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**Case summary**

**Siemens A.G. v The Argentine Republic**

**Year of the award:** 2007

**Forum:** ICSID

**Applicable investment treaty:** Argentina – Germany BIT (1991)

<b>Arbitrators</b>	<b>Timeline of the dispute</b>
Dr Andrés Rigo Sureda, President Judge Charles N. Brower Professor Domingo Bello Janeiro	23 May 2002– request for arbitration 19 December 2002 – arbitral tribunal constituted 3 August 2004 – decision on jurisdiction 6 February 2007 – arbitral award

**Table of contents**

<a href="#">I. Executive Summary.....</a>	<a href="#">2</a>
<a href="#">II. Factual Background and Claims of the Investor.....</a>	<a href="#">3</a>
<a href="#">A. Factual Background.....</a>	<a href="#">3</a>
<a href="#">B. Claims of the Investor.....</a>	<a href="#">4</a>
<a href="#">III. Findings on Merits.....</a>	<a href="#">4</a>
<a href="#">A. Applicable law.....</a>	<a href="#">4</a>
<a href="#">B. Expropriation.....</a>	<a href="#">4</a>
<a href="#">C. Fair and Equitable Treatment &amp; Full Protection and Legal Security.....</a>	<a href="#">5</a>
<a href="#">D. Arbitrary Measures.....</a>	<a href="#">6</a>
<a href="#">E. Umbrella Clause &amp; Discriminatory Measures – Not Decided.....</a>	<a href="#">6</a>
<a href="#">IV. Findings on Damages.....</a>	<a href="#">6</a>
<a href="#">A. Law Applicable to the Determination of Damages.....</a>	<a href="#">6</a>
<a href="#">B. Standard of Compensation.....</a>	<a href="#">6</a>
<a href="#">C. Date for Establishing the Value.....</a>	<a href="#">7</a>
<a href="#">D. Method of valuation.....</a>	<a href="#">8</a>
<a href="#">E. Heads of Damages .....</a>	<a href="#">8</a>
<a href="#">1. Book Value.....</a>	<a href="#">9</a>
<a href="#">2. Loss of Profits.....</a>	<a href="#">9</a>
<a href="#">3. Post-Expropriation Costs .....</a>	<a href="#">10</a>
<a href="#">4. Evidence.....</a>	<a href="#">11</a>
<a href="#">F. Interest.....</a>	<a href="#">11</a>
<a href="#">G. Costs.....</a>	<a href="#">12</a>
<a href="#">H. Currency of Compensation.....</a>	<a href="#">12</a>
<a href="#">I. Taxation.....</a>	<a href="#">13</a>
<a href="#">V. Implications/Initial Analysis.....</a>	<a href="#">13</a>

## **I. Executive Summary**

In 1996, Argentina called for bids for the provision of services related to immigration control, personal identification and electoral information technology systems. Siemens A.G., a German corporation, won the tender through its Argentinean subsidiary SITS. In 1998, SITS and Argentina entered into a Contract for the provision of these services for a six-year term that was renewable for two further three-year terms (investment). Under the terms of the Contract, a US\$ 20 million performance bond was paid to Argentina to guarantee the performance of SITS' obligations under the Contract.

In 1999, immediately prior to an election in Argentina, the provision of certain services under the contract was suspended at Argentina's request. Furthermore, as a result of the new Argentinean Government's actions, other services were suspended in 2000. Also in 2000, the new Argentinean Government sought to renegotiate the contract. Agreement was seemingly reached during the renegotiation process, but notwithstanding Siemens' efforts, nothing was ever formalised. In late 2000, the Argentine Congress approved a law which empowered the President to renegotiate public sector contracts. A new draft proposal was issued to Siemens in 2001 that was inconsistent with what was seemingly agreed in 2000. Siemens was informed that the "proposal" was non-negotiable. In May 2001, the Contract was terminated by decree because Siemens did not agree to that new proposal.

In 2002, Siemens initiated ICSID arbitral proceedings under the Argentina-Germany BIT. It claimed that Argentina's actions amounted to a breach of the umbrella clause, an expropriation of its investment, a violation of its obligations to accord fair and equitable treatment and full protection and security, and were arbitrary and discriminatory. Siemens claimed US\$462,477,071 in damages plus compound interest at 6% per annum and requested the return of the performance bond.

The Tribunal found that Argentina had unlawfully expropriated Siemens' investment, had failed to afford fair and equitable treatment and full protection and security, and had taken arbitrary measures in respect of the investment. The Tribunal applied customary international law to award compensation because the expropriation was held to be unlawful. It approached the determination of compensation on the basis of the investment's book value (as suggested by Siemens), which was calculated as a sum of funds invested by Siemens and evidenced by SITS' financial statements. The Tribunal rejected the claim for loss of profits but awarded compensation for post-expropriation costs and required Argentina to pay for services rendered but unpaid (US\$217,838,439 in total). The Tribunal further required Argentina to indemnify Siemens for any future claims by subcontractors against Siemens in relation to the Contract, and ordered Argentina to return the performance bond. The Tribunal awarded annually compounded interest at the average interest rate applicable to US six-month certificates of deposit (2.66% at the relevant times).

## **II. Factual Background and Claims of the Investor**

### ***A. Factual Background***

In 1996 Argentina called for bids for the provision of services related to immigration control, personal identification and electoral information technology systems. The Claimant, Siemens A.G. (“Siemens”), a German corporation, established SITS (a domestic Argentine company fully owned by Siemens) for the purposes of bidding for the provision of these services. SITS’ bid proved successful and in October 1998, SITS and Argentina entered into a contract for the provision of mentioned services (“Contract”). The Contract was for a six-year term that was automatically renewable for two three-year terms. Payment under the Contract was comprised of the price of each national identity card (“DNI”) that was produced by SITS, the fee for immigration proceedings passed through the system, and the price for printing voting rolls. Prices under the Contract were denominated in Argentine pesos. Under the terms of the Contract, a US \$20 million performance bond was paid to Argentina to guarantee the performance of SITS’ obligations under the Contract (“Performance Bond”).

Production of DNIs was scheduled to commence in August 1999. This required the Argentine Government to reach agreement with the Provinces and City of Buenos Aires. However, in August 1999 the Argentine Government requested that the production of DNIs be postponed because of extremely high demand for DNIs in the period before the elections that had been scheduled for October 1999. DNI production was postponed for several months. New Argentine authorities took office on 10 December 1999.

On 1 February 2000, the immigration control sub-system commenced operation. However, its operation was suspended on the next day on the grounds that certain governmental authorization was required. Such suspension continued indefinitely. Furthermore, on 24 February 2000, Argentina suspended the production of DNIs on the basis that some DNIs issued to foreigners had incorrectly printed fingerprints. Argentina did not permit SITS to remedy this defect.

In January 2000, the new Government indicated that it would seek to renegotiate the Contract. In March 2000 a special commission was established to review the Contract (“Commission”). During the review process, Siemens made several proposals. Agreement was reached with the Commission on a proposal in November 2000; the negotiated proposal was sent to the Argentine Government, and the Government sent back a “Contract Restatement Proposal” identical in terms to the negotiated proposal, thus seemingly indicating that the parties were in agreement.

Also in November 2000, the Argentine Congress approved the Economic-Financial Emergency Law which empowered the President to renegotiate public sector contracts. The Government proposed to include the Contract under the provisions of the 2000 Emergency Law and Siemens did not object to this because, according to Siemens, it may have helped to speed up the approval process. On 19 December

2000, Siemens met with the President of Argentina who allegedly promised to issue a decree approving the Contract Restatement Proposal by 31 December 2000. The decree was not issued and on 3 May 2001, SITS received a new draft proposal from the Government that differed substantially from the Contract Restatement Proposal. On 8 May 2001, Siemens commented on the new terms. The Government responded by stating that the terms in the new proposal were not negotiable. On 18 May 2001, the Contract was terminated by Decree 669/01 (“Decree”). SITS filed an administrative appeal against this decree, which was rejected.

## **B. Claims of the Investor**

Siemens initiated ICSID arbitral proceedings under the *Treaty on the Mutual Protection and Promotion of Investments* between the Federal Republic of Germany and the Argentine Republic, dated 9 July 1991 (“Treaty”). It claimed that Argentina’s actions amounted to a breach of the umbrella clause, an expropriation of its investment, a violation of Argentina’s obligations to afford fair and equitable treatment and full protection and security, and were arbitrary and discriminatory.

Siemens claimed a total of US \$462,477,071 in damages (the basis for the calculation of damages being the fair market value of investment, plus lost profits, plus additional damage suffered due to the expropriation, including post-expropriation costs), and requested that the Tribunal award 6% compound interest. Siemens also requested to indemnify it in respect of any future claims that may be made by the subcontractors in relation to the Contract and requested the return of the Performance Bond.

## **III. Findings on Merits<sup>1</sup>**

### **A. Applicable law**

The Tribunal held that its inquiry regarding breaches of the Treaty was governed by “*the [ICSID] Convention, by the treaty and by applicable international law*” (para.78).

### **B. Expropriation**

The Tribunal first noted that, in order for a State to incur international responsibility, it must have used its public authority (i.e. its actions must be based on its “superior governmental power”) rather than be purely contractual in character (para.252). In this regard, the Tribunal concluded that Argentina had acted in exercise of its police powers rather than as a contracting party (para.260). Accordingly, it found that Argentina’s behavior could be considered a breach of the Treaty rather than simply a breach of contract.

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<sup>1</sup> Prior to this award on merits, the Tribunal issued a decision on jurisdiction of 3 August 2004 which is not covered in this summary.

The Tribunal found that the Contract fell under the Treaty definition of “investments” and could therefore be expropriated (para.267).

Notwithstanding the fact that Siemens alleged that a “creeping expropriation” had occurred, the Tribunal concluded that of all the relevant measures taken by Argentina in the exercise of its public authority, the Decree which terminated the Contract was “*by itself and independently... an expropriatory act*” (para.271). In this regard, it noted that the Decree was not based on the Contract, was a permanent measure, and its effect was to terminate the Contract (para.272). The Tribunal further said that the governmental measures prior to this point “*stand as part of a gradual process which, with the issuance of Decree 669/01, culminated in the expropriation of Siemens’ investment*”.

The Tribunal also concluded that the expropriation was **unlawful** because there was no evidence of a public purpose in the governmental measures prior to the issuance of the Decree, and in any event, compensation had not been paid to Siemens (para.273). Siemens subsequently alleged that this issue was relevant for the purposes of the amount of compensation that should be determined as payable to it (see para.329).

### ***C. Fair and Equitable Treatment & Full Protection and Legal Security***

Article 2(1) of the Treaty provides that “*In any case [the parties to the Treaty] shall treat investments justly and fairly*” (para.291). Notwithstanding the fact that there is no reference to international law or to a minimum standard in Article 2(1), the Tribunal found that it was bound to find the meaning of these terms in international law (para.291).

Article 4(1) of the Treaty required Argentina to provide full protection and legal security. Siemens relied upon the reference to “legal” security to argue that it “*goes beyond mere physical violence and extends to the investor’s legal position*” (para.286).

The Tribunal provided the following reasons for its conclusion that Argentina had breached the full protection and legal security and fair and equitable treatment obligations in the Treaty:

- Argentina’s initiation of the renegotiation of the Contract for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens’ investment (para.308).
- Argentina had shown a lack of transparency in respect of the investment (para.308).
- Argentinean arguments that the structure of the State did not permit it to conclude agreement with its provinces, and therefore fulfill its contractual undertakings, ran “*counter to the principle of good faith underlying fair and equitable treatment*” (para.308).

## **D. Arbitrary Measures**

The Tribunal found that some of Argentina's measures were not based on reason. In particular, it noted that Argentina had never explained why the authorisation needed to start the immigration control sub-system (DNM sub-system) was not given after the system had started to operate, and as to why Argentina did not allow the error in respect of the personal identification sub-system (RNP sub-system) to be corrected. Ultimately, it stated that “[w]hile the Tribunal could accept that there may have been reasons to justify the temporary suspension of the DNM and RPN [sic] sub-systems, the Tribunal finds its permanent suspension arbitrary” (para.319).

## **E. Umbrella Clause & Discriminatory Measures – Not Decided**

As a result of its conclusions in respect of other Treaty provisions, the Tribunal found it unnecessary to determine whether Argentina had breached the non-discriminatory treatment obligation (para.320). With respect to the umbrella clause, due to the fact that the contract was between Argentina and SITS (not Argentina and Siemens), and SITS was not a party to the proceedings, the Tribunal did not consider whether Argentina had breached this Article (para.204).

# **IV. Findings on Damages<sup>2</sup>**

## **A. Law Applicable to the Determination of Damages**

In light of its finding that the expropriation was unlawful, the Tribunal stated that “[t]he law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty” (para.349). Accordingly, the Tribunal found that customary international law as reflected in the Draft Articles on State Responsibility<sup>3</sup> and the *Factory at Chorzów* case and not the Treaty should be applied for the purposes of determining the compensation payable to Siemens (para.353).

## **B. Standard of Compensation**

The Treaty required compensation for (lawful) expropriation corresponding to the “value” of the expropriated investment. Argentina interpreted the reference to “value” – as opposed to “fair market value” – to exclude future profits (para.331).

<sup>2</sup> Arbitrator Professor Domingo Bello Janeiro delivered a 2-page Separate Opinion where he disagreed with the majority on two points: he held the view that, first, an independent valuation expert should have been appointed by the Tribunal, and second, that the allocation of costs in the proceedings should have been on an equal basis.

<sup>3</sup> The Tribunal stated that the Draft Articles “are currently considered to reflect most accurately customary international law on State Responsibility” (para.350).

Argentina also argued that where it was necessary for social reasons, the fair market value test should not be used to determine the standard of compensation because this would be “*incompatible with the principle of self-determination*” and “*a serious limitation on State sovereignty*” preventing the accomplishment of social and economic reforms by poorer nations (para.346). Argentina further relied on the approach of the European Court of Human Rights to support its argument that in some circumstances, less than “full market value” would be due.<sup>4</sup>

As mentioned above, the Tribunal decided that the Treaty provision on compensation for expropriation did not apply in this case due to the unlawfulness of expropriation. However, because in the *Factory at Chorzów* case the PCIJ also operated by the term “value” (not “fair market value” or “full value”), the Tribunal interpreted this term. In this respect the Tribunal found that “*it is only logical that, if all of the consequences of the illegal act need to be wiped out, the value of the investment at the time of this Award [must] be compensated in full*” and that “*the term ‘value’ does not need further qualification to mean not less than the full value of the investment*” (para.353).

The Tribunal dismissed Argentina’s arguments regarding social reforms, State sovereignty and ECtHR practice, stating that the purpose and proportionality of State measures taken were relevant to the issue of liability and not to the issue of compensation. Finally, the Tribunal observed that the “margin of appreciation” concept found in the First Protocol to the European Convention on Human Rights is “not found in customary international law or the Treaty” (para.354).

The Tribunal thus proceeded to calculate the “full value of investment” to Siemens in terms of the sums invested in the project (para.360).

### **C. Date for Establishing the Value**

The Tribunal found that if all the consequences of the illegal act needed to be wiped out, the value of the investment **at the time of the Award** must be compensated (para.353). In this regard, it noted a “key difference” between compensation under customary international law and Article 4(2) of the Treaty stating that:

*Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of the expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages (para.352).*

*[T]he value of the investment to be compensated is the value it has now, as of the date of this Award, unless such value is lower than at the date of expropriation, in which event the earlier value would be awarded. (para.360)*

The analysis of the Award shows that the Siemens was ultimately awarded the value of its investment as at 18 May 2001, i.e. the date of the Decree (presumably, because the value of investment had not increased since) plus post-expropriation costs, and not the value of investment as at the date of the Award (see para.377).

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<sup>4</sup> With reference to *James v UK*, European Court of Human Rights, 1986.

## **D. Method of valuation**

Siemens claimed the book value of its investment (the costs it actually incurred, which were “wasted” in the effort to produce profits) plus the lost future profits calculated on the basis of the Contract prices for its services and discounted to their present value. The Tribunal called this approach “unusual” stating that

*“Usually, the **book value** method applied to a recent investment is considered an appropriate method of calculating its fair market value when there is no market for the assets expropriated. On the other hand, the **DCF method** is applied to ongoing concerns based on the historical data of their revenues and profits; otherwise, it is considered that the data is too speculative to calculate future profits. Normally the two methods are regarded as **alternative means** of valuing the same object.”* (para.355) (emphasis added)

However, the Tribunal held (without providing reasons) that in the circumstances of the present case, Siemens’ approach had merit (para.357). One reason could be that, at the end of the day, the Tribunal declined to Award any lost profits, so in effect only book value of the investment (established by calculation of the funds invested) was awarded.

## **E. Heads of Damages**

The full list of Siemens’ claims comprised:

- 1) book value of investment on the date of expropriation, calculated by reference to costs incurred before that date (US\$283,859,710) (paras.328, 355, 362);
- 2) loss of profits or *lucrum cessans* calculated as a percentage of the revenues that SITS would have received if SITS had provided the services at the prices set out in the Contract (US\$ 124,541,000) (paras.355, 378);
- 3) post-expropriation costs incurred by SITS in continuing a skeleton operation in Argentina (US\$9,178,000) (para.386);
- 4) unpaid invoices by the Government for services rendered (US\$219,899) (para.386);
- 5) damages claimed or that may be claimed by sub-contractors involved in the project (US\$44,678,462) (paras.329, 386);
- 6) the return of the Performance Bond (para.385).

Further, Siemens requested that the Tribunal award compound interest at the rate of 6% per annum and that interest be computed from 18 May 2001 for compensation on account of the expropriated investment, and from the date costs were incurred – for post-expropriation damages.



## 1. Book Value

On the basis of SITS' 2001 financial statements, Siemens' expert calculated the book value of the investment by summing up Siemens' capital contributions, the loans made to SITS and the interest that had to be paid on those loans (para 367). The Tribunal accepted this approach in principle, but deducted certain amounts on account of excessive interest rates, tax credits, and risks associated with contract termination (para.375). The Tribunal thus calculated the book value of the lost investment – on the basis of funds spent by Siemens on the investment project – to be \$208,440,540.<sup>5</sup>

### *Capitalization of Interest*

The Tribunal agreed that an amount representing the capitalization of interest to be paid by SITS on its loans ought to be included in the award. However, it stated that in the present case the financing of the project was highly leveraged (i.e. there was a high debt to equity ratio), and loans were provided to SITS at higher-than-market interest rates. The Tribunal thus reduced the amount of capitalized interest using the actual cost of funds to Siemens (rather than the *de facto* interest rate charged by Siemens to SITS) as a guide.<sup>6</sup> The Tribunal also deducted interest on loans made to SITS by parties other than Siemens and its subsidiaries. (paras.368-372)

### *Tax Credits*

The Tribunal concluded that tax credits that had been included as extraordinary losses in SITS' financial statements because of the uncertainty regarding their recoverability should not be included in SITS' book value. It also noted that the tax credits had not actually been realized because of SITS' lack of revenue (para.373).

### *Risks Related to Contract Termination*

The Tribunal concluded that provisioning in SITS' financial statements for termination of the Contract would not be allowed because the Tribunal had allowed compensation for consequential damages. It expressed the view that if provision was to be made for such risks, "double counting" would occur. (para.374)

## 2. Loss of Profits

Siemens claimed \$124,541,000 on account of loss of profits before taxes (a discounted estimate of profits calculated as a percentage of revenues that SITS would have received on the basis of contract prices) (paras.355, 378). The Tribunal

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<sup>5</sup> The resultant amount was double-checked by looking at SITS' use of funds, i.e. by determining how much funds were used for the Project. This calculation led to the result very close to the one achieved through the "book value" method (paras.376-377).

<sup>6</sup> In this regard, the Tribunal noted that "*corporations of Siemens' size and creditworthiness hedge a substantial portion of the interest rate risk inherent in their fixed rate borrowings through floating interest rate swaps*" (para.370). Accordingly, the Tribunal found that the interest rate that ought to be taken into account was the floating rate that Siemens could have achieved using "interest rate swaps" during the life of the Contract. It found this to be 2.35% (para.370).

concluded that Siemens was not entitled to any compensation for loss of profits for the following reasons:

- First, Siemens' profit calculations were based on the issuance of a certain number of DNI's. Siemens' calculations were found to be excessive and were reduced substantially (para.380).
- Second, the Tribunal deducted a 21% value added tax from the profit calculations (para.381).
- Third, as a result of the novelty and complexity of the project, delays were likely to have occurred and the profitability of the project was extremely sensitive to delay. As a result of this the Tribunal found that "*[a]n extension of the Contract to 9 or 12 years would have had devastating effects on the profit rate*" (para.383).
- Fourth, any profits would have been subject to a corporate profits tax (para.384).

The reasons provided by the Tribunal suggest that the amount of lost profits ought to have been reduced, but not completely rejected.

### **3. Post-Expropriation Costs**

As mentioned above, Siemens claimed \$9,178,000 for post-expropriation costs incurred by SITS in continuing a skeleton operation; \$219,899 for unpaid invoices by the Government; \$44,678,462 for sub-contractors' claims; and the return of the Performance Bond (para.386). The Tribunal held – in relation to these elements taken together – that "the claim on account of post-expropriation costs is justified in order to wipe out the consequences of expropriation" and made the following findings in respect of the mentioned four elements of damage:

- With respect to post-expropriation costs, Siemens' claim was justified.
- With respect to unpaid invoices, the Tribunal noted that "*such amount is not disputed and would normally be considered an asset forming part of the value of the investment*" (para.389) and decided that Siemens must be compensated for the full amount claimed.
- With respect to the sub-contractors' claims arising in relation to the Contract, the Tribunal took note of the Government's alleged measures to transfer these claims to Argentina, but decided nevertheless that Argentina must indemnify Siemens, its subsidiaries and its affiliates in respect of any claims "heretofore or hereafter asserted" against them by enumerated subcontractors. (para.387)
- With respect to the Performance Bond, as the Contract had been terminated on grounds other than performance the bond should be returned to Siemens. (para.388)

## 4. Evidence

Siemens alleged that SITS' audited financial statements, audited by KPMG, were sufficient evidence of the amounts invested by Siemens. Argentina, on the other hand, argued that the Tribunal should use an independent expert to analyze SITS' accounts in order to "*ensure that the amounts spent by SITS were spent for the purposes of carrying out the Project*" (para.359). Argentina did not adduce any evidence to question KPMG's audit. The Tribunal accepted SITS' audited financial statements as the starting point to determine SITS' value because they had been "*audited by a highly qualified firm of independent auditors, which confirmed the reliability of the accounting records*" (para.368).

The Tribunal declined to appoint an independent valuation expert.<sup>7</sup> In this regard, the Tribunal noted that Argentina had submitted no convincing evidence to show that the funds provided to SITS were not used for the intended purpose and as a consequence of this stated that it "*saw no merit in prolonging the proceedings*" (para.360).

### F. Interest

The Treaty provided that interest was to be paid at the "*usual bank rate*" (para.391). Siemens requested the Tribunal to award compound interest at the rate of 6% per annum (para.390). It also requested that interest accrue from 18 May 2001 for compensation for the value of the expropriated investment, and as from the date costs were incurred – for additional damages (para.390).

In respect of the appropriate **rate of interest**, the Tribunal found that:

*"...in determining the applicable interest rate, the guiding principle is to ensure "full reparation for the injury suffered as a result of the internationally wrongful act". The Tribunal considers that the rate of interest to be taken into account is not the rate associated with corporate borrowing but the interest rate the amount of compensation would have earned had it been paid after the expropriation. Since the awarded compensation is in dollars, the Tribunal considers that the average rate of interest applicable to US six-month certificates of deposit is an appropriate rate of interest. The average of such rate from May 18, 2001 to September 30, 2006 is 2.66%." (para.396, citations omitted)*

In respect of the starting **dates** from which interest should be awarded, the Tribunal found that:

- On the amount representing the book value of the investment, interest should accrue from the date of expropriation, namely 18 May 2001 (para.397).

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<sup>7</sup> In his Separate Opinion, Arbitrator Professor Bello Janeiro adopted the view that an independent expert in valuations should have been appointed "*in order to calculate and fully support the amount of damages to be awarded*" given that "*present case comprises complex valuation and financial issues [...] with very complicated opinions and data*".

- Compensation for post-expropriation costs should include interest from the date on which they were incurred. However, as a result of the multiple dates involved, the Tribunal chose 1 January 2002, being the date “*by which most of these costs had been incurred*” (para.397).
- In respect of interest on unpaid invoices, the Tribunal chose 1 January 2000, because the bills related to services rendered in 1999 (para.397).
- In the event that Siemens or its related companies were held liable for the claims of sub-contractors, interest would accrue from the future date of payment of any claim (para.398).
- In the event that the Performance Bond was not returned by Argentina, the Tribunal stated that interest shall accrue on the amount of the bond as from 30 days of the date of dispatch of the Award (para.398).

In respect of the issue of the **compounding of interest**, the Tribunal concluded that the relevant question was whether, “*had compensation been paid to Siemens following the expropriation, Siemens would have earned interest on interest paid on the amount of compensation*” (para.399). It determined on this basis that interest should be compounded annually (para.401).<sup>8</sup>

## **G. Costs**

Taking into account that Siemens did not fully prevail in the proceedings, the Tribunal concluded that each party must bear its own legal costs. It also found that Argentina and Siemens shall be responsible for 75% and 25% respectively of the fees and expenses of the Tribunal and the ICSID Secretariat. In his Separate Opinion, Professor Bello Janeiro expressed the view that the costs of the proceedings should be allocated equally “*in agreement with prevailing arbitration practice*”.

## **H. Currency of Compensation**

Argentina argued that the Contract was denominated in pesos and it had not guaranteed the parity of the peso at the time it entered into the Contract (para.361). However, the Tribunal concluded that compensation should be paid in dollars because at the date of expropriation (18 May 2001) the peso was at par with US dollar. Accordingly, if the obligation to compensate in full was to be met, the Tribunal stated that “*the Claimant would have been compensated in pesos convertible at that rate. Therefore the Tribunal concludes the compensation shall be paid in dollars*” (para.361).

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<sup>8</sup> With references to *Santa Elena, Metalclad, Wena Hotels*. The *Ad Hoc* Committee in *Wena Hotels* held that compound interest was compatible with the objectives of prompt, adequate and effective compensation and compensation that reflects the market value of the investment immediately before the expropriation.

## I. Taxation

The Tribunal found that all compensation paid to Siemens must be net of any taxes and costs (para.403(11)).

## V. Implications/Initial Analysis

- The Tribunal found Argentina liable for **multiple violations** of the Treaty. However, it did not award compensation for each violation separately because compensation for expropriation presumably covered all losses.
- The Tribunal applied **customary international law** to the award of compensation due to the fact that the expropriation was found to be **unlawful**. The Tribunal determined that the Treaty provision on compensation related only to compensation for lawful expropriation.
- The Tribunal dismissed Argentina's argument that if Argentina had expropriated Siemens' property for **social or economic reasons**, the "fair market value" should not apply because this would limit the sovereignty of poor countries by limiting their ability to introduce reforms.
- Application of customary international law and the requirement to wipe out all consequences of the expropriation led to compensation of Siemens' **post-expropriation costs** in addition to the value of the investment at the date of expropriation.
- The Tribunal found that the obligation to pay compensation corresponding to the "*value*" (both in the *Chorzów Factory* case and the Treaty) means not less than the **full value** of the investment. This reasoning is similar to the approach adopted in *CME v The Czech Republic* where the Tribunal equated the treaty formula of "*just compensation [representing] the genuine value of the investment affected*" with the "fair market value" standard.
- The Tribunal approached the issue of expropriation on the basis that the Contract was Siemens' investment. However, for the purposes of determining the damages payable to Siemens, it was not clear whether the Tribunal was calculating the **value** of the Contract or the value of SITS. In this respect, the Award is confusing.
- Different parts of the Award refer to the **book value** of Siemens' "investment" (i.e., as the Tribunal found earlier, the Contract, or Contract rights), the book value of Siemens' "enterprise" (i.e. SITS) (paras.352, 373), and the "book value of [Siemens'] costs actually incurred" (paras.355, 360). Despite the fact that the Tribunal used SITS' financial statements as main evidence, it could hardly be estimating the book value of SITS because it did not deduct SITS' liabilities (such as debt or interest payments),<sup>9</sup> nor did it take account of the

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<sup>9</sup> Cf., for example, *AAPL v Sri Lanka*.

depreciation of SITS' assets (at least not explicitly),<sup>10</sup> nor did it deduct the residual value of SITS (which would have been logical because Siemens continued to own SITS after the termination of the contract).<sup>11</sup> The “**book value**” was calculated by the Tribunal with reference to costs incurred by Siemens for the purpose of the investment (“sunk costs”), as recorded in SITS' books. Reliance on SITS' financial statements was probably due to the fact that Siemens channeled all funds relating to the project through SITS.

- The Tribunal remarked that Siemens' approach to compensation (i.e. the book value of investment plus *lucrum cessans* arrived at through discounting an estimate of profits) was “*admittedly unusual*” because the **book value method** is normally considered to be an appropriate method of calculating fair market value when there is no market and no basis for calculating lost profits by a forward-looking valuation method (such as DCF analysis). By contrast, the **DCF method**, which focuses on lost profits and disregards the book value of assets (because they are used to generate profits), is generally applied to ongoing concerns based on the historical data of their profits. Despite the admitted unusualness of Siemens' approach, the Tribunal considered (without explanation) that it “*has merit in the particular circumstances*”. One reason could be that, at the end of the day, the Tribunal did not award lost profits, so in effect only book value of the investment was awarded.
- In terms of **evidence**, SITS' audited **financial statements** were found to be the starting point to determine investment's value because they had “*been audited by a highly qualified firm of independent auditors [KPMG], which confirmed the reliability of the accounting records*”. This evidence was thus presumed as *prima facie* correct in the absence of any evidence to the contrary.
- In determining the book value of investment, the Tribunal reduced the amount of **capitalized interest** on loans made SITS by Siemens or its subsidiaries. The Tribunal concluded that it was appropriate to capitalize interest, but that the interest rate should reflect the actual cost of the funds to Siemens.
- The Tribunal declined to award Siemens compensation for **loss of profits**. However, the four reasons given by the Tribunal suggest that while Siemens' loss of profits may have been substantially less than the figure claimed by Siemens', they should not have been negated entirely.
- **Flow-through**: the loss of profits was claimed by Siemens on the basis of profits lost by SITS and not on the basis of the dividends that Siemens might have lost due to SITS' lost profits. The Tribunal did not comment on this approach.
- By requiring Argentina to indemnify Siemens for (future) sub-contractors' claims arising in respect of the Contract, the Tribunal effectively provided for compensation of possible **future incidental expenses/consequential losses**.

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<sup>10</sup> Cf., for example, *Amco v Indonesia*.

<sup>11</sup> Cf., for example *CME v The Czech Republic*.

- Tribunals' award of sums on **invoices unpaid** by Argentina to SITS differs markedly from *Azurix v Argentina* (despite the fact that Andrés Rigo Sureda presided over both tribunals). In *Azurix*, the claim for unpaid bills was rejected on the grounds that relevant amounts were owed to the investor's subsidiary enterprise and the latter was not a party to the dispute. In *Siemens*, unpaid invoices were *awarded* in the same circumstances.
- The Tribunal ordered the return of the **Performance Bond** which represents an element of restitution.
- When determining the **rate of interest**, the Tribunal concluded that the term "usual bank rate" (as provided for in the Treaty) referred the amount of interest the compensation would have earned had it been paid after the expropriation.
- The Tribunal found that all compensation paid to Siemens must be net of any **taxes** and costs.