the toll rates from US$ 7.40 to AR$ 7.40 and their freezing until the finalization of the renegotiation process. The Claimant argues that the need to restore the Concession's equilibrium was acknowledged by Argentina through the Emergency Law, which provided that public contracts would be renegotiated by the State within a period of 180 days. Argentina's acknowledgment of the Emergency Law's negative impact on the Concession's economic equilibrium was further expressed in the LOUs and the transitory agreements.[235]

218. The Claimant argues that Puentes waited for over ten years for Argentina to restore the economic equilibrium – to no avail. Argentina did not ratify either the LOUs or the transitory agreements. The Claimant further contends that the execution of these instruments would not even have restored the Concession's economic equilibrium, but they would have provided a first important step, enabling Puentes to repay its debts to Argentina and other lenders and ultimately, once complete renegotiation had occurred, would have restored the internal rate of return contemplated in the LOUs and the transitory agreements.[236]

219. The Claimant emphasizes that Argentina also caused the Claimant to expect that it would comply with the terms of the Financial Assistance Loan. Since no other third-party funding was available and due to Argentina's warning either to accept the FAL or abandon the investment, the Claimant argues that it had no other choice but to accept the Financial Assistance Loan, notwithstanding its onerous terms.[237]

220. The Claimant asserts that it relied on Argentina's contractual commitments when it contributed an additional US$ 3,439,390.37 to finish Project construction. Arguably, these types of commitments have been viewed by tribunals as the most likely to create legitimate investor expectations that the State will conduct itself in a certain manner. For example, the arbitral tribunal in *Total v. Argentina* held that specific legal obligations assumed by

[235] *Ibid*., ¶¶ 189-191.
[236] *Ibid*., ¶ 197.
[237] *Ibid*., ¶ 198.

the host State in contracts, concessions or stabilization clauses create a legitimate expectation upon which the investor is entitled to rely as a matter of law.[238]

221. In the Claimant's view, Argentina's issuance of Resolution 14 unilaterally modified the terms of the Financial Assistance Loan, thereby changing Puentes' finances and destroying its ability to pay back the Financial Assistance Loan or earn any profit.[239]

(iii) Argentina's Conduct Was Arbitrary, Grossly Unfair, Unjust and Idiosyncratic

222. The Claimant alleges that Argentina's conduct, consisting of (i) its failure to renegotiate the Concession Contract, and (ii) its termination of the Concession, was arbitrary, grossly unfair, unjust and idiosyncratic.[240] The Claimant does not, however, challenge the legality of the Emergency Law *per se*.

223. The Claimant highlights that past tribunals have found that Argentina's failure to restore the economic balance after the enactment of the Emergency Law breached the FET standard (*e.g.*, *Impregilo v. Argentina* and *EDF International v. Argentina*). It further underscores that the delay in concluding the renegotiation process within a reasonable time was held by the *Hochtief* tribunal to be a breach of the FET standard since it crossed a line between what was merely sub-optimal administration and bureaucratic delay, and what became a failure to remedy the adverse consequences of Argentina's measures that was so prolonged and so complete as to infringe the investor's rights under the BIT. The Claimant further notes that the *Hochtief* tribunal also held that Argentina's failure to implement any of the LOUs and transitory agreements was unfair to Puentes.[241]

224. According to the Claimant, Argentina's unfair and inequitable treatment is comprised of the following acts: (i) it presented a renegotiation proposal in April 2005, more than three years after the enactment of the Emergency Law, which provided 180 days for the renegotiation of public contracts; (ii) it repudiated the First LOU by unilaterally replacing

[238] *Ibid*., ¶ 199.
[239] *Ibid*., ¶ 200.
[240] *Ibid*., ¶¶ 202, 207.
[241] *Ibid*., ¶¶ 203-204.

it with the Second LOU; (iii) it denounced the Second LOU based on a claim by one of Puentes' subcontractors 'in spite of the fact that Argentina was already well-aware of that claim prior to proposing the Second [LOU] and that the resolution of the subcontractor's claim depended on the successful renegotiation of the Concession Contract'; (iv) it represented to Puentes that a transitory agreement rather than a letter of understanding would allow the agreement to be ratified more quickly, although it ultimately failed to implement any of the four agreements subsequently executed; (v) it represented to Puentes that a transitory agreement would not require a public hearing for its ratification (after Puentes agreed to two transitory agreements, Argentina claimed that a public hearing needed to be held nevertheless); and (vi) it forced Puentes into dissolution by failing to ratify the Fourth Transitory Agreement and by preventing Puentes' shareholders from injecting more capital into the company to prevent its dissolution.[242]

225. These actions, in the Claimant's view, demonstrate Argentina's continued delay in the negotiations with Puentes. Additionally, the Claimant posits that Argentina violated its own legally-imposed deadlines, made unreasonable excuses for its failure to execute, convinced Puentes to accede to terms promising benefits that were never delivered, and withheld approvals that would have prevented Puentes' dissolution.[243] In the words of Puentes' CFO, Mr. Gabriel Hernández: "Resolution SOP 14/03 and the Emergency Law financially asphyxiated the company."[244]

226. Lastly, the Claimant alleges that Argentina wrongfully terminated the Concession Contract citing Puentes' dissolution as a ground for termination, despite the fact that Argentina had blocked Puentes' shareholders from approving a capital injection to avoid dissolving the company. In the Claimant's view, each ground for termination alleged by Argentina is equally absurd and arbitrary.[245]

[242] *Ibid*., ¶ 205.
[243] *Ibid*., ¶ 206.
[244] **CWS-0003**, Witness Statement of Gabriel Hernández, 27 Dec. 2016, ¶ 35.
[245] Claimant's Memorial, ¶ 207.

(iv) The *Jurisprudence Constante*

227. The Claimant notes that several other arbitral tribunals have concluded that Argentina's failure to renegotiate public contracts disrupted by the emergency measures violated the FET standard. The Claimant emphasizes that while there is no rule of *stare decisis* in international investment law, it has been held that a series of cases that resolve a particular issue in the same manner can – and should – operate as an influential guide to subsequent tribunals addressing the same issue.[246]

228. The Claimant highlights that several investment tribunals have held that Argentina breached the FET standard with its pesification measures and abrogation of inflation-protection clauses. The Claimant notes that every tribunal addressing this issue has found that Argentina breached the FET standard when failing to renegotiate the public concessions negatively affected by the Emergency Law, thereby failing to restore the contracts' economic equilibrium after the end of the economic crisis.[247]

229. The Claimant posits that, in accordance with this *jurisprudence constante*, absent very compelling circumstances, this Tribunal should find that Argentina's failure to renegotiate Puentes' Concession and to restore its economic equilibrium constitutes a breach of the FET standard.[248]

(v) Argentina's FET Arguments Are Incorrect

230. The Claimant makes various responses to Argentina's FET arguments. First, contrary to the Respondent's contention, the Claimant argues that it did not breach the Concession Contract from the very beginning. In its view, the financial issues Puentes faced arose from a range of factors, such as (i) the looming Argentine economic crisis, (ii) Argentina's repeatedly late payment of the agreed subsidy amounts, (iii) the IDB's and banks' withdrawal in response to both these factors, and (iv) the Emergency Law. The Claimant

[246] *Ibid*., ¶¶ 208-209; Claimant's Reply, ¶ 227.
[247] Claimant's Memorial, ¶ 210; Claimant's Reply, ¶ 225.
[248] Claimant's Memorial, ¶ 212.

argues that, in any event, its alleged non-compliance would be irrelevant to the question whether Argentina had to re-establish the Contract's economic equilibrium and whether it did so in fact.[249]

231. Second, the Claimant argues that Argentina's alleged measures to support the Project are neither correct nor relevant. In any event, far more consequential than any role Argentina played in the IDB negotiations was its failure to pay the subsidy on time, its pesification and its failure to re-establish the Concession's economic equilibrium. According to the Claimant, Argentina's financial assistance to Puentes was an abusive money-making venture for the State.[250]

232. Third, Argentina's argument that the economic equilibrium was disrupted before the enactment of the Emergency Law is, in the Claimant's view, solely based on the fact that the IDB refused to disburse the Loan because of expectations that traffic volume would be reduced. The Claimant submits that the IDB negotiations were affected by several factors, such as Argentina's failure to pay the subsidy in a timely manner. It further contends that there are reasons to believe that the IDB would have disbursed the Loan, had Argentina met its contractual obligations.[251]

233. Fourth, the Claimant argues that whether Puentes owed Boskalis-Ballast or not, Puentes could not pay its subcontractors without Argentina having restored the Concession's economic equilibrium. Arguably, the tribunal in the *Boskalis-Ballast* ICC Arbitration explicitly recognized that the uncorrected imbalance created by Argentina's pesification put Boskalis-Ballast and Puentes in difficult economic circumstances.[252]

234. Fifth, the Claimant notes that Argentina's reliance on the findings of the *Hochtief* tribunal that Puentes was in financial difficulties is irrelevant. It stresses that, in any event, the

[249] Claimant's Reply, ¶¶ 232-234.
[250] *Ibid*., ¶¶ 235-238, 256-259.
[251] *Ibid*., ¶¶ 239-242.
[252] *Ibid*., ¶¶ 243-247.

Hochtief tribunal was wrong in its assessment of why and to what degree Puentes was experiencing financial challenges before the Argentine economic crisis.[253]

235. Sixth, Argentina's position that renegotiating the Concession Contract would have contravened the principle of equality among bidders fails to consider that Argentina had committed itself to rebalancing the Concession Contract if its conduct disrupted the Concession's economic balance. If the Consortium and the other concessionaires would have known during the bidding process that Argentina would refuse to rebalance their contracts' equilibrium, they would have either not participated or submitted a different bid. Accordingly, the principle of equality supports the reestablishment of the equilibrium.[254]

b. The Respondent's Position

236. The Respondent posits that the FET standard, coinciding with the minimum standard of treatment, does not provide an absolute guarantee of legal stability or an insurance policy, as confirmed by the *Hochtief* tribunal. A broad interpretation of the standard that would protect the investor's expectations is nowhere to be found: not in the Italy-Argentina BIT, nor in any other BIT concluded by Argentina.[255]

237. The Respondent emphasizes that due regard has to be given to the context and circumstances of the case at hand, in particular that: (i) the Project was approved under the public works concession regime; (ii) it was stated in the Concession Contract that Puentes would not receive sureties or guarantee from Argentina and that the Concession would not have any guaranteed minimum revenues or traffic volume; and (iii) the Concession Contract was a risk contract as per Decree No. 650/1997.[256]

238. The Respondent further contends that Puentes did not manage to obtain financing for the Project from the very outset for reasons not attributable to Argentina, being the fact that the obligation to submit the FIFA was of essence to the Contract. Argentina claims that,

[253] *Ibid*., ¶¶ 248-251.
[254] *Ibid*., ¶¶ 252-255.
[255] Respondent's Counter-Memorial, ¶ 389; Respondent's Rejoinder, ¶¶ 389-390.
[256] Respondent's Counter-Memorial, ¶¶ 394-397; Respondent's Rejoinder, ¶¶ 398-399.

despite Puentes' failure, Argentina still disbursed the subsidy, maintained the Concession and granted Puentes financial aid, thereby bearing the burden of the risk assumed by Puentes. The Respondent notes that, while Argentina could have terminated the Concession Contract, it opted for maintaining it.[257]

239. Argentina alleges that regard should also be given to the measures it adopted to support the Project. Among others, it granted repeated extensions for Puentes to comply with its obligation to submit the FIFA, negotiated with the IDB and supported Puentes in its efforts to obtain financing; it also granted Puentes financial aid at a time when Argentina was facing an unprecedented economic, financial, social, political and institutional crisis, and maintained the Concession despite Puentes' multiple breaches.[258]

240. The Respondent argues that Puentes itself recognized that the economic and financial equilibrium of the Concession Contract was disrupted before the Emergency Law was enacted.[259] Arguably, Puentes' financial problems arose prior to the crisis, as demonstrated by the ICC arbitration proceedings commenced by its subcontractor Boskalis-Ballast. According to Argentina, the *Hochtief* tribunal also noted that there was evidence that Puentes was in financial difficulties even before pesification. This shows that the disequilibrium alleged by the Claimant occurred before the emergency measures and is solely attributable to the Claimant.[260]

241. Moreover, the Respondent posits that the Claimant's contention that Argentina's failure to rebalance the Concession forced Puentes into reorganization proceedings is false. The Respondent asserts that Puentes' insolvency proceedings were caused by the bankruptcy claim brought by its subcontractor Boskalis-Ballast to secure the ICC Arbitration award rendered in its favor.[261]

[257] Respondent's Counter-Memorial, ¶¶ 398-403; Respondent's Rejoinder, ¶¶ 393-396, 401-403.
[258] Respondent's Counter-Memorial, ¶ 404; Respondent's Rejoinder, ¶¶ 412-414, 424, 448.
[259] Respondent's Counter-Memorial, ¶¶ 405-407; Respondent's Rejoinder, ¶¶ 420-423; 426-428.
[260] Respondent's Counter-Memorial, ¶¶ 408-414; Respondent's Rejoinder, ¶¶ 429-434.
[261] Respondent's Counter-Memorial, ¶¶ 434-437; Respondent's Rejoinder, ¶ 434.

242. Argentina emphasizes that the disruption of the economic equilibrium of the Contract due to Puentes' financial difficulties before the adoption of the emergency measures made it difficult to renegotiate the Concession and, at the same time, meet the goal of protecting the public interest and the principle of equality among bidders, both of which the State must ensure.[262]

243. The Respondent further claims that the *Hochtief* tribunal did not actually find that the pesification policy as such breached the FET standard. It further contends that a lack of adjustment of tariffs does not in itself amount to treatment that is contrary to the FET standard but rather must be assessed in light of all circumstances of the case.[263]

244. The Respondent contends that Puentes falsely claims that it was forced to sign the Financial Assistance Loan Agreement and that Argentina unilaterally changed the terms of the Agreement through Resolution 14. Puentes was free to accept or reject the FAL Agreement and it could even terminate it if Puentes obtained more convenient financing sources.[264] Further, in Argentina's view, Resolution 14 did not increase the interest rate.[265]

245. Further, the Respondent requests the Tribunal to consider that: (i) Puentes was not providing public services at the time the renegotiation commenced; (ii) other concessionaires showed themselves to be collaborative, which allowed negotiations to be concluded well ahead of the Agreement entered into with Puentes; and (iii) Argentina continued with the renegotiation process, even after being warned by the subcontractors that the adoption of any measures should be subject to the prior regularization of Puentes' situation with its subcontractors and suppliers.[266]

246. The Respondent contends that the need to establish a common line between the renegotiation process and Puentes' insolvency proceedings rendered the terms of the

[262] Respondent's Counter-Memorial, ¶ 415; Respondent's Rejoinder, ¶¶ 443-445.
[263] Respondent's Counter-Memorial, ¶¶ 418-419; Respondent's Rejoinder, ¶ 447.
[264] Respondent's Counter-Memorial, ¶¶ 421-422; Respondent's Rejoinder, ¶¶ 438, 449.
[265] Respondent's Counter-Memorial, ¶ 434-436; Respondent's Rejoinder, ¶¶ 457, 459-461.
[266] Respondent's Counter-Memorial, ¶¶ 438-440; Respondent's Rejoinder, ¶ 463.

Second LOU ineffective, and a new agreement needed to be reached consistent with the new situation.[267]

247. According to Argentina, the filing of a petition for the commencement of insolvency proceedings is one of the grounds for termination of the Concession Contract, with the same effects and scope as in the event of termination through the fault of the Concessionaire. The Respondent emphasizes that, nonetheless, Argentina did not terminate the Concession and continued to seek a solution, even once Hochtief initiated its ICSID arbitration. This is acknowledged by the Claimant itself.[268]

248. The Respondent contends that the Claimant's reliance on the transitory agreements to support its argument that Argentina purportedly violated the FET standard is contradictory. If the LOUs and the transitory agreements created obligations for Argentina, that means that the renegotiation was successful and, therefore, it is not possible to invoke a breach of the BIT on this basis. On the contrary, if the LOUs and the transitory agreements did not result in an effective agreement between the Parties, it cannot be argued that they created obligations for Argentina. The Respondent submits that Puentes itself denounced the Fourth (and last) Transitory Agreement, thereby abandoning the renegotiation process of the Contract. It was also Puentes that filed an administrative claim requesting that the Concession Contract be declared terminated on the basis of Argentina's fault. Puentes further filed a complaint in court.[269]

249. With respect to the Claimant's argument relating to Puentes' request for a capital increase, the Respondent alleges that such purported request was in fact intended to *decrease* the equity set out in the Contract from AR$ 30 million to AR$ 1 million. In the Respondent's view, said amount was insufficient to attain the corporate purpose and inconsistent with the Contract's obligation regarding the level of equity funding.[270]

[267] Respondent's Counter-Memorial, ¶ 441; Respondent's Rejoinder, ¶ 471.
[268] Respondent's Counter-Memorial, ¶¶ 443-444; Respondent's Rejoinder, ¶ 473.
[269] Respondent's Counter-Memorial, ¶¶ 445-447; Respondent's Rejoinder, ¶¶ 474-476.
[270] Respondent's Counter-Memorial, ¶¶ 448-451.

250. Lastly, the Respondent submits that the Claimant incorrectly cites the grounds that justified Argentina's termination of the Concession Contract. Article 1 of the Termination Resolution declared the termination of the Concession Contract by reason of the Concessionaire's dissolution and liquidation. Termination was thus automatically triggered by the decision of Puentes' shareholders to dissolve the company, and was not based on the grounds alleged by the Claimant. In the Respondent's view, termination of a contract, carried out in accordance with its terms, does not amount *per se* to a violation of the standards set forth in the applicable BIT.[271]

(2) The Tribunal's Analysis

251. At the outset, the Tribunal agrees with the Claimant that, under the applicable FET standard, Argentina has a positive obligation to accord fair and equitable treatment to covered investments, in accordance with investors' legitimate expectations, and a negative obligation consisting of refraining from unjustified or discriminatory treatment.

252. The positive obligation incorporated in the FET standard is included in Article 2.2 (first sentence) of the BIT: '*Cada Parte Contratante acordará siempre un trato equitativo y justo a las inversiones de inversores de la otra. Parte Contratante […]*'. In the unofficial English translation: '*Each Contracting Party shall always accord a fair and equitable treatment to the investments made by the investors of the other Contracting Party. […]'*

253. The negative obligation incorporated in the FET standard is included in Article 2.2 (second sentence) of the BIT: '*[…] Cada Parte Contratante se abstendrá de adoptar medidas injustificadas o discriminatorias que afecten la gestión, el mantenimiento, el goce, la transformación, la cesación y la liquidación de las inversiones realizadas en su territorio por los inversores de la otra Parte Contratante*'. In the unofficial English translation: *'[…] Neither Party shall impair by unjustified or discriminatory measures, the management, maintenance, enjoyment, transformation, cessation, or disposal of investments*'.

[271] Respondent's Counter-Memorial, ¶¶ 452-460; Respondent's Rejoinder, ¶¶ 480-484.

(i) Positive obligation under the FET standard

254. The applicable BIT does not restrict the positive obligation to accord FET to the minimum standard under customary international law, but allows for the broader range of treatment provided through autonomous treaty practice, comprising of "a variety of distinct components".[272] The Claimant cites *Waste Management II* with approval on this point:

> *[F]air and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process . . .. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*[273]

255. This Tribunal would, however, like to emphasize that *Waste Management II* is a NAFTA Chapter Eleven case, and given the precise formulation of NAFTA Article 1105, its tribunal had to consider the facts from a customary law point of view – unlike the present Tribunal. Regardless of whether the customary standard has developed to the same extent (a point on which the present Tribunal does not wish or need to take a position), as argued by the Claimant and summarized above,[274] FET as an autonomous treaty standard protects, at its core, the reasonable legitimate expectations of an investor vis-à-vis the State's conduct in relation to its investment. This standard has been elaborated upon at length in the case law, including in *Impregilo, Hochtief, National Grid, Total, EDFI and SAUR, BG and LG&E,*[275] giving rise to a *jurisprudence constante*. Even though these cases were

[272] Claimant Memorial, ¶ 183.
[273] **CL-0027**, *Waste Management II* ¶ 98.
[274] *See* ¶¶ 212-235 *supra*.
[275] **CL-0003**, *Impregilo* Award ¶ 331; **CL-0013**, *Hochtief,* Decision on Liability ¶ 281; **CL-0015**, *National Grid P.L.C. v. Argentine Republic, UNCITRAL,* Award, 3 November 2008 ("***National Grid*, Award**"), ¶ 179; **CL-0004**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ("***Total*, Decision on Liability**"), ¶ 180; **CL-0136**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, 1 February 2016, ¶ 325; **CL-0002**, *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentina Republic.*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 1005; **CL-0016**, *BG Group Plc. v. The Republic of Argentina,* UNCITRAL Arbitration, Final Award, 24 Dec. 2007, ¶ 309; **CL-0008**, *LG&E*, Decision on Liability, ¶ 137.

decided on the basis of different BITs, the relevant treaties all contain identical or similarly worded FET clauses. [276]

256. As to the positive obligation to accord FET in the present case, the primary legitimate expectation of the Claimant was grounded in the Concession Contract itself: while this Contract may not create any expectation of a particular rate of return or profitability, it establishes the foundation for other expectations, including the expectations of a certain economic environment based on the existence of the Convertibility Law and the indexing of values, as well as the specific expectation that the economic equilibrium of the contract would be maintained (Article 31.2 of the Concession Contract). Such an expectation is particularly relevant for long-term commitments by foreign investors in sectors such as infrastructure which are capital-intensive and risk-laden.

257. The revenue side of the equilibrium equation was fundamentally altered by the Emergency Law through the creation of an economic imbalance by causing the conversion of the toll rates from US$ 7.40 to AR$ 7.40 and their freezing until the finalization of the renegotiation process.[277] The Emergency Law recognized the need to restore the Concession's equilibrium by providing (in its Article 9) that public contracts would be renegotiated by the State within a period of 180 days, but this provision was not complied with by the State. The purpose of such renegotiation would not be the improvement of any company's position, but merely the restoration of the equilibrium. Article 9 incorporates an obligation of conduct which, when coupled with the promises of restoration of the economic equilibrium as a matter of local law, creates a legitimate and reasonable expectation of result.

258. An additional persuasive element in this regard is the Argentine Commercial Court Judgment of 11 June 2008, holding that UNIREN's failure to continue renegotiation (after

[276] Respondent's Counter-Memorial, ¶¶ 373-393; Respondent's Rejoinder, ¶¶ 377-392.
[277] The evidence before the Tribunal indicates that the cost side of the equation was also adversely affected by the Emergency Law and subsequent acts and omissions (Resolution 14, the failure to renegotiate the Concession Contract and restore its economic equilibrium, the failure to approve Puentes' request to increase its capital so as to comply with Argentine corporate law and avoid dissolution, and the Termination Resolution). These measures exacerbated the effects of the de-pegging of the peso to the U.S. Dollar and of de-indexation, and contributed to the ultimate failure of Puentes.

the 2007 LOU) was in breach of Argentine law, and expressing its concern that more than six years after enactment of the Emergency Law 'the grave imbalance in terms of the agreement persists'.[278]

259. Explicit and specific representations were made by the State through both the renegotiation clause in the Emergency Law, providing that equilibrium would be restored within a reasonable time frame, and the obligations under Article 31.2 of the Concession Contract. The investor clearly relied on these provisions when returning to the negotiation table and signing the 2006 LOU, indicating it was accepting the conditions. In other words, the Claimant's reasonable expectations that the Concession's economic equilibrium would be restored within a reasonable time if Governmental action (*e.g.,* tariff pesification under the Emergency Law) affected it negatively, were legitimate. By 2006, enough time had passed after the enactment of the Emergency Law in 2002 to support the conclusion that the State had had ample opportunity to conclude a successful renegotiation and implement its results accordingly. The fact that a number of other developments were ongoing and affecting the economic and political position of the Government is not relevant with regard to the impact of the Emergency Law. As a result, the Tribunal finds that the Respondent has acted in breach of Article 2.2 (first sentence) of the BIT when it failed in November 2006 to restore the economic equilibrium of the Contract.

260. The Tribunal, while troubled by several aspects of the 2003 Financial Assistance Loan (including Resolution 14), does not consider that it needs to determine whether this Loan represents a separate breach of FET. (The Tribunal notes that the Claimant does not appear to maintain this is the case, since its damages claim does not cover this time period.) The Tribunal does, however, consider that the terms on which the Financial Assistance Loan, as its terms were ultimately set by Resolution 14, was granted, had the effect of exacerbating the financially straitened situation of Puentes created by the Emergency Law,

[278] **Exhibit C-0040**, Court Order in Puentes del Litoral S.A. s/insolvency proceedings, File No. 093971, Court 13, Sec. 26, 11 June 2008.

making the need for restoration of the equilibrium in a reasonable time even more compelling.[279]

261. Finally, with respect to the Respondent's failure to approve the requested equity infusion in 2012, the Tribunal accepts that the failure to restore the economic equilibrium of the Concession within a reasonable time had the consequence that Puentes was necessarily driven into a state of insolvency over a period of time thereafter—"financial asphyxiation", as it was termed by the Claimant, with the predictable effect on shareholders' equity. This act was therefore not an isolated contractual decision but part of the relevant course of conduct. It represented in effect the "nail in the coffin" for Puentes.

262. The Tribunal did not find the Respondent's legal arguments persuasive: reliance on the *NEER* standard does not justify the breach of the Claimant's legitimate expectations; nor does termination of the Concession Contract serve as a defense to liability under the BIT. The main element of the breach is the failure to rebalance and restore the equilibrium in 2006; the later termination of the Contract is irrelevant, given the Tribunal's finding that the insolvency of Puentes was a consequence of the breach.

263. Neither was the Tribunal persuaded by the factual arguments of the Respondent: the status of the Project at the time of the Emergency Law is irrelevant given the Respondent's conduct and the fact that the Project was completed and operational at the time the breach occurred. The Claimant had indeed assumed risks with respect to commercial matters such as traffic volume and revenues but again, this is irrelevant in light of the Tribunal's basis for finding a breach on the part of the Respondent. The same analysis applies to the Claimant's alleged breach of its contractual undertakings regarding financing (failure to obtain third-party financing) during the construction phase and the measures taken by the Respondent to support the Project. (Argentina nevertheless still disbursed the subsidies, maintained the Concession and granted Puentes financial aid that enabled the Project to be completed.) These facts, and the acknowledged financial support provided by the

[279] This was not only a function of the interest rate, compounding provisions, and repayment terms, but also because of the operation of the expense pesification provisions.

Respondent in the form of the subsidy and the Financial Assistance Loan, do not alter the fact that the Concession Contract and the Emergency Law created an obligation of rebalancing which was violated.[280]

264. Equally, the situation of Puentes with its subcontractors and suppliers and the filing of a petition for the commencement of insolvency proceedings are not considered decisive. While these factors may have complicated or prolonged the renegotiation process to some extent, they do not explain its extensive duration and ultimate failure. Had the Concession Contract been timely rebalanced, some of the events highlighted by Respondent may not even have occurred. The Tribunal's finding that the breach took place in 2006 obviates the need to address any subsequent issues from a liability standpoint.

265. On the contrary, Argentina behaved in an arbitrary, grossly unfair, unjust and idiosyncratic manner in not renegotiating the Concession Contract within a reasonable time, *i.e.,* not presenting a renegotiation proposal after the 180-day deadline set out in the Emergency Law; unilaterally replacing the first LOU; denouncing the second LOU; making representations regarding the First Transitory Agreement; not ratifying the Fourth Transitory Agreement; and in preventing Puentes' shareholders from injecting more capital into the company to avoid its dissolution. Equally, the Respondent conducted itself in an unjust manner when terminating the Concession.

266. The Tribunal appreciates that Argentina has argued that termination was an automatic result of the Concessionaire's dissolution and liquidation. While the Contract may have technically permitted such an action, FET requires that the Tribunal consider the

[280] At most, they might have an effect on the terms of the new equilibrium, but this would be a matter for Argentine law. In so holding, the Tribunal is not taking the position that contractual breaches or other conduct by a concessionaire or other holder of a public contract are never relevant to a determination of whether FET has been violated, only that on the facts of this case, they do not defeat either the investor's legitimate expectations as to rebalancing or the ultimate conclusion of breach. The Tribunal appreciates that Argentina asserts that Puentes itself took the position that the Contract's equilibrium had been upset by late July 2001, when Puentes wrote to the government asking it to rebalance the Concession. *See* para. 86 *supra.* The Parties dispute whether this request was commercially motivated (Argentina's position) or the result of the changing economic circumstances of the country (the Claimant's position). It is not disputed that Argentina's economic position as a country began to deteriorate several years before the enactment of the Emergency Law in January 2002. It is not clear to the Tribunal what the precise mix of commercial and macroeconomic factors behind Puentes' request may have been, but in any event a need to make such a determination is obviated by subsequent events.

termination not in isolation, but in conjunction with the other facts and circumstances of this case. Viewed in light of the totality of the facts and circumstances, it is clear that the termination was the final consequence of the failure to rebalance and the prolonged period of disequilibrium in which Puentes tried to operate under the unsustainable yoke of frozen tariffs, the terms of the Financial Assistance Loan, and increasing costs. If Respondent's failure to approve the equity infusion was the nail in the coffin of the investment following the failure to timely renegotiate, the termination of the Contract was its burial.

267. The Tribunal does not accept Argentina's argument that if the LOUs and Transitory Agreements created obligations for Argentina, this means that the renegotiation was successful and, therefore, it is not possible to invoke a breach of the BIT. It is manifest that the renegotiation, despite multiple attempts over a period of years, was not successful. But the breach of FET stems from the obligation created by the Emergency Law and the Concession Contract to restore the economic equilibrium within a reasonable time. Although the Respondent implies that the Claimant, in contrast to other concessionaires, was not sufficiently cooperative, this has not been proven. The Claimant has demonstrated that it fully participated in the process and acquiesced in the various LOUs and Transitory Agreements in the hope and expectation that an agreement would be reached. The Respondent has not demonstrated any bad faith on the part of the Claimant. And while the history of this Concession might have introduced some complexities not present in other concessions, the extreme and unjustified duration of the renegotiation efforts leaves little doubt in the Tribunal's mind that the "reasonable time" standard for rebalancing was breached.

(ii) Negative obligations under the FET standard

268. The Tribunal's determination that the positive obligation to accord fair and equitable treatment to the Claimant's investments specified by Article 2.2 (first sentence) was violated effectively establishes that the negative obligation set forth in the second sentence of that same Article has been violated, at least with respect to the "unjustified" prong of that negative obligation. As the foregoing analysis has indicated, the Respondent had an

obligation to restore the Concession's equilibrium within a reasonable time in the wake of the 2002 Emergency Law, based on both the provisions of the Concession Contract and the Emergency Law itself. That did not occur. Instead, the Concessionaire was subjected to a protracted series of negotiations between 2006 and 2014 during which period of time its toll rates were frozen at 2002 levels and its financial viability increasingly undermined, culminating in its insolvency and the Concession Contract's termination. Neither the circumstances of Puentes or the Project during that period, nor Puentes' prior conduct, justified such treatment. While recognizing the financial and other support that the Respondent gave to Puentes and the Project at various times, that support did not justify the treatment they received, either. Accordingly, on the facts of this matter, the Tribunal finds that Article 2.2 (second sentence) has also been violated.

269. As a result, the Tribunal holds that the evidence presented before it supports a finding that the Claimant has been treated in an unfair, inequitable and unjustified manner, thereby acting in breach of Article 2.2 (first and second sentences) of the BIT.

270. The Tribunal makes no findings at this juncture regarding the other "limb" of the second sentence of Article 2.2, discrimination, as that concept will be addressed in its various formulations in Articles 3, and 4 of the BIT in the following section.

C. DISCRIMINATORY MEASURES

(1) The Parties' Positions

a. The Claimant's Position

(i) The Content of the Prohibition of Discriminatory Treatment

271. It should be noted at the outset that the Claimant's discrimination claim encompasses several provisions of the BIT which contain discrimination elements. It has approached this claim in an overarching way.

272. The Claimant contends that most tribunals and international authorities have interpreted the concept of discrimination as concerning (i) different treatment, (ii) between two appropriate comparators, (iii) that cannot be justified.[281]

273. According to the Claimant, the first element is non-controversial. Thus, one must assess whether a State has subjected a covered investment to treatment less favorable than treatment accorded to others.[282]

274. The second element, in the Claimant's view, consists of determining who are the appropriate persons as points of comparison and what subject matters fall within the concept of treatment. In terms of "who", the BIT's national treatment and most-favored-nation provisions (Articles 3.1 and 4) provide that covered investments may not receive less favorable treatment as compared to the investments of Argentine nationals and other foreigners. The Claimant contends that, with regard to the subject matter, Article 2.2 provides that States may not subject covered investments to discrimination with respect to nearly all of the investment's phases, and Article 3 states that the national treatment and most-favored-nation provisions apply to all matters governed by the BIT.[283]

275. Regarding the third requirement – whether the less favorable treatment is justified – the Claimant notes that arbitral tribunals have used the concept of "like circumstances" to address the question of whether there was any legitimate reason justifying the less favorable treatment.[284]

276. The Claimant submits that while some arbitral tribunals have determined that investments that compete with each other are in "like circumstances", an investment treaty's prohibitions against discriminatory treatment should not be interpreted as being limited to different treatment between investments that compete since (i) nothing in the BIT suggests that competition should determine the scope of discriminatory treatment; and (ii) the object and purpose of investment law is distinct from trade law. While trade law is concerned

[281] Claimant's Memorial, ¶ 217; Claimant's Reply, ¶¶ 266, 268-275.
[282] Claimant's Memorial, ¶ 217.
[283] *Ibid*., ¶ 218.
[284] *Ibid*., ¶¶ 219-222.

with reciprocal exchange of market opportunities and preventing protectionism, investment law seeks to protect the economic value of investments from a host state's opportunistic behaviour.[285]

(ii) Argentina Subjected Puentes to Less Favorable Treatment than Other Road Concessions

277. The Claimant argues that Argentina refused to grant Puentes any toll rate increase for over 12 years, while, at the same time, it granted numerous and substantial toll increases to other toll road operators. According to the Claimant, between 2002 to 2013, Argentina granted toll rate increases to at least 12 road operators, namely (1) Autopistas Urbanas, S.A.; (2) AUSOL; (3) Grupo Concesionario del Oeste, S.A.; (4) AEC S.A.; (5) Caminos del Río Uruguay; (6) Concesionaria del Sur; (7) Consortium formed by Vial 3 and Emcovial; (8) Cincovial, S.A.; (9) Caminos de las Sierras (Zárate-Brazo Largo Bridge); (10) AUFE S.A.C.; (11) ARSSA; and (12) Raúl Uranga – Carlos Sylvestre Begnis Tunnel.[286]

278. The Claimant contends that, as compared to these 12 toll-road concessionaires, Puentes received less favorable treatment.[287]

(iii) Investments of Argentines and Other Foreign Nationals in Toll-Road Concessions as Elements of Comparison

279. According to the Claimant, Argentine nationals and nationals of other countries owned the shares in the project companies that held the other toll-road concessions to which Argentina granted toll increases. Since the shares of those investors in those companies and the related interests in the toll-road concessions constitute investments of those Argentine and foreign investors, they constitute appropriate points of comparison.[288]

[285] *Ibid*., ¶¶ 223-225.
[286] *Ibid*., ¶¶ 226-227.
[287] *Ibid*., ¶ 228.
[288] *Ibid*., ¶¶ 229-231.

280. In the Claimant's view, toll rate increases constitute an appropriate subject matter for purposes of "treatment" because they concern the use and operation of an investment, thereby falling within the ambit of the BIT.[289]

(iv) The Claimant's Investment in Puentes and the Investments of Argentine and Other Foreign Nationals in Other Road Concessions Are in "Like Circumstances"

281. The Claimant's investment and the investments of Argentine and other foreign nationals in other road concessions are in "like circumstances": (i) they are in the same economic sector as Puentes; (ii) their rates were denominated in Dollars and linked to the U.S. Consumer Price Index ("**CPI**"); (iii) their concession contracts allocated risks such as construction costs, traffic volumes, financing and government measures in a similar fashion to the Concession; (iv) the Emergency Law also negatively affected those toll-road concessionaires; and (v) they equally participated in the renegotiation process.[290]

282. In the Claimant's view, even if the term "like circumstances" were to be construed as being limited to investments in direct competition, Puentes was subjected to discriminatory treatment. Apart from the Project works, the only two means to travel between the Provinces of Entre Ríos, Santa Fe and Buenos Aires are the Zárate-Brazo Largo bridge toll-road concession and the Raúl Uranga-Carlos Sylvestre Begnis tunnel. According to the Claimant, the concessionaires operating these two concessions received toll rate increases.[291]

283. The fact that Puentes and Caminos del Río Uruguay were in "like circumstances" was also confirmed in the Claimant's view when Argentina, after terminating the Contract, awarded the Concession to Caminos del Río Uruguay. According to the Claimant, a few weeks later Argentina increased the toll rate for Rosario-Victoria bridge and roadway built by Puentes.[292]

[289] *Ibid*., ¶ 230.
[290] *Ibid*., ¶ 232.
[291] *Ibid*., ¶ 233.
[292] *Ibid*., ¶ 234.

284. The Claimant contends that the Emergency Law further demonstrates that Puentes was in "like circumstances" with other toll-road concessionaries since that Law obligated Argentina to restore the economic equilibrium of all concessions it affected.[293]

285. Lastly, the Claimant argues that the reasons put forward by Argentina to sustain that Puentes was not in "like circumstances", lack merit. UNIREN's May 2014 report asserted that Puentes' Concession was different because (i) the Contract provided that Argentina would provide a subsidy to finance the construction, (ii) the main bridge was not complete when the Emergency Law was enacted, and (iii) Argentina provided the Financial Assistance Loan to Puentes, enabling it to complete construction, after noting five aspects that the Concession had in common with the other toll-road concessions.[294]

286. In the Claimant's view, UNIREN's decision to compare Puentes with other concessionaires proves that Puentes was in "like circumstances" with the other road-toll concessions that did receive toll-rate increases. The aspects that, according to Argentina, distinguished Puentes from the other concessionaires are incorrect and unreasonable. First, the subsidy did not change the fact that the Emergency Law made it impossible for Puentes to cover its costs with its toll revenue. Moreover, some of the other concessionaires received subsidies from a trust fund created in 2001 from a tax on diesel oil and with the aim of compensating toll-road concessionaires for the reduction in their income and the maintenance of their contracts' economic equilibrium.[295] Second, according to the Claimant, the Emergency Law did not differentiate between concessions that had finished their works and those that were not yet operating at the time of its enactment. It applied to the Concession Contract in any case because it pesified and froze its toll rate. Further, Argentina invited Puentes to the March 2002 kick-off renegotiation meeting with the other affected concessionaires, and asked Puentes to explain how the Emergency Law had affected the Concession despite the Project being incomplete at that time.[296] Third, in the

[293] *Ibid*., ¶ 235.
[294] *Ibid*., ¶¶ 236-237.
[295] *Ibid*., ¶ 238.
[296] *Ibid*., ¶ 239.

Claimant's view, the Financial Assistance Loan was necessary because the Emergency Law had made it impossible to obtain third-party funding.[297]

b. The Respondent's Position

(i) The Content of the Prohibition on Discriminatory Treatment

287. Argentina submits that, pursuant to Articles 2.2 and 3 of the BIT,[298] discriminatory treatment exists when the different treatment: (i) is accorded on grounds of nationality; (ii) is less favorable than that accorded to other investors in like circumstances; (iii) is accorded with the intention to harm the foreign investor; (iv) causes actual injury to the foreign investor; and (v) lacks reasonable justification.

(ii) Argentina Did Not Discriminate Against Webuild

288. In the Respondent's view, the Emergency Law was non-discriminatory in nature as it was general in scope and affected all toll-road concessionaires. The Law established general rules applicable to all economic agents without including any unreasonable distinctions and without targeting any specific group of citizens or investors. Argentina contends that the Law pursued the protection of the economic public policy interests which had been threatened by the serious economic, financial, exchange rate, social, political and institutional crisis that Argentina was facing.[299]

289. Argentina emphasizes that the renegotiation process established by the Emergency Law was aimed at (i) assessing all contracts on an equal footing without conferring any privileges, (ii) weighing the level of commitment shown by each concessionaire in the performance of their contract prior to the outbreak of the crisis, and (iii) assessing the objective possibilities of reaching a reasonable solution of the basis of shared efforts between the concessionaire and Argentina, taking due account of the users' interests.[300]

[297] *Ibid*., ¶ 239.
[298] Argentina's submissions treat the Claimant as arguing discrimination under Articles 2.2 and 3 of the BIT only, and do not address Article 4.
[299] Respondent's Counter-Memorial, ¶¶ 471-476.
[300] *Ibid*., ¶ 477.

290. The Respondent posits that, contrary to the Claimant's allegation that Puentes was treated in a discriminatory manner because Argentina did not restore the Concession's economic equilibrium, the economic equilibrium was disrupted before the enactment of the Emergency Law and was caused by Puentes' own financing problems. According to the Respondent, Puentes' financial situation made it difficult to renegotiate the Concession Contract and, at the same time, meet the goal of protecting the public interest and the principle of equality among bidders.[301]

291. Argentina submits that, when determining whether a treatment is more or less favorable than another, such treatment must be assessed as a whole and not by referencing to only one specific aspect. In this regard, the measures adopted by Argentina to support the Project need to be considered. According to the Respondent, such measures included, among others, the grant of repeated extensions to allow Puentes to comply with its obligation to submit the FIFA, Argentina's negotiation with the IDB and support to help Puentes obtain financing, the grant of financial aid at the time when Argentina was facing its crisis, as well as its maintenance of the Concession despite Puentes having breached the Concession Contract several times.[302]

292. The Respondent claims that Puentes' Concession presented certain features that distinguish it from other toll-road concessionaires, as stated by UNIREN in its Report of 28 May 2014.[303] First, most of the works under the Concession were subsidized by Argentina. Contrary to the Claimant's contention, other concessionaires did not receive subsidies from a special trust created in 2001. Rather, the trust was created by Decree No. 976/01 for granting compensation to certain concessionaires of the national road network for the decrease in their revenues as a result of a reduction in the toll rates. Second, contrary to other toll-rate concessionaires, Puentes had not completed the main works when the Emergency Law was enacted. The Concession Contract was nonetheless referred to renegotiation. Third, completion and commissioning of the works under the Concession

[301] *Ibid*., ¶¶ 478-482.
[302] *Ibid*., ¶¶ 483-484.
[303] **Exhibit C-0316**, Report issued by UNIREN, May 28, 2014, p. 5.

were only possible through Argentina's financial aid, a benefit which was not granted to other toll-road concessionaires or any other public works and services company.[304]

293. The Respondent alleges that, contrary to the Claimant's contention, the Financial Assistance Loan was necessary not because the Emergency Law made it impossible to acquire third-party funding, but rather because of Puentes' failure to obtain financing and the disruption of the Concession's economic equilibrium prior the enactment of the Emergency Law, and for reasons not attributable to Argentina.[305]

294. Argentina further argues that two additional events negatively affected the renegotiation process: (i) Puentes' insolvency proceedings, which had a major impact on the evolution of the renegotiation process and entailed a new legal situation thereby rendering the Second MOU ineffective; and (ii) Hochtief's ICSID claim against Argentina. The *Hochtief* Arbitration entailed the pursuit of two avenues of redress affecting the renegotiation process.[306]

295. Lastly, the Respondent alleges that the toll rate increase of the Rosario-Victoria connection occurred a year and a half after the connection was added to the Concession granted to Caminos del Río Uruguay, S.A after termination of Puentes' Concession Contract.[307]

(2) The Tribunal's Analysis

296. In light of the Tribunal's decision regarding Article 2.2, the Tribunal has decided, for reasons of judicial economy, not to address the discrimination claims in detail.

297. In particular, having decided that Argentina violated Article 2.2 (second sentence) of the BIT by unjustified measures, the Tribunal sees no need to decide whether those measures were also discriminatory within the meaning of Article 2.2.[308]

[304] Respondent's Counter-Memorial, ¶¶ 485-490; Respondent's Rejoinder, ¶¶ 497-502.
[305] Respondent's Counter-Memorial, ¶ 491; Respondent's Rejoinder, ¶ 505.
[306] Respondent's Counter-Memorial, ¶¶ 493-499; Respondent's Rejoinder, ¶¶ 508-513.
[307] Respondent's Rejoinder, ¶ 514.
[308] The Tribunal has some doubt in any event whether the test of discrimination proffered by Claimant is the right test in the context of an FET provision as it is for Article 3.

298. Article 4 of the BIT provides that:

> *En caso que los inversores de una de las Partes Contratantes sufrieran pérdidas en sus inversiones en el territorio de la otra Parte por causa de guerra o de otros conflictos armados, estados de emergencia u otros acontecimientos políticos-económicos similares, la Parte Contratante en cuyo territorio se ha efectuado la inversión concederá en lo relativo a indemnizaciones un tratamiento no menos favorable del que otorgue a sus propios ciudadanos o personas jurídicas o a los inversores de un tercer Estado.*

In its unofficial English translation:

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

299. This provision has only been argued in passing by the Claimant. It has not been addressed by Respondent. Moreover, the Tribunal notes that its application is limited by its terms to differential damages arising from situations of "war or other armed conflict, a state of national emergency, or other similar political-economic events". Given that the Claimant claims damages only from 2006, after the national emergency had ended, it is not clear this Article would apply, and the Tribunal sees no reason to explore it further absent submissions from the Parties.[309]

300. That leaves Article 3.1, which provides that:

> *Cada Parte Contratante, en el ámbito de su territorio, acordará a las inversiones realizadas por inversores de la otra Parte Contratante, a las ganancias y actividades vinculadas con aquéllas y a todas las demás cuestiones reguladas por este Acuerdo, un trato*

[309] As with Article 2, the Tribunal has doubt whether the concept of "discrimination" in this context is satisfied by the same test as for Article 3.

> *no menos favorable a aquél otorgado a sus propios inversores o a inversores de terceros países.*

In its unofficial English translation:

> *Each Contracting Party shall, in its own territory, accord to investments made by investors of the other Contracting Party, to the returns and activities related thereto and to all other matters regulated by this Agreement, a treatment not less favourable than that accorded to its own investors or to investors of third countries.*

301. While the Tribunal considers that other toll-road concessionaires may well be appropriate comparators, particularly given the lack of any distinction in the Emergency Law between completed and still-in-progress concessions, and the conduct of the Respondent in inviting renegotiation to concessionaires in both categories, more significant questions are presented in relation to other issues this claim presents. With respect to the issue of "like circumstances", while it is difficult to imagine what differences could justify the prolonged period of limbo into which Puentes was placed by the renegotiation saga described earlier, it is reasonable to consider that at least some of the factors highlighted by the Respondent that it says set Puentes apart (the subsidy, the Financial Assistance Loan, the carryover effects of financial issues from the construction phase into the operations phase), and particularly those issues that carried over into the operational phase, would have needed to be taken into account in some fashion in the renegotiation process. Other questions include: (i) whether the renegotiation process constitutes a form of "treatment" as required by Article 3; and (ii) whether, assuming the "treatment" requirement is satisfied, such treatment reflected discrimination on the basis of nationality, no evidence of which has been shown. Given the Tribunal's decision that both the positive and negative obligations of Article 2.2 of the BIT have been breached, the Tribunal sees no benefit in reaching a conclusion on these issues.

D. EXPROPRIATION

(1) The Parties' Positions

a. The Claimant's Position

302. The Claimant argues that the BIT prohibits two types of expropriatory measures. First, neither Contracting Party may directly expropriate an investment of a national of the other Contracting Party. Second, neither signatory may indirectly expropriate through measures having an equivalent effect. In the Claimant's view, common factors that are often considered include the measures' economic impact and whether they violate an investor's legitimate expectations. This second element is derived from the language of the BIT, which provides that the expropriatory measure may not be "discriminatory or contrary to a commitment undertaken". Further, there exists a consensus that not only tangible property and physical assets may be expropriated, but that also a broad range of economically significant rights, including legal and contractual rights, might be subject to expropriation.[310]

(i) Argentina Indirectly Expropriated the Claimant's Investment

303. In the Claimant's view, five acts or omissions of Argentina – taken together – constitute an indirect expropriation of the Claimant's investment in Puentes' shares, the Concession Contract and the Inter-Company Loans: (i) the Emergency Law; (ii) Resolution 14; (iii) the failure to renegotiate the Concession Contract and restore its economic equilibrium; (iv) the failure to approve Puentes' request to increase its capital so as to comply with Argentine corporate law and avoid Puentes' dissolution; and (v) the Termination Resolution.[311]

304. **The Emergency Law**. According to the Claimant, it is undisputed that the measures under the Emergency Law, consisting of the pesification and freezing of toll rates as well as the initiation of renegotiation, affected Puentes' economic equilibrium. This was

[310] Claimant's Memorial, ¶¶ 241-250.
[311] *Ibid*., ¶ 251. This latter act is also argued to constitute a direct expropriation. *Ibid.,* ¶¶ 258-267. *See* ¶¶ 311-315 *infra.*

acknowledged by Argentina. The Claimant contends that, nonetheless, Argentina took no effective measure to restore the Concession's equilibrium.[312]

305. **Failure to Renegotiate the Concession**. In the Claimant's view, it is undisputed that Argentina was obliged to restore the Concession's economic equilibrium pursuant to the Concession Contract. Argentina, Puentes and its shareholders were all aware that the only possible way to re-establish the Concession's economic balance would be to increase Puentes' toll rates.[313]

306. **Resolution 14**. The Claimant contends that after Puentes opened the bridge to traffic, Argentina issued Resolution 14 which unilaterally changed the financial terms of Argentina's Financial Assistance Loan, thereby worsening Puentes' economic and financial situation. The Claimant asserts that Resolution 14 required Puentes to allocate almost all of its toll revenue to service the Financial Assistance Loan.[314]

307. **Failure to approve Puentes' increase of capital and termination**. In the Claimant's view, by 2012 Puentes' liabilities exceeded its equity due to Argentina's refusal – for over ten years – to grant it toll rate increases. Under Argentine corporate law, Puentes' shareholders were forced to either contribute more equity or dissolve the company. The Claimant alleges that Argentina – which had to approve the equity increase – refused to do so. As a result, Puentes' shareholders were forced to dissolve the company, which was then used as a ground for termination by Argentina.[315]

308. The Claimant posits that the abovementioned measures destroyed the entire economic value of its investment. These measures also violated the Claimant's legitimate expectations that Argentina would take steps to maintain the Concession's economic equilibrium if Argentina's measures negatively affected that balance as reflected in the Concession Contract, Argentine law and the Regulatory Framework. They also violated the Claimant's legitimate expectations under the Emergency Law and the Contract that the

[312] *Ibid*., ¶ 252.
[313] *Ibid*., ¶ 253.
[314] *Ibid*., ¶ 254.
[315] *Ibid*., ¶ 255.

renegotiation process and the six agreements signed by Puentes would restore the Contract's economic equilibrium. The Claimant asserts that, as a consequence, Webuild and Puentes lost their legal rights to possess and control the toll highway and bridge as well as their rights to collect revenue.[316]

309. The Claimant contends that the standard proposed by the Respondent, consisting of requiring the seizure of title to determine that an unlawful indirect expropriation has occurred, should not be taken into account. Under the analysis, and contrary to Argentina's criticisms, the practice of considering an investor's legitimate expectations to determine an unlawful expropriation is undisputed. The Claimant further notes that Argentina has not advanced any evidence showing that Puentes was not substantially deprived of its rights.

310. With regard to Argentina's police powers argument, the Claimant alleges that the defense has to be non-discriminatory in order to be valid, which is not the case. It also cannot be said that the exercise of police powers has been done with *bona fides*. In particular, Resolution SOP No. 14/03 did not merely implement the terms of the Financial Assistance Loan but imposed abusive loan terms on the Claimant.[317]

(ii) The Termination Resolution Constitutes a Direct Expropriation

311. In the Claimant's view, when deciding whether the termination of a concession is an expropriatory measure, a tribunal must consider whether the termination is in conformity with the contract or whether it was unlawful. Under this analysis, the decisive issue is whether the reasons given for the termination constituted a legally valid ground for terminating the Concession Contract according to its provisions.[318]

312. The Claimant contends that Argentina failed to provide legal grounds for the Concession Contract's termination and that the grounds it advanced were absurd. The Claimant alleges

[316] *Ibid*., ¶ 256.
[317] Claimant's Reply, ¶¶ 293-307.
[318] Claimant's Memorial, ¶¶ 258-261.

that despite Argentina framing its reasons within the Contract's permitted grounds for termination, a closer inspection reveals that they are nothing more than pretext.[319]

313. In the Claimant's view, Argentina primarily relies on Puentes' dissolution for terminating the Concession Contract, while failing to recognize that its own actions forced the Company's dissolution. Prior to termination, Argentina refused Puentes' request to amend its bylaws and allow an equity increase. It further refused to ratify the Fourth Transitory Agreement, which would have prevented Puentes from dissolving. Further, even though Argentina did not base the Concession Contract's termination on its remaining complaints, these are equally absurd. First, Argentina alleges that Puentes' reorganization proceedings modified the basis of the renegotiation process, making it difficult for the Concessionaire and UNIREN to reach an agreement. Nonetheless, the emergency measures expressly excluded reorganization proceedings as a ground for terminating a concession contract.[320]

314. Second, the Claimant disagrees with Argentina that Hochtief's ICSID claim prevented rebalancing the Concession. It notes that years after commencement of the *Hochtief* Arbitration, Argentina continued proposing and signing transitory agreements, giving Puentes the impression that it could resolve its claims with Argentina.

315. Lastly, the Claimant observes that Puentes did not file its administrative complaint against Argentina in bad faith since, by the time Puentes filed the complaint, Puentes had negotiated with Argentina for a decade, had asked Argentina to approve its bylaws amendment allowing an injection of equity, and had agreed to every renegotiation agreement Argentina had proposed.[321]

(iii) Argentina's Expropriation of the Claimant's Investment Was Unlawful

316. According to the Claimant, under Article 5 of the BIT, for an expropriation to be lawful the following four requirements need to be met cumulatively: (i) the measure must be for a public purpose, security or national interest of the expropriating State; (ii) the measure

[319] *Ibid*., ¶ 262.
[320] *Ibid*., ¶ 264.
[321] *Ibid*., ¶ 266.

must be taken in accordance with due process of law; (iii) the measure must not be discriminatory or contrary to undertaken commitments; and (iv) the measure must be accompanied by prompt, adequate and effective compensation, which represents the fair market value of the expropriated investments.[322]

317. The Claimant alleges that Argentina's termination of the Concession Contract was not in the public interest and that Argentina did not claim in the Termination Resolution (or otherwise) that it was terminating the Contract to serve a public interest. The Claimant asks the Tribunal to conclude that Argentina's expropriatory measures were unlawful since Argentina relied on unlawful contractual grounds to terminate the Concession Contract.[323]

318. According to the Claimant, Argentina's treatment of the Claimant was less favorable than that granted to other toll-road concessionaires. It contends that the Contract's termination substantially differed from that of other very similar concessions.[324]

319. Further, the Claimant claims that Argentina has never paid any compensation to the Claimant for its expropriatory measures, much less the "real market value" that the BIT requires for lawful expropriations.[325]

320. Lastly, the Claimant contends that Argentina's expropriatory measures violated due process since (i) Argentina expropriated the Concession Contract on the false pretense that Puentes had breached the agreement, and (ii) Argentina's invoked reasons were the direct consequence of its own conduct.[326]

b. The Respondent's Position

321. The Respondent contends that, as a preliminary matter, it is inconsistent to argue that the same measure qualifies at the same time as both a direct and an indirect expropriation.[327]

[322] *Ibid*., ¶ 268.
[323] *Ibid*., ¶¶ 268-271.
[324] *Ibid*., ¶¶ 272-273.
[325] *Ibid*., ¶¶ 274-275.
[326] *Ibid*., ¶¶ 276-279.
[327] Respondent's Counter-Memorial, ¶ 502.

322. It further argues that there has been neither a direct nor an indirect expropriation in the present case as there has been no formal transfer of title or outright seizure of the Claimant's shares in Puentes, nor has Argentina adopted measures that destroyed the entire economic value of the Claimant's investment.[328]

323. In the Respondent's view, for an indirect expropriation to occur, the following requirements must be met cumulatively: (i) the disputed measure must interfere with the investor's property rights; (ii) the interference with the investor's property rights must be substantial; and (iii) the measure must not constitute regulations falling within the exercise of the State's police powers.[329]

324. With regard to the first requirement for an indirect expropriation, Argentina submits that the interference of the measure at issue with the investor's legitimate expectations does not suffice. Rather, the Claimant should prove the existence of government interference with a specific right in its investment, namely its shares in Puentes. According to Argentina, the Claimant has failed to do so and even continues to exercise its shareholder rights in Puentes as it is party to two court cases that at least at the time of the submissions in this case were pending before Argentine courts. (The current status is unknown to the Tribunal.) The Claimant incorrectly bases its expropriation claim on the non-restoration of the economic equilibrium of the Concession after the Emergency Law, since the disruption of the economic equilibrium occurred before the outbreak of the crisis and the adoption of the emergency measures.[330]

325. Regarding the second requirement, the Respondent argues that the measures at issue did not have the requisite magnitude or severity. Thus, the actions or omissions invoked by the Claimant, whether taken as a whole or individually, do not constitute a substantial deprivation of property rights, nor do they evidence an expropriatory intention or effect.

[328] *Ibid*., ¶¶ 503-504.
[329] *Ibid*., ¶ 505.
[330] Respondent's Counter-Memorial, ¶¶ 506-510; Respondent's Rejoinder, ¶¶ 521-528.

The Respondent further claims that the Claimant bears the burden of proving that it suffered a substantial interference with its property rights.[331]

326. Lastly, regarding the final requirement, Argentina claims that good faith, non-discriminatory regulations falling within the exercise of a State's police powers do not amount to expropriation and, therefore, do not require compensation.[332]

327. Argentina submits that the measures did not violate Article 5 of the BIT. The Emergency Law and efforts to renegotiate the Concession Contract were not unreasonable and disproportionate in the face of the grave crisis endured by Argentina. The State could not but enact the Emergency Law and renegotiate the concession contracts. With respect to Resolution 14, the non-approval of Puentes' request regarding the amendment of its bylaws and the termination of the Concession Contract, these were adopted within the framework agreed upon by the Parties in the Concession Contract and the Financial Aid Agreement. In the latter regard, the tribunal in *Impregilo v. Argentina* held that a measure adopted in conformity with obligations assumed by the State and investor under a contract cannot be considered to be expropriatory or compensable.[333]

328. With regard to the request for the amendment to the bylaws, Argentina claims that it was Puentes' intention to effect a 30-fold reduction of the equity with respect to the amount stated in the Concession Contract, and that it is inconceivable that a company in charge of a road corridor as the one in this case could have equity amounting only to AR$ 1,000,000. The Respondent further claims that the Claimant falsely presents the facts when stating that it requested authorization for a capital stock increase. According to Argentina, what the Claimant requested was a capital stock decrease, from AR$ 30,000,000 to AR$ 1,000,000.[334]

329. According to the Respondent, the Termination Resolution does not constitute an expropriatory measure. It was issued in response to Puentes' dissolution, which constituted

[331] Respondent's Counter-Memorial, ¶¶ 511-513; Respondent's Rejoinder, ¶¶ 521-535.
[332] Respondent's Counter-Memorial, ¶¶ 514-525; Respondent's Rejoinder, ¶¶ 536-538.
[333] Respondent's Counter-Memorial, ¶¶ 526-528; Respondent's Rejoinder, ¶¶ 539-543.
[334] Respondent's Counter-Memorial, ¶¶ 530-531; Respondent's Rejoinder, ¶¶ 544-545.

a ground for automatic termination under the Concession Contract based on the fault of the Concessionaire.[335]

(2) The Tribunal's Analysis

330. The Claimant has cited to both paragraphs 1(a) and 1(b) of Article 5 of the BIT in support of its claim of expropriation. However, its arguments are almost exclusively, albeit loosely, focused on the requirements of Article 5.1(b), and do not address Article 5.1(a) in any detail. Accordingly, the Tribunal will focus on Article 5.1(b), which provides

> *Las inversiones de los inversores de una de las Partes Contratantes, no serán directa o indirectamente nacionalizadas, expropiadas, incautadas o sujetas a medidas que tengan efectos equivalentes en el territorio de la otra Parte, a no ser que se cumplan las siguientes condiciones:*
>
> *- que las medidas respondan a imperativos de utilidad pública, de seguridad o interés nacional;*
>
> *- que sean adoptadas según el debido procedimiento legal;*
>
> *- que no sean discriminatorias ni contrarias a un compromiso contraído;*
>
> *- que estén acompañadas de disposiciones que prevean el pago de una indemnización adecuada, efectiva y sin demora.*

In the unofficial English translation:

> *Investments by investors of one of the Contracting Parties shall not be nationalized, expropriated, seized or otherwise appropriated, either directly or indirectly, through measures having an equivalent effect in the territory of the other Party, unless the following conditions are complied with:*
>
> *--the measures are for a public purpose, security or national interest;*

[335] Respondent's Counter-Memorial, ¶ 532.

> *--they are taken in accordance with due process of law;*
>
> *--they are non-discriminatory or contrary to a commitment undertaken;*
>
> *--they are accompanied by provisions for the payment of prompt, adequate and effective compensation.*

331. *Prima facie*, the Tribunal notes that, at most, the measures identified by the Claimant (the Emergency Law, Resolution 14, the failure to renegotiate the Contract and restore its economic equilibrium, the failure to approve Puentes' request to increase its capital so as to comply with Argentine corporate law and avoid Puentes' dissolution, and the Termination Resolution) could be capable of causing an indirect expropriation, not a direct expropriation. Contrary to Argentina's submission, such expropriation, if any, would not be limited to the "investment" (*i.e.*, shares) referenced in the jurisdictional decision.[336]

332. The termination of the Concession Contract via the Termination Resolution and the subsequent award of the Concession to another party can be seen as the culmination of a series of actions that effectively deprived the Claimant of the value of its investments in Puentes.[337] Puentes was formed for the purpose of carrying out the Concession and the Concession Contract is not only a tangible property right, but was the basis on which Puentes carried out its business and thus its key asset. Without the Contract, even if Puentes technically remained in existence for some period of time, its value as an investment vehicle was gone.[338]

333. The Tribunal notes that there is significant overlap with the Claimant's reasoning in regard of the fair and equitable treatment standard, especially as pleaded over the course of the oral hearings. In particular, the Claimant has sought to amalgamate the concept of legitimate expectations, as used in the FET context, with the Article 5.1(b) reference in the

[336] *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, ¶ 186.
[337] While the Termination Resolution may have been technically permitted by the Concession Contract, in the Tribunal's view, that does not prevent its being considered as part of the measures constituting an indirect expropriation.
[338] It was in any event technically insolvent by that time; hence the need for a capital infusion.

third of the four listed requirements to "commitment undertaken". Even if there is some overlap on the facts of this case given the BIT's specific reference to commitments, the Tribunal is doubtful that the concept of legitimate expectations, as such, is applicable in the expropriation context. The Tribunal agrees with Argentina that expropriation is focused on the degree of interference with property rights. Nonetheless the Tribunal accepts that there was a commitment by Argentina, both in the Concession Contract and the Emergency Law, to restore the economic equilibrium of the Concession. Thus, even without discrimination, as to which, as set forth in the preceding section, the Tribunal harbors significant doubt, this element could be satisfied. A restoration of the Concession Contract's equilibrium in a timely fashion would presumptively have led to a different ultimate outcome than Puentes' dissolution following its insolvency and the Termination Resolution.

334. But the measures the Claimant has challenged in this context are not solely concerned with the failure to restore the Concession's economic equilibrium. They start with the Emergency Law, which surely represents a measure taken for a public purpose, security or national interest. This was a generalized measure, taken in response to a national economic emergency. The Tribunal considers that the Emergency Law as well as the renegotiation process were legitimate exercises by Argentina of its police powers.

335. Thus, the indirect expropriation claim boils down to those measures that were not of general application but were related specially to Puentes and the Concession—Resolution 14, the failure of the renegotiation efforts, the non-approval of the equity infusion, and the Termination Resolution. These are all measures that have been considered in the context of FET and include the measures that have been found either to have constituted a breach of FET or to have exacerbated the situation. Accordingly, judicial economy would suggest there is no need to resolve an expropriation claim unless, if upheld, the damages that would accrue to the Claimant would be more favorable.

336. Article 5.1(c) of the BIT specifies the compensation to be given for an expropriation (the Parties disagree as to whether it applies to both lawful and unlawful expropriations). The

specific standard is the market value of the investment "immediately before the expropriation or nationalization decision was announced". There is also a provision for interest to accrue "until the date of payment at a normal commercial rate of interest". In the Tribunal's view, this market value standard applies to lawful expropriations, a circumstance which is not present here. In the event of an unlawful expropriation, the applicable standard would be the customary public international law standard, as reflected in the *Chorzow Factory* decision, as discussed in paragraphs 360 to 363 *infra*.

337. Based on the foregoing, a finding of an unlawful expropriation would not lead to greater damages than would be the case for a FET violation. For these reasons, the Tribunal considers it unnecessary to consider the expropriation claim further.

E. NECESSITY

(1) The Parties' Positions

a. The Respondent's Position

(i) Safeguarding of Argentina's Essential Interests Against a Grave and Imminent Peril

338. Argentina claims that, in the hypothetical case that the Tribunal should find the challenged measures to be in breach of the BIT, the necessity defense would preclude the wrongfulness of the measures under general international law.[339]

339. The Respondent submits that a State may invoke necessity if the act is the only way for the state to safeguard an essential interest against a grave and imminent peril. It further alleges that when faced with the 2001 crisis, it had no choice but to adopt the Emergency Law and related measures adopted in 2002 to safeguard its essential interests. The tribunal in *LG&E v. Argentina* held that a State's essential interest can comprise economic or financial interests. The tribunal further described the seriousness of Argentina's crisis by explaining that 'the conditions as of December 2001 constituted the highest degree of public disorder

[339] Respondent's Counter-Memorial, ¶¶ 534-540; Respondent's Rejoinder, ¶ 550.

and threatened Argentina's essential security interests.' The tribunals in *Continental v. Argentina*[340] and *Metalpar v. Argentina*[341] decided in similar terms.[342]

340. The Respondent further claims that, in the face of this crisis, leading economists affirmed that Argentina's currency board regime could no longer be sustained and that the abrogation of the fixed exchange rate through devaluation and pesification were the only viable alternative.[343]

(ii) Non-Contribution of Argentina to the Situation of Necessity

341. The Respondent affirms that a State may not invoke necessity as a ground to preclude wrongfulness if it has contributed to the situation of necessity. The contribution to the situation must be sufficiently substantial and not merely incidental or peripheral.[344]

342. According to Argentina, this is not the case at hand. After implementing the convertibility plan under the Washington Consensus following the recommendation of international organizations, Argentina started to face external shocks in 1997. To tackle the recession, Argentina adopted certain measures with the support of international organizations, which provided unfruitful. The recession ultimately resulted in the 2001 crisis.[345]

343. In this regard, Argentina claims that it made every effort to prevent its economy from collapsing, as acknowledged by the tribunal in *Continental v. Argentina*. Further, as recognized by the tribunal in *Metalpar v. Argentina*, there were several external factors that played a role in Argentina's situation. The Respondent relies on *LG&E v. Argentina* and *Urbaser v. Argentina* which, according to the Respondent, also concluded that

[340] **AL RA 236**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 ("***Continental*, Award**"), ¶ 180.
[341] **AL RA 224**, *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008 ("***Metalpar*, Award**"), ¶ 208.
[342] Respondent's Counter-Memorial, ¶¶ 544-551; Respondent's Rejoinder, ¶ 554 (footnotes omitted).
[343] Respondent's Counter-Memorial, ¶¶ 552-556; Respondent's Rejoinder, ¶¶ 555-562.
[344] Respondent's Counter-Memorial, ¶ 561; Respondent's Rejoinder, ¶ 568.
[345] Respondent's Counter-Memorial, ¶¶ 562-563.

Argentina had not contributed to the crisis to the point of precluding necessity as a defense.[346]

(iii) No Impairment of an Essential Interest of the State Towards Which the Obligation Exists, or of the International Community

344. The Respondent raises the point that the international obligations the Claimant alleges Argentina has breached are contained in the Argentina-Italy BIT, a treaty concluded with Italy. In this regard, the emergency measures adopted as a response to the 2001 crisis do not impair the essential interests of Italy, or those of the international community as a whole, as affirmed by the tribunal in *LG&E v. Argentina*.[347]

(iv) No BIT Exclusion of Necessity

345. Argentina acknowledges that a State cannot invoke necessity as a ground for precluding wrongfulness if the obligation excludes the possibility of invoking necessity. In this regard, it argues that none of the BIT provisions that the Claimant alleges Argentina has breached exclude the possibility of invoking necessity or limit its invocation.

346. The Respondent submits that, pursuant to Article 8.7 of the BIT, the applicable principles of international law are part of the law applicable to the dispute, necessity being included in the applicable international law.[348]

b. The Claimant's Position

347. The Claimant argues that necessity measures may not continue after the crisis period has ceased.[349]

[346] Respondent's Counter-Memorial, ¶¶ 564-571, citing **AL RA 236**, *Continental*, Award, ¶¶ 225-227, 236; **AL RA 224**, *Metalpar*, Award, ¶ 195; **AL RA 211**, *LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ("***LG&E*, Decision on Liability**"), ¶¶ 256-257, and **AL RA 262**, *Urbaser & CABB v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016 ("***Urbaser*, Award**"), ¶ 710.. Respondent's Rejoinder, ¶¶ 578-586.
[347] Respondent's Counter-Memorial, ¶¶ 573-574 (footnotes omitted).
[348] Respondent's Counter-Memorial, ¶¶ 575-577.
[349] Claimant's Reply, ¶ 309.

348. The Claimant further submits that Argentina already argued the defense of necessity in the case of *Impregilo v. Argentina*, in which the tribunal held that the emergency measures may not continue after a crisis ends. It concluded that Argentina's economic crisis had almost certainly ended by 2003 and, in any event, before Puentes sought to rebalance the Concession's economic equilibrium. The findings of the *Impregilo* tribunal in this regard are *res judicata* in these proceedings since the four required elements were met: (i) the same parties were parties to a prior final award; (ii) an issue or question was distinctly put at issue; (iii) the tribunal actually decided that issue; and (iv) the holding regarding that issue or question was necessary to one of the holdings in the award's *dispositif*.[350]

349. The Claimant further clarifies that it does not allege that abrogating the fixed exchange rate or pesification violated its rights under the BIT. Rather, the Claimant contends that its claims concern Argentina's conduct after the crisis and that Argentina cannot claim that during the relevant period for this case it faced a "grave and imminent peril".[351]

350. In the Claimant's view, Argentina has also failed to prove how the adopted measures were the only way to safeguard an essential interest against grave and imminent peril. Nonetheless, the measures that the Claimant alleges violated the BIT are: (i) the abusive terms of the Financial Assistance Loan; (ii) the denial of Puentes' request to increase its share capital to avoid liquidation; (iii) the Concession's termination; and (iv) the failure from 2006 to 2014 to re-establish the Concession's economic equilibrium. According to the Claimant, Argentina failed to prove that any of these measures were the only way to safeguard anything, that an essential interest was at stake and what the grave and imminent peril was.[352]

351. The Claimant argues that, with regard to the Concession's economic equilibrium, the Emergency Law obligated Argentina to restore the economic equilibrium of affected public concessions. According to the Claimant, at no time during the negotiation of the transitory agreements did Argentina take the position that it could not restore the equilibrium because

[350] *Ibid*., ¶¶ 310-315; **CL-0003**, *Impregilo*, Award, ¶ 360.
[351] *Ibid*., ¶¶ 316-317.
[352] *Ibid*., ¶¶ 318-321.

this would threaten an essential state interest. On the contrary, an Argentine bankruptcy judge ordered Argentina to restore the Concession's economic equilibrium and Argentina restored the economic equilibriums of numerous other similarly-situated concessions.[353]

(2) The Tribunal's Analysis

352. In the *Hochtief* Arbitration, the necessity defense under customary international law was dismissed twice. First, the majority of that tribunal did not find that the adoption and pursuit of the policy of pesification was *per se* a breach of the FET standard,[354] so no necessity justification was examined. Second, a breach of FET was found by the *Hochtief* tribunal as set forth below, but the tribunal did not consider the necessity defense persuasive. The *Hochtief* tribunal held that

> *(1) Respondent's failure to implement timeously the renegotiation process (i.e., by 2006 or 2007, but taking account of prior losses: see paragraph 286 above) and (2) the adoption of Resolution 14 in June 2003, violated the BIT. The next question is whether either breach might be excused or rendered unlawful by the defence of necessity. That would be possible only if the emergency persisted at the relevant time.*[355]

The tribunal proceeded to dismiss the necessity defense because it did not consider the emergency to have persisted: "[t]he economic crisis had ended by the time that the losses for which reparation is due were sustained."[356]

353. Other tribunals have reached similar findings, including *Impregilo.*[357]

354. The Parties in the present case have not advanced any arguments that would lead the present Tribunal to conclude differently: the majority of the crisis had passed at the time of breach so the necessity defense is not applicable in this case. As a result, any

[353] *Ibid*., ¶¶ 322-324.
[354] **CL-0013,** *Hochtief,* Decision on Liability, ¶ 244.
[355] *Ibid.*, ¶ 292.
[356] *Ibid.*, ¶ 301.
[357] Claimant's Reply, ¶ 315, including authorities cited at note 566.

counterarguments to this defense need not be further discussed, nor any arguments by Argentina that it did not contribute to the state of necessity.

VI. DAMAGES

A. STANDARDS OF COMPENSATION

(1) The Parties' Positions

a. The Claimant's Position

355. According to the Claimant, Argentina must be ordered to pay full reparations, which would wipe out all the consequences of the illegal act and re-establish the situation which would have existed if the act had not been committed. Regarding the compensation to be paid, which Claimant frames principally in the context of an unlawful expropriation, the Claimant argues that customary international law is applicable. Under this analysis, payment of compensation to Webuild should occur, Claimant submits, on the basis of the higher of the market value at the time of expropriation plus interest or the value on the date of the award.[358]

356. According to the Claimant, even if the expropriation were lawful or the measure of compensation for unlawful expropriation were the same as that provided in the BIT with respect to lawful expropriation, it would still be entitled to prompt, adequate and effective compensation. This would require Argentina to pay full compensation equivalent to the "actual" or fair market value of its investment.[359]

357. The Claimant further alleges that in the event the Tribunal does not consider that Argentina expropriated its investment, Argentina is still bound to compensate it fully under the *Chorzów Factory* standard for its unfair and unequitable treatment, its failure to grant full protection and security and its discriminatory measures. In its view, there is strong

[358] Claimant's Memorial, ¶¶ 282-298; Claimant's Reply, ¶ 329.
[359] *Ibid*., ¶¶ 300-306.

precedent for basing damages caused by these breaches on the fair market value standard, plus historical or discrete losses when applicable.[360]

358. As a result, the Claimant requests that, when it comes to the value of its investment, Argentina pay the greater of (i) the market value of the expropriated investment at the time of the Termination Resolution in August 2014, and (ii) the market value of the expropriated investment at the date of the award, calculated with the benefit of post-taking information and assuming that Argentina would have complied with its statutory and contractual obligations related to the Concession. Further, the Claimant contends that Argentina must not only pay the value of its expropriated investment, but must also compensate for all historical, consequential and incidental damages and expenses caused by the expropriation, which would include (i) eliminating the effects of the historical damage caused to Webuild by Argentina's wrongful conduct during the creeping expropriation starting in September 2006 and up to its formal termination of the Concession Contract in August 2014; (ii) compensating for the lost value of Shareholder Loans which could not be re-paid due to Argentina's pre-termination wrongful conduct; and (iii) any other consequential costs and damages suffered by Claimant as a result of the expropriation after August 2014 (arbitration and litigation costs in this ICSID arbitration, including attorneys' fees, etc.).[361]

b. The Respondent's Position

359. According to the Respondent, if the Tribunal determines that there was a breach of the BIT, the standard of compensation will be fair market value.[362] The Respondent further asserts that under general principles of international law and the applicable domestic law, the existence of an obligation to compensate Puentes is subject to a series of general principles of international law, which are not present in the Claimant's claim. It identifies the following as relevant principles: causation; reasonableness; damages that are non-

[360] *Ibid*., ¶¶ 307-321.
[361] *Ibid*., ¶ 322.
[362] Respondent's Counter-Memorial, ¶ 586.

hypothetical in amount and limited to the period when the wrongful act occurred; no double recovery; mitigation; repair; and cause and effect.[363]

(2) The Tribunal's Analysis

360. Having concluded that the Respondent breached Article 2.2, the Tribunal concurs with the submission of the Claimant that the applicable standard for quantum is the customary international law standard, best reflected in *Chorzów Factory* decision, rather than the BIT's Article 5 expropriation standard which, in the Tribunal's view, deals with lawful expropriations and is therefore not relevant in this case. Although *Chorzów Factory* involved an unlawful expropriation, its damages standard has been applied in cases involving other treaty violations, such as FET, where the underlying treaty did not set forth a standard of damages.[364]

361. *Chorzów Factory* requires that "reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[365] *Chorzów Factory* does not, however, detail precisely what methodologies may be consistent with its "full reparation" standard. Tribunals applying it, including *S.D. Myers v. Canada*, *CMS v. Argentina, Azurix v. Argentina* and *National Grid v. Argentina,* have considered a number of different methodologies to be appropriate.[366] The Tribunal accepts that market value, the standard for lawful expropriations, is not a limitation. As the *ADC v. Hungary* tribunal held, "the *Chorzów Factory* standard requires that the date of valuation should be the date of the

[363] *Ibid*., ¶¶ 591, 593; Respondent's Rejoinder, ¶¶ 597-599.
[364] *See* e.g., **CL-0035**, *Rumeli,* Award ¶ 792; **CL-0120**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 615; **CL-0250**, *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12- Annulment, Decision on Annulment, 1 September 2009, ¶ 332; **CL-0009,** *Vivendi I,* Award, ¶¶ 8.2.5, 8.2.7; **CL-0102**, I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP 2009) p. 34.
[365] **CL-0099**, PCIJ, *The Factory At Chorzow (Claim for Indemnity) (Germany v. Poland),* Judgment, 13 September 1928, p.40.
[366] *See* e.g., **CL-0137**, *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000, ¶ 309; **CL-0005**, *CMS*, Award, ¶ 410; **CL-0028**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 424; **CL-0015**, *National Grid*, Award ¶¶ 269-270, 296.

Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed."[367]

362. In terms of the Respondent's list of principles, the Tribunal notes the overlap among several of them: "causation" and "cause and effect" seem to be expressing virtually the same concept that is implied in *Chorzów Factory's* use of the term "consequence"—*i.e.*, that the damages must flow from the wrongful act; while "mitigation" and "repair" also seem to be highly similar. Many tribunals have emphasized that while damages are not always susceptible of being quantified with complete precision, they need to be reasonable in amount and not too remote. Avoiding double recovery and requiring appropriate mitigation are also recognized as relevant principles in the context of full reparation. Whether they should be limited to the time period when the wrongful act occurred is more questionable; in the Tribunal's view, the principle of full reparation for the consequences of the act is the overriding principle, while principles such as non-remoteness rather than a temporal limit *per se* will operate to contain the extent of recoverable damages.

363. Before turning to the actual calculation of quantum, the Tribunal will address the issue of causation raised by the Respondent.

B. CAUSATION

364. The Respondent maintains that the Claimant's, not the Respondent's, conduct is the cause of Puentes' ultimate financial failure and dissolution; that the disruption of the economic equilibrium was caused by the Claimant's failure to obtain financing and preceded Argentina's economic emergency; that its insolvency was the result of how Puentes dealt with its subcontractors.[368] For these reasons, Argentina considers that it should have no

[367] **CL-0098**, *ADC Affiliated Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2004, ¶ 497.
[368] This position is best illustrated by the Respondent's "chain of events" slide in its closing presentation at the Hearing. *See* Respondent's Closing Statement, slide 169.

damages liability; its experts' calculations reflecting some liability are provided in the event the Tribunal concludes to the contrary.[369]

365. The Claimant maintains that these events did not cause the ultimate failure of Puentes, and it was the "financial asphyxiation" of the company due to the failure of Argentina to restore the Concession's economic equilibrium following the emergency, exacerbated by the burdens of the Financial Assistance Loan as modified by Resolution 14, that did so.[370]

366. The Tribunal does not consider the financing failure, whatever its causes, to have been responsible for the destruction of Puentes. The financing failure—which in the Tribunal's view most likely was the result of a mix of commercial and macroeconomic factors which are difficult to isolate with any precision--—undoubtedly created problems for the completion of the Project.[371] As Respondent has highlighted, Puentes itself in 2001, prior to the enactment of the Emergency Law, characterized its financial difficulties as a state of disruption of the economic equilibrium of the Concession Contract.[372] This characterization of its economic difficulties seems odd to the Tribunal, since the Project was not completed at that time and Puentes therefore had no operating revenues (although it did have subsidies). However, it clearly reflects the financial challenges Puentes was then confronting which threatened the completion of construction. (It was fortuitous in the Tribunal's view that construction was as advanced as it was by the time the Emergency Law was enacted.) But those problems were ultimately overcome, and the Project entered into operation in 2003. Thereafter, the factor that in the Tribunal's judgment most crippled Puentes in the operational stage was the lack of increase in its toll rates over a prolonged period, leaving it unable to cover its operating costs and service its debt, including the onerous obligations imposed by the Financial Assistance Loan, as modified by Resolution

[369] Respondent's Counter-Memorial, ¶ 608.
[370] *See, e.g.,* **CWS-0003,** Witness Statement of Gabriel Hernández, 17 Dec. 2016, ¶ 35.
[371] The *Hochtief* tribunal found that "there were 'many issues' that prevented the IDB from disbursing the loan in the manner anticipated by the Consortium." *Hochtief*, Decision on Liability, ¶ 222.
[372] Respondent's Counter-Memorial, ¶¶ 599-604, citing to, *inter alia,* **RA-011**, letter from PDL to OCCOVI of 3 August 2001.

14. This was the direct result of the failure of Argentina to meet its obligation to restore the economic equilibrium of the Contract after a reasonable time.

367. Had the economic equilibrium of the Concession been restored in 2006, as the Tribunal has concluded it should have been, it is reasonable to assume that Puentes would have been able to avoid Boskalis-Ballast's filing of the insolvency petition, and the subsequent reorganization proceedings in 2007. To be sure, Puentes had a debt overhang from the construction phase, including not only the subcontractor debt to Boskalis-Ballast and Shareholder Loans, but also the high-cost Financial Assistance Loan. The Financial Assistance Loan was secured by the toll revenues of Puentes and therefore had priority of payment in the period in question, leaving even fewer resources to cover other obligations and operating costs. As noted earlier in the discussion of FET, the Tribunal considers that the FAL, as modified by Resolution 14, contributed to the economic problems of Puentes.[373]

368. Although the Tribunal finds that the financial failure of Puentes was the consequence of the failure to restore the Concession's economic equilibrium and that the legal element of causation is therefore satisfied, it considers it inappropriate to hold Argentina responsible for 100% of the damage. As the Tribunal noted in its analysis of the admissibility of the Webuild Shareholder Loan claims, beyond the need to avoid double recovery, consideration must be given to precisely how those claims and the pre-operational financial challenges of Puentes in general should be taken into account, in recognition of the fact that Puentes' economic challenges were not entirely of Argentina's creation and resulted in an "overhang" in the operational phase of the Project. The Tribunal will return to this issue after discussing the quantum calculation issues that have been raised.

[373] *See* ¶¶ 251-267 *supra*.

C. QUANTUM

(1) The Parties' Positions

a. The Claimant's Position

369. Webuild presents a damages methodology that measures the fair market value of its investment in Puentes as of the date of the Termination Resolution in August 2014 (the "**Valuation Date**"), comprised of two projected income streams: (i) historical damages from 1 September 2006 to the Valuation Date; and (ii) future damages from the Valuation Date to the end of the Concession on 13 September 2023, discounted back to the Valuation Date. The calculation assumes on a "but for" basis that Argentina had implemented the terms of the 2006 LOU by September 2006, as provided therein. The Claimant's experts thus estimate the value of the Claimant's equity and debt share in Puentes as of 31 August 2014 assuming that Puentes' toll rates would have been initially adjusted on 1 September 2006, and would have been recalculated 12 months later, in order to restore the Concession's economic equilibrium.[374]

370. The Claimant's experts rely primarily on the discounted cash flow ("**DCF**") method, or "income" approach, which has four main value drivers: (i) AR$ revenues, determined by AR$ toll rates and traffic; (ii) operating expenses (including sales, general and administrative expenses); (iii) capital expenditures; and (iv) discount rate.[375]

371. The Claimant's experts value Puentes at US$ 764.8 million in the "but for" scenario as of 31 August 2014. After deducting debt repayments and multiplying the remaining equity value by the 26% ownership of Puentes by Webuild, the experts obtain equity damages to Webuild of US$ 167.2 million. They also conclude that in this "but for" scenario, Webuild would have recovered its loans to Puentes plus interest after Puentes honored its debts with other creditors, in the amount of US$ 52.8 million.[376]

[374] Claimant's Memorial, ¶ 324.
[375] *Ibid.*, ¶¶ 328-329.
[376] *Ibid.*, ¶¶ 331-332.

372. In total, the Claimant's experts initially calculate damages to Webuild (taking into account both debt and equity) in the amount of US$ 219.9 million under the income approach and US$ 285.3 million under the alternative "net capital contributions" ("**NCC**") approach.[377]

373. In its Reply on the Merits, the Claimant provided an updated amount on damages (both debt and equity) to Webuild in the sum of US$ 174.2 million under the income approach, and US$ 176.9 million under the NCC approach.[378]

b. The Respondent's Position

374. The Respondent's experts valued Webuild's stake in Puentes based on the guidelines established by the *Hochtief* tribunal. Instead of the 31 August 2014 Valuation Date used by the Claimant, the Respondent submits that the date should be in 2002, as was the case in the *Hochtief* arbitration. It also argues for a different methodology, "free cash flows to shareholders", as was used by the Tribunal in *Hochtief,* instead of "free cash flow to firm", as used by the Claimant's experts.

375. In its Counter-Memorial, after opining that no damages should be awarded, the Respondent's experts calculated the value of Webuild's stake in Puentes in the amount of US$ 11.63 million as of 31 August 2014.[379] In the Rejoinder, the experts calculated a value for that stake of US$ 10.93 million as of 31 August 2014.[380]

376. According to the Respondent, Puentes' allegations relating to the termination of the Concession Contract cannot give rise to a claim under the BIT, but merely form a claim under the Contract which Puentes has submitted to the Argentine courts. The Respondent contends that this item should not be compensated in the present treaty proceedings.[381]

[377] *Ibid.*, ¶¶ 333-335.
[378] Claimant's Reply, ¶ 389. Under the income method, the damages component represented by the equity stake was US$ 121.4 million, with the debt amounting to US$ 52.8 million, while under the NCC method, the equity stake represented US$ 59.3 million, with the debt amounting to US$ 117.6 million.
[379] Respondent's Counter-Memorial, ¶¶ 610, 612.
[380] Respondent's Rejoinder, ¶ 612.
[381] Respondent's Counter-Memorial, ¶ 611.

377. Lastly, the Respondent disputes a number of the assumptions on the basis of which the Claimant's experts have made their "but for" calculations, as well as some of the calculations.[382] These are discussed in detail in the course of the Tribunal's analysis below and will not therefore be detailed at this juncture.

(2) The Tribunal's Analysis

378. The Tribunal does not consider the approach to the calculation of damages taken by the *Hochtief* tribunal to be appropriate for this case. Hochtief's FET claim was put forward on a materially different basis than the FET claim in this case, challenging *inter alia* the pesification effected by the Emergency Law and claiming an entitlement to dollarized tariffs.[383] It also covered a different period of time. Although the *Hochtief* tribunal did not accept the proposed damage calculations of either the Claimant or the Respondent in that case and performed its own calculation, it nonetheless awarded damages on the basis of the Emergency law's elimination of pesification and toll rate increases based on the U.S. CPI,[384] beginning on 23 May 2003, when it found the income stream began to be affected.[385]

379. In contrast, the basis of the Claimant's case here is not pesification, but Argentina's failure within a reasonable time following the end of the emergency to restore the economic equilibrium of the Concession Contract. Webuild has not sought to recover any damages for the period between 2002 and 2006 (including the period of the Financial Assistance Loan). Its historical damage calculations begin in September 2006, grounded in the terms of the 2006 LOU. Its "but for" scenario is consistent with the basis of the FET violation that the Tribunal has determined took place (*i.e.,* the failure to restore the Concession's economic equilibrium at the time of the 2006 LOU).

380. In the Tribunal's view, therefore, the approach proposed by the Respondent is inapposite. The Tribunal further considers that the DCF model, put forward by the Claimant as its

[382] Respondent's Rejoinder, ¶¶ 614-618.
[383] Claimant's Reply, ¶¶ 347-351.
[384] *Hochtief*, Decision on Liability, ¶ 316.
[385] *Hochtief*, Decision on Liability, ¶ 326.

primary method of valuation, which in the Tribunal's experience is a widely accepted methodology in investment treaty disputes where a completed and operating project is involved, is the most suitable model for this case.

381. The Tribunal is also not persuaded that the methodology of free cash flow to shareholders, the approach taken by the *Hochtief* tribunal, instead of the free cash flow to the firm (*i.e.,* Puentes), used by the Claimant's experts, is the most appropriate methodology, nor that some of the assumptions made by that tribunal, *e.g.*, assuming repayment of all debt before any distributions would be made to shareholders, reflect the most likely conditions in an operating scenario in which the economic equilibrium of the Concession has been restored and Puentes is therefore engaged in normal operations.

382. The Tribunal's remaining analysis will therefore focus on the DCF model proposed by Claimant, the methodology of free cash flow to the firm, and the calculations of damages pursuant to that model, and consider the issues raised by the Respondent with respect to the DCF calculations, including the assumptions on which those calculations are based.

383. As noted earlier, the four key drivers of value in the DCF calculations are: revenues (driven by toll rates and traffic assumptions); operating expenses; capital expenditures; and the discount rate (for cash flows from the Valuation Date to the end of the Concession on 13 September 2023). In the subsections below, the Tribunal will discuss the issues raised by the Respondent with respect to three of these four areas—revenues, expenses and the discount rate (no issues appear to have been raised with respect to capital expenditures). With respect to some of the issues, the Tribunal defers any decision pending further submissions and/or calculations from the Parties. Its requests for further information are set forth in each relevant subsection below and summarized in a separate subsection at the end of this section.

(i) Revenues

(a) Reliance on toll rates in 2006 LOU in "but for" and frequency of toll rate increases

384. The Respondent objects to the Claimant's experts' reliance on toll rates in the 2006 LOU in its "but for" scenario, asserting that they are too high, including in comparison to the current concessionaire. The Respondent also argues that the monthly toll rate increases assumed by the Claimant's experts are not provided for in the 2006 LOU.[386]

385. The Claimant argues that the 2006 LOU is consistent with the approach taken by Argentina in the Bid and Concession Contract, in the renegotiation of other concessions, and was proposed by Argentina; it also criticizes the use by Argentina's experts of dollarized tolls given pesification and asserts that comparing the toll rates of the current concessionaire is inapposite given that concessionaire's lack of investment in the Project.[387]

386. As noted earlier, the Tribunal considers reliance on the toll rates in the 2006 LOU to be appropriate in this case. They are not hypothetical or speculative, and are consistent with the basis of the finding that the FET standard was violated by the failure to restore the Concession's economic equilibrium at that time. The toll rates in the DCF model used by the Claimant's experts conform to the toll rates set forth in the 2006 LOU. Section Five (Rate Schedule) of that document provides: "[w]ith a view to partially restoring the economic-financial equation under the CONCESSION CONTRACT, a new Rate Schedule is hereby established for the CONCESSION as set forth in Annex IV hereto …"[388]

387. The damages report of the Claimant's experts states that: "we assume that the toll rate review set out in the 2006 MoU[389] would have been ratified and completed. Therefore, using the 2006 PEF, we estimate the toll rate level that would allow the Concessionaire to

[386] Respondent's Counter-Memorial, ¶¶ 613-617; Respondent's Rejoinder, ¶¶ 607-611; *see also* Respondent's Closing Statement, slides 194 and 198.
[387] Reply, ¶¶ 353 *et seq*; Claimant's Opening Statement, slides 118-119.
[388] **Exhibit C-0171**, First Letter of Understanding (LOU), 16 May 2006. This document is also referred to in the Parties' and Experts' submissions as an MOU.
[389] As noted earlier, the 2006 LOU is also sometimes referred to as the 2006 MOU.

obtain the regulated rate of return as explained in Section IV.2 and in detail in Appendix B."[390]

388. The reference to the "2006 PEF" (*Plan Economico Financiero)* is to "the valuation model used by the regulator to estimate the economic equilibrium of the Concession," and is based on the model presented by the Consortium of which Webuild was part and adjusted to reflect Argentina's new economic reality in 2006.[391]

389. The Tribunal agrees that the current concessionaire's lack of investment in the Project makes it an inappropriate comparator for purposes of evaluating the toll rates in the "but for" scenario. As noted above, it considers the 2006 LOU to provide a reasonable basis for revised toll rates that would have represented, in the words of that LOU, a "partial restoration" of the Concession's equilibrium.

390. Under the terms of the 2006 LOU, the new toll rates it specified appear to have a duration of a year-plus (the remainder of 2006 and 2007). Section 6 of that document permits the Concessionaire, starting on 31 December 2007, to apply for a rate redetermination based on a cost increase as measured by specified indices in excess of 5%. It goes on to specify a process for approval of rate redetermination requests that initially involves OCCOVI and ultimately the "National Executive Branch", during a period not to exceed 150 days.

391. The Concession Contract seemed to contemplate toll increases on an annual basis (Article 25.2), again depending on cost increases as measured by the CPI. Annex II to the 2006 LOU, the *Plan Económico Financiero,* also appears to assume annual increases in toll

[390] Bambaci-Dellepiane Damages Report of 2 January 2017, **CER-0001**, p. 42, ¶ 83 [footnote inserted].
[391] *Id.* p. 63, ¶. 115. The 2006 PEF appears to be reflected in Exhibit BD-35, which is entitled the *Plan Económico Financiero para Renegociación.* Argentina submitted for the first time at the Hearing on the Merits that this exhibit was not part of the 2006 MOU and has never been validated. Respondent's Closing Statement, slide 184. Although this exhibit does not appear to be included in the annexes to the 2006 MOU, that does not necessarily in the Tribunal's view call the validity of the document into question. Moreover, Annex II to the 2006 MOU is entitled *Plan Económico Financiero.* As first introduced into the record, it was not legible, but was provided in a legible form by the Claimant following the Hearing at the Tribunal's request. *See* ¶¶ 46-47, *supra.* The Claimant's expert, Ms. Bambaci, explained at the Hearing that Annex II was derived from **BD-35**, an Excel spreadsheet containing the output from the 2006 PEF. Tr. 8:1129-1148. The Respondent also commented on Exhibit **BD-35** in a post-Hearing submission, in response to statements made by the Claimant when it provided the legible documents. *See* ¶¶ 47-48, *supra.* In any event the *ingresos* set forth in the two documents for toll revenues appear to be consistent, so whatever distinctions there may be between the two documents may not be relevant in any event.

rates.[392] In the Tribunal's view, this is a more realistic interval than a monthly interval, given the Government approvals involved and the linkage to price increases. Unlike the 2006 LOU, the Contract provision does not appear to limit toll rate increases to situations where costs have increased more than 5%. Given that Puentes agreed to the 2006 LOU, however, in the Tribunal's view, this is an appropriate limitation.

392. It is not clear to the Tribunal at this juncture what impact, if any, the frequency of toll increases has on the revenue calculation. Given the possibility that it does, and that such impact may be material, the Tribunal considers that a recalculation of toll rate increases on the basis of annual rate increases linked to the price indices set forth in Section 6 of the 2006 MOU and including the 5% threshold specified therein, is in order. It therefore instructs the Parties to provide an agreed recalculation on this basis or, if a recalculation cannot be agreed, for each party to submit its recalculation.

(b) Assumption regarding toll subsidy

393. The Respondent has questioned whether a subsidy incorporated into the revenue calculations of the Claimant's quantum experts is appropriate on two grounds: first, whether this subsidy would extend beyond 2006, particularly in light of the Respondent's submission that tariff compensation ceased to be granted to all road concessionaires in 2012; and second, because it is not included in the 2007 LOU or the Transitory Agreements.[393]

394. The Claimant has indicated that this subsidy was put forward by Argentina in the 2006 LOU, and Argentina's submissions seem at least implicitly to accept that position. As to its duration, one of its testifying quantum experts indicated on redirect during the Hearing that, based on the terms of section 12 of the 2006 LOU, if the subsidy had been abolished in 2012, that provision would require its replacement by something similar.[394] She went

[392] **Exhibit C-0171,** Annex II, p. 1.
[393] Respondent's Closing Statement, slides 185-188.
[394] Tr. Day 9: 1177 *et seq*. (redirect of Ms. Bambaci). The relevant text reads (in translation): "*The circumstance shall not prevent the … 'compensation method from being replaced' … if doing so is previously agreed upon by the Parties with another method that correctly recognizes the economic impact of the referred rate reduction.*" Tr. Day#9:1178:21-1179:4.

on to testify that if that were the case, there would be no substantial effect on the calculation of revenues.[395] The Claimant has indicated that its calculations assume the same level of subsidies will continue throughout the term of the Concession.[396]

395. OCCOVI Resolution No. 14/2012 is the document reflecting the abolition of the subsidy in 2012.[397] Argentina devoted some attention to this issue in its closing presentation at the Hearing,[398] but did not quantify the effect on revenues. The Tribunal does not have evidence indicating why the provision may not have been included in the 2007 LOU or Transitory Agreements.

396. The Tribunal considers that a decision on whether the subsidies would be maintained for the duration of the Concession is premature. It asks the Parties to provide an indication in the revised damages calculation of what the impact would be if the subsidies did not continue beyond 2012.

(c) Elasticity

397. The Respondent submits that higher toll rates would lead to lower traffic on the toll road. In its view, this implies a higher elasticity rate than that posited by the Claimant's experts: -0.30 for light traffic (*e.g.*, passenger vehicles) and -0.25 for heavy traffic (*e.g.*, trucks and commercial vehicles).[399]

398. The Claimant disagrees, noting that the majority of users of the toll road are commercial truck drivers (*i.e.*, drivers of heavy vehicles) and that the alternatives to the toll road require traveling much longer distances, making these users more willing to continue to use the toll road even in the face of higher tolls. Their elasticity numbers are substantially different, particularly for heavy traffic: -0.22 for light traffic and -0.05 for heavy traffic.[400]

[395] Tr. Day 9: 1179: 18.
[396] Tr. Day 2: 222: 11 *et seq.*
[397] **Exhibit C-0289**, Resolution No. 140/2012, 26 Jan. 2012.
[398] Respondent's Closing Statement, slides 186-199.
[399] Respondent's Closing Statement, slide 199. *See also* First UTDT Report, pp. 60-64 and Second UTDT Report, pp. 36-40.
[400] Claimant's Reply, ¶ 363 *et seq*; Claimant's Opening Statement, slide 121. *See also* First BRG Report, App. D, pp. 85-92 and Second BRG Report, Section VI.2, pp. 42-47 and Appendix E, pp. 84-88.

399. To address this issue, the Tribunal considers it helpful first to review the toll rate scheme in general. The table below prepared by Claimant's quantum experts illustrates the seven categories of vehicles for which tolls would be assessed, and the toll rates for each, under the 2006 LOU as of 1 September 2006 and prior thereto:

Table 8: Toll Rate Scheme

Category		Description	Toll Rate Scheme	
			Until Sep 1, 2006	*As of Sep 1, 2006*
1		Motorcycles	Base Toll Rate * 0.50	Base Toll Rate * 0.50
2		2-axle (height below 2.10 m and w/o dual wheel)	Base Toll Rate * 1.00	Base Toll Rate * 1.00
3		2-axle (height above 2.10 m or with dual wheel)	Base Toll Rate * 2.00	Base Toll Rate * 2.00
4		3 to 4 axles (height below 2.10 m and w/o dual wheel)	Base Toll Rate * 2.00	Base Toll Rate * 2.00
5		3 to 4 axles (height above 2.10 m or with dual wheel)	Base Toll Rate * 3.00	Base Toll Rate * 5.25
6		4 to 6 axles	Base Toll Rate * 4.00	Base Toll Rate * 7.00
7		More than 6 axles	Base Toll Rate * 5.00	Base Toll Rate * 8.75

Source: Bambaci - Dellepiane based on 2006 Plan Económico Financiero (BD-035) and Concession Contract (BD-004).

Based on the elasticity figures in the table below, the Tribunal understands that categories 5-7 are what are considered to constitute "heavy" traffic, while categories 1-4 are treated as "light" traffic.

Table 9: Summary of Elasticity Parameters used by vehicle category

Category		Elasticity Parameter
1		-0.22
2		-0.22
3		-0.22
4		-0.22
5		-0.05
6		-0.05
7		-0.05

Source: Bambaci - Dellepiane model, sheet "Val Revs (m)" (BD-005).

400. While the user profile does seem to suggest a basis for the Claimant's experts' assumptions regarding elasticity, especially as it concerns the so-called "heavy" traffic categories, the Tribunal notes that the Respondent's proposed elasticity numbers are apparently those put forward by Hochtief's quantum expert witness Philip Bates in its ICSID arbitration.[401] Although Mr. Bates' report does not appear to be in the public domain, the *Hochtief* tribunal's Decision on Liability suggests that the "but for" toll rates were set forth in Dollars rather than Argentine pesos (consistent with the theory of the case).[402]

401. In accepting the Claimant's experts' estimation of toll receipts in their "but for" scenario, the *Hochtief* tribunal adopted the lower end of the range of elasticity values contained in the "envelope" of values proposed by Mr. Bates.[403] In these proceedings, the Respondent has put forward multiple values, all lower than those put forward by the Claimant, that include calculations using the lower end of the envelope of values put forward by Mr. Bates in the *Hochtief* proceedings.[404]

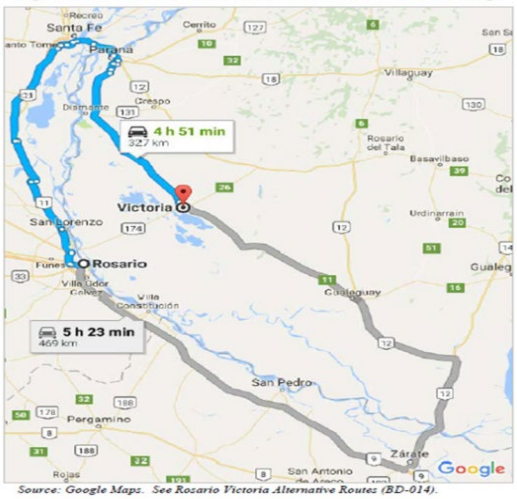
402. Given the differences in framing between the *Hochtief* case and the instant case, as well as and the evidence that has been submitted in these proceedings, the Tribunal does not consider it appropriate to simply accept the *Hochtief* elasticity values. In particular, the Claimant's Reply evidence would seem to suggest that users, particularly those in the "heavy traffic" categories who are likely to be commercial users, would be less affected by toll rate increases than might be the case if the alternatives were better. The *Hochtief* tribunal did not cite detailed evidence in support of its decision, but simply expressed a preference for the lower end of the spectrum put forward by the expert.[405]

403. There is undisputed evidence before the Tribunal that that the alternatives to the toll road established by the Project involve traveling significantly greater distances, with

[401] Respondent's Counter-Memorial, ¶ 613.c.
[402] **CL-0013,** *Hochtief*, Decision on Liability, ¶¶ 250, 312, 313.
[403] **CL-0013,** *Hochtief*, Decision on Liability, ¶ 318.
[404] First Report of Machinea/Schargrodsky, 18 June 2017, ¶¶ 186-195.
[405] As its reason for selecting the lower end, the *Hochtief* tribunal stated only that it "considers that it is appropriate, given the burden that lies upon the Claimant to prove its case, to prefer the experts' calculations based on Mr Bates' lower bound figures". *Hochtief*, Decision on Liability, ¶ 318.

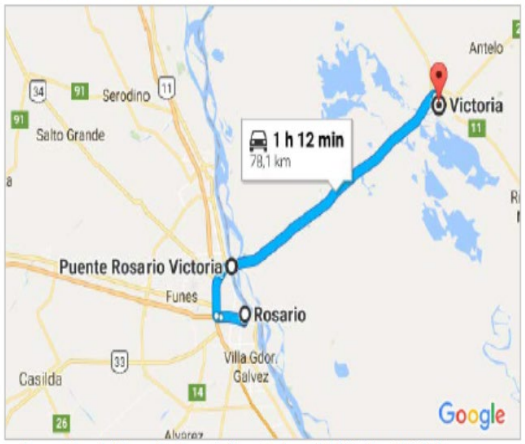
concomitant costs in time and operating expense of the vehicles involved. The excerpts below (taken from the Claimant's Opening Statement at the Hearing)[406] show, first, the Rosario-Victoria route established by the Project and the associated time and distance, and second, the alternative routes, with time and distance.

Figure 1: Rosario – Victoria routes, before Rosario-Victoria Bridge



Source: Google Maps. See Rosario Victoria Alternative Routes (BD-014).

Figure 2: Rosario – Victoria route, using Rosario-Victoria Bridge



Source: Google Maps. See Rosario Victoria through RV Bridge (BD-015).

404. In other words, there are no easy alternatives to the Project's toll road for those wanting to travel east-west in that part of Argentina. This does not tell the Tribunal what the precise elasticity should be, but it does support the view that there would be some degree of demand inelasticity, which would be greater for heavier traffic, that pays the higher tolls, than passenger cars or non-commercial vehicles, who may be less sensitive to the time value of money and less able to pass increased costs through.

405. The Tribunal considers that it requires further information in order to decide this issue. It therefore requests that the Parties agree on a revised calculation, in the context of the overall set of revisions requested herein, that makes three different assumptions of elasticity: namely, the Bates envelope of elasticities at the low end, high end and midpoint. In addition, if those calculations do not do so already, they should reflect greater inelasticity for heavy than light traffic (reflecting the differential levels set forth in Table 9 above), in light of the evidence before the Tribunal. The Respondent is instructed to share with the

[406] Claimant's Opening Statement, slide 4.

Claimant any information the Claimant may require to prepare this calculation. If the Parties cannot agree on a recalculation, each party should submit its recalculation.

(d) Rate of Return Assumptions

406. The Respondent has criticized the internal rate of return ("**IRR**") on the Project assumed by the Claimant's experts in their calculations, in two respects: first, because in its view the model uses a guaranteed rate of return for the Project, which is not provided for in the Concession Contract; and second, because the "but for" IRR of 9.18% is greater than the expected IRR.[407]

407. The calculations of the Claimant's experts do not appear to stem from the assumption that the Contract guarantees a specific rate of return to the Claimant, but that the Concession's original economic equilibrium was based on assumptions about the internal rate of return (also referred to as the regulated rate of return as noted below). Consequently, a restoration of that equilibrium would imply a similar rate of return.

408. In their first Report, the Claimant's experts Bambaci and Dellapiane state that:

> *The initial economic equilibrium of the Concession was determined by the cash flows presented by the winning Consortium during the bidding process. Contemplating the investments required, and the cash flows expected (at the allowed per-car toll rate of US$ 7.40), the resulting internal rate of return or 'IRR' of these forecasts was 12.94% ('regulated rate of return'). The internal rate of return of a project is that which reconciles positive expected future cash flows so that when expressed in present value, they are equal to the value of investments (i.e. negative cash flows), and therefore the net present value (NPV) equals zero.*[408]

409. Their first report calculated the original equilibrium of the Concession in real U.S. Dollars. However, in the second Report, they determined that the original equilibrium was actually measured in a combination of nominal and real U.S. Dollars, resulting in a re-calculation

[407] Respondent's Opening Statement, slide 157.
[408] BRG First Report, ¶ 44. *See also* Appendix B.

of the original IRR. This resulted in a decrease in the original IRR from 12.94% to 8.87%.[409]

410. In its second report, the Claimant's experts indicate that the IRR of the cash flows they calculate for the Project is in fact 9.18% due to the "actual evolution of traffic rather than the expected [in the 2006 PEF]".[410] They confirm that the IRR of their new cash flow calculation is 9.18%, which, they say, is "not substantially different" than the target IRR of 8.87%.

411. The Respondent is correct that the Concessionaire was not guaranteed a particular return from the Project. Indeed, it is not contested that the Contract was an "at risk" contract from a commercial perspective.[411] However, the 2006 LOU, Section 4, entitled Rate of Return, appears to contemplate the calculation of an IRR based in constant pesos as at September 1997 for the entire Concession period, and a waiver of the IRR rights set forth in the Concession Contract.[412] The issue therefore appears to the Tribunal to be more one of calculation than concept.

412. The Tribunal considers that insofar as an IRR is based on actual, historical numbers, an increase from 8.87% to 9.18% may be explainable.[413] However, to the extent that future projections assume a higher rate of return than the IRR assumed in the 2006 LOU, the Tribunal has difficulty with the justification for such increase, particularly where the Project will continue, in the Claimant's projections, to secure State subsidies. It may also

[409] *See* BRG Second Report, ¶¶ 7-8. This obviously undercut the statements made by the Claimant based on the first report about "shared sacrifice".
[410] BRG Second Report, ¶ 63.
[411] The Claimant does not accept that this encompassed sovereign, or government, risk. *See*, e.g., Claimant's Opening Statement, slide 19, citing to Concession Contract, Art. 31.2, **C-0008**.
[412] **C-0031**, Letter from UNIREN to Puentes attaching the First MOU, 10 May 2006; **C-0171**, Letter from Puentes to UNIREN, 16 May 2006 (sending the First MOU signed and dated).
[413] In their original report, Bambaci and Dellapiane concluded that the *ex post* rate of return, which they also refer to as an "implicit" IRR, in the "but-for" valuation was 8.449% rather than 12.94% due to the effects of the crisis, particularly changes in the foreign exchange regime, on the economic equilibrium. **CER-0001,** ¶¶ 12, 95. However, their second report uses the 12.94% IRR figure, and does not seem to pick up the "ex post" or "implicit" IRR concepts used in the first report.

be questioned whether the conditions that led to an increase in the historical period could be sustained.

413. Accordingly, the Tribunal asks the Claimant to clarify to what extent, if any, future cash flows are calculated based on an IRR in excess of 8.87%, and specify the basis of such calculations. Further, to the extent that is the case, the Tribunal requests an adjusted calculation based on the 8.87% rate, along with a calculation using the 9.18% rate, so that the effect of any higher rate that the Claimant's experts consider historical performance may justify is clear.

(e) Adjustment of Working Capital

414. The final issue raised by the Respondent with respect to the "but for" calculation of revenues relates to an adjustment to the working capital of Puentes made by the Claimant's experts. According to the Respondent, a deferred tax benefit was incorporated into the model as a current asset, when in its view, it is a non-current asset. The effect of the inclusion of this tax benefit, it is asserted, artificially increased the cash flows of Puentes for 2006 and thereafter, with an overall impact on the damages calculation of US$ 27.2 million.[414]

415. The Claimant's experts, in their second report, appear to address this issue (relating to tax credits), stating that:

> *227. As of 2005, PdL's Financial Statements reflected uncertainty as to whether it would be able to use its accumulated tax credits, and therefore registered only part of it as an asset. The Financial Statements explain that only the tax credit recoverable within the legal prescription periods were added to the 'other non-current credits,' so the total carryforward tax (i.e., tax credit) is provisioned. In our first report, we assumed that PdL would only be able to recover this limited amount of tax credit. This assumption was incorrect.*
>
> *228. In our but-for scenario, the company would have been able to use its accumulated tax credits to reduce the income tax payable*

[414] Respondent's Opening Statement, slide 158; Respondent's Closing Statement, slides 195-197.

> *amounts arising from the higher revenue from the renegotiated tariffs. In this updated assessment, we introduce an income tax credit of AR$ 135,580,968 (or US$ 46.379.159) as stated in PdL's 2005 Financial Statement. In fact, Machinea-Schargrodsky agree with this assumption as they have included the accumulated tax credit in their own valuation based on the Hochtief Award.*[415]

416. In the Tribunal's view, this explanation only partially addresses the issues raised by Argentina. The Tribunal understands that a tax loss carryover, which appears to result in a tax credit, would increase the profitability of Puentes and in consequence, cash flows in a DCF calculation. The Tribunal is not certain it understands the implications of the current versus non-current asset issue raised by Argentina. Paragraph 227 quoted above seems to suggest Puentes's historical tax losses (or at least the ones whose future availability to Puentes was uncertain as of 2005) were in fact treated as non-current assets, while the portion that could be used was in fact treated as a current asset. If this is correct, then the Tribunal would understand that the "but-for" scenario would permit the use of the remainder of the tax loss carryover as a credit for the period permitted by Argentine law. Assuming a five-year loss carryforward, Puentes would be able to use the remainder of its previous losses in 2007-2010 (since 2006 was Year 1), but not in any years thereafter. Given the apparent magnitude of this item in relation to the quantum of damages, the Tribunal seeks confirmation from the Parties before deciding this issue that: (i) its understanding of the "current" versus "non-current" asset issue as set forth above is correct; (ii) whether under Argentine law loss carryovers are in fact limited to five years; and (iii) that the treatment of this issue in the experts' calculations is consistent with the legal position in Argentine law. If the relevant period is five years, revised calculations shall also be provided.

(ii) Expenses

(a) Recalculation of Interest Rate on Financial Assistance Loan

417. The Respondent disputes the decision by the Claimant's experts, in the "but for" scenario, to reduce the interest rate on the Financial Assistance Loan.[416] This was the rate, it will be

[415] BRG Second Report, ¶¶ 227-228.
[416] Respondent's Counter-Memorial, ¶ 613.d.

recalled, that was set subsequent to the FAL by Resolution 14.[417] The reduction has the effect of increasing the value of the Claimant's equity investment by US$ 2.7 million.[418]

418. The Claimant's response to this criticism is that it was proper to recalculate the interest rate on the Financial Assistance Loan, since the rate, unilaterally fixed by Resolution 14, was abusive.[419] Moreover, it submits that the rate was reduced in the 2006 LOU and with equilibrium restored, Puentes would have been able to borrow commercially.[420]

419. It appears to the Tribunal that the rate may well have been reduced in the 2006 LOU. Section 9 of that LOU appears to peg the rate to the Interest Rate for Loans to Leading Companies in the 25th percentile, as published by the Central Bank, or to an annual rate of 9.5%, whichever is higher.[421] It is not clear what these new rates would have been under the 2006 LOU; the Parties are requested specifically to confirm them, and Claimant is also asked to confirm the rates assumed by its experts in the "but for" scenario. [422]

420. The *Hochtief* tribunal held that the terms of the Financial Assistance Loan, as ultimately set by Resolution 14, were a violation of FET.[423] While this Tribunal has deemed it unnecessary to make such a finding given the differences between the two claims, it has found that the Financial Assistance Loan, as its terms were ultimately set by Resolution 14, at a minimum exacerbated Puentes' financial situation and made timely restoration of the economic equilibrium of the Contract even more necessary.[424]

[417] *Supra* ¶¶ 103-105.
[418] Claimant's Reply, ¶ 364.
[419] *Ibid. See also* **CER-0001,** ¶ 136.
[420] Claimant's Reply, ¶ 364; *see also* Claimant's Opening Statement, slide 122: "*[i]t is economically rational to assume that interest rates would be reduced in the 'but for' scenario because the uncertainty of repayment is mitigated by the toll-rate increase resulting from implementation of the 2006 MOU.*"
[421] *See* **BD-034**, p. 8; and BRG First Expert Report, ¶ 136. Previously, the applicable rate, as set by Resolution 14, was the *Tasa Activa de Cartera General para Operaciones Diversas from Banco de la Nación,* BD-032. Note that this seems to be a daily rate.
[422] The "but for" calculations appear to have been made on the basis of a so-called "synthetic" cost of debt from December 2005 to August 2014 at a rate of 10.39% pre-tax on average. *See* Respondent's Closing Statement, slide 199. However, this does not clarify the issue.
[423] **CL-0013,** *Hochtief*, Decision on Liability, ¶¶ 263-265.
[424] *See* ¶¶ 366-368 *supra.*

421. The Tribunal therefore considers that a reduction of the rate on the Financial Assistance Loan once the emergency had ended and the Contract's financial equilibrium restored is logical and reasonable, more so if supported by the 2006 LOU. The Claimant should confirm the assumed rate of interest in the "but for" scenario, and that it conforms to the provisions of Section 9 of the 2006 LOU. Assuming the rates used conform to this provision, the Tribunal sees no need for new calculations. If not, a new calculation shall be performed based on the terms of the 2006 LOU.

(b) Reduction of Interest Rate on Shareholder Loans and Amount of Shareholder Loans in "But For"

422. The Respondent disputes the reduction in the Claimant's experts' "but for" calculations of the interest rate charged by Webuild and Hochtief, the two largest Puentes shareholders, on Shareholder Loans to Puentes after Argentina ceased making further advances to Puentes against the FAL.[425] Webuild alone made approximately US$ 3.5 million in Shareholder Loans to Puentes in 2003. The interest rate on its Shareholder Loans and the Loans from *Hochtief* was 15%.

423. The Claimant's response to this criticism appears to be that in the "but for" scenario, once economic equilibrium had been restored and the toll rates had been increased, the uncertainty surrounding the Project's financial viability would have been reduced, and other financing would have been available, enabling Puentes to rely less on shareholder financing (or at least be able to compel shareholders to reduce their interest rates).[426] Its experts' calculations demonstrate that a reduction of the rate increases the equity claim but reduces the debt claim in the DCF analysis, resulting in an overall reduction of the value of Webuild's equity stake in Puentes by approximately US$ 23 million.[427] (It should be noted that the Tribunal suspects that the word "increase" in paragraph 140 should be "decrease", based on Table 8 that shows a reduction with the new interest rate of "Total

[425] *See* ¶¶ 374-377 *supra.*
[426] *See* BRG Second Report, ¶ 140.
[427] BRG Second Report, ¶ 140; *see also* Table 8 (**BD-115**).

Damages to Salini Impregilo" from US$ 198.0 to 174.2, a reduction which corresponds to the 12.4% figure in that paragraph.)

424. Given the Tribunal's decision on admissibility of the Webuild Shareholder Loan claims,[428] this change would therefore appear to benefit Argentina. It also appears to the Tribunal to be logical and reasonable.

425. The Respondent's expert also submitted that there would be more Shareholder Loans in the "but for" scenario than the Claimant's experts have posited.[429] The Claimant considers this to be economically irrational.[430]

426. Given that the "but for" scenario is premised on the economic equilibrium having been restored after the end of the emergency, and that the Project was completed and operational, it is reasonable in the Tribunal's view to assume that to the extent the Project had borrowing needs, it would be able to look to commercial markets to fulfill those needs. Moreover, the Project already had significant debt by virtue of the Financial Assistance Loan and the Shareholder Loans. The history of the Project indicates to the Tribunal that Shareholder Loans were viewed as a last resort. Not all shareholders of Puentes were apparently willing or able to make such loans, with the result that the two largest shareholders were compelled to do so in order to complete the Project. Accordingly, the Tribunal considers that an assumption of no further Shareholder Loans is reasonable.

(c) Other Issues

427. The Respondent has alleged that the Claimant's expense calculation contains additional errors: 1) use of inapplicable indices from Decree No. 1295/02 to update expenses; and 2) an error in estimating operating expenses for 2014 by not annualizing administrative expenses, which error was carried over into subsequent years to the end of the Concession Contract.[431]

[428] *See* ¶ 211 *supra*.
[429] Respondent's Counter-Memorial, ¶ 613.f.
[430] Claimant's Reply, ¶¶ 371-372; Claimant's Opening Statement, slide 123.
[431] Respondent's Rejoinder, ¶ 615; Respondent's Opening Statement, slide 158.

428. The Respondent has not quantified the impact of these errors and, as they appear only to have been raised at the time of the Rejoinder, the Claimant did not have an opportunity to respond in a submission.

429. Presumably had the economic impact of these items been significant, the Respondent would not only have raised its concerns in its Rejoinder, but would have quantified their impact, as it did with other issues. In any event the issues raised by the Respondent are not sufficiently clear for the Tribunal to evaluate them, and the Tribunal considers that they are not sustained.

(iii) Discount Rate

430. The Claimant's "but for" calculations use the same rate, its Weighted Average Cost of Capital, or WACC, both to update historical losses of Puentes as of the Valuation Date and to discount future losses.[432] The Respondent takes issue with the use of the WACC for both sets of losses. It argues that the same rate should not be used for both: that future flows should be discounted by the cost of equity; and historical flows should be updated applying a risk-free rate (one-year U.S. Treasury bills is proposed) as they carry no associated risk.[433]

431. The Claimant in response has submitted that the same risk-adjusted rate should be used for both; otherwise, the result would be the unjust enrichment of the Respondent.[434]

432. The Tribunal considers valid Argentina's position that the risk profile of historical losses is different from future losses, and further considers that a risk-free rate for such losses is more appropriate than a risk-adjusted rate. It also agrees with the Claimant, however, that care must be taken to avoid unjust enrichment of the Respondent through the application of a risk-free rate to historical losses that is not appropriate.[435] Moreover, the Claimant is correct that Article 5 of the BIT provides for a normal commercial rate of interest for lawful

[432] BRG Second Report, ¶ 61 ("In our First Report, we estimated the WACC ranging between 9.3% and 13.6% for 2006-2013 and at 8.9% as of September 2014.").
[433] Respondent's Counter-Memorial, ¶ 613.h; *see also* UTDT Second Report, ¶¶ 10-11.
[434] Claimant's Reply, ¶¶ 374-383; *see* Claimant's Opening Statement, slide 125.
[435] Claimant's Memorial, ¶ 344; Claimant's Reply, ¶¶ 326, 373-379, 385-387.

expropriations. It would therefore be anomalous in the Tribunal's view to provide for an interest rate for an FET violation, an unlawful act, that is lower than the BIT prescribes for a lawful act. A "normal commercial rate of interest" in the Tribunal's view does not mandate a WACC, however. The Tribunal invites further submissions from the Parties as to what a non-risk-based normal commercial rate around the Valuation Date in 2014 would have been.

433. As for the discount rate for future cash flows, the Tribunal agrees with the Claimant that this should be a risk-weighted rate. In its view, given the methodology being followed (free cash flow to firm), and the fact that cash flows to Puentes would be used to pay both creditors and shareholders, the Tribunal does not consider that the cost of equity is as suitable a measure as the WACC, which takes into account the cost of debt as well as the cost of equity. It therefore would apply the WACC calculated by the Claimant's experts for the relevant period.

434. A final issue that has been raised by Respondent is the risk of double recovery. As the Tribunal has already observed in its Decision on Jurisdiction, this issue can be managed.[436] To do so, however, requires that the Tribunal be provided with current information on the status of any recovery of Puentes from the domestic proceedings to date. The Tribunal therefore requests that Claimant provide it with such information.

D. COMPOUND PRE- AND POST-AWARD INTEREST

(1) The Parties' Positions

a. The Claimant's Position

435. The Claimant requests an award of pre-award and post-award interest from 31 August 2014 until the date Argentina pays in full, at the highest possible lawful rate, such as Argentina's borrowing rate or another rate that the Tribunal may deem appropriate to the circumstances

[436] Decision on Jurisdiction, ¶ 173.

of the case.[437] Further, the Claimant seeks that any award of interest granted by this Tribunal be compounded on an annual basis.[438]

b. The Respondent's Position

436. In the Respondent's view, the Claimant's request for capitalization of interest should be rejected and the amount of a potential capitalization should be adjusted using a risk-free rate.[439] The Respondent also argues that Argentine law's asserted prohibition on capitalization of interest precludes any compounding.[440]

(2) The Tribunal's Analysis

437. The Tribunal agrees with the Claimant that annual compounding is appropriate and that compounding in general is consistent with many recent decisions of investment tribunals. Moreover, although Article 5 of the BIT, prescribing a commercial rate of interest, does not apply *strictu sensu*, it stands to reason that if that is the BIT's standard for lawful expropriations, a similar standard should apply for treaty violations. While the BIT deals with rates and not the issue of compounding, the reference to "commercial" suggests that compounding, which is common commercially, is consistent with that term. Capitalization of interest is not at issue; indeed, the Tribunal recalls that the FAL terms as fixed by Resolution 14 featured daily compounding of interest.

VII. DECISIONS AND FURTHER INSTRUCTIONS

A. DECISIONS

438. For the reasons set forth above, the Tribunal decides as follows:

(1) Webuild's claims with respect to its Shareholder Loans are admissible;

[437] Claimant's Memorial, ¶ 338.
[438] *Ibid.*, ¶¶ 339-346.
[439] Respondent's Counter-Memorial, ¶¶ 619-630.
[440] Respondent's Counter-Memorial, ¶ 624.

(2) Argentina has violated Article 2.2 of the BIT, first sentence, the obligation to give fair and equitable treatment to investments covered by the BIT, through its failure by September 2006, after the end of the economic emergency, to reestablish the economic equilibrium of the Concession as required by the Concession Contract and the Emergency Law;

(3) Argentina has also violated Article 2.2 of the BIT, second sentence, by its unjustified conduct in failing to reestablish the economic equilibrium of the Concession within a reasonable time after the end of the economic emergency;

(4) In light of the Tribunal's decision relating to Article 2.2 (first and second sentences), no decision needs be reached by the Tribunal on the discrimination claims raised by the Claimant under Articles 2.2, 3 and 4, or the expropriation claim raised by the Claimant under Article 5, of the BIT;

(5) Argentina's defense of necessity is denied;

(6) With respect to damages as a consequence of the breaches noted above, no final decision on the quantum of damages and interest to be awarded is made at this time, with such decision being deferred to the ~~final~~ Award following further submissions of the Parties on the questions set forth in subsection B of this section and further deliberations of the Tribunal. The Tribunal has determined that the *Chorzów Factory* standard of full reparation, using an income method, calculated on the basis of free cash flow to the firm, shall be used to calculate damages, including historical damages from September 2006 to the Valuation Date of 31 August 2014, and future damages from that date to the end of the Concession; and,

(7) The Tribunal reserves any decision on costs for the Award in these proceedings.

B. FURTHER INSTRUCTIONS AND QUESTIONS

439. The Tribunal instructs the Parties (or a Party, as indicated) to prepare revised calculations of damages consistent with its decision set forth in Section VII.A on the following basis:

a. *Toll Rates.* Initial toll rates should correspond to those set forth in the 2006 LOU, which by its terms was aimed at a partial restoration of the Concession's equilibrium. Readjustment of rates after the initial period set by the 2006 LOU shall be done on an annual basis consistent with the indices and 5% threshold specified in that LOU (based on paragraph 390 above).

b. *Toll Subsidy.* The revised calculations of damages shall include a figure showing the impact of termination of any toll subsidy included in the 2006 LOU after 2012 versus the continuation of such subsidy until the end of the Concession (based on paragraphs 393 to 396 above).

c. *Elasticities.* The revised calculation of damages should be based on three different assumptions regarding elasticity values: one at the low end of the envelope of values put forward by Mr. Bates in the *Hochtief* Arbitration; one at the high end; and one at the midpoint. Given the Tribunal's finding of greater inelasticity of demand for heavy rather than light traffic, the values in each calculation should reflect this differential, using the same degree of differential as reflected in Table 9 set forth in paragraph 399 above.

d. *Rate of Return.* The Claimant is also requested to clarify to what extent, if any, future cash flows in any calculation of damages are based on an IRR in excess of 8.87% and, to the extent that may be the case, to provide an additional calculation based on an IRR of no greater than 8.87%, along with a calculation using an IRR of 9.18% (or such other rate as may result from the new calculation of damages requested by this Decision), taking into account any variations caused by actual performance), so that the effect of any higher rate that the Claimant's experts

consider historical performance may justify is clear, as set out in paragraphs 406 to 413 above.

e. *Working Capital: Current vs. Non-Current Assets and Duration of Tax Credit Carryover.* The Parties are requested to clarify the position regarding tax credit carryovers, as set forth in paragraphs 414 to 416 above. If such carryovers are limited in duration to five years under Argentine law, the revised calculations of damages shall be consistent with that limitation.

f. *Rate of Interest on the FAL.* To enable the Tribunal better to understand the treatment of the interest rate on the FAL in the "but for" scenario, the Claimant is requested to confirm specifically the assumed rate of interest on the Financial Assistance Loan in that scenario. The Parties are also requested to confirm the Interest Rate for Loans to Leading Companies in the 25th percentile as published by the Argentine Central Bank, as referenced in Section 9 of the 2006 LOU. Assuming the 2006 LOU provisions have been correctly applied, the FAL rate reduction shall be unchanged from the earlier calculations performed by Claimant's experts. If, however, that rate has not been correctly applied, a new calculation shall be performed using the correct rate based on the 2006 LOU (paragraphs 417 to 421 above).

g. *Rate of Interest on Shareholder Loans and Additional Shareholder Loans.* The assumed rate of interest on shareholder loans (including the Shareholder Loans) shall be unchanged from the earlier calculations performed by those experts. No additional shareholder loans shall be assumed to have been made in the "but for" scenario (paragraphs 422 to 426 above).

h. *Effect of Debt Overhang from Pre-Operation Phase.* The Claimant is requested to clarify the extent to which, if any, in the "but for" scenario there existed a debt overhang from the construction phase (whether to subcontractors such as Boskalis-Ballast, shareholders or Argentina under the FAL) that would presumably not have been present absent the cancellation of the IDB Loan and the effects of the

economic emergency on Puentes' ability to retire such debt, and the impact any such overhang might have on the revenues Puentes would be required to earn in order to achieve the targeted IRR in that scenario (paragraph 368 above).

i. *Other.* Except as set forth herein, all other assumptions in the calculation of damages in the "but for" scenario shall remain unchanged.

j. *Interest Rate on Historical Losses.* Historical losses are to be calculated using a risk-free standard commercial rate of interest on or around the Valuation Date. The Tribunal invites further submissions from the Parties as to what a non-risk-based normal commercial rate around the Valuation Date in 2014 would have been. A short-term instrument such as a one-year U.S. Treasury bill would appear to be inapposite for a long-term investment and in light of the standard of a commercial rate of interest; the Parties should therefore consider rates based on instruments of longer tenor, *e.g.*, five or ten years. Alternative calculations should be provided using the chosen rates (paragraph 432 above).

k. *Discount Rate for Future Losses.* The discount rate for future projected losses shall continue to be the WACC (paragraph 433 above).

l. *Compounding.* Interest shall be compounded annually (paragraph 437 above).

440. In addition: the Tribunal requests answers to the following questions from the Parties or a Party, as indicated:

a. *Current Legal Status of Puentes.* The Claimant is invited to clarify the current status of Puentes, including whether its dissolution is complete, and if so, the date on which that dissolution occurred. If any liquidating distributions were made to shareholders, these should be identified, by shareholder. The Claimant and the Respondent are also invited to provide information on the current status of the two domestic court cases pending at the time of the submissions in this case.

b. *Subcontractor and Other Repayments.* The Claimant is also invited to confirm: (1) that all subcontractors are fully repaid in its "but for" scenario, and to specify the timing of such repayment(s); and (2) to provide current information regarding any repayments of Shareholder Loans (including to Webuild) or third parties, including but not limited to subcontractors, that have been made pursuant to the reorganization plan, to the extent the record is not up to date, or to confirm that the record fully reflects such repayments.

c. *Effect of Reduction of Interest Rate on Shareholder Loans.* The Claimant is requested to confirm that the Tribunal's reading of paragraph 140 of the Second BRG Report is correct in considering that the word "increase" should be "decrease" (and if not, to clarify the position on the issue discussed in paragraphs 422-426 above).

d. *Double Recovery Issues.* To avoid double recovery, the Claimant is also requested to confirm the status of any recovery it or its shareholders have received from any claims it has pursued in Argentine courts, and to indicate the status of any such proceedings.

441. The Respondent is requested to provide any information that the Claimant may reasonably require to respond to the Tribunal's requests. The Parties are encouraged to work together to provide joint or agreed responses to these questions to the extent possible.

442. The Parties are encouraged to provide their responses to the above requests within sixty (60) days of this Decision via a joint submission. Alternatively, if the calculations are not agreed, the Parties shall note any areas of disagreement in their joint submission, or make separate simultaneous submissions.

[signed]

Professor Kaj Hobér
Arbitrator

Professor Jürgen Kurtz
Arbitrator

Ms. Lucinda A. Low
President of the Tribunal

[signed]

Professor Kaj Hobér
Arbitrator

Professor Jürgen Kurtz
Arbitrator

Ms. Lucinda A. Low
President of the Tribunal

Professor Kaj Hobér
Arbitrator

Professor Jürgen Kurtz
Arbitrator

[signed]

Ms. Lucinda A. Low
President of the Tribunal

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

WEBUILD S.P.A. (FORMERLY SALINI IMPREGILO S.P.A.)
Claimant

and

ARGENTINE REPUBLIC
Respondent

ICSID Case No. ARB/15/39

DECISION ON RESPONDENT'S REQUEST FOR RECONSIDERATION

Members of the Tribunal
Ms. Lucinda A. Low, President
Professor Kaj Hobér
Professor Jürgen Kurtz

Secretary of the Tribunal
Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to the Tribunal
Professor Freya Baetens

Date of dispatch to the Parties: 25 September 2024

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TABLE OF ABBREVIATIONS/DEFINED TERMS

Except for the terms defined below, or otherwise indicated in this Decision, all other terms defined in the Decision on Liability and Directions on Quantum and used herein shall have the same meaning ascribed to them therein.

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
Argentina or the Respondent	The Argentine Republic
BIT or the Treaty	Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments which was signed on 22 May 1990 and entered into force on 14 October 1993
Claimant	Webuild S.p.A. (formerly known as Salini Impregilo S.p.A.)
Claimant's Response	Response filed on 17 July 2024 by Webuild on the Request for Reconsideration, styled as "Claimant's Response to the Argentine Republic's Request for Reconsideration of the Decision on Liability".
Claimant's Surrebuttal	Rejoinder filed on 7 August 2024 by Webuild on Respondent's Reply, styled as "Claimant's Surrebuttal to the Argentine Republic's Request for Reconsideration of the Decision on Liability"
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
Decision on Jurisdiction	Decision on Jurisdiction and Admissibility issued by the Tribunal on 23 February 2018
Decision on Liability	Decision on Liability and Directions on Quantum issued by the Tribunal on 3 March 2023
FET	Fair and Equitable Treatment

ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Convention or the Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966
Parties	Webuild and Argentina
PdL or Concessionaire	Puentes del Litoral S.A., a company incorporated in Argentina by certain consortium partners ("Consortium"), including Webuild S.p.A. (formerly Salini Impregilo S.p.A.), to execute a Concession Contract, signed on 14 September 1998, for the construction, operation and maintenance of a bridge and toll road between the cities of Rosario and Victoria in Argentina.
PdL Case	Local proceeding between Puentes del Litoral S.A. and Ministerio de Planificación resulting in the Local Judgment
PdL Judgment or Local Judgment	Decision rendered on 27 June 2024 by the Federal Court on Administrative-Contentious Matters No. 8 of the Argentine Republic of Puentes del Litoral S.A.'s contractual claim against the Ministerio de Planificación
R-[#]	Respondent's Exhibit
Request for Reconsideration	Request filed by the Respondent on 10 July 2024 on the Decision on Liability, styled "Argentine Republic's Submission on the Implications of the PdL Judgment".
Respondent or Argentina	The Argentine Republic
Respondent's Reply	Reply filed on 31 July 2024 by the Respondent on Claimant's Response, styled as "Reply of the Argentine Republic on the Implications of the Judgment in the PdL Case"
RL-[#]	Respondent's Legal Authority

Tribunal	Arbitral Tribunal constituted on 11 July 2016 and reconstituted on 15 July 2021
Webuild	Webuild S.p.A. (formerly, Salini Impregilo S.p.A.), an Italian industrial group incorporated under Italian law

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I. INTRODUCTION & PROCEDURAL HISTORY

1. On 3 March 2023 the Arbitral Tribunal issued its Decision on Liability and Directions on Quantum (hereinafter, the "**Decision on Liability**"). The Tribunal's main rulings were that:

2. Webuild's claims with respect to its Shareholder Loans were admissible;

3. Argentina had violated Article 2.2 of the BIT, first sentence (the obligation to give fair and equitable treatment ("**FET**") to investments covered by the BIT), through its failure by September 2006, after the end of the economic emergency, to reestablish the economic equilibrium of the Concession as required by the Concession Contract and the Emergency Law;

4. Argentina had also violated Article 2.2 of the BIT, second sentence, by its unjustified conduct in failing to reestablish the economic equilibrium of the Concession within a reasonable time after the end of the economic emergency;

5. In light of the Tribunal's decision relating to Article 2.2 (first and second sentences), the Tribunal decided that no decision needed to be reached by it on the discrimination claims raised by the Claimant under Articles 2.2, 3 and 4, or the expropriation claim raised by the Claimant under Article 5, of the BIT;

6. Argentina's defense of necessity was denied;

7. With respect to damages as a consequence of the breaches noted above, no final decision on the quantum of damages and interest to be awarded was made at that time, with such decision being deferred to the Award following further submissions of the Parties on the questions set forth under VII(B) of the Decision on Liability and further deliberations of the Tribunal. The Tribunal determined that the *Chorzów Factory* standard of full reparation, using an income method, calculated on the basis of free cash flow to the firm, shall be used to calculate damages, including historical damages from September 2006 to the Valuation Date of 31 August 2014, and future damages from that date to the end of the Concession; and,

8. The Tribunal reserved any decision on costs for the Award in these proceedings.[1]

9. On 9 June 2023, each Party filed a submission in response to the Tribunal's questions and instructions in the Decision on Liability.

10. On 18 April 2024, the Tribunal informed the Parties that while it was in the process of drafting its Award, and having deliberations on the same, the Tribunal would find it useful to have the Claimant's comments on the Respondent's requests in its 9 June 2023 submission concerning the local proceedings in connection with the risk of double recovery under paragraph 117(c), (d), (e), and (f) of that submission. The Claimant was requested to file this submission by 26 April 2024.

11. Also on 18 April 2024, the Respondent requested leave from the Tribunal to respond to the Claimant's comments on the matter concerning the risk of double recovery.

12. On 19 April 2024, the Tribunal granted leave to the Respondent to reply to the Claimant's comments by 7 May 2024, giving the Claimant the opportunity to respond, if it so wished, to the Respondent's reply by 15 May 2024.

13. As scheduled, (i) on 26 April 2024, the Claimant filed its comments on the Respondent's requests concerning the local proceedings in connection with the risk of double recovery under paragraph 117(c), (d), (e), and (f) of the Respondent's submission of 9 June 2023; and (ii) on 7 May 2024, the Respondent filed its response. Subsequently, on 10 May 2024, the Claimant filed further comments on the matter.

14. On 21 May 2024, the Tribunal invited the Parties to file short submissions on costs, updating the ones of 12 March 2021, by 31 May 2024.

15. On 31 May 2024, each Party filed an updated statement of costs.

16. On 1 July 2024, the Respondent filed a request for the admissibility of new evidence: a judgment rendered on 27 June 2024 by the Federal Court on Administrative-Contentious Matters No. 8 of the Argentine Republic in the local proceeding entitled "Puentes del Litoral S.A. c/Ministerio de Planificación s/Proceso de Conocimiento" (the "**PdL Case**")

[1] Decision on Liability, ¶ 438.

(the "**PdL Judgment**" or "**Local Judgment**"), which according to Argentina, constituted a "new and relevant fact". The Respondent requested that the Tribunal provide an opportunity for the Parties to file simultaneous submissions on the impact of the PdL Judgment in this arbitration proceeding.

17. On 2 July 2024, the Claimant objected to the Respondent's request, but stated that if the Tribunal was to permit the incorporation of the PdL Judgment, the Tribunal should then allow the Respondent to file a short submission, to be followed by the Claimant's response, with no further submissions.

18. On the same date, the Tribunal informed the Parties that it would allow one round of submissions: the Respondent was to file a copy of the PdL Judgment together with a submission not to exceed 10 pages, by 9 July 2024, and the Claimant, if it so wished, was to file a response with the same page limit by 16 July 2024. By communication of the same date, the Respondent stated that it reserved its rights to request an opportunity to file observations on the Claimant's response. Subsequently, at the Parties' request, the Tribunal extended those deadlines by one day, in light of a national holiday in Argentina.

19. Accordingly, on 10 July 2024, the Respondent filed a submission on the PdL Judgment's impact in this arbitration, together with the PdL Judgment, as Exhibit **A RA-0645**, and Legal Authorities **AL RA-059, AL RA-0201**, **AL RA-0398**, and **AL RA-0405** to **AL RA-0411**. The Respondent's submission, styled "Argentine Republic's Submission on the Implications of the PdL Judgment", included a request on the basis of the PdL Judgment for the Tribunal to revise its Decision on Liability (the "**Request for Reconsideration**").

20. On 11 July 2024, the Claimant called the Tribunal's attention to the fact that the Respondent had actually filed a Request for Reconsideration of the Tribunal's Decision on Liability, instead of a submission that discussed the implications of the PdL Judgment as a new and relevant fact, as the Respondent had originally requested. In light of this, the Claimant requested leave from the Tribunal to file its response by 19 July 2024, instead of by 17 July 2024. On the same date, the Tribunal invited the Respondent to comment on the Claimant's request.

21. On 12 July 2024, the Respondent noted that it did not object to the Tribunal granting such an extension, but that it would in turn request the opportunity to respond to the Claimant's arguments. Subsequently, the Claimant filed an objection to the Respondent's request. On the same date, and after considering the Parties' communications, the Tribunal granted the Claimant's extension request for the filing of its response until 19 July 2024.

22. On 16 July 2024, the Respondent circulated an English translation of its Request for Reconsideration and the PdL Judgment.

23. On 19 July 2024, the Claimant filed a response to the Respondent's Request for Reconsideration, styled "Claimant's Response to the Argentine Republic's Request for Reconsideration of the Decision on Liability," together with Exhibits **C-0461** to **C-0463** in English and Spanish and Legal Authorities **CL-0254** to **CL-0260** (the "**Claimant's Response**").

24. On 23 July 2024, having considered the Parties' positions, and after due deliberation, the Tribunal notified the Parties of its decision to authorize a second round of sequential submissions, and provided its instructions to such effect. The Respondent's submission would be due by 31 July 2024, and the Claimant's by 7 August 2024.

25. As scheduled, on 31 July 2024, the Respondent filed its reply on the Request for Reconsideration, styled "Reply of the Argentine Republic on the Implications of the Judgment in the PdL Case (the "**Respondent's Reply**"), with the English version following on 6 August 2024.

26. On 7 August 2024, the Claimant filed the rejoinder to Argentina's Reply, styled "Claimant's Surrebuttal to the Argentine Republic's Request for Reconsideration of the Decision on Liability" (the "**Claimant's Surrebuttal**").

II. THE PARTIES' POSITIONS

A. RESPONDENT'S POSITION

27. The Respondent submitted its Request for Reconsideration of the Tribunal's Decision on Liability based on the the PdL Judgment, a judgment issued by the Federal Court in

Administrative-Contentious Matters No. 8 of the Judiciary Branch of the Argentine Republic on 27 June 2024.

28. According to the Respondent, the PdL Judgment (i) deals with the same facts at issue in this arbitration proceeding; (ii) involves the Claimant, who participated as an interested third party in the PdL Case given the close connection between the claims made in this arbitration proceeding to those made in the judicial proceeding; and (iii) confirms "that Argentina acted lawfully with respect to the financial problems of Puentes del Litoral ("**PdL**" or "**Concessionaire**") […] during the Concession, and that the termination of PdL's Concession Contract due to the Concessionaire's fault, as provided in the Concession Contract, complied with the requirements of legality and due process."[2]

29. In the first place, the Respondent explains what it considers to be the impact of the PdL Judgment in this arbitration proceeding based on the different outcomes in the Decision on Liability and the Local Judgment despite the similarities between them.

30. *First*, the Respondent notes that the similarity of the claims was asserted by the Claimant at the jurisdictional stage of this proceeding, which was further acknowledged by the Tribunal when it determined "that since the claims brought by PdL in local jurisdiction were substantially similar to Webuild's claim in the arbitration, the BIT's requirements for establishing arbitral jurisdiction had been met."[3]

31. In line with this, the Respondent rejects the Claimant's new position that the PdL Case and this proceeding "maintain fundamental differences".[4] According to the Respondent, the "Claimant cannot seek to benefit from the similarity of the PdL Case and this arbitration for purposes of arguing that it met the jurisdictional requirements […] and, at the same time, deny that similarity in attempt to minimize the implications of the PdL Case Judgment."[5]

[2] Request for Reconsideration, ¶ 2.
[3] Request for Reconsideration, ¶¶ 3-4.
[4] Respondent's Reply, ¶ 9; citing Claimant's Response, ¶ 18.
[5] Respondent's Reply, ¶ 10.

32. *Second*, the Respondent argues that both claims are "substantially similar" as they relate to the same Concession Contract and sovereign acts by Argentina,[6] they faced the same facts,[7] and involved Webuild. Delving into the participation of Webuild in the PdL Case, the Respondent states that Webuild (i) was cited by the judge in the PdL Case as an interested third party due to its shareholder status; (ii) made a filing in the PdL Case; but (iii) failed to file evidence or invoke any rights, despite having been given the opportunity to do so.

33. The Respondent notes that despite the similarities previously detailed, this Tribunal reached a "decision entirely contradictory to the ruling on the PdL Case."[8] Argentina explains that the contradictions between the decisions are as follows.

34. **PdL's financial debacle**: according to the Respondent, this Tribunal decided that the Emergency Law, together with other measures, "were the cause of PdL's financial debacle" and found "irrelevant" the "problems arising from PdL's failure to obtain financing". On the other hand, the Local Judgment concluded that "PdL's financial difficulties were caused by the failure to obtain financing in a timely manner, which was a cause for termination of the Concession Contract."[9]

35. The Respondent adds that the *Hochtief v. Argentina* tribunal dealt with the same facts of this arbitration proceeding and found that PdL "faced serious financial difficulties prior to the emergency measures" due to its failure to obtain firm and irrevocable financing within the timeframe established in the Concession Contract and its indebtedness to its main subcontractor, which triggered PdL's reorganization proceedings.[10] Making reference to the Claimant's allegations that Argentina "overstates the similarity between the cases", and that this Tribunal had witness statements not available in *Hochtief* or the PdL Case and broader witness statements, the Respondent clarifies the following:

[6] Request for Reconsideration, ¶ 3; citing Decision on Jurisdiction, ¶ 134 ("The dispute submitted to Argentine forums by Puentes shared substantially similar facts with the BIT claim subsequently submitted to arbitration by Salini Impregilo. Both related to the same Concession Contract and the same sovereign acts by Argentina.")
[7] Request for Reconsideration, ¶ 12.
[8] Request for Reconsideration, ¶ 6.
[9] Request for Reconsideration, ¶¶ 7-9.
[10] Request for Reconsideration, ¶ 13, citing *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014 ("***Hochtief* Decision**"), ¶¶253-258, **AL RA-59**.

36. Regarding witnesses: (i) witness Mr. Villagi filed a witness statement, provided live testimony and was cross-examined during the Hearing on the Merits of this case, and also provided testimony in the *Hochtief* arbitration and the PdL Case; (ii) it is untrue that witnesses Mr. Bes and Mr. Lommatzsch provided different testimonies in *Hochtief* and this proceeding; (iii) none of the witnesses who testified in this arbitration, but not in the PdL Case, "addressed issues that were not already covered."[11]

37. With reference to the documentary evidence, the Respondent states that the "Claimant misrepresents the content of the documents it mentions, and in some cases invents quotes, in order to force the alleged contradiction"[12] and that without any support the Claimant qualifies the PdL Judgment as a "gross incompetence and judicial impropriety."[13]

38. **Unlawful termination of the Concession Contract**: Argentina alleges that this Tribunal found "the termination of the Concession Contract was unjust and attributable to Claimant's conduct and, therefore, considered it a breach of the fair and equitable treatment standard",[14] but the PdL Judgment established that "the State respected the due process and the termination was the only permitted alternative",[15] considering that PdL was dissolved, which was a cause of termination of the Concession Contract pursuant to the Terms and Conditions of the bidding process.

39. The Respondent submits that the Federal Court on Administrative-Contentious Matters No. 8 issued the PdL Judgment based on Argentine law and acted as the "competent court in connection with a contract governed by Argentine law regarding its performance and termination."[16] Accordingly, Argentina argues that the Tribunal "should asses the application of Argentine law in light of the findings of the local Judgment",[17] because otherwise, by failing to apply the municipal law, the Tribunal would be "exceeding its

[11] Respondent's Reply, ¶ 13.
[12] Respondent's Reply, ¶ 15, where Respondent refers to an alleged misrepresentation of the Memorandum of Agreement dated 20 October 2000, UNIREN's Report dated 19 January 2007, the Second Letter of Understanding, a court decision in PdL's reorganization proceeding, and a transcript of the 2011 Public Hearings.
[13] Respondent's Reply, ¶ 15.
[14] Request for Reconsideration, ¶ 10.
[15] Request for Reconsideration, ¶ 11.
[16] Request for Reconsideration, ¶ 14.
[17] Request for Reconsideration, ¶ 19.

powers, and its decision would be subject to annulment under the terms of Article 52 of the ICSID Convention."[18]

40. Finally, the Respondent relies on *Azinian v. Mexico*,[19] *SAUR v. Argentina*,[20] and *América Móvil v. Colombia*[21] to determine that "a public authority cannot be faulted for acting in a manner that has been validated by its courts".[22] The Respondent further asserts that as Webuild's legitimate expectations were determined to be grounded in the Concession Contract, Webuild's legitimate expectations under the BIT "could not consist in the State acting contrary to the law governing the Concession Contract."[23]

41. The Respondent defends the application of *Azinian* despite such case dealing with a claim of expropriation and notes that the tribunal considered "that a local judgment does not preclude the possibility of a breach of a standard of treatment if the local judgment is clearly incompatible with a rule of international law or there is a denial of justice."[24] Argentina further explains that the Claimant does not rebut the fact that "it cannot be concluded that the State breached the treaty by terminating a concession contract if the public authority declared the termination of the contract […] and the local courts confirm the public authority's decision,"[25] which happened in this case.

42. *Third*, the Respondent alleges that this Tribunal has already relied on a local judicial decision, namely the 2008 ruling of the Argentine Commercial Court towards PdL's reorganization proceeding, when ruling on Argentina's liability. Thus, it explains that the Tribunal should consider the PdL Judgment as a *decisive factor* in this instance "since it was issued by the forum specialized in the interpretation and application of the specific Argentine law."[26]

[18] Request for Reconsideration, ¶ 19.
[19] *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, Award, 1 November 1999("***Azinian***"), ¶ 96, **AL RA-201**.
[20] *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, ¶ 327, **CL-245**.
[21] *América Móvil S.A.B. de C.V. v. Colombia,* ICSID Case No. ARB(AF)/16/5, Award, 7 May 2021, ¶ 333, **AL RA-405**.
[22] Respondent's Reply, ¶ 7.
[23] Request for Reconsideration, ¶ 14.
[24] Respondent's Reply, ¶ 7; citing Claimant's Response, ¶¶ 27 and 28.
[25] Respondent's Reply, ¶ 7.
[26] Request for Reconsideration, ¶ 20.

43. In the second place, Argentina analyses the Tribunal's power to review the Decision on Liability under the ICSID Convention, and ICSID case law, and concludes that the Tribunal can and should review its Decision on Liability.

44. *First*, Argentina explains that pursuant to Article 41 of the ICSID Convention, the Tribunal can review the Decision on Liability considering that this Article "empower[s] arbitral tribunals to determine their own jurisdiction".[27] It adds that Article 44 of the Convention grants the Tribunal the power to "decide any procedural question not provided for by the ICSID Convention, the Arbitration Rules or the applicable procedural rules."[28] Furthermore, Argentina states that "the revision of a pre-award decision is possible in situations analogous to those provided for in Article 51 of the ICSID Convention"[29] based on "the ground of discovery of some facts of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant."[30]

45. *Second*, the Respondent relies on other ICSID tribunals' decisions to determine that the Tribunal has the power to reopen the Decision on Liability. Argentina explains that in *Cavalum v. Spain*, the tribunal confirmed that the power to reopen a pre-award decision arises from Article 44 of the ICSID Convention and such power may be exercised "when reasons of judicial and arbitral integrity so require."[31] In *Standard Chartered Bank v. Tanzania,* the tribunal found that Articles 41(1) and 44 of the ICSID Convention empowered tribunals to reopen [a decision] in certain limited circumstances. Argentina explains that in *Standard Chartered* the tribunal noted that the decision to reopen a decision (i) "has practical advantages"; (ii) "should be guided by, although, not bound by, the limitations on reopening that apply to awards"; and (iii) "must at least extend to the grounds for reopening an award in Article 51."[32]

[27] Request for Reconsideration, ¶ 23.
[28] Request for Reconsideration, ¶ 21.
[29] Request for Reconsideration, ¶ 22.
[30] Request for Reconsideration, ¶ 22.
[31] *Cavalum SGPS, S.A. v. Spain,* ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration*,* 10 January 2022, ("***Cavalum***"), ¶¶ 65, 71, **AL RA-406**.
[32] Request for Reconsideration, ¶ 23; citing *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Award, 12 September 2016 ("***Standard Chartered***"), ¶¶ 320, 322, **AL RA-408**.

46. Moreover, Argentina states that in *Infracapital v. Spain* the tribunal found that "ICSID tribunals have the authority to re-examine a decision when some fact of decisive importance is discovered on a point already decided." It argues as well that the tribunal in that case also determined that (i) "a new decision of a tribunal could be considered a 'fact'"; (ii) that this decision constituted a *newly discovered fact* if it was unknown to the tribunal and the party seeking review; and (iii) it should be established if the new decision constituted or not "an outcome-determinative legal development."[33] Furthermore, the Respondent argues that the PdL Judgment is a *newly discovered fact* "since it did not exist at the time the Decision on Liability was issued", thus "it was unknown to the Tribunal and the Respondent", and that it constitutes an outcome-determinative legal development since "it was issued by a Court with jurisdiction regarding the Concession Contract governed by Argentine law, which is part of the law applicable in the present arbitration."[34]

47. Additionally, the Respondent contests the Claimant's position that the PdL Judgment must be either binding or controlling for review to be granted. Argentina explains that both *Landesbank v. Spain* and *Cavalum v. Spain* established that "a subsequent legal authority is not enough by itself to warrant reconsideration, but it must be a decisive legal authority."[35] Argentina insists that the PdL Judgment fulfils the standard.

48. To conclude, Argentina requests that the Tribunal reconsider and revise the Decision on Liability, taking into account that the PdL Judgment is not only a persuasive but a determinative element since it (i) was issued by a court of the jurisdiction specialized in the interpretation and application of the specific Argentine law governing the Concession Contract; (ii) analysed the same facts as have been considered in this proceeding; and (iii) involved the same parties.[36]

[33] Request for Reconsideration, ¶ 24; citing *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Spain*, ICSID Case No. ARB/16/18, Decision on Respondent's Second Request for Reconsideration, 19 August 2022, ¶¶ 33, 36, 37, 90, **AL RA-411**; *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Spain,* ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and Merits, 1 February 2022, ¶¶ 89, 90, **AL RA-409**.
[34] Request for Reconsideration, ¶ 25.
[35] Respondent's Reply, ¶¶ 6-7, citing *Landesbank Baden-Württemberg, et. al v Spain,* ICSID Case No. ARB/15/45, Decision on Respondent's Request for Reconsideration, 22 February 2023, ("***Landesbank***"), **CL-255**; and *Cavalum*, ¶¶ 80-81, **AL RA 406**.
[36] Request for Reconsideration, ¶¶ 20, 25, 26. Respondent's Reply, ¶¶ 20-21.

B. CLAIMANT'S POSITION

49. The Claimant rejects the Respondent's Request for Reconsideration of the Tribunal's Decision on Liability, and rebuts the Respondent's arguments as follows.

50. In the first place, the Claimant states that the Decision on Liability is *res judicata* and binding on the Parties; thus, Webuild affirms that the Tribunal owes no deference to the PdL Judgment. Webuild asserts that "the Decision on Liability represents the Tribunal's decision on issues of fact and law"[37] and bases its conclusion on an International Court of Justice judgment:

> [O]nce the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case […] and for the Court itself in the context of that case. […] For the Court *res judicata pro Veritate habetur*, and the judicial truth within the context of a case is as the Court has determined it […] This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.[38]

51. In the same vein, Webuild relies on other ICSID awards and affirms that "tribunals have found that a pre-award decision on an issue of fact or law is binding on the parties,"[39] and adds that the Tribunal rendered a decision after eight years of proceedings in which it heard the Parties -including the issues that Argentina "rehashes in its Request for Reconsideration"-, analysed the complexities of this case not present in other concessions,[40] and took into account the totality of the facts and evidence in the case.[41]

52. Accordingly, Webuild affirms that "the Tribunal is far from being an outlier in terms of its legal and factual analysis as the Argentine Republic suggests."[42] The Claimant further

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[37] Claimant's Response, ¶ 4.
[38] Claimant's Response, ¶3, citing to *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Judgment, 26 February 2007, ¶¶ 139-140, **CL-0254**.
[39] Claimant's Response, ¶ 3, relying on *Standard Chartered*, **AL RA-408**, *Cavalum*, **AL RA-406**; *Landesbank*, ¶ 36, **CL-0255**; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceeding, 26 June 2002, ***("Waste Management II"),*** ¶ 47, **CL-0189**; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion, 10 April 2015, ("***Perenco***"), ¶ 42, **CL-0256**; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 126, **CL-0005**; *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration, 10 March 2014, ¶¶ 20-21, **CL-0257**.
[40] Claimant's Response, ¶ 4.
[41] Claimant's Response, ¶ 13; Claimant's Surrebuttal, ¶ 14.
[42] Claimant's Response, ¶ 4.

alleges that Argentina overstates the relevance of the PdL Judgment and the *Hochtief* Decision on liability because "the Tribunal here had available to it the benefit of witness and expert testimony not available in either the *Hochtief* arbitration nor in Puentes del Litoral's lawsuit and [is] free to carry out its own independent analysis."[43]

53. Also, the Claimant in its Surrebuttal addresses the clarifications made by the Respondent regarding witnesses and documentary evidence filed in this case:

54. Webuild explains that Mr. Bes' testimony within this arbitration "did not analyze or could not really testify as to the IDB's reasons why disbursements were not made, a fact he did not admit in the *Hochtief* arbitration."[44]

55. Mr. Lamdany, not Mr. Villagi, was unavailable to participate in the Hearing on the Merits, however, the latter did render additional testimony in this proceeding regarding UNIREN reports.[45]

56. Therefore, Webuild concludes that the "Tribunal's decision is conclusive and leaves no room for reconsideration" as it "represents the Tribunal's final conclusions of law and fact as to liability and is binding on the Parties and the Tribunal."[46]

57. Finally, Webuild expressly states that it disagrees with the Respondent's assertion that the Parties "generally agree that an arbitral tribunal may revise its pre-award decisions." On the contrary, the Claimant emphasizes that Decision on Liability is *res judicata*[47] and that "local law cannot rehabilitate the Argentine Republic's international liability"[48] considering that the obligations acquired under the BIT "go beyond mere contractual breaches even if the factual basis of the two types of claims may to a large extent coincide."[49]

[43] Claimant's Response, ¶ 6.
[44] Claimant's Surrebuttal, ¶ 17.
[45] Claimant's Surrebuttal, ¶ 18-20.
[46] Claimant's Response, ¶ 6.
[47] Claimant's Surrebuttal, ¶ 2.
[48] Claimant's Surrebuttal, ¶ 4.
[49] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 ¶ 182, **CL-0003**.

58. In the second place, the Claimant asserts that the Tribunal does not have the power to reopen and reconsider wholesale the Decision on Liability. According to Webuild such power (i) is not unlimited and is available to reconsider only *some* aspects if (ii) the Tribunal "did not intend its decision to be final", and (iii) there are *exceptional* circumstances, which are not present in this case.[50]

59. On the first point, Webuild explains that inasmuch as the ICSID Convention is silent on a tribunal's power to revise prior decisions, arbitral tribunals have taken two opposing pathways towards the powers granted by Article 44 of the Convention. On the one hand, tribunals have rejected the possibility of revisiting previous decisions[51], and on the other hand, tribunals have found the power to review decisions is inherent in the conduct of a proceeding.[52] Moreover, the Claimant states that "regardless of the different paths taken, all tribunals agree that an ICSID tribunal cannot reconsider its prior decisions absent limited and exceptional circumstances, nor can the reconsideration be unconstrained."[53]

60. On the second aspect, Webuild rebuts Respondent's commentary on *Standard Chartered* and *Cavalum*. The Claimant states that the *Standard Chartered* tribunal decided that "the decisions made by ICSID tribunals in the course of a case are binding" and that "a decision of an ICSID tribunal cannot be considered to be merely a draft that can be reopened at will."[54] The Claimant asserts that in *Cavalum*, the tribunal held that "if a decision is made on a preliminary issue of law which is intended to be final, the mere fact that it may have been erroneous may not be a sufficient ground for reopening this decision."[55]

61. Following this argument, Webuild affirms that this Tribunal issued both the Decision on Jurisdiction and Decision on Liability as final and binding decisions being "fully aware that Puentes del Litoral had initiated a lawsuit before a contentious administrative court in Argentina."[56] The Claimant notes that the Tribunal (i) "rejected the Argentine Republic's

[50] Claimant's Response, ¶ 7. See Claimant's Surrebuttal, ¶¶ 4-5.
[51] Claimant's Response, ¶ 8, where Webuild cites *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration, 10 March 2014, ¶ 22, **CL-0257** ("Article 44 of the ICSID Convention makes explicit the tribunal's power to address procedural issues not dealt with in the Convention or the Rules. […] It cannot be seen as conferring a broad unexpressed power of substantive decision.")
[52] Claimant's Response, ¶ 8; citing *Landesbank*, ¶ 36, **CL-0255**.
[53] Claimant's Response, ¶ 8.
[54] Claimant's Response, ¶ 9, citing *Standard Chartered*, ¶ 322, **AL RA-408**.
[55] Claimant's Response, ¶ 10, citing *Cavalum*, ¶ 75, **AL RA-406**.
[56] Claimant's Response, ¶ 11.

request to stay the arbitration proceeding pending Puentes del Litoral's lawsuit"; and (ii) "dismissed the *forum non conveniens* objection."[57] On the latter point, the Claimant argues that the Tribunal's decision on its Decision on Jurisdiction remains relevant because "if Puentes del Litoral's contractual lawsuit was not a reason to grant the Argentine Republic's *forum non conveniens* objection, the judgment resulting from that litigation cannot justify reconsideration of the Tribunal's Decision on Liability either."[58]

62. Based on these considerations, the Claimant states that the PdL Judgment should not change the Tribunal's analysis as (i) Webuild claims under the BIT are independent and distinct from the contractual claims asserted by Puentes del Litoral in local courts;[59] (ii) Webuild appeared in the PdL Case "against its will and its BIT claims were not subject to that court's jurisdiction"[60]; and (iii) it dealt with a different cause of action, was brought by different party, and applied domestic law only. Finally, the Claimant establishes that the Local Judgment has no effect on the Tribunal's determination of liability despite the relation between the causes as "a state may breach a treaty without breaching a contract"[61] and "a breach of contract is neither necessary nor a sufficient condition for a breach of treaty."[62]

63. In the third place, Webuild alleges the Local Judgment has no effect, either controlling or persuasive, on the Decision on Liability given that it (i) does not provide new evidence; and (ii) the Tribunal owes no deference to the Local Judgment.[63]

64. By citing *Landesbank* the Claimant states that the grounds for reconsideration pursuant to Article 51 of the ICSID Convention are narrow, including a new discovered fact of such nature as to decisively affect the outcome if it had been known at the time the decision was

[57] Claimant's Response, ¶ 11.
[58] Claimant's Surrebuttal, ¶ 7.
[59] Claimant's Surrebuttal, ¶ 6 ("There is simply no dependency relation between this ICSID Tribunal's main findings on Webuild's treaty claims, the Republic's international liability, and the domestic decision of an Argentine court regarding Puentes del Litoral's contract claims under Argentine law- they are simply based on different instruments, legal regimes, and standards of treatment.")
[60] Claimant's Response, ¶ 11.
[61] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.3.10, **CL-0009**.
[62] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009, ¶ 139, **CL-0236**.
[63] Claimant's Response, ¶ 14.

rendered by the tribunal.[64] Webuild adds that for a fact to decisively affect the outcome it must be "some development (such as a relevant and controlling judgment or award)."[65] None of the requirements are met according to Webuild, due to the following:

65. The Local Judgment is not a new fact that decisively affects the outcome of this case considering that (i) the parties in the proceedings are different, and Webuild "is neither the plaintiff nor the respondent" in the PdL Case; (ii) Webuild filed "no evidence and pursued no rights" in the PdL Case.[66]

66. The facts between both cases differ as one was an administrative lawsuit and the other one is based under a bilateral investment treaty. The Claimant argues it has proved that (i) Webuild is an investor covered by the BIT; (ii) it made a qualified investment in Argentina; (iii) it had legitimate expectations; and (iv) Argentina breached its treaty obligations.[67] Thus, it states that despite "*some* commonality of facts" between the claims, "very little - other than gross incompetence and judicial impropriety- can explain how an independent court" can reach to a conclusion that is the opposite to that of the Tribunal.[68]

67. This Tribunal has already considered the Parties' different positions on the key facts the Respondent highlights in its Request for Reconsideration regarding the Emergency Law, Puentes del Litoral's failure to obtain financing, and the Concession Contract's termination.[69] Therefore, the decision reached in the Local Judgment alone "is self-serving and not dispositive",[70] and even if the Contentious Administrative Court found that Puentes del Litoral was in contractual breach, the PdL Judgment "does not defeat or in any way alter either Webuild's legitimate expectations as to rebalancing or the ultimate conclusion of breach."[71]

68. Finally on this matter, Webuild asserts that Argentina relies on seven cases to supposedly justify revision of the Decision on Liability; however, it notes that only in one case, namely,

[64] Claimant's Response, ¶ 15, relying on *Landesbank*, ¶ 35, **CL-0255**.
[65] Claimant's Response, ¶ 15; citing *Landesbank*, ¶ 41, **CL-0255**.
[66] Claimant's Response, ¶ 17.
[67] Claimant's Response, ¶ 18.
[68] Claimant's Response, ¶ 19.
[69] Claimant's Surrebuttal, ¶¶ 20-23.
[70] Claimant's Response, ¶ 20.
[71] Claimant's Response, ¶ 21.

Standard Chartered, did the tribunal grant a reconsideration request due to an exceptional circumstance *i.e.*, a party concealed information from the tribunal.[72] The Claimant adds that the other six were decided contrary to what the Respondent suggests.

69. Further, Webuild states that the Tribunal owes no deference to the Local Judgment as it is not controlling, binding, or determinative. Based on *Cavalum,* it argues that "a subsequent legal authority is not enough by itself to warrant reconsideration", and instead it must be shown that the new legal authority "not only undermines the Tribunal's legal conclusion but shows that it was wholly wrong."[73]

70. For instance, the Claimant alleges that in *Cavalum* and *Landesbank*, the tribunals held respectively that (i) "the new CJEU judgment did not add new reasoning that the tribunal had not already considered in its pre-award decision",[74] and (ii) as the arbitration is held under the ICSID Convention and it is not seated in any State "the reasoning in the two Swedish cases is therefore inapplicable."[75] Webuild applies both decisions to this case and concludes that the "Tribunal found that the termination of the contract itself under domestic law does not affect its main liability determination under the BIT that Argentina failed to provide FET."[76]

71. Also, Webuild addresses the *Azinian* case cited by the Respondent and states that Argentina fails to mention that the tribunal in said case concluded that "an international tribunal called upon to rule on a Government's compliance with an international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of public officials."[77] It adds as well that Webuild's claim differs from *Azinian's,* as in the latter the investors claimed an expropriation of their investments, which the Tribunal itself considered unnecessary to analyse.[78] Moreover, the claimants in *Azinian* "did not challenge the judicial decisions validating that conduct in the arbitration (even though these decisions had been issued before the arbitration)".[79] Thus, the Claimant contends that the PdL

[72] Claimant's Surrebuttal, ¶ 11.
[73] Claimant's Response, ¶ 23, citing *Cavalum*, ¶¶ 80-81, **AL RA-406**.
[74] Claimant's Response, ¶ 23.
[75] Claimant's Response, ¶ 24, citing *Landesbank*, ¶ 47, **CL-0255**.
[76] Claimant's Response, ¶ 25.
[77] Claimant's Response, ¶ 28, citing *Azinian*, ¶ 92, **AL RA-201**.
[78] Claimant's Response, ¶ 28.
[79] Claimant's Surrebuttal, ¶ 9.

Judgment has no impact on the Tribunal's determination, and that this proceeding "is not paralyzed by the fact that the national courts have approved under the relevant conduct of public officials" as decided by the tribunal in the mentioned case.[80]

72. In the fourth place, the Claimant addresses the possible annulment of the arbitral award raised by Argentina in case the Tribunal fails to "assess the application of Argentine law in light of the findings of the local Judgment."[81] Webuild states that this *threat* to the Tribunal has no grounds considering that the Tribunal "in accordance with the BIT and international law, discerned when and how to apply the BIT, international law and Argentine law- and having done so to resolve the dispute does not equate with exceeding its power."[82] The Claimant asserts that (i) the Tribunal "has not failed to apply the applicable law"; (ii) under the ICSID Convention, annulment is not an appellate procedure, and the correctness of a tribunal's reasoning, either factual or legal, is not subject to annulment; (iii) the Local Judgment is not the law in the Argentine Republic, rather it is "merely a first instance judgment"; and (iv) the Tribunal's tasks differ from those of an annulment committee.[83]

73. Finally, the Claimant relies on *Perenco v. Ecuador* to assert that "a tribunal equally cannot, in a phased arbitration, hold the sword of Damocles above its head and second-guess itself as to whether it has manifestly exceeded its powers, seriously departed from a fundamental rule of procedure, and so on" and to the contrary, "when deciding a claim, a tribunal should avoid taking on the role of simultaneously acting as if it were an annulment committee sitting in judgment of its own work."[84]

74. For all the reasons set forth, Webuild requests the Tribunal to reject the Request for Reconsideration, with costs, and urges the Tribunal to proceed to prompt issuance of the final award.

[80] Claimant's Surrebuttal, ¶ 10; citing *Azinian*, ¶ 98, **AL RA-201**.
[81] Claimant's Response, ¶ 29.
[82] Claimant's Response, ¶ 29.
[83] Claimant's Response, ¶ 29.
[84] Claimant's Response, ¶ 29, citing *Perenco*, ¶ 33, **CL-0256**.

III. THE TRIBUNAL'S ANALYSIS

75. The Tribunal recognizes that the Parties disagree as to the extent of its authority to reconsider its Decision on Liability, with the Respondent arguing that Article 44 of the ICSID Convention gives inherent power to the Tribunal to review pre-award decisions, in situations analogous to those provided for in Article 51 of the ICSID Convention;[85] and the Claimant contending that in accordance with the international law principle of *res judicata,* the Tribunal does not have the power to reopen and wholesale reconsider its Decision on Liability.[86] The Tribunal sees no need to address this issue in detail, as even under the standards put forward by the Respondent, it considers that there is insufficient basis to justify such reconsideration.

76. The Tribunal concurs with the Claimant when it observes that Webuild's claims under the BIT are independent and distinct from the contractual claims asserted by Puentes del Litoral in local courts. It further concurs that the cause of action was different, the claim in the local proceedings was brought by a different party, and the only applicable law was domestic law.[87] Here, in contrast, the cause of action arose under the BIT, the claim was not brought by PdL but by the Claimant, and FET is an obligation under the BIT.

77. While Argentina is correct that the BIT's Article 8(7) cites to domestic law as one of the sources of applicable law, it is not the sole source; rather, the BIT also requires application of the treaty (the "**Agreement**") itself, along with applicable principles of international law. The Tribunal's decision on FET is grounded in the Agreement and principles of international law, but also took into account the provisions of the Concession Contract, the various representations made by the Respondent to the Claimant after cancellation of the Contract, and local law, and was cognizant of the local proceeding.

78. The Tribunal understands that the Claimant was involuntarily joined to the local proceeding at the request of the Respondent. This also militates in the Tribunal's view against finding the decision as *res judicata.*

[85] Request for Reconsideration, ¶¶ 21-25; and Respondent's Reply, ¶¶ 3-7 and citations therein.
[86] Claimant's Response, ¶¶ 8-13; Claimant's Surrebuttal, ¶ 2 and citations therein.
[87] *See* ¶ 51, *supra*.

79. The previous findings or decisions of this Tribunal cited by Argentina do not compel a different result, but must be considered in their particular context.

80. Argentina refers to the Tribunal's citation in its Decision on Liability to a 2008 ruling of the Argentine Commercial Court, that PdL's reorganization proceeding was not an obstacle to continued renegotiation of the Concession Contract, as a "persuasive element".[88] But this citation goes to an issue that Argentine law clearly governs—namely, the existence of a duty to renegotiate in light of the economic emergency. It has no relevance to the present issue.

81. Next, the Respondent invokes the Tribunal's reliance in the jurisdictional phase of this case on PdL's submission of the dispute to the local courts for the purpose of satisfying the jurisdictional requirement of Article 8 of the BIT. That was, however, a different case than the one that produced the PdL Judgment, namely, an administrative complaint initiated by PdL which was ultimately closed based on the non-response of the Argentine authorities.[89] The Tribunal agrees with the Claimant that such reliance for the purpose of determining compliance with the jurisdictional requirements of Article 8 does not mean that the PdL Judgment should control the ultimate decision on liability. A requirement that a dispute be submitted to local courts for a period of time in many cases will imply a submission of the same dispute to local law. There is thus nothing in that prior determination, including the fact that it was brought by PdL, that requires that this Tribunal be bound as to the merits of an issue of state responsibility by a subsequent local judgment.

82. Respondent also raises the *Hochtief* Decision, leading to a debate between the Parties about similarities or differences between the evidentiary records in the two cases.[90] The Tribunal extensively considered the *Hochtief* Decision in its Decision on Liability, along with evaluating the evidence before it, and sees no basis in the Request for Reconsideration for reopening that discussion.

83. The Tribunal appreciates that the judgment of the Federal Court for Administrative-Contentious Matters No 8 that issued the PdL Judgment is a competent local court in the

[88] Request for Reconsideration, ¶ 20, citing Decision on Liability, ¶ 258.
[89] *See* Claimant's Surrebuttal, ¶ 8 and citations therein.
[90] *See* ¶¶ 28, and 43-44, *supra*. *See also* Respondent's Reply, ¶ 60, and Claimant's Surrebuttal, ¶ 15.

matter. It finds no basis for the Claimant's suggestion that the local court acted improperly.[91] But even if the parties to that case were identical to the Parties in the present proceeding (which they are not),[92] and factual overlap undoubtedly is present, the standard of decision for this Tribunal –charged with determining whether an FET violation has occurred based on the BIT and international law, rather than Argentine law--is far different.

84. The Tribunal has reviewed the PdL Judgment carefully and considers that it contains nothing in its analysis that requires reconsideration of its prior decision. In particular, in the Decision on Liability the Tribunal considered Argentina's argument that under the terms of the Concession Contract, termination was an automatic consequence of PdL's dissolution and liquidation, and found it not dispositive for the reasons expressed in the Decision on Liability.[93] It is of course open to the Argentine courts to rule differently, just as it is open to this Tribunal to do so, given the difference in governing standards. That the outcomes may differ as a result does not make them necessarily inconsistent.

85. The Respondent notes, correctly, that the Tribunal considered that the primary legitimate expectation of the Claimant was grounded in the Concession Contract, and argues that the Claimant could not have a legitimate expectation that the State would act contrary to the law governing the Concession Contract.[94] The expectation in question, fortified and confirmed by Argentine law and the State's conduct and specific representations in the wake of the Emergency Law, was that the equilibrium of the Concession Contract, fundamentally altered by measures in the Emergency Law, would be re-established within a reasonable time. The Tribunal found that the State failed to do so, and engaged in a course of conduct over a prolonged period of time, beginning in 2006, which effectively strangled PdL economically and made its failure and ultimate dissolution inevitable.[95]

86. The Tribunal took into account in its analysis the financial difficulties of PdL prior to the emergency measures, finding that PdL's conduct justified some allocation of contributory

[91] The Tribunal considers the Claimant's disparaging remarks vis-à-vis that court both unnecessary and inappropriate.
[92] The fact that Claimant was joined involuntarily at the request of Argentina to the proceedings before the Federal Court for Administrative-Contentious matters does not create such identity, in the Tribunal's view.
[93] Decision on Liability, ¶ 266.
[94] Request for Reconsideration, ¶ 14.
[95] Decision on Liability, ¶¶256-267.

fault in relation to the quantum of damages, to be assessed in the Tribunal's pending Award.[96]

87. The Tribunal's previous rejection of Argentina's stay request in favor of the local proceedings, and the dismissal of the Respondent's *forum non conveniens* objection[97]--which was based on the same lawsuit that ultimately has given rise to the PdL Judgment--also underscores the distinctness of standards governing decisions in the local and international proceedings.

88. None of the legal authorities cited by the Respondent compels a different outcome. The Respondent places particular reliance on the *Azinian* case,[98] in which a tribunal had to address the termination of a waste treatment contract by a municipal government after that decision was declared lawful by the local courts. There, of course, the decision of local courts regarding the contract in question preceded the termination, and the claimants did not challenge the decision of the courts. Not surprisingly, therefore, the tribunal held that

> [e]ven if the Claimants were to convince this Arbitral tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of [the treaty]. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally lawful end…."[99]

89. The Tribunal notes that the claim before the tribunal in *Azinian* was an expropriation claim, with the sole measure cited as the basis for that claim being the contract's annulment.[100] As noted above, that is not the case here. The Tribunal agrees with the statement of the tribunal in *Azinian* that "an international tribunal called upon to rule on a Government's compliance with an international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of local officials."[101]

[96] Decision on Liability, ¶368.
[97] Decision on Jurisdiction, ¶ 173.
[98] *Azinian*, **AL RA-201**.
[99] *Azinian,* ¶ 99, **AL RA-201** cited in Request for Reconsideration, ¶ 15. *See* also Respondent's Reply, ¶ 7.
[100] Claimant's Surrebuttal, ¶ 9, citing *Azinian,* ¶ 97, **AL RA-201**.
[101] *Azinian,* ¶ 98, cited in Claimant's Surrebuttal, ¶ 10, **AL RA-201**.

90. Other tribunals considering new information, and in particular new legal authorities, have established that "a subsequent legal authority is not enough by itself to warrant reconsideration, but it must be a decisive legal authority".[102]

91. For the reasons set forth above, the Tribunal concludes that the PdL judgment is not a decisive legal authority for purposes of its application of the Treaty, that in any event the relevant facts and circumstances have been taken into account in its Decision on Liability, and that any divergence between its Decision on Liability and the PdL Judgment is a consequence of the different standards which apply. It therefore declines to reconsider its Decision on Liability and denies the Request for Reconsideration.

92. Regarding the Claimant's request for costs in relation to the Request for Reconsideration, considering the outcome of the present Decision and the principle that costs follow the event, the Tribunal considers that the legal fees incurred by the Claimant in responding to the Request for Reconsideration should be borne by the Respondent. It therefore directs the Claimant to submit to the Tribunal, within fifteen (15) days of this Decision, a supplemental submission with respect to its legal costs associated with responding to the Request. The Award to be rendered in these proceedings will include an order with respect to the costs determination reflected in this Decision.

IV. DECISION

93. For the reasons stated above, the Tribunal hereby decides, as follows:

(1) The Request for Reconsideration is denied;

(2) The Claimant's legal costs incurred in responding to the Request shall be borne by the Respondent;

Within fifteen (15) days of the date hereof, the Claimant shall submit to the Tribunal a supplemental statement of the costs covered by subparagraph (2) above.

[102] *Landesbank*, **CL-255**; and *Cavalum*, ¶¶ 80-81, **AL RA 406**.

[signed]

Professor Kaj Hobér
Arbitrator

[signed]

Professor Jürgen Kurtz
Arbitrator

[signed]

Ms. Lucinda A. Low
President of the Tribunal