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Case summary

Enron Corporation and Ponderosa Assets, L.P.
v
The Argentine Republic

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

Arbitrators	Timeline of the dispute
Professor Francisco Orrego-Vicuña, President Professor Albert Jan van den Berg Mr Pierre-Yves Tschanz	26 Feb 2001 – original request for arbitration 25 March 2003 – new request for arbitration 1 November 2001 – arbitral tribunal constituted 14 January 2004 – decision on jurisdiction (original claim) 2 August 2004 – decision on jurisdiction (ancillary claim) 22 May 2007 – arbitral award

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I. Executive Summary

The dispute concerns the claims of two US investors with indirect equity participation in TGS, an Argentinean gas transportation company created during the Argentine privatization in the early 1990s. At that time, as part of incentives to attract foreign investment, Argentina established a regulatory framework that included the right to calculate tariffs for gas transportation in US dollars (with billing in pesos at the prevailing rate of exchange), as well semi-annual adjustment of tariffs by reference to the US PPI (Producer Price Index). These and other guarantees were enshrined in various legislative enactments as well as in the TGS' License signed by both TGS and the Government.

In 2000, in view of public pressure and the impending economic crisis, tariffs were at first temporarily frozen and then *de facto* permanently suspended. Further, in January 2002, Argentina enacted the "Emergency Law", which eliminated the calculation of tariffs in US dollars, converting tariffs to pesos at the rate of one dollar to one peso ("pesification"), and abolished PPI adjustments. Devaluation of peso followed, greatly diminishing TGS' earnings and accordingly the value of the company.

Enron Corporation and Ponderosa Assets, L.P. initiated ICSID arbitral proceedings claiming multiple violations of the 1991 Argentina-US BIT and requesting damages. The Tribunal found that the dismantling of the regulatory framework, on which the Claimants had legitimately relied at the time of making the investment, constituted a violation of the BIT fair and equitable treatment obligation. The Tribunal also found the breach of the BIT "umbrella clause" but rejected the claim of expropriation and other claims, as well as Argentina's pleas of emergency and necessity.

When dealing with compensation, the Tribunal followed the PCIJ *Chorzów Factory* dictum and the *SD Myers* approach that "compensation should undo the material harm inflicted by a breach". As a primary measure of compensation, the Tribunal took the difference between the "fair market value" of investment (Claimants' shareholding in TGS) at the time preceding "pesification" (31 December 2001) and its current value. It also awarded an additional amount for the suspension of tariff adjustments in 2000-2001.

To establish the pre-breach value of TGS as a "going concern", and of the Claimants' shareholding in TGS, the Tribunal – assisted by an independent expert – relied on the DCF method, making certain adjustments to reflect the reality of the economic crisis. The current value was determined on the basis of the price obtained by Claimants, when they sold their shareholding in TGS in 2006. Both results were corrected to reflect only the regulated (tariff-based) part of the TGS' business and verified by the TGS' stock market values (TGS' shares were publicly traded). The Tribunal awarded an aggregate amount of damages of US$106.2 million and interest from 1 January 2002 to the date of the Award at the LIBOR+2% rate, compounded semi-annually.

II. Factual Background and Claims of the Investor

The Claimants, two US companies Enron Corporation and Ponderosa Assets L.P.,[1] held an indirect equity interest in TGS, an Argentinean gas transportation company. TGS was created in early 1990s during privatization in Argentina and was granted a gas transportation License (signed both by the Government and by TGS) for 35 years, till 2027. The legislative framework introduced by Argentina for gas transportation included features designed to attract foreign investment: calculation of tariffs in US dollars converted into pesos for billing purposes at the prevailing exchange rate (as part of the broader economic policy, Argentine peso was fixed at par with the US dollar); semiannual adjustment of tariffs according to changes in the US Producer Price Index ("PPI"); the commitment that there would be no price freeze applicable to the tariff system, and some further guarantees.

Claimants' held their share in TGS through a local Compañía de Inversiones de Energía S.A. ("CIESA"). The size of the Claimants' shareholding evolved between 1992 and 1999, reaching an alleged 35.5% in 1999. The Respondent maintained, however, that Enron held only 19.5% interest in TGS. The divergence was due to the fact that part of Enron's contribution to CIESA was in the form of guaranteeing a loan taken by CIESA. This became an important issue in the discussion on damages.

In late 1999, in view of the public opposition and impending economic crisis, agreements were signed between the industry and the Government postponing the PPI adjustment of tariffs through 30 June 2002. These agreements were approved by Decree 669/00, which also provided for the subsequent compensation of the deferred increase with interest. However, on 18 August 2000, a judicial injunction was granted upon 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.

Subsequently, to manage the expanding economic crisis, Argentina enacted on 2 January 2002 the "Emergency Law" which eliminated the right to calculate tariffs in US dollars, converting tariffs to pesos at the fixed rate of exchange of one dollar to one peso ("pesification"). The Law also definitely abolished PPI adjustments. Devaluation of peso followed, greatly diminishing TGS' real earnings and the value of the company.

The Claimants initiated ICSID arbitral proceedings under the 1991 Argentina-US BIT, arguing that the abolition of the PPI adjustments and "pesification" amounted to expropriation of their investment and constituted other violations of the BIT (fair and equitable standard, full protection and security, arbitrary and discriminatory measures, "umbrella clause").[2] The Claimants maintained that the unavailability of PPI adjustments in 2000-2001 led to a loss of revenue in the amount of US$15.8 million

[1] Enron owned and controlled Ponderosa Assets. Presumably for this reason, the Tribunal did not distinguish between the two Claimants, treating them as a single entity.

[2] Note that the arbitration had been originally initiated by the claimants in 2001, with respect to a certain tax measure ("Stamp Tax Claim"). The claims considered in this award were submitted in 2003 as ancillary to the original claim, but after the original Stamp Tax Claim was discontinued (pursuant to the parties' agreement), the ancillary claim remained the only one to be heard.

and that the Emergency Law entailed a decrease in value of the regulated business of TGS[3] of more than US$1 billion.

In 2005, the Claimants transferred their indirect equity interest in TGS to Petrobras and obtained, instead, 19.5% direct interest in TGS. In January 2006, the Claimants sold 15.2% of their holdings to an investment fund D.E. Shaw (with an option to buy the remaining 4.3%) and thus effectively withdrew from TGS.

III Findings on Merits[4]

A. Applicable law

In accordance with Article 42(1) of the ICSID Convention, in the absence of parties' agreement regarding applicable law, the Tribunal held that both Argentine law and international law including the Argentina-US BIT "have a complementary role to perform" and that it will apply both national and international law "to the extent pertinent and relevant to the decision of the various claims submitted". The Tribunal noted that in case of conflict between a treaty rule and a rule of domestic law, the former will prevail, but found no inconsistency between Argentine law and international law "as far as the basic principles governing the [issues in this case] are concerned." (paras.206-209)

B. Treaty Violations Found

Before proceeding to the claims under the BIT, the Tribunal held that the Respondent is liable under Argentine law as one of the laws applicable to the dispute, because it failed to observe its commitments under the License, with no excuse to justify the non-compliance. Importantly, the Tribunal also noted that while the Argentinean economic crisis did not "amount to a legal excuse", "just as it is not reasonable for the licensees to bear the entire burden of such changed reality neither would it be reasonable for them to believe that nothing happened in Argentina since the License was approved." (paras.231-232)

1. Fair and Equitable Treatment (FET)

Having discussed the relationship between the treaty FET standard and the customary international law minimum standard, the Tribunal concluded that the former can require treatment beyond that of the latter. The Tribunal further held that the "stable framework for the investment" was a key element of the FET standard, and that the latter protected investor's expectations derived from the conditions offered by the State, and relied upon by the investor, when deciding to invest.

[3] The other, unregulated, part of the company's business involved production of liquefied natural gas.

[4] Before proceeding to the merits, the Tribunal issued two decisions on jurisdiction – one on the original Stamp Tax Claim (14 January 2004) discontinued later by the parties' agreement; and the second on the ancillary claim (2 August 2004) at issue in the present dispute. In both decisions the Tribunal affirmed its jurisdiction over the dispute.

The Tribunal found that the measures at issue had undoubtedly changed the legal and the business framework which existed at the time when investments had been made and on which the Claimants had reasonable grounds to rely. Thus the Tribunal concluded that there was an objective breach of the FET standard under the BIT regardless of whether the Respondent had acted in good faith. (paras.251-268)

2. 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 found that ordinary meaning of the phrase "any obligation" included both contractual obligations and statutory obligations undertaken "with regard to investments". The Tribunal held that the Respondent – by breaching its obligations under the contract (License) and its statutory obligations in respect of the investment – violated the BIT umbrella clause. (paras.269-277)

C. Rejected Claims

1. Expropriation

The Tribunal found no expropriation, whether direct or indirect, in this case. The Tribunal stated that there could be no direct form of expropriation if at least some essential component of property rights had not been transferred to a different beneficiary, in particular the State. With regard to the question of indirect or creeping expropriation, the Tribunal accepted that indirect or creeping expropriation could arise from many kinds of measures and they had to be assessed in their cumulative effects. Based on the evidence in the present case, however, the Tribunal was not convinced that indirect expropriation had occurred. (paras.234-250)

2. Arbitrariness and Discrimination

The Tribunal found no arbitrariness and discrimination in the present case. According to the Tribunal, a finding of *arbitrariness* required a manifest impropriety not visible in the actions of Argentina which, although far from desirable, were nonetheless not entirely surprising in the context in which it took place. The Tribunal arrived at a similar conclusion in respect of *discrimination*. The Tribunal did not find any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors, and acknowledged that it was not inconceivable to have different solutions for different sectors of the economy without being discriminatory. (paras.278-283)

3. Full Protection and Security

The Tribunal found that no failure to give full protection and security to officials, employees or installations had been alleged by the Claimant. Further, the argument made in general about a possible lack of protection and security in the broader ambit of the legal and political system had not been in any way substantiated or even adequately developed for the purposes of this case. The Tribunal accordingly rejected this claim. (paras.284-287)

D. Respondent's Plea of Emergency and Necessity

Argentina pleaded exemption from liability on the grounds of national emergency or state of necessity under (1) domestic law; (2) customary international law, and (3) the BIT, all based on the severity of its economic crisis in the early 2000s. Upon examination of the arguments in light of the rules invoked by Argentina, the Tribunal held that necessary conditions and requirements contained in those rules were not fully met by Argentinean measures and, therefore, declined the emergency and necessity defence. (paras.288-342)

IV. Findings on Damages

A. Law Applicable to the Determination of Damages

As mentioned above, in accordance with Article 42(1) of the ICSID Convention, the Tribunal applied both Argentine law and international law, with international law having prevalence over national law. With respect to the damages part of the Award, the Tribunal relied solely on international law.

B. Claims of the Investor

The Claimants asked for relief under three heads:

1) Full market value of the expropriated investment[5] (calculated alternatively on 31 August 2000 and 31 December 2001) and full compensation for other treaty breaches;
2) Management fees due under the Technical Assistance Agreement (TAA) between EPCA (wholly owned subsidiary of Enron) and TGS;
3) Compensation for the loss in revenue suffered due to the unavailability of US PPI adjustments for 2000-2001.

The Tribunal eventually allowed the first and the third claim rejecting the second one. Most of its attention was focused on the first claim.

[5] The parties submitted their arguments on damages without knowing the Tribunal's decision on the merits, and the Claimants proceeded on the assumption that a finding of expropriation would be made.

C. Approach to Compensation

The Tribunal held that in the absence of BIT provisions that would specify the damages to which the investor is entitled in case of breach of the FET standard or of the umbrella clause, the "appropriate standard of reparation under international law is compensation for the losses suffered by the affected party", as established by the PCIJ in the *Chorzów* case.[6] (para 359) The Tribunal noted that this has been confirmed by other tribunals dealing with compensation for FET breaches[7] and cited *Myers* to reaffirm the discretion to determine a specific measure of compensation within the general guiding principle that "*compensation should undo the material harm inflicted by a breach of an international obligation*". (para.360)

The Tribunal held that in the present case the appropriate approach was to compensate for the difference in the "fair market value" of investment resulting from the BIT breaches.[8] Mindful that this standard applied in cases of expropriation, it observed that "the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line" and also noted the "cumulative nature of the breaches" in the present case. (paras.361-363)

D. General Objections of the Respondent

Before proceeding to valuation, the Tribunal addressed, and dismissed, the following general objections of the Respondent:

1. Historical returns on investment

The Respondent argued against compensation because "the historical return that the Claimants obtained on the investment was allegedly significantly higher than that considered in the determination of tariffs in connection with the cost of capital." The Tribunal rejected this argument stating that historical return on investment was irrelevant for determining damages because the claims referred to the impact of the measures on the value of the business, which excluded consideration of past performance or returns. (para.369)

2. Leverage policy

[6] "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re establish the situation which would, in all probability, have existed if that act had not been committed".

[7] With reference to *Myers v Canada*, *Metalclad v Mexico* and *MTD v Chile*.

[8] The Tribunal defined "fair market value" as "the price at which property would change hands between a hypothetical willing and able buyer and an hypothetical willing and able seller, absent compulsion to buy or sell, and having the parties reasonable knowledge of the facts, all of it in an open and unrestricted market." (para.361)

Argentina maintained that TGS' aggressive leverage policy (by 2001, 50% of the company's assets had been financed with debt) had increased its vulnerability to changing economic conditions and had a negative impact on the equity value, which would otherwise be higher, arguing that the Government could not be held liable for that. (paras.84, 158, 371) The Tribunal dismissed that argument observing that TGS' leverage was reasonable by industry standards and close to that advised by the regulator. The Tribunal further noted that the stock market did not consider such leverage as endangering the company prior to the measures, and that it was only after the pesification of tariffs that the stock exchange price decreased dramatically. The Tribunal thus concluded that the decrease in value was due to the measures and not to the leverage. (paras.373-375)

3. Country risk

The Respondent contended that the tariffs included a premium for the risk of devaluation, tariff freeze and pesification as part of the "country risk" and maintained that the Claimants could not "pretend to charge higher tariffs for a risk, and later, if the risk materialized, argue that such risk should not be born by them". (para.120) The Tribunal dismissed this argument in its findings on liability, holding that country risk or default risk was "related exclusively to the risk of default of a given country on its foreign debt" and was independent from the currency devaluation risk. (para.149) At the damages stage, the Tribunal reaffirmed these findings stating that the "country risk" did not include the risk of freeze and pesification of tariffs, and that therefore the Claimants have to be compensated for the effect of these measures. (para.378)

E. Valuation

1. Valuation methods applied

To implement its approach to measuring the damages, the Tribunal proceeded to compare the fair market value of the Claimant's investment before the measures were adopted and its present value. (paras.379-380) The Tribunal had a menu of valuation methods available to it. It did not accept the use of book value, unjust enrichment and stock market value methods for estimating the market value of TGS as a going concern. According to the Tribunal, the book value method failed to take into consideration the expected performance of the company in the future. The unjust enrichment method did not to provide the value of the company but, instead, looked at the extent of unfair enrichment to the government which would then be based on price paid for the licence or wealth transferred to the entity benefiting from such enrichment. With regard to the stock value method, the Tribunal stated that as a result of illiquidity in the stock market and the limited volume of transactions, market capitalization might provide a distorted valuation of TGS, although it was willing to rely on it for verification purposes. (paras.381-383)

The Tribunal held that in view of the fact that TGS was a "going concern", its fair market value should include the measure of future prospects[9] and thus found the Discounted Cash Flow (DCF) method to be appropriate, noting that DCF is a "sound tool used internationally to value companies" but adding that it ought to be used "with caution as it can give rise to speculation". The Tribunal also stated that the DCF method had been "constantly used by tribunals in establishing the fair market value of assets to determine compensation of breaches of international law"[10] (paras.384-385)

With regard to the *current* value of the investment, the Tribunal decided that it would rely on the price of the sale of shares in 2006 to D.E. Shaw as "real", "certain" and better reflecting the current market value of the company than the DCF method, suggested by the Claimants. (paras.387-388)

In sum, the Tribunal applied DCF to estimate the value of TGS and of Claimants' investment (*i.e.*, their equity participation in TGS) before pesification took place and used the 2006 sale transaction with D.E. Shaw to estimate the current value of TGS and of Claimants' investment. Both results were contrasted with the stock market value. The Tribunal established the difference between these two values to calculate the damages suffered by the Claimants as shareholders of TGS. (para.389) In performing valuation, the Tribunal was assisted by its own independent expert. (paras.38, 364)

2. Size of the Claimants' shareholding

Part of Claimants' indirect shareholding (35.5%) in TGS was financed through guaranteeing CIESA's loan. In 2005, Enron made a swap transaction as a result of which it was released from its obligations as a guarantor of CIESA's debt and retained only 19.5% direct shareholding. Given this, to attain the net value of the Claimants' stake in TGS in December 2001, the Tribunal used the 35.5% figure as an initial point of valuation but deducted from it the Enron's share in CIESA's liabilities, for which it no longer had any responsibility. This net figure was then compared with the net present value of the sale to D.E Shaw. (paras.391-401)

3. The question of the regulated and the non-regulated business

TGS has two businesses: regulated (gas transportation) and non-regulated (production of liquefied natural gas). The Respondent argued that valuation should reflect the value of equity in TGS as a whole, including all of its business (the non-regulated business had benefited from the devaluation of peso and its revenue had increased). Recognizing the in-principle validity of the Respondent' approach, the Tribunal rejected its argument in this case reasoning that (1) the claims concerned the consequences of the government measures targeted only at the regulated sector of activity; (2) Argentine legislation clearly instructed TGS to keep the accounts of the two sectors completely separate from each other and that (3) the "success of the non-regulated business should not subsidize the losses of the regulated business." Thus,

[9] With reference to *Amco v Indonesia* (Resubmitted case), *LETCO v Liberia*, *Metalclad v Mexico*, *Starett Housing Corp. v Iran* and *Phillips Petroleum v Iran*.
[10] With reference to *Amco v Indonesia* (Resubmitted case), *LETCO v Liberia* and *CMS v Argentina*.

the Tribunal focused only on the regulated business of TGS for valuation purposes. (paras.173-181, 402)

4. DCF value of the investment before pesification

The Tribunal chose 31 December 2001 (date preceding the introduction of the Emergency Law) as an appropriate **valuation date** referring to the fact that pesification of tariffs had a "higher incidence on the difference in value" and thus caused the "most serious damage" to the Claimants.

The Tribunal started off on the assumption that the Claimants' expert's valuation was correct but adjusted a number of variables used in the DCF analysis, in particular the tariff base, the Weighted Average Cost of Capital (WACC) and the period of tariff adjustment.[11] Importantly, the Tribunal used these corrections as a tool to "reflect the reality of the [Argentine economic] crisis and the specific influence it has in connection with valuation and compensation" as compared to a "normal business scenario". (para.407)

The Tribunal determined that the total net value of the Claimants' participation in the regulated business[12] after the deduction of their share in CIESA's debt amounted to US$129 million. The Tribunal verified this result by looking at the TGS' stock exchange valuation ("only as a reference value and not as valuation tool in itself") in the period September-November 2001. The Tribunal was satisfied that "the figures resulting from DCF do not show unreasonable differences with those resulting from the verification done in light of the stock market value". (paras.424-427)

5. Current value of the investment

The Tribunal calculated the current value of the investment based on the sale price to D.E. Shaw on 18 January 2006, taking into account only the value attributable to the regulated business. On this basis, the total current value of the 19.5% shareholding in TGS was calculated at US$148.5 million. By January 2006, the share of the regulated business diminished to 42% (share in total operational earnings) with the corresponding value of US$62.5 million. When expressed in 2001 currency, the value of the Claimant's participation amounted to US$38.6 million. (paras.429-436) This result was successfully verified by the stock exchange valuation. (para.437)

6. Difference in values

The difference between the value of the Claimants' participation in the regulated business of TGS before the breach (US$129 million) and the current value (expressed in 2001 currency – US$38.6 million) resulted in an amount of US$90.4 million in respect of the pesification of tariffs. (para.438)

[11] The findings on these issues are quite fact-specific; they can be found at paras.408-415.

[12] The share of the regulated business (88%) was determined by reference to its share in the total operational income of the company. (para.419)

F. Additional Claims

1. Operator damages

The Claimants requested damages relating to the Technical Assistance Agreement (TAA) between TGS and the EPCA (an indirectly wholly owned subsidiary of Enron), under which EPCA received an annual compensation for its role as "Technical Operator" of TGS' gas transportation system. The Claimants pointed out that the substantial reduction of TGS' revenue stream damaged the Technical Operator. The Tribunal considered that the Claimants had not proven that "the fees under the TAA are a form of delayed compensation and therefore should be included in computations of profitability or damages". It was also noted that the TAA was transferred to Petrobras for an undisclosed amount. For these reasons, the claim was rejected. (paras.440-444)

2. Tariff adjustment (PPI) damages

The Tribunal found earlier that the freeze of US PPI tariff adjustments was in violation of the treaty. While the post-2001 negative effects of the freeze were included in the calculation of damages arising from pesification (the valuation date was 31 December 2001), separate compensation was due for 2000 and 2001. On this account, the Tribunal awarded US$15.8 million (as claimed by the Claimants and in the absence of an alternative calculation from the Respondent). (paras.445-448)

G. Overall Amount of Compensation

Summing up the post-2001 damage (for pesification and freeze of tariffs) of US$90.4 million with the damage for the 2000-01 freeze of tariffs (US$15.8 million) to arrive at an aggregate amount of damages of US$106.2 million. (paras.449-450)

H. Interest

In contrast to the Claimants proposition to update the amount of damages to the date of award by using WACC *and* to award interest, the Tribunal stated that "once the amount of damage and compensation has been determined at a given date it is more appropriate that the amount should bear interest as from such date. Moreover, any risk of double recovery is thereby avoided." The Tribunal therefore ordered the payment of interest at the 6 month average LIBOR rate plus 2 per cent for each year, or proportion thereof, for the period beginning on 1 January 2002 and, as requested by the Claimants, until the date of dispatch of the Award. Interest was to be compounded semi-annually. (paras.451-452)

I. Costs

The Tribunal held that each party shall bear its own legal costs and that the arbitration costs shall be borne by the parties in equal shares.

V. Implications / Initial Analysis

- In the case of Treaty not specifying the damages to which the investor is entitled in case of breach of non-expropriation standards, the appropriate **standard of reparation** under (customary) international law is the one established by the PCIJ in the *Chorzów Factory* case. The basic principle is to fully compensate for the loss, or to "undo the material harm caused by the breach", and it is within the tribunal's discretion to determine the best way to reach this objective.
- The Tribunal gave a narrow interpretation of the "**country risk**" as relating exclusively to the risk of default of a given country on its foreign debt. It declined to accept that the adverse effect of the measures at issue is part of the country risk and that it had been compensated for through high returns on investment.
- A party who makes an argument that the loss has been caused, or aggravated, by a **cause** not relating to the breach, or by the **contributory fault** of the claimant (in this case, aggressive leverage policy of the investor, as alleged by the Respondent) has the burden of proving relevant facts.
- Another case where the "**fair market value**" approach, normally applicable in the case of expropriation, has been applied in a non-expropriation case. The Tribunal justified its adoption of this approach by the fact that indirect expropriation the breach of fair and equitable standard can lead to similar consequences, as well as by the cumulative nature breaches.
- The Tribunal calculated the damages as the **difference between the fair market value** of the investment before the breach and its present fair market value.
- Valuation techniques allow establishing the **value of discrete segments of a business** of a particular enterprise (in this case, the value of the regulated business only, leaving aside the non-regulated business). When doing that, the Tribunal refused to take into account the positive effect that the measures had on the other (non-regulated) part of the business. This finding appears controversial given that the task of the tribunal is to determine the *loss* of an investor, and this loss would be smaller if account be taken of the growth of the other part of its business attributable to the measures at issue. Thus, the overall effect of the measures on the business (and the investment) was not considered.
- The Tribunal rejected the **book value** method for calculation of fair market value as failing to incorporate the expected performance of the firm in future.
- The Tribunal also disapproved **unjust enrichment** approach as it did not provide a value of the company.
- With regard the **stock value method** the Tribunal found that when markets are illiquid or the volume of transactions is limited, market capitalization might provide distorted valuation indications. However, it was still possible to rely

on this approach if longer periods of time were taken into consideration, so as to determine relevant averages. Verification showing the absence of “unreasonable differences” between the results arrived at through different valuation methods reinforces the strength of the findings on value.

- In respect of going concerns as in the present case, the Tribunal believed that fair market value of such a going concern should include the measure of its future profits, which is reflected by **DCF method**. DCF method reflects the company’s capacity to generate positive returns in the future; it is an appropriate method to value a going concern. The Tribunal noted that the value of market capitalization was a relevant element to verify the outcome of the DCF method so as to establish whether the variables used in the latter reflect reasonable assumptions. The use of market capitalization is intended only as a reference value and not as valuation tool in itself.
- The Tribunal chose a **valuation date** before the breach which inflicted “most serious damage” on the claimants. However, the additional damage caused by earlier measures was compensated separately.
- It is at the compensation stage that the Tribunal sought to distribute the burden of the **Argentinean economic crisis** between the Claimants and the State in a balanced manner refusing to put it on any one party. To come to a DCF value that is lower compared to the normal business scenario, the Tribunal adjusted the assumptions and variables the DCF analysis.
- When performing the DCF analysis, the Tribunal did not indicate the **length of projections** and whether it used the terminal value or not. Presumably, the projections could not go beyond 2027 because this was the time-limit for TGS’ License.