Title:
CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, at:

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24. Has there been Expropriation of the Investment?

[...]
260. The Tribunal has examined with great attention the views expounded by the parties on this issue. Both parties are in agreement that no direct expropriation has taken place. The issue for the Tribunal to determine is then whether the measures adopted constitute an indirect or regulatory expropriation. The answer is of course not quite simple for indeed the measures have had an important effect on the business of the Claimant.

261. The Tribunal in the Lauder case rightly explained that

"The concept of indirect (or "de facto", or "creeping") expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property."129

262. The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation. In the Metalclad case the tribunal held that this kind of expropriation relates to incidental interference with the use of property which has "the effect of depriving the owner, in whole or in significant part, of the use or reasonable-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."130 Similarly, the Iran - United States Claims Tribunal has held that deprivation must affect "fundamental rights of ownership,"131 a criteria reaffirmed in the CME v. Czech Republic case.132 The test of interference with present uses and prevention of the realization of a reasonable return on investments has also been discussed by the Respondent in this context.133

263. Substantial deprivation was addressed in detail by the tribunal in the Pope & Talbot case.134 The Government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in that case, is not present in the instant dispute. In fact, the Respondent has explained, the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment.

264. The Tribunal is persuaded that this is indeed the case in this dispute and holds therefore that the Government of Argentina has not breached the standard of protection laid down in Article IV(1) of the Treaty.

265. It remains necessary to examine the extent of the interference caused by the measures on the Claimant's business operations under the other standards of the Treaty. This question will be addressed next by the Tribunal.

25. Has there been a Breach of Fair and Equitable Treatment?

266. The second substantive standard of protection provided to investors under the Treaty is that of fair and equitable treatment. Article II(2)(a) provides:

"Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."

267. Under this provision, the Claimant asserts that Argentina has breached the fair and equitable treatment standard and has not ensured full protection and security to the investment, particularly insofar as it has profoundly altered the stability and predictability of the investment environment, an assurance that was key to its decision to invest. The Claimant cites a number of distinguished writers and decisions pointing out the significance of this particular requirement, with particular reference to the CME case, where it was held that

"[The Government] breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest."135
268. The Claimant also relies on the following finding of the tribunal in the **Tecnicas Medioambientales Tecmed, S.A. v. Mexico case** to the effect that fair and equitable treatment:

"...requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment..."\(^{136}\)

269. According to the Claimant's argument, the uncertainty characterizing the period 2000 - 2002 and the final determinations under the Emergency Law that dismantled all the arrangements in reliance on which the investment had been made, are the main events that resulted in the breach of this standard.

270. In the Respondent's view, the standard of fair and equitable treatment is too vague to allow for any clear identification of its meaning and, in any event, it only provides for a general and basic principle found in the law of the host State which at the same time is compatible with an international minimum standard. A deliberate intention to ignore an obligation or even bad faith would be required to breach the standard, the argument adds.

271. The Respondent argues next that the standard is not different from the international minimum standard, citing to this effect a number of authors and cases and in particular the tribunal's holding in the **Robert Azinian and others v. Mexico case** that an "investor should not be dealt with in a manner that contravenes international law."\(^{137}\) The **Pope & Talbot case** is also discussed by the Respondent in this context, explaining that in spite of the fact that it opted for a NAFTA standard additional to or higher than that of customary international law it still based its test on equity, justice and reasonableness.\(^{138}\)

272. Argentina believes that none of the measures adopted breaches the standard or for that matter international law as the legislative prerogatives of the State cannot be frozen in time and the Emergency Law is just one such exercise of its prerogative. In the Respondent's view, stability does not mean immobilization and the measures adopted, particularly the "pesification", were the solution necessary to prevent greater social damage and poverty. It is further argued that there is ample precedent upholding the legality of devaluation, both under domestic and international law, with particular reference to the situation in the United States in the 1930s. It is also asserted that the Claimant has not proved any damage in connection with its allegation of breach of this standard and the compensation claimed under this item cannot in any way be assimilated to that corresponding to expropriation, as the Claimant requests.

273. The key issue that the Tribunal has to decide is whether the measures adopted in 2000 - 2002 breached the standard of protection afforded by Argentina's undertaking to provide fair and equitable treatment. The Treaty, like most bilateral investment treaties, does not define the standard of fair and equitable treatment and to this extent Argentina's concern about it being somewhat vague is not entirely without merit.

274. The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable "to maintain a stable framework for investments and maximum effective use of economic resources." There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.

275. The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. The discussion above, about the tariff regime and its relationship with a dollar standard and adjustment mechanisms unequivocally shows that these elements are no longer present in the regime governing the business operations of the Claimant. It has also been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision.

276. In addition to the specific terms of the Treaty, the significant number of treaties, both bilateral and multilateral, that
have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability. Many arbitral decisions and scholarly writings point in the same direction.\textsuperscript{139}

\textbf{277.} It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.

\textbf{278.} It was held by the Tribunal in the Metalclad case that Mexico had in several ways failed to provide a

"...predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrate a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly..."\textsuperscript{140}

\textbf{279.} So too the Tribunal in the Tecnicas Medioambientales case has held in this respect:

"The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations..."\textsuperscript{141}

\textbf{280.} The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.

\textbf{281.} The Tribunal, therefore, concludes against the background of the present dispute that the measures adopted resulted in the objective breach of the standard laid down in Article II(2)(a) of the Treaty.

\textbf{282.} There is one additional aspect the Tribunal must examine having heard the arguments of the parties. That is whether the standard of fair and equitable treatment is separate and more expansive than that of customary international law, as held by the tribunal in Pope and Talbot, or whether it is identical with the customary international law minimum standard, as argued by Argentina.

\textbf{283.} The Tribunal is mindful of the discussion prompted by these arguments, particularly with reference to the NAFTA Free Trade Commission's Note of Interpretation identifying the fair and equitable treatment standard with that of customary international law.\textsuperscript{142} This development has led to further treaty clarifications as in the Chile - United States Free Trade Agreement.\textsuperscript{143}

\textbf{284.} While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.

\textbf{26. Has there Been Arbitrariness and/or Discrimination?}

\textbf{285.} Article II(2)(b) of the Treaty provides that

"Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments."
286. The Claimant invokes the test defined in the Pope and Talbot case, and asserts that because the measures adopted are opposed to the rule of law or surprise a sense of judicial propriety, it follows that there has been arbitrary treatment of the investor and hence the Treaty standard has been breached. In the Claimant's view, dismantling the whole legal framework of the gas industry is contrary to any reasonable expectation.

287. The Claimant further asserts that such measures are discriminatory because they result in a dissimilar treatment of investors in similar situations, in accordance with the test defined in the Goetz v. Burundi case. In particular, the Claimant explains that other public services relying on dollar-based tariffs, such as telephone companies, water distribution enterprises, banks, waterway transportation companies and other businesses, and significantly, the gas producers, have all been treated in a more favorable manner. It is also argued that discrimination does not relate exclusively to nationality and can result from the compulsory transfer of resources of one economic agent or sector to another, as has happened in the Argentine economy.

288. The Respondent rejects such considerations and argues that the measures adopted were reasonable and proportional to the objective pursued. It is argued, following the findings in the ELSI case, that discrimination requires intentional treatment in favor of a national and to the detriment of a foreign investor, a treatment that does not apply to other nationals in a similar situation. The Genin v. Estonia case is also invoked by the Respondent to the effect that discrimination and arbitrariness require bad faith or a willful disregard of due process of law.

289. The Respondent also asserts, following Professor Schachter, that arbitrariness can in no case be used to describe legislation to carry out economic, social or political objectives. In any event, it is argued, the standard provides that discrimination is forbidden in respect of similarly situated groups or categories of people, which is not the case in respect of the gas industry. Neither, in the Respondent's view, is there any discrimination based on nationality, this being the only one envisaged by the prohibition under international law.

290. The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment. The standard is next related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted.

291. In the Lauder case, an equivalent provision of the pertinent investment treaty was explained in accordance with the definition of "arbitrary" in Black's Law Dictionary, which states that an arbitrary decision is one "depending on individual discretion; ... founded on prejudice or preference rather than on reason or fact." This Tribunal is not persuaded by the Claimant's view about arbitrariness because there has been no impairment, for example, in respect of the management and operation of the investment. Admittedly, some adverse effects can be noted in respect of other matters, such as the use, expansion or disposal of the investment, which since the measures were adopted have been greatly limited. To the extent that such effects might endure, the test applied in the Lauder case becomes relevant and could result in a factor reinforcing the related finding of a breach of fair and equitable treatment.

292. The situation in respect of discrimination is somewhat similar. The Respondent's argument about discrimination existing only in similarly situated groups or categories of people is correct, and no discrimination can be discerned in this respect. Admittedly, it is quite difficult to establish whether that similarity exists only in the context of the gas transportation and distribution industry or extends to other utilities as well.

293. Be that as it may, the fact is that to the extent that the measures persisted beyond the crisis, the differentiation between various categories or groups of businesses becomes more difficult to explain. "Indeed, the Government of Argentina has successfully concluded renegotiations and other arrangements with a number of industries and businesses equally protected by guarantees of investment treaties. This includes the gas producers, but not the transportation and distribution side of the industry. The gas producers have been allowed to proceed to a gradual tariff adjustment to be completed by mid-2005. The longer the differentiation is kept the more evident the issue becomes, thus eventually again reinforcing the related finding about the breach of fair and equitable treatment."
295. The Tribunal, therefore, cannot hold that arbitrariness and discrimination are present in the context of the crisis noted, and to the extent that some effects become evident they will relate rather to the breach of fair and equitable treatment than to the breach of separate standards under the Treaty.

27. Has the Protection under the Umbrella Clause been Breached?

296. The Claimant invokes yet another ground on which the protection and guarantees of the Treaty have been breached by the Respondent, as under Article II(2)(c) of the Treaty which provides that each party "shall observe any obligation it may have entered into with regard to investments."

297. The Claimant argues in this respect that all the commitments made by Argentina towards the investment, whether under the legislation in force or contractual arrangements, have been breached as a result of the measures adopted and particularly the dismantling of the tariff regime and related matters. Therefore, the argument follows, the umbrella clause of the Treaty has also been breached.

298. In the Respondent's view, first of all no commitments were made under the law, and those that were made under the License were purely contractual. Following the Azinian case in respect of concessions contracts,151 and the Genin152 and SGS v. Pakistan cases in respect of Licenses,153 the Respondent argues that not all contract breaches amount to treaty breaches and hence cannot be protected under a clause of this kind. In any event, it is asserted that the Claimant can invoke no rights or commitments under the License as these concern only TGN.

299. The Tribunal will not discuss the jurisdictional aspects involved in the Respondent's argument, as these were dealt with in the decision on jurisdiction. Regarding the merits of the argument, however, the Tribunal believes the Respondent is correct in arguing that not all contract breaches result in breaches of the Treaty. The standard of protection of the treaty will be engaged only when there is a specific breach of treaty rights and obligations or a violation of contract rights protected under the treaty. Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor.

300. This discussion has been, to an important extent, clarified in recent decisions of arbitral tribunals having to deal with the issue of contract and treaty claims. This is particularly so in the Lauder v. Czech Republic, Genin v. Estonia, Aguas del Aconquija v. Argentina,154 Azurix v. Argentina,155 SGS v. Pakistan, SGS v. Philippines156 and Joy Mining v. Egypt cases,157 among others. In these decisions, commercial disputes arising from a contract have been distinguished from disputes arising from the breach of treaty standards and their respective causes of action.

301. None of the measures complained of in this case can be described as a commercial question as they are all related to government decisions that have resulted in the interferences and breaches noted.

302. While many, if not all, such interferences are closely related to other standards of protection under the Treaty, there are in particular two stabilization clauses contained in the License that have significant effect when it comes to the protection extended to them under the umbrella clause. The first is the obligation undertaken not to freeze the tariff regime or subject it to price controls.158 The second is the obligation not to alter the basic rules governing the License without TGN's written consent.159

D. STATE OF NECESSITY CONTENDED IN THE ALTERNATIVE
The Government of Argentina has contended in the alternative that in the event the Tribunal should come to the conclusion that there was a breach of the Treaty the Respondent should be exempted from liability in light of the existence of a state of necessity or state of emergency. Force majeure, emergency and other terms have also been used by the Respondent in this context.

This contention is founded on the severe economic, social and political crisis described above and on the belief that the very existence of the Argentine State was threatened by the events that began to unfold in 2000. The Respondent asserts in this respect that economic interest qualifies as an essential interest of the State when threatened by grave and imminent peril.

It is argued that the Emergency Law was enacted with the sole purpose of bringing under control the chaotic situation that would have followed the economic and social collapse that Argentina was facing. State of necessity based on this crisis would exclude, in the Respondent's argument, any wrongfulness of the measures adopted by the government and in particular would rule out compensation.

In support of its argument the Respondent invokes first the existence of the state of necessity under Argentine law and its acceptance under the Constitution and the decisions of courts. The Tribunal has already discussed the meaning of the state of necessity and the state of emergency under Argentine law and its interpretation by the Supreme Court, with particular reference to its temporary nature and the requirement not to upset the rights acquired by contract or judicial decision. These issues will not be discussed here again.

The Respondent has also invoked in support of its contention the existence of a state of necessity under both customary international law and the provisions of the Treaty. In so doing, the Respondent has raised one fundamental issue in international law.

The Respondent's View of the State of Necessity under Customary International Law

The Respondent has mainly based its argument on this question on the ruling of the International Court of Justice in the Gabcikovo-Nagymaros case which held that the state of necessity is recognized by customary international law for "precluding the wrongfulness of an act not in conformity with an international obligation."

The French Company of Venezuelan Railroads case is invoked so as to justify that the government's duty was to itself when its "own preservation is paramount." Further support is found in the Dickson Car Wheel Co. case where it was decided that the "foreigner, residing in a country which by reasons of natural, social or international calamities is obliged to adopt these measures, must suffer the natural detriment to his affairs without any remedy, since Governments ...are not insurers against every event."

In addition to the discussion of these and other cases, the Government of Argentina also relies on the work of the International Law Commission under the leadership of the Special Rapporteurs F. V. Garcia-Amador, Roberto Ago and James Crawford. In particular the Respondent argues that it meets the criteria set out in Article 25 of the Articles on International Responsibility. The specific terms of Article 25 will be discussed further below.

In the Respondent's view the Argentine State was not only facing grave and imminent peril affecting an essential interest, but it did not contribute to the creation of the state of necessity in a substantive way. This situation, it is argued, was prompted for the most part by exogenous factors. It is further asserted that the measures adopted, particularly the pesification of contractual relations, were the only measures capable of safeguarding the essential economic interests affected. By introducing the measures, the Respondent argues, the essential interests of another State that was a beneficiary of the obligation breached or, for that matter, those of the international community as a whole were not affected and foreign investors were also not treated in a discriminatory manner.

The Claimant's View of the State of Necessity Under Customary International Law
The Claimant first argues in connection with the state of necessity that the Respondent has not met the heavy burden of proof required by the International Court of Justice in the Gabcikovo-Nagymaros case. The Claimant notes that the Court made reference to the work and views of the International Law Commission insofar the latter explained that "...the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met ...". Those conditions reflect customary international law.¹⁶⁵

The Claimant asserts next that neither has the Respondent complied with the conditions set down for the operation of state of necessity under Article 25 of the Articles on State Responsibility. In the Claimant's view, severe as the crisis was, it did not involve "grave" or "imminent" peril nor has it been established that the Respondent State did not contribute to the emergency as most of the causes underlying the crisis were endogenous. Moreover, it is asserted that the Respondent has not shown that the measures adopted were the only means available to overcome the crisis.

30. The Tribunal's Findings in Respect of the State of Necessity under Customary International Law

The Tribunal, like the parties themselves, considers that Article 25 of the Articles on State Responsibility adequately reflect the state of customary international law on the question of necessity. This Article, in turn, is based on a number of relevant historical cases discussed in the Commentary,¹⁶⁶ with particular reference to the Caroline,¹⁶⁷ the Russian Indemnity,¹⁶⁸ Societe Commerciale de Belgique,¹⁶⁹ the Torrey Canyon¹⁷⁰ and the Gabcikovo-Nagymaros cases

³¹⁵. Article 25 reads as follows:

³¹⁶. Article 25 reads as follows:

³¹⁷. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the Article to the effect that necessity "may not be invoked" unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity.¹⁷¹ The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.

³¹⁸. The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of Article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization. Again here the Tribunal is not called upon to pass judgment on the measures adopted in that connection but simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness.

³¹⁹. A first question the Tribunal must address is whether an essential interest of the State was involved in the matter. Again here the issue is to determine the gravity of the crisis. The need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered. In addition, the plea must under the specific circumstances of each case meet the
legal requirements set out by customary international law.

320. In the instant case, the Respondent and leading economists are of the view that the crisis was of catastrophic proportions; other equally distinguished views, however, tend to qualify this statement. The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey.

321. It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness. The Respondent's perception of extreme adverse effects, however, is understandable, and in that light the plea of necessity or emergency cannot be considered as an abuse of rights as the Claimant has argued.

322. The Tribunal turns next to the question whether there was in this case a grave and imminent peril. Here again the Tribunal is persuaded that the situation was difficult enough to justify the government taking action to prevent a worsening of total economic collapse. But neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness.

323. A different issue, however, is whether the measures adopted were the "only way" for the State to safeguard its interests. This is indeed debatable. The views of the parties and distinguished economists are wide apart on this matter, ranging from the support of those measures to the discussion of a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others. Which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal's task, which is to establish whether the requirements for the preclusion of wrongfulness have or have not been met.

324. The International Law Commission's comment to the effect that the plea of necessity is "excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient," is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.172

325. A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by Article 26 of the Articles.

326. In addition to the basic conditions set out under paragraph 1 of Article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the Commentary, the use of the expression "in any case" in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.173

327. The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty.

328. The second limit is the requirement for the State not to have contributed to the situation of necessity. The Commentary clarifies that this contribution must be "sufficiently substantial and not merely incidental or peripheral". In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.

329. The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial.
The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.

330. There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the Gabcikovo-Nagymaros case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be "cumulatively" satisfied.174

331. In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts.

31. The Emergency Clause of the Treaty

332. The discussion on necessity and emergency is not confined to customary international law as there are also specific provisions of the Treaty dealing with this matter. Article XI of the Treaty provides:

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

333. Article IV (3) of the Treaty reads as follows:

"Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses."

334. The meaning and extent of these clauses has prompted an important debate between the parties and the legal experts requested by them to discuss the issue, namely Dean Anne-Marie Slaughter and Professor Jose E. Alvarez.

335. The Tribunal will now consider the views of the parties and the experts on this matter, beginning with those of the Claimant.

32. The Claimant's View of the Treaty's Emergency Clauses

336. The Claimant argues that the Treaty clauses provide very narrow and specific exceptions to liability that do not allow the Respondent to invoke the operation of the state of necessity or emergency.

337. The Claimant asserts first that under Article 25(2) of the Articles on State Responsibility necessity may not be invoked if the international obligation in question excludes the possibility of invoking necessity. This, in the Claimant's view, is the case here as the object and purpose of the Treaty, which is to provide protection to investors in circumstances of economic difficulty, exclude reliance on such difficulties for non-performance of the obligations.
established under the Treaty. Moreover, the Claimant argues, both under the Treaty umbrella clause embodied in Article II (2) (c) and Article X the Respondent has the duty to observe obligations entered into with regard to investments.

338. The Claimant invokes in support of its views the Himpurna case where force majeure was not accepted as precluding the wrongfulness of acts of devaluation and the contractual obligations were upheld even in circumstances of economic adversity. Socobelge, on which the Himpurna tribunal relied in part, is also invoked by the Claimant as an example of contract enforcement in spite of an economic crisis. To the same effect the Claimant invokes the Martini case.

339. In connection with the specific clause of Article XI of the Treaty the Claimant, following the expert opinion of Professor Jose E. Alvarez, argues first that this clause is not self-judging, and therefore requires the Tribunal and not the Respondent to decide when or to what extent essential security interests were at stake. The Claimant makes the further point that if the State were to have discretion in this regard, such discretion should be provided expressly. Provisions of this kind include Article XXI of the GATT as well as provisions in the bilateral investment treaties concluded by the United States with Russia and with Bahrain. It is further affirmed, that this requirement was also the conclusion of the International Court of Justice in the Nicaragua case, and the Oil Platforms case.

340. The Claimant argues next that economic crises do not fall within the concept of "essential security interests," which is limited to war, natural disaster and other situations threatening the existence of the State. In its view, this is also the meaning of Article 25 of the Articles on State Responsibility, the interpretation given to Article XXI of the GATT and the scope of the Russian Indemnity case.

341. A third argument made by the Claimant is that, in any event, Article XI does not exempt the Respondent from liability as this provision does not allow for the denial of benefits under the Treaty.

342. The Claimant discusses in this context the meaning of Article IV(3) of the Treaty which, it is argued, is not intended to reduce the obligations of the host state to investors but rather to reinforce such obligations, and cannot be read to include economic emergency. The ICSID cases American Manufacturing v. Zaire and AAPL v. Sri Lanka are invoked as precedents supporting this interpretation.

343. It is further argued in this regard that even if the Article were to include economic difficulties the Claimant would still be entitled to full protection under the most favored nation clause (MFNC) of both Articles II(1) and IV (3) of the Treaty, and certainly nothing less than the treatment local investors or those from other countries have received from the Respondent. The MFNC is also invoked in support of the argument that other bilateral investment treaties concluded by the Respondent do not contain provisions similar to Article XI and thus the Claimant is entitled to the better treatment resulting from the absence of such exceptions.

33. The Respondent's View of the Treaty's Emergency Clauses

344. Articles IV (3) and XI of the Treaty provide, in the Respondent's view, for the lex specialis governing emergency situations which the Government has implemented in order to maintain public order, protect its essential security interests and reestablish its connections with the international economic system, all with a view to granting investors treatment not less favorable than that granted to nationals.

345. The Respondent argues first that the object and purpose of the Treaty do not exclude the operation of necessity or emergency, which are expressly provided for in periods of distress. To this effect, the Respondent further argues, the decisions invoked by the Claimant in support of its views are not relevant to the present case.

346. The Respondent particularly rejects the reliance by the Claimant on the tribunal's decision in the Himpurna case. The Claimant invoked that decision to draw a comparison with the Indonesian crisis and to show that the tribunal in that case had held that necessity was excluded by specific commitments undertaken by contract and treaty. The present dispute, the Respondent argues, has emerged under circumstances very different from those that prevailed in Indonesia.
and the Himpurna case in no way contradicts the position taken by Argentina in light of extraordinary circumstances.

347. The Respondent also rejects the relevance of the situation of Greece in the 1930s as taken into account in the decision in the Socobelge case. This decision was also invoked by the Claimant to show that the obligations under a contract were upheld in spite of financial hardship, in the case of Greece. The Respondent believes the Argentine crisis to have been much worse and deeper and that force majeure as discussed in that case was held to be beyond the powers of the Permanent Court of International Justice.

348. As to the Martini case, invoked by the Claimant as an example of state of necessity not having been accepted as an excuse and of contractual commitments having been strictly enforced, the Respondent does not consider it relevant to the present case as it did not deal with a case of institutional abnormality.

349. The expert opinions of Dean Anne Marie Slaughter, introduced by the Respondent on December 15, 2003 and June 23, 2004, elaborate on the meaning and the coverage of the relevant Treaty articles. It is first asserted in this respect that Article XI of the Treaty needs to be interpreted broadly and this in fact was the intention of the parties.

350. Since the very outset of the United States' model bilateral investment treaties it has been apparent, in the expert's view, that this country desired to safeguard certain sovereign interests by means of "non-precluded measures" such as those of Article XI. This trend was strengthened after the decision in the Nicaragua case which held that similar provisions of another treaty could not be understood to be self-judging. At the time the Treaty was signed with Argentina, it is further argued, this trend had become manifest as evidenced by the treaties negotiated with other countries and debates in the United States Congress.

351. On the basis of the principle of reciprocity, it is explained next, Argentina should be accorded the benefit of a similar understanding when invoking necessity and emergency. The self-judging character of these provisions, in the expert's view, should not be understood as precluding their submission to arbitration as the Tribunal must determine whether Article XI applies and whether measures taken thereunder comply with the requirements of good faith.

352. The expert's opinions also emphasize that security interests include economic security, particularly in the context of a crisis as severe as that of Argentina, and that, as in many instances of force majeure, the State should be released from treaty obligations. It is held, moreover, that the Claimant has not been treated differently from nationals or other investors under Article IV (3) of the Treaty.

34. The Tribunal's Findings in Respect of the Treaty's Clauses on Emergency

353. The first issue the Tribunal must determine is whether the object and purpose of the Treaty exclude necessity. There are of course treaties designed to be applied precisely in the case of necessity or emergency, such as those setting out humanitarian rules for situations of armed conflict. In those cases, as rightly explained in the Commentary to Article 25 of the Articles on State Responsibility, the plea of necessity is excluded by the very object and purpose of the treaty.184

354. The Treaty in this case is clearly designed to protect investments at a time of economic difficulties or other circumstances leading to the adoption of adverse measures by the Government. The question is, however, how grave these economic difficulties might be. A severe crisis cannot necessarily be equated with a situation of total collapse. And in the absence of such profoundly serious conditions it is plainly clear that the Treaty will prevail over any plea of necessity. However, if such difficulties, without being catastrophic in and of themselves, nevertheless invite catastrophic conditions in terms of disruption and disintegration of society, or are likely to lead to a total breakdown of the economy, emergency and necessity might acquire a different meaning.

355. As stated above, the Tribunal is convinced that the Argentine crisis was severe but did not result in total economic and social collapse. When the Argentine crisis is compared to other contemporary crises affecting countries in different regions of the world it may be noted that such other crises have not led to the derogation of international contractual or
obligations. Renegotiation, adaptation and postponement have occurred but the essence of the international obligations has been kept intact.

356. As explained above, while the crisis in and of itself might not be characterized as catastrophic and while there was therefore not a situation of force majeure that left no other option open, neither can it be held that the crisis was of no consequence and that business could have continued as usual, as some of the Claimant's arguments seem to suggest. Just as the Tribunal concluded when the situation under domestic law was considered, there were certain consequences stemming from the crisis. And while not excusing liability or precluding wrongfulness from the legal point of view they ought nevertheless to be considered by the Tribunal when determining compensation.

357. A second issue the Tribunal must determine is whether, as discussed in the context of Article 25 of the Articles on State Responsibility, the act in question does not seriously impair an essential interest of the State or States towards which the obligation exists. If the Treaty was made to protect investors it must be assumed that this is an important interest of the States parties. Whether it is an essential interest is difficult to say, particularly at a time when this interest appears occasionally to be dwindling.

358. However, be that as it may, the fact is that this particular kind of treaty is also of interest to investors as they are specific beneficiaries and for investors the matter is indeed essential. For the purpose of this case, and looking at the Treaty just in the context of its States parties, the Tribunal concludes that it does not appear that an essential interest of the State to which the obligation exists has been impaired, nor have those of the international community as a whole. Accordingly, the plea of necessity would not be precluded on this count.

359. The third issue the Tribunal must determine is whether Article XI of the Treaty can be interpreted in such a way as to provide that it includes economic emergency as an essential security interest. While the text of the Article does not refer to economic crises or difficulties of that particular kind, as concluded above, there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI.

360. It must also be kept in mind that the scope of a given bilateral treaty, such as this, should normally be understood and interpreted as attending to the concerns of both parties. If the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example, major economic emergencies, it could well result in an unbalanced understanding of Article XI. Such an approach would not be entirely consistent with the rules governing the interpretation of treaties.

361. Again, the issue is then to establish how grave an economic crisis must be so as to qualify as an essential security interest, a matter discussed above.

362. It is true that Paragraph 6 of the Protocol attached to the Treaty qualifies the reference to maintenance or restoration of international peace and security as related to obligations under the Charter of the United Nations. Similarly, the letter of submission of the Treaty to Congress in Argentina and the Report of the pertinent Congressional Committee, refer in particular to situations of war, armed conflict or disturbance. However, this cannot be read as excluding altogether other qualifying situations.

363. Since the Security Council assumes to be many times the law unto itself, and since there is no specific mechanism for judicial review under the Charter, it is not inconceivable that in some circumstances this body might wish to qualify a situation of economic crisis as a threat to international peace and security and adopt appropriate measures to deal with a given situation. This would indeed allow for a broad interpretation of Article XI.

364. As explained by Professor Alvarez, in practice the Security Council has, to a limited extent, adopted decisions
connecting economic measures with security matters, for example, in the formulation of the sanctions program enacted as a consequence of the 1991 Gulf War and other instances. In such cases, it is explained, there could be a treaty breach under the authority of the Security Council. However, this sort of situation does not have to do with the present case.

365. It is also important to note that in Dean Slaughter's understanding of the reference to the United Nations in the Treaty Protocol, such clause should not be considered as self-judging to the extent that the issue relates to the maintenance or restoration of international peace and security, involving a broader understanding of the concept as opposed to a nation's own security interest. The latter would in her view allow for self-judging insofar as the security interest is not a part of the maintenance or restoration of international peace and security. The question of the self-judging character of these provisions will be discussed next.

366. The fourth issue the Tribunal must determine is whether the rule of Article XI of the Treaty is self-judging, that is if the State adopting the measures in question is the sole arbiter of the scope and application of that rule, or whether the invocation of necessity, emergency or other essential security interests is subject to some form of judicial review.

367. As discussed above, three positions have emerged in this context. There is first that of the Claimant, supporting the argument that such a clause cannot be self-judging. There is next that of the Respondent, who believes that it is free security interests need the adoption of extraordinary measures. And third, there is the position expressed by Dean Slaughter to the effect that the Tribunal must determine whether Article XI is applicable particularly with a view to establishing whether this has been done in good faith.

368. The Tribunal notes in this connection that, as explained by Dean Slaughter, the position of the United States has been evolving towards the support of self-judging clauses insofar as security interests are affected. This policy emerged after the Nicaragua decision, which will be discussed below, and was expressly included in the U.S.- Russia bilateral investment treaty, which has incidentally not been ratified. With some changes it was also included in the U.S.- Bahrain investment treaty, the precise meaning of which is debated by the experts. The GATT self-judging clause was also mentioned above. Other treaties have not included a self-judging clause but this again is debated by the experts, and in any event such policy would also be reflected in the 2004 U.S. Model bilateral investment treaty.

369. The discussion of these treaties in the U.S. Congress allows for a variety of interpretations but does not clearly support the conclusion that all such clauses are self-judging. The record shows that during the discussion of the first round of bilateral investment treaties in 1986 a proposal to allow for the termination of treaties in light of security needs was not accepted, although this discussion apparently did not address specifically the question of self-judging clauses. The expert discussion of the Exon-Florio law has also generated much debate on its meaning.

370. The Tribunal is convinced that when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly. The examples of the GATT and bilateral investment treaty provisions offered above are eloquent examples of this approach. The first does not preclude measures adopted by a party "which it considers necessary" for the protection of its security interests. So too, the U.S.- Russia treaty expressly confirms in a Protocol that the non-precluded measures clause is self-judging.

371. The International Court of Justice has also taken a clear stand in respect of this issue, twice in connection with the Nicaragua case and again in the Oil Platforms case noted above. Referring to the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, the Court held:

"Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court... The text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its}
essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of ‘necessary’ measures, not of those considered by a party to be such.”

372. As explained above, in the Gabcikovo-Nagymaros case the International Court of Justice, referring to the work and views of the International Law Commission, notes the strict and cumulative conditions of necessity under international law and that "the State concerned is not the sole judge of whether those conditions have been met.”

373. In light of this discussion, the Tribunal concludes first that the clause of Article XI of the Treaty is not a self-judging clause. Quite evidently, in the context of what a State believes to be an emergency, it will most certainly adopt the measures it considers appropriate without requesting the views of any court. However, if the legitimacy of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness. It must also be noted that clauses dealing with investments and commerce do not generally affect security as much as military events do and, therefore, would normally fall outside the scope of such dramatic events.

374. The Tribunal must conclude next that this judicial review is not limited to an examination of whether the plea has been invoked or the measures have been taken in good faith. It is a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness.

375. The Tribunal must still consider the question of the meaning and extent of Treaty Article IV (3) in light of the discussion noted above. The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.

376. As noted above, the Tribunal is satisfied that the measures adopted by the Respondent have not adversely discriminated against the Claimant.

377. Although the MFNC contained in the Treaty has also been invoked by the Claimant because other treaties done by Argentina do not contain a provision similar to that of Article XI, the Tribunal is not convinced that the clause has any role to play in this case. Thus, had other Article XI type clauses envisioned in those treaties a treatment more favorable to the investor, the argument about the operation of the MFNC might have been made. However, the mere absence of such provision in other treaties does not lend support to this argument, which would in any event fail under the ejusdem generis rule, as rightly argued by the Respondent.

378. The Tribunal must finally conclude in this section that the umbrella clauses invoked by the Claimant do not add anything different to the overall Treaty obligations which the Respondent must meet if the plea of necessity fails.

35. Temporary Nature of Necessity

379. The Tribunal is also mindful that Article 27 of the Articles on State Responsibility provides that the invocation of a circumstance precluding wrongfulness is without prejudice to "(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists."

380. The temporary nature of necessity is thus expressly recognized and finds support in the decisions of courts and tribunals. The Commentary cites in this connection the Rainbow Warrior and Gabcikovo-Nagymaros cases. In this last case the International Court of Justice held that as soon "as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.”
381. This does not appear to be contested by the parties as various witness statements did in fact clearly establish that the crisis had been evolving toward normalcy over a period of time. The Claimant invokes to this effect the statements of Ambassador Remes Lenicov and Doctor Folgar, who explained how the crisis was subsiding by the end of 2002.\textsuperscript{196} This was also the view of the Argentine Supreme Court and the Procurador General noted above. It may be observed that this positive trend continued to evolve thereafter.

382. Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.

36. Necessity and Compensation

383. Article 27 also expressly provides that any circumstance precluding wrongfulness is without prejudice "(b) the question of compensation for any material loss caused by the act in question". Again this conclusion finds support in the Gabčíkovo-Nagymaros case, where the Court noted that "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner."\textsuperscript{197}

384. This criterion was also the basis for the decisions in earlier cases, such as the Compagnie Generale de l'Orinoco case\textsuperscript{198} and the Properties of the Bulgarian Minorities in Greece case\textsuperscript{199} invoked by the Claimant, or the Orr and Laubenheimer case.\textsuperscript{200} In these cases the concept of damages appears to have been broader than that of material loss in Article 27.

385. The Respondent has argued in this connection that the Compagnie Generale de l'Orinoco dealt with a totally different set of issues, all involving illicit acts, and is therefore not relevant to the present case. The Respondent further invokes the Gould Marketing, Inc. case, where the Iran-United States Tribunal held that injuries caused as a result of social and economic forces beyond the power of the State to control through due diligence are "not attributable to the state for purposes of its responding for damages."\textsuperscript{201}

386. The Claimant, however, contends that "[i]n any event, Article XI does not exempt Argentina from liability," since it "provides only a temporary and limited suspension of benefits, and Argentina is still therefore obliged to provide compensation for the permanent losses [...]."\textsuperscript{202} It recalls that the Treaty shows a difference between clauses that (a) "do not preclude or do not impede certain measures", (b) "permit a Party clearly to deny treaty benefits", or (c) "permit treaty termination" -- Articles XI, I (2) and XIV (2), respectively.

387. Because the Argentine crisis, as explained above, gradually subsided, the Claimant asserts that "[e]ven assuming that at the beginning of 2002 Argentina was experiencing an emergency of the sort covered by Article XI, Argentina has not demonstrated that the crisis persists today. Argentina's measures promise to remain in effect indefinitely, and [...]the Respondent] must therefore compensate CMS for the harm it has suffered, regardless of the applicability of Article XI."\textsuperscript{203}

388. The Claimant's reasoning in this respect is supported by Article 27 and the decisions noted above, as well as by the principle acknowledged even in the generality of domestic legal systems: the plea of state of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed. Still more stringent are the requirements of emergency under Argentine case law as discussed above.

389. The Respondent contends to the contrary that no compensation is due if the measures in question were undertaken in a state of necessity, under the rule contained in Article XI of the Treaty,\textsuperscript{204} and that the norm which prescribes that the Parties shall avoid uneven treatment of investors does not otherwise establish a duty to compensate even if the investor had been submitted to unfair or unequal treatment.\textsuperscript{205}

390. The Tribunal is satisfied that Article 27 establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems.
391. The Tribunal’s conclusion is further reaffirmed by the record. At the hearing the Tribunal put the question whether there are any circumstances in which an investor would be entitled to compensation in spite of the eventual application of Article XI and the plea of necessity. 206

392. The answer to this question by the Respondent’s expert clarifies the issue from the point of view of both its temporary nature and the duty to provide compensation: while it is
difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.207

393. The Tribunal also notes that, as in the Gaz de Bordeaux case, the International Law Commissions Commentary to Article 27 suggests that the States concerned should agree on the possibility and extent of compensation payable in a given case.208

394. It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due. This the Tribunal will do next.

E. REMEDIES

37. The Parties' Submissions

395. The Claimant has argued that its investment has been expropriated by the Respondent without prompt, adequate and effective compensation and that the Respondent has also violated the standards of treatment set out in Article II of the Treaty. The Claimant requests the Tribunal to grant full compensation for these breaches in terms of recovering the fair market value of the investment calculated immediately before the date of expropriation, with interest paid at the rate of six-month certificates of deposit in the United States, compounded semi-annually. The Claimant also undertakes to relinquish title to its shares to the Government of Argentina upon payment of compensation.

396. To this end, the Claimant asserts that the fair market value is the price of an asset in a hypothetical market, which in the case of an income-producing asset or "going concern " is also the measure of future prospects. The discounted cash flow method (DCF) is favored, in the Claimant's view, in both international finance and international arbitration. It is also asserted that the relevant date of valuation in this case is August 17, 2000. Relying on the Report prepared by its expert, the Claimant submits that the fair market value at that date is US$ 261.1 million in the event that the Government of Argentina decides to take title to CMS' shares in TGN, or US$ 243.6 million in the event that title to the share remains with CMS.209

397. The Respondent objects to the dates and estimates used by the Claimant because it has chosen the worst moments of the crisis to undertake the downside valuation and has not taken into account the sharp decline of all the economic indicators for that period. The Respondent objects in particular to the assumption that no renegotiation will succeed and that the emergency will continue until 2037, as well as to the assumption that income and costs denominated in US dollars will not change. The Respondent also argues that the rate of exchange used between Argentine pesos and U.S. dollars in the valuation process is too high. Other issues raised by the Respondent have been examined above, such as debt restructuring, export tariffs and the duration of the license.

398. The Respondent also asserts that the DCF method is not appropriate and that it has resulted in gross overvaluation of the shares. In the Respondent's view, the discount rate used in the pesification scenario is also grossly exaggerated. The Respondent argues that more accurate method is the stock exchange valuation of shares of similarly situated companies. It also asserts that what CMS paid for its shares in 1995 and 1999 was overvalued.
by 50% and 26.53% respectively at the date of valuation chosen.\textsuperscript{210} As noted above, the Respondent has not submitted its own valuation.

### 38. The Standards of Reparation under International Law

\textbf{399.} It is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction.\textsuperscript{211} As this is not a case of reparation due to an injured state, satisfaction cart be rules out et the outset.

\textbf{400.} Restitution is the standard used to reestablish the situation which existed before the wrongful act was committed.\textsuperscript{212} provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation. The Permanent Court of International Justice concluded in the landmark Chorzow Factory case that

"restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it -- such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."\textsuperscript{213}

\textbf{401.} Compensation is designed to cover any "financially assessable damage including loss of profits insofar as it is established."\textsuperscript{214} Quite naturally compensation is only called for when the damage is not made good by restitution.\textsuperscript{215} The decision in Lusitania, another landmark case, held that "the fundamental concept of 'damages' is ...reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole."\textsuperscript{216}

\textbf{402.} The loss suffered by the claimant is the general standard commonly used in international law in respect of injury to property, including often capital value, loss of profits and expenses.\textsuperscript{217} The methods to provide compensation, a number of which the parties have discussed, are not unknown in international law. Depending on the circumstances, various methods have been used by tribunals to determine the compensation which should be paid but the general concept upon which commercial valuation of assets is based is that of "fair market value." That concept has an internationally recognized definition which reads as follows:

"the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."\textsuperscript{218}

\textbf{403.} In the case of a business asset which is quoted on a public market, that process can be a fairy easy one, since the price of the shares is determined under conditions meeting the above mentioned definition. However, it happens frequently that the assets in question are not publicly traded and it is then necessary to find other methods to establish fair market value. Four ways have generally been relied upon to arrive at such value. (1) The "asset value" or the "replacement cost" approach which evaluates the assets on the basis of their "break-up" or their replacement cost; (2) the "comparable transaction" approach which reviews comparable transactions in similar circumstances; (3) the "option" approach which studies the alternative uses which could be made of the assets in question, and their costs and benefits; (4) the "discounted cash flow" ("DCF") approach under which the valuation of the assets is arrived at by determining the present value of future predicted cash flows, discounted at a rate which reflects various categories of risk and uncertainty.\textsuperscript{219} The Tribunal will determine later which method it has chosen and why.

\textbf{404.} Decisions concerning interest also cover a broad spectrum of alternatives, provided it is strictly related to reparation and not used as a tool to award punitive damages or to achieve other ends.\textsuperscript{220}
The Tribunal will now consider these various, options in the light of the present dispute.

39. Restitution by Means of Negotiation

Restitution is by far the most reliable choice to make the injured party whole as it aims at the reestablishment of the situation existing prior to the wrongful act. In a situation such as that characterizing this dispute and the complex issues associated with the crisis in Argentina, it would be utterly unrealistic for the Tribunal to order the Respondent to turn back to the regulatory framework existing before the emergency measures were adopted, nor has this been requested. However, as the Tribunal has repeatedly stated in this Award, the crisis cannot be ignored and it has specific consequences on the question of reparation.

Just as an acceptable rebalancing of the contracts has been achieved by means of negotiation between the interested parties in other sectors of the Argentine economy, the parties are free to further pursue the possibility of reaching an agreement in the context of this dispute. As long as the parties were to agree to new terms governing their relations, this would be considered as a form of restitution as both sides to the equation would have accepted that a rebalancing had been achieved. This was in fact the first major step for the settlement of the dispute in the Gaz de Bordeaux case.

40. Compensation

The Tribunal, however, cannot leave matters pending until an agreed settlement is reached; this is a matter strictly in the hands of the parties and its outcome is uncertain. In the absence of such agreed form of restitution, the Tribunal must accordingly determine the amount of compensation due.

41. The Applicable Standard

A first question the Tribunal needs to address is that of the standard of compensation applicable in the circumstances of this dispute. As was the situation in the Feldman v. Mexico case, the Tribunal is faced with a situation where, absent expropriation under Article IV, the Treaty offers no guidance as to the appropriate measure of damages or compensation relating to fair and equitable treatment and other breaches of the standards laid down in Article II. This is a problem common to most bilateral investment treaties and other agreements such as NAFTA. The Tribunal must accordingly exercise its discretion to identify the standard best attending to the nature of the breaches found.

Unlike the circumstances in the Feldman case, however, the Tribunal is persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation; it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses. Moreover, precisely because this is not a case of expropriation, the Claimant has offered to transfer its shares in TGN to the Argentine Republic, and the Tribunal will address this question in due course.

42. The Valuation Method to be Used

The Tribunal has concluded that the discounted cash flow method it the one that should be retained in the present instance.

First of all, the shares of TGN are not publicly traded on a stock exchange or any other public market. The Respondent has argued that, in order to estimate the value of TGN, reference should have been made to TGS, another natural gas transporter, and three other natural gas distributors which were listed on the Argentine stock exchange. However, as noted by Mr. Bello, “(...) market capitalization in illiquid markets as Argentina is not the most adequate method to value companies (...).” Moreover, as noted also by Mr. Bello, there were significant differences between TGN and those companies regarding asset levels, business segments, financing policy, and other issues. In the circumstances, the Tribunal has come to the conclusion that this approach would not be appropriate.
As to the asset value approach, it would be inappropriate in the present circumstances. CMS is a minority shareholder in TGN which is an ongoing company with a record showing profits.

As to the comparable transaction approach, the Tribunal has not been provided with any significant evidence of such transactions and it would be a most speculative enterprise to try and determine the compensation due to CMS on that basis.

As to the option valuation method, it does not appear to be of any help in this case. TGN is a gas transportation company and it is very difficult to imagine what uses or options there could be for gas transmission lines other than to transport gas.

This leaves the Tribunal with the DCF method and it has no hesitation in endorsing it as the one which is the most appropriate in this case. TGN was and is a going concern; DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets; as a matter of fact, it was used by ENARGAS in its 1996/7 tariff review. Finally, there is adequate data to make a rational DCF valuation of TGN.

The Claimant has requested that the interest should be set at the average rate applicable to U.S. six-month certificates of deposit, compounded semi-annually starting on August 18, 2000.

The Tribunal is of the opinion that the U.S. Treasury Bills rate is more appropriate under the circumstances and that the interest should be simple for the period extending from August 18, 2000, to 60 days after the date of this decision or the date of effective payment if before. For this period the interest rate shall be 2.51% which corresponds to the annualized average rate for the U.S. Treasury Bills as reported by the Federal Reserve Bank of St. Louis. Thereafter, the interest shall be the arithmetic average of the six-month U.S. Treasury Bills' rates observed on the afore-mentioned date and every six months thereafter, compounded semi-annually. That amount shall be calculated from the same source as the one mentioned above. Interest shall apply to both the value loss suffered by CMS and the residual value of its shares.

131 Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 CTR 219 (1984-II), at 225; see also Phelps Dodge Corp. v. Islamic Republic of Iran, 10 CTR 121 (1986-I).
133 U.S. Supreme Court, Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Argentina Rejoinder, at 182.
134 Pope & Talbot, http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF, paras. 96, 102.
137 Robert Azinian and others v. United Mexican States (Cases No. ARB(AF)/97/2) (Azinian), Award of November 1, 1999, 14 ICSID Review -- FILJ 538 (1999); 39 ILM 537 (2000); 121 I.L.R. 2 (2002); 5 ICSID rep. 272 (2002); American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo (Case No. ARB/93/1), Award of February 21, 1997.


Genin, Argentina Answer, at 255. Also Myers, Argentina Answer, at 257.


Lauder, para. 221.


Azinian, 14 ICSID Review ?? FILJ 538 (1999); 39 ILM 537 (2000); 121 I.L.R. 2 (2002); 5 ICSID Rep. 272 (2002); Argentina Answer, at 225.

Genin, 17 ICSID Rev. ?? FILJ 395 (2002); Argentina Answer, at 223?224.


Azurix Corp. v. Argentine Republic (Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, 43 ILM 262 (2004).


License, Clause 9.8.

License, Clause 18.2.

Argentine Answer, p. 585; Argentine Rejoinder, p. 833.


The Caroline incident of 1837 and related diplomatic correspondence of 1842, as discussed in Crawford, at 179?180.


Permanent Court of International Justice, Societe Commerciale de Belgique, 1939, Series A/B, No. 78.


Crawford, at 184.

Crawford, at 185.


The Martini case, as cited in Claimant's Reply, at 102?103.


180 International Court of Justice, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Merits), ICJ Reports, 1986, at 14, paras. 222, 282; also decision on Jurisdiction and Admissibility, ICJ Reports, 1984, at 392, para. 83.

181 International Court of Justice, Case Concerning Oil Platforms, Merits, November 6, 2003, para. 43.


184 Crawford, at 185.


186 As discussed by an experienced diplomat, "With no higher authority to gainsay it, threats to international peace and security are what the Security Council says they are"; Gareth Evans: "When is it Right to Fight?", Survival, Vol. 46 (3), 2004, 59?82, at 69.


189 Statement by Professor Anne Marie Slaughter, Hearing, Vol. 8, August 18, 2004, at 1844.


194 Rainbow Warrior, RIAA, Vol. XX, 1990, 217, at 251?252, para. 75; Crawford at 189.

195 Crawford, at 189.

196 Claimant's post?hearing brief, at 11.


202 Claimant's Rejoinder, para. 304.

203 Claimant's Rejoinder, para. 307.

204 Argentina Rejoinder, paras. 960 et seq.

205 Argentina Rejoinder, para. 981.


208 Crawford, at 190.


217 See the International Law Commission's Articles on State Responsibility, 2002, at 225, para. 21.

218 International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website, June 6, 2001, p.4


Referring Principles:

- VII.6 - Duty to pay interest
- XI.1 - Compensation for expropriation