This case summary was prepared in the course of research for
S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008)

LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.
v
The Argentine Republic

Year of the award: 2006-2007
Forum: ICSID
Applicable investment treaty: Argentina-US BIT (1991)

Arbitrators	**Timeline of the dispute**
Dr Tatiana B. de Maekelt, President Professor Albert Jan van den Berg Judge Francisco Rezek	21 December 2001 – Request for arbitration 19 December 2002 – Arbitral tribunal constituted 30 April 2004 – Decision on Jurisdiction 3 October 2006 – Decision on Liability 25 July 2007– Award

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I. Executive Summary

The dispute concerns a claim by three U.S. investors – LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. (collectively "LG&E") – that held a shareholding interest in three local gas distribution companies in Argentina, created during the privatization in early 1990s and granted Licenses until 2027. At that time, in order to attract foreign investors, Argentina enacted legislation which guaranteed that tariffs for gas distribution would be calculated in U.S. dollars and that automatic semi-annual adjustments of tariffs would be based on the U.S. Producer Price Index (PPI). Several other guarantees relating to the tariff regime were provided.

As a consequence of the economic crisis that developed in Argentina in the late 1990s – early 2000s, the Government abrogated the guarantees provided at the time of privatization, which led to a great reduction in the profitability of the gas distribution business and, accordingly, returns on LG&E's investment.

LG&E initiated ICSID arbitral proceedings claiming multiple violations of the 1991 Argentina-US BIT and requesting damages. The Tribunal found that Argentina's abrogation of the guarantees breached the standard of fair and equitable treatment and the umbrella clause and was discriminatory. However, claims of expropriation and arbitrariness were dismissed. Importantly, the Tribunal found that Argentina was in a state of necessity between 1 December 2001 and 26 April 2003 and, therefore, should be absolved from international responsibility for losses that occurred during this period.

In determining "full reparation" required by international law, the Tribunal rejected the "fair market value" approach of awarding the difference between market values of shares before and after the breaches, primarily because the Claimants remained in possession of their shares which could rebound in value in future. The Tribunal determined that the reduction in the amount of dividends paid out to the Claimants constituted the "actual loss" caused by the wrongful conduct. To calculate compensation, the Tribunal assessed "the amount of dividends that could have been received *but for* the adoption of the measures" by comparing the pre-crisis dividends with the dividends actually paid out after the crisis.

The calculation was made up to 28 February 2005 (deadline for supplying evidence to the Tribunal). The Tribunal disallowed future damages (until the end of the Licenses) as "uncertain" because it was not clear whether Argentina would maintain its measures in place and whether the future actual dividends would remain on the current low level. At the same time, the Tribunal refused to order the annulment of the measures by Argentina and the re-establishment of the pre-crisis tariff regime stating that this would constitute undue interference with State sovereignty. Losses incurred during the state of necessity were subtracted from damages. The total amount of compensation was fixed at US$57.4 million, including compound interest from the date of the first measure to the date of the Award at the rate of short-term US Treasury bills.

II. Factual Background and Claims

The Claimants, three US investors – LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc (collectively referred to as "LG&E") – held equity interest in three local Argentinean gas companies Distribuidora de Gas del Centro (45.9%), Distribuidora de Gas Cuyana (14.4%) and Gas Natural BAN S.A. (19.6%). These three Argentinean companies were created in the early 1990s as a consequence of the privatization of Argentina's national natural-gas transport and distribution monopoly.

In order to attract foreign investors to participate in the capital of the newly-created companies, Argentina introduced – at the time of privatization – a legislative framework that included several advantageous features such as: the calculation of tariffs for gas distribution in U.S. dollars before conversion into pesos, semi-annual adjustments of tariffs according to the changes in the U.S. Producer Price Index ("PPI"), the commitment that tariffs were to provide an income sufficient to cover all costs and a reasonable rate of return, and that there would be no price freeze applicable to the tariff system without compensation. These obligations were set out in the Argentine legislation as well as in the Licenses granted to each of the gas distribution companies until 2027. The Government honoured these obligations during 1993-1999, and the licensees invested heavily in gas-distribution infrastructure.

In view of the economic crisis that had started developing in Argentina in the late 1990s, the Government met with the licensees to discuss a suspension of the semi-annual tariff adjustments. In 2000, the Government and the licensees entered into two agreements. In the first agreement, the licensees agreed to a one-off, six-month postponement of the tariff adjustments due in January 2000. The situation in Argentina continued to deteriorate leading to a second agreement postponing the tariff adjustments until 30 June 2002. These agreements were approved by Decree 669/00 of 17 July 2000, which also provided for the subsequent compensation for the deferred tariff increase. However, on 18 August 2000, a judicial injunction was granted, at the request of the Argentine Ombudsman, which suspended Decree 669/00 and the PPI adjustments. The injunction remained in force at the date of the arbitral award.

As the Argentinean crisis deepened, on 1 December 2001 the Government issued the so-called "*Corralito*" Decree restricting bank withdrawals and prohibiting any transfer of money abroad. Further, on 2 January 2002, the Government enacted the "Emergency Law", which abrogated the convertibility of pesos to the U.S. dollars and consequently the right to calculate tariffs in dollars. The Law also definitively abolished PPI adjustments.

In 2001, the Claimants initiated ICSID arbitral proceedings under the 1991 Argentina-US BIT. They argued that by failing to observe the guarantees that it made with respect to the Claimants' investment, Argentina had breached the fair and equitable treatment standard, taken arbitrary and discriminatory measures and violated the "umbrella clause". They also claimed that Argentina indirectly expropriated their investments without observance of due process. They requested full compensation ranging between US$ 248 million and US$ 268 million.

III Findings on Merits

A. Applicable Law

In the absence of a choice of law by the parties, the Tribunal applied Article 42(1) of the ICSID Convention. The Tribunal held that the Argentina-US BIT, general international law and Argentine law applied, with international law prevailing over domestic law. (paras.82-99)

B. Treaty Violations Found

Before proceeding to the claims, the Tribunal found that Argentina's guarantees to investors included the following:

1) The tariffs would be calculated in U.S. dollars before conversion into pesos;
2) The tariffs would be subject to semi-annual adjustments according to the PPI;
3) The tariffs were to provide an income sufficient to cover all costs and reasonable rate of return;
4) The tariff system would not be subject to freezing without compensation.

The Tribunal also found that the "Emergency Law", which abolished both the calculation of tariffs in U.S. dollars and the semi-annual adjustments of tariffs according to PPI, seriously affected Claimants' rate of return and Argentina took no steps to compensate the Claimants, forcing them into renegotiation instead (paras.119-120).

1. Fair and Equitable Treatment (FET)

The Tribunal held that the FET standard includes as its essential element "stability of the legal and business framework" and that investors' expectations at the time of investment should be considered in this connection, noting, at the same time, that these expectations must take into account business risks. It also accepted that violations of the FET standard may arise from a State's failure to act transparently but refused to include the principle of bad faith into the test. (paras.121-131)

The Tribunal concluded that Argentina had breached its FET obligation by failing to honour the specific guarantees it had provided to foreign investors and had thereby violated the "stability and predictability" requirement. The Tribunal recognized the economic hardships that had occurred in Argentina during this period but held that "Argentina went too far by completely dismantling the very legal framework constructed to attract investors". (paras.132-139)

2. Discriminatory Treatment

The Tribunal held that discrimination against gas distribution companies vis-à-vis other utilities companies was "evident" even though the claimants had failed to show

that "the measures targeted the claimant's investments specifically as foreign investments" (paras.147-148).

3. Umbrella Clause

The "umbrella clause" of the BIT read "*[e]ach party shall observe any obligation it may have entered into with regard to investments*". The Tribunal held that Argentina's statutory framework was not of a general nature but was specific in relation to LG&E's investment. The dismantling of this framework thus constituted a violation of obligations undertaken by Argentina with regard to the Claimants' investment, and accordingly, of the umbrella clause (paras.169-175).

C. Rejected Claims

1. Indirect Expropriation

Even though the Tribunal accepted that Argentina's conduct had had a negative impact on the Claimants' investment, it found that it had not deprived them of "the right to enjoy their investment" or the day-to-day control over it. Also, the effect of the measures had not been permanent. The Tribunal concluded that "without a permanent, severe deprivation with regard to its investment or almost complete deprivation of the value of LG&E's investment", a finding of indirect expropriation could not be made. (paras.185-200)

2. Arbitrary Treatment

The Tribunal concluded that the Argentinean measures had not been arbitrary. It distinguished between arbitrary and unfair measures and stated that even though the measures were unfair and inequitable they were "the result of reasoned judgment rather than simple disregard of the rule of law". Hence the claim of arbitrariness was rejected. (paras.155-163)

D. Respondent's Plea of Necessity

Article XI of the BIT read "*This Treaty shall not preclude the application by either party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests*". The Tribunal applied a twofold analysis to establish whether Argentina was in a state of necessity under Article XI. Firstly, it analysed whether the conditions that existed in Argentina entitled it to invoke the protections included in Article XI. Secondly, it determined whether the measures implemented by Argentina were *necessary* to maintain public order or to protect its essential security interests. (para.205)

The Tribunal rejected the notion that Article XI was only applicable in circumstances amounting to military action and war, as argued by the Claimants, and considered that

"when a state's economic foundation is under siege, the severity of the problem can equal that of any military invasion".

As to the question of whether the measures were necessary, the Tribunal rejected that there were other means available to respond to the crisis, although it admitted that there may have been a number of ways to draft the economic recovery plan. It found that the measures were necessary to maintain public order and protect Argentina's essential security interests and met the requirements of Article XI. The Tribunal also found that Article 25 of the Draft Articles on State Responsibility[1] supported its conclusions under Article XI. The period of the state of necessity was established from 1 December 2001 (date of the "Corralito" Decree) to 26 April 2003 (date of taking of office by the new President of Argentina). (paras.226-258)

On the question of compensation for losses suffered by the investors during the state of necessity, the Tribunal held that they should be borne by the investors. It observed that Article 27 of the Draft Articles on State Responsibility[2] was not specific about whether any compensation was payable to the party affected by losses, the kind of losses that could be compensated for, and the circumstances in which compensation should be payable. The Tribunal considered that in the case before it "Article XI establishe[d] the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State [was] exempted from liability". The Tribunal found, however, that once the state of necessity was over on 26 April 2003, the State was no longer exempted from liability. (paras.259-265)

IV. Findings on Damages

A. Law Applicable to the Determination of Damages

In the Damages Award, the Tribunal stated that given the absence of provisions governing the standard and measure of compensation for treaty breaches other than expropriation in the applicable BIT, it would rely on the "principles governing reparation under international law and the few precedents in investment treaty arbitration". (para.30[3])

[1] Article 25 of the Draft Articles on State Responsibility provides:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with the international obligation of that State unless the act:
>
> a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> a) The international obligation in question excludes the possibility of invoking necessity; or
>
> b) The State has contributed to the situation of necessity."

[2] Article 27 of the Draft Articles on State Responsibility provides:

> The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
>
> (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
>
> (b) The question of compensation for any material loss caused by the act in question.

B. Approach to Compensation

The Tribunal started its analysis by saying that "the most important consequence of the committing of a wrongful act is the obligation for the State to make reparation for the injury caused by that act" (with reference to the *Chorzów Factory* case) (para.29). The Tribunal reasoned that in this context it had to address three issues:

- Standard of reparation;
- Measure of compensation; and
- Method of quantification of compensation

1. Standard of Reparation

The Tribunal agreed with the Claimants that "the appropriate standard for reparation under international law is 'full' reparation" as laid down by the PCIJ in the *Chorzów Factory* case and codified in Article 31 of the Draft Articles on State Responsibility. (para.31) The objective of full reparation is to put the Claimants into the position they would have been in had the measures not been adopted and to wipe out the consequences of Argentina's breach. (paras.58, 60)

2. Measure of Compensation

Inapplicability of the Fair Market Value approach

The Claimants quantified their damage by comparing the fair market value (FMV) of their shares in the gas distribution companies before and after the Argentinean measures had been taken (paras.10-17, 33-34). Despite the fact that the Respondent did not challenge this method as such (only the manner in which it had been applied by the Claimants), the Tribunal rejected this approach holding that

> [T]his type of valuation is appropriate in cases of expropriation in which the claimants have lost the title to their investment or when interference with property rights has led to a loss equivalent to the total loss of investment. However, this is not the case. (para.35)

The Tribunal recalled that it had rejected the claim for expropriation for the reason that the Claimants had not been deprived of the right to enjoy their investment, the effect of the State's actions had not been permanent on the value of the Claimants' shares, and the Claimants' investment had not ceased to exist. On this basis, the Tribunal rejected the "reduction in share value" approach as not reflecting the actual damage incurred by the Claimants. (paras.35-36)

The Tribunal further noted that the FMV was reserved in the Treaty for cases of expropriation and considered that it did not extend to other treaty breaches. It further emphasized the difference between "compensation" as the consequence of a legal act

[3] Unless indicated to the contrary, paragraph numbers in this section of the summary refer to the Damages Award.

and "damages" as the consequence of the committing of a wrongful act. Suggesting that FMV was not the proper measure of compensation for unlawful expropriation, the Tribunal considered that it was *a fortiori* not appropriate for breaches of other Treaty standards. (paras.37-38)

The Tribunal distinguished this case from *Azurix v Argentina* and *CMS v Argentina*, where respective tribunals opted for the FMV standard despite the non-expropriatory character of breaches. The Tribunal made the distinction because there was no termination of the License (in *Azurix* the violations resulted in the termination of the concession), and because of the uncertainty and absence of adequate proof of "important long-term losses" (as found in *CMS*).

Following *Myers*, the Tribunal emphasized its discretion to determine the appropriate measure of compensation (para.40) and proceeded to identify it.

The "Actual Loss" Incurred "As a Result" of the Wrongful Acts

With reference to the Draft Articles (Article 36), *Lusitania*, *Chorzów Factory* and *Feldman v Mexico*, the Tribunal found that "the determination of compensation depends on the identification of the damage caused by Respondent's wrongful acts and the establishment of lost profits". (para.41)

> Accordingly, the issue that the Tribunal has to address is that of the identification of the "*actual loss*" suffered by the investor "*as a result*" of Argentina's conduct. The question is one of "*causation"*: what did the investor lose by reason of the unlawful acts? (para.45)

The Tribunal rejected the decrease in value of shares as the Claimants' loss noting that the value of LG&E's investment had "rebounded" since the economic crisis and that the effect of the measures on the value of the Claimants' shares had not been permanent. The Tribunal further stated that the decrease in value could have been used as a measure of loss, had LG&E sold its investment, as did other foreign investors, for a depressed value resulting from the measures. (para.47)

The Tribunal determined that the measures had resulted in a significant decrease in the Licensees' revenues that, in turn, had produced a decrease in the amount of dividends distributed to shareholders. Thus, the Tribunal took as a measure of actual damage "the amount of dividends that could have been received *but for* the adoption of the measures." (para.48)

The Tribunal rejected Argentina's argument that the financial position of the Claimants would in any case have been affected by the economic collapse. It ruled that the Respondent's conduct, rather than the economic situation, was the "proximate cause" of the Claimants' loss. (para.50) In the same vein, the Tribunal rejected Argentina's argument that the country risk premium included in the tariffs had already compensated LG&E for the risk of investing in a country like Argentina. The Tribunal held that the inclusion of this premium in tariffs did not excuse Argentina for the abrogation of the regulatory framework: a contrary approach would "result in the

absurd situation that high-risk borrowers would be excused from their international responsibility." (para.52)

3. Method of Quantification

The Tribunal summarized its method of quantification as follows:

> A calculation will be made of the dividends that would or could have been generated without any change in the tariff system. Dividends received by the Claimants will be subtracted from this figure, after which the damages suffered during the State of Necessity will be subtracted from this amount. (para.59)

For the calculation of the amount of dividends that the Claimants would have received but for the breach, the Tribunal made *inter alia* the following assumptions:

- The regulatory framework would have remained intact (PPI adjustments, calculation of tariffs in US dollars);
- The annual average dividend during the period preceding the state of necessity (rather than a forward projection of dividends) must be used as a basis for calculation;[4]
- Dividends would have been affected by fluctuations in the peso in relation to the dollar;
- Each company would have continued to apply the same dividend policy as before August 2000;
- Losses incurred during the state of necessity (1 December 2001 – 26 April 2003) are to be subtracted. (para.61)

C. Restitution and Loss of Future Dividends

The Tribunal established 28 February 2005 (the deadline set by the Tribunal for the submission of evidence by the parties) as a cut-off date for the calculation of damages. The Claimants objected to this approach because the breach was continuing and there was no indication that Argentina was going to withdraw its measures and restore the pre-crisis tariff regime. According to the Claimants, the award should therefore either include the present value of projected lost dividends (lost profits) up to the expiry of the License in 2027, or the Tribunal should order Argentina to return its regulatory framework to its original state. (paras.65, 69, 70, 81-83) The Claimants explained that the Tribunal's "cut-off" approach would be "unfair and burdensome because it would force them to seek periodic additional relief at great cost and expense. This would place on them the whole burden of the risk and uncertainty resulting from Argentina's conduct and would reward it for persisting in its illegal conduct" (para.66)

[4] In choosing to rely on past figures rather than on future projections, the Tribunal referred to Decision 9 of the Governing Council of the United Nations Compensations Commission. (Damages Award, footnote 25)

1. Restitution

Regarding the Claimants' request to direct Argentina to re-establish its pre-crisis tariff regime, the Tribunal noted that this was effectively a request for restitution. While recognizing that the State was under a duty to perform the obligation breached and to cease the wrongful act by restoring the basic guarantees of the tariff regime, the Tribunal noted that Argentina had chosen not to restore its tariff obligations despite the Tribunal's Decision on Liability. Additionally, the Tribunal stated:

> The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty.

Consequently, the Tribunal arrived at the conclusion that only compensation could be awarded. (paras.84-87)

2. Lost Profits

As a matter of general principle, the Tribunal outlined the distinction between accrued losses and lost future profits saying – with reference to the ILC Commentaries to the Draft Articles – that the future profits needed to be "sufficiently certain" to be recoverable. (para.51)

The Tribunal agreed with the Claimants that Argentina's breach was of a continuing nature but stated that it could only award compensation for the loss that was certain. The Tribunal was not convinced of the certainty of lost future dividends and therefore rejected this claim. The Tribunal reasoned as follows:

> The uncertainty concerning lost future profits in the form of lost dividends results from the fact, noted above, that Claimants have retained title to their investments and are therefore entitled to any profit that the investment generates and could generate in the future. Any attempt to calculate the amount of the lost dividends in both the actual and "but for" scenarios is a highly speculative exercise. If the Tribunal were to compensate LG&E for lost future dividends while it continues to receive dividends distributed by the Licensees at a hypothetical low amount, a situation of double recovery would arise, unduly enriching the Claimants. (para.90)

The Tribunal distinguished this case from the precedents invoked by LG&E to support its claim for future profits by observing that in each of those cases "the investors had lost title to their property or the relevant contracts or licenses had been put to an end. In such circumstances, it is certain that the claimants would have lost the opportunity to earn any future profit."[5] (para.91)

[5] Commenting on *Amco II*, *LETCO v Liberia*, *Sapphire*, *Lena Goldfields*, *Shufeldt*.

The Tribunal also refused to extend the period for calculation of lost dividends beyond the **cut-off date** 28 February 2005 (even though the award was issued in July 2007) because Argentina had not had an opportunity to respond to the evidence produced after 28 February 2005 (referring to the principle of due process). (paras.92-95) The Tribunal acknowledged that, as a result, the Claimants effectively had to bear the burden of seeking periodic additional relief. However, the Tribunal emphasized that the Claimants had chosen to maintain their investments in Argentina regardless of the latter's reluctance to re-establish the tariff regime. The Tribunal derived the following consequences from the Claimants' decision to keep their shares:

> (i) the impact of Argentina's conduct on the value of investments has not crystallized and is subject to the changing regulatory environment and fluctuations of the stock market; (ii) lost future profits are uncertain and their calculation is speculative; and (iii) compensation could only be awarded for damages actually suffered and sufficiently proven. (para.96)

The Tribunal underscored, however, that Argentina would continue to be liable for the payment of compensation after 28 February 2005, if it failed to restore the regulatory framework. (para.97)

D. Calculation of Compensation

The Tribunal made certain adjustments to its method of quantification, summarized above:

- It took into account the actual business growth during the 2000-2005 period (by reference to the average annual growth rate of gas volumes) (para.100);
- It included into the calculation the dividends for 2004, even though under the corporate rules they would have been paid in April 2005, i.e. after the cut-off date (para.101).

The Tribunal thus calculated the amount of compensation as the difference between the "but for" dividends that would have been received by the Claimants if the tariff regime had been maintained and the actual dividends received by them. The calculation was done in relation to each of the gas companies where the Claimants held shares and in accordance with the size of the relevant shareholding. The amount of compensation was reduced by the amount of dividends lost during the period of state of necessity. The total amount of compensation (including interest) to the date of Award was fixed at US$57.4 million. (paras.107-109)

E. Interest

Claimants sought compound interest from 18 August 2000 at a rate equal to the one-month interest rate earned on U.S. Treasury bills. The Tribunal held that interest was part of "full" reparation; interest compensated for the fact that, between the date of the illegal act and the date of actual payment of compensation, the injured party could not use or invest the amounts of money due. According to the Tribunal, in awarding

interest, it is "decisive to identify the available investment alternatives to the investor". (para.55) The Tribunal used this rationale as a basis for its findings on the type of interest due, the applicable rate and the period covered.

With reference to *Azurix* and *MTD*, the Tribunal held that "in 'modern economic conditions', funds would be invested to earn **compound** interest" and that compound interest "better reflect[ed] contemporary financial practice" (paras.56, 103)

The Claimants suggested that interest should be calculated at a **rate** equal to Argentina's borrowing rate, which was substantially higher that short-term US Treasury bills, "to prevent Argentina from benefiting financially from the difference in rates by delaying payment of damages". (para.71) The Tribunal stated that this would be "speculative and extemporaneous" and used the rate of short-term US Treasury bills[6] initially suggested by the Claimants in their calculations, and not objected to by the Respondent (paras.78, 102).

The Tribunal ordered the interest to be paid from 18 August 2000 until the date of the Award. The Tribunal also ordered **post-award** compound interest at the rate six-month US Treasury bills, starting 30 days after the dispatch of the Award, until full payment.

F. Costs

As "equitable allocation" of costs, the Tribunal held that each party should bear its own costs, expenses and attorneys' fees. (paras.110-113)

V. Implications / Initial Analysis

- The Tribunal determined that the **FMV approach** (in this case, difference in FMV of shares before and after the breach) was appropriate in non-expropriatory cases only when interference with property rights "led to a loss equivalent to the total loss of investment". The main rationale for this reasoning is that in a case, where a claimant retains ownership of its investment (shares), if the value of investment rebounds after the award, this will lead to over-compensation. Over-compensation could be prevented, however, by giving the Respondent State an option to buy the investment (shares) at their current residual value (as in *CMS*). Another problem with adopting the FMV approach in this case concerns reduction in compensation attributable to the state of necessity – under the "difference in value" approach, this reduction could only be done in a purely discretionary manner.
- The Tribunal determined that the right **approach to compensation in non-expropriatory** cases lay in identifying the "*actual loss*" suffered by the investor "*as a result*" of the wrongful conduct. However, in many cases this "actual loss" can be determined through the decrease in the FMV of investment.

[6] It is not specified in the Award, what "short-term" means in this context.

- As a measure of compensation, the Tribunal used the "**amount of dividends** that could have been received *but for* the adoption of the measures". This appears to be the right approach in the circumstances of this case. It was previously applied in *Nykomb*. A problem with this approach, however, is that a lot depends on the **dividend pay out policy** of the company in question, which may be subject to change. The Tribunal had to base its analysis on the pre-crisis dividend policy and to assume that it remained the same. The Tribunal did not consider whether there had been a change in the dividend policy (in relation to the dividends actually paid out in 2000-2005), which might distort the amount of compensation.
- The Tribunal put a lot of emphasis on **causation** applying the "but for" and the "proximate cause" tests. On this basis, the Tribunal rejected the Respondent's argument that the damage would in any case have been incurred as a result of the negative economic situation. Between two competing causes, the Tribunal chose the one (measures at issue) that it considered "proximate".
- The Tribunal deducted the amount of damages incurred during the **period of necessity** from the overall amount of compensation. This does not appear to be in full consistency with Article 27 of the Draft Articles on State Responsibility, although the issue is debatable. The Tribunal relied on its interpretation of Article XI of the BIT to come to this conclusion.
- The Tribunal refused to order **judicial restitution** (annulment of measures at issue and the re-establishment of the tariff system) on the basis that it would be an "undue interference with [Argentina's] sovereignty".
- The "dividends" approach reveals its disadvantages when one has to consider **future losses**. The Tribunal declined to award future lost dividends due to the uncertainty as to how the company would perform in the future (it would have had to assume that the dividends would remain at the current low level, and if this assumption proved wrong, the Claimants would be over-compensated). The "change in value" approach (coupled with transferring shares to the State at residual value) would obviate this problem.
- The Tribunal suggested that **lost future profits** can only be awarded when the source of profit is lost completely and irretrievably.
- The Tribunal's approach of fixing a **cut-off date**, up to which damages were calculated, two years before the date of the Award, does not appear to be justified. The rationale for this (Respondent has to have an opportunity to comment on evidence) seems to be stretched because the Respondent had ample opportunity to comment on the Tribunal's in-principle approach to the determination of compensation, the rest was a more or less automatic exercise based on historical dividend pay outs and actual business growth figures. There were no speculative variables that could be a ground for a serious argument. The figures could be verified by the Tribunal's independent expert.
- The Tribunal said that the Claimants were entitled to bring future actions against Argentina should they continue incurring damages as a result of Argentina's **continuous breach**.
- The Tribunal did not analyze **intra-corporate relationship** between the three Claimants and awarded a single amount of compensation to all three together.

- It appears that **interest** was calculated on the *full* amount of compensation starting from 18 August 2000 (the date of the first measure). This seems incorrect because, but for the breach, the money would be received by the Claimants periodically, once a year, rather than at once on 18 August 2000.
- **Interest** during the period of the state of necessity was included in the award despite the fact that the Tribunal held that Argentina should be absolved from liability during this period. This appears to be inconsistent with the Tribunal's approach of absolving Argentina from liability during this period.