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INTRODUCTORY NOTE TO DECISION OF THE AD HOC COMMITTEE ON THE APPLICATION FOR
ANNULMENT OF THE ARGENTINE REPUBLIC
BY CHIARA GIORGETTI*
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The *Ad Hoc Committee* on the Application for Annulment of the Argentina Republic (“Argentina”) delivered its decision to the Parties September 25, 2007. The Committee upholds Argentina’s application for annulment on the umbrella clause, but dismisses all other claims.

The request for annulment of the Award dated 12 May 2005 rendered by the Tribunal in the arbitration between CMS Gas Transmission Company (“CMS”) and the Republic of Argentina (“the Award”)¹ was filed with the Secretary-General of the International Center for Settlement of Investment Disputes (“ICSID”) by Argentina almost exactly two years earlier, on September 8, 2005.

In accordance with Art. 52(3) of the Arbitration Rules, the Chairman of the Administrative Council appointed the *Ad Hoc Committee* (the Committee), which was composed of Judge Gilbert Guillaume (France, President), Judge Nabil Elárby (Egypt) and Professor James R. Crawford (Australia), all renowned experts in international public law.

The 2005 Award was the first to be decided in relation to Argentina’s economic crisis of 2001-2002, and the annulment decision is likewise the first to apply the limited grounds for review afforded by Article 52(1) of the ICSID Convention to an Award on this matter.² Given that many decisions based on very similar legal issues are pending or have been recently decided, the annulment decision is particularly important. In fact, the Committee itself remarked that, because the arbitration at issue was the first of a long series relating to the Argentine crisis, it would “seek to clarify certain points of substance on which, in its view, the Tribunal made manifest errors of law.”³ Manifest errors of law are not, however, grounds for annulment of an Award, and in fact the Committee noted that “it remain[ed] to be seen, whether as a consequence [of the finding on manifest error of law] the award should be annulled.”⁴

The main facts of the dispute are not complex.⁵ In the nineties, Argentina privatized its gas industry and regulated the transport and distribution of natural gas. The State monopoly for the transportation and distribution of gas was divided into several companies, including Transportadora de Gas del Norte (TGN). In 1992, TNG was granted a license to transport gas in Argentina. By 1999, CMS Gas Argentina, a wholly owned subsidiary of CMS, a US company, had acquired a total of 29.42% shares in TNG. Gas tariffs were to be calculated in dollars, conversion to pesos to be effected at the time of billing, and tariffs adjusted every six months in accordance with the US Producer Price Index (US-PPI).

In 2001, Argentina declared a public emergency. This terminated the rights of licenses of public utilities to calculate tariffs in dollars and to periodically adjust them based on an US based index. Tariffs were redenominated in pesos at one peso to one dollar rate.

Interestingly, CMS had initially filed a case with ICSID in relation to the application of the US-PPI to tariffs of the gas industry under the BIT between US and Argentina (the Treaty).⁶ However, it extended its claims to cover the measures taken by Argentina to address the economic crisis, and the Tribunal held it had jurisdiction over the entire dispute.⁷

The Tribunal issued its Award in May 2005, and rejected CMS’s claims of expropriation under Article IV of the Treaty and of discrimination and arbitrary treatment under Article II(2)(b). It also ruled that Argentina had breached the fair and equitable treatment clause in Article II(2)(a) of the Treaty and had failed to observe the obligations entered into with regards to the investment guaranteed in Article II(2)(c) of the Treaty. The Tribunal also rejected Argentina’s state of necessity defense under both international customary law and Art. XI of the Treaty. As a result, the Tribunal awarded CMS compensation of US\$133.2 million. The Tribunal also directed CMS to transfer the ownerships of its shares in TNG to Argentina upon payment of the compensation and an additional sum of more than two million dollars.⁸

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Argentina's request for annulment alleged several defects in the Tribunal's findings, and namely on those relating to fair and equitable treatment (Art. II(2)(a))⁹, the umbrella clause (Art. II(2)(c)),¹⁰ necessity under the Treaty (Art. XI)¹¹ and under customary international law, and in the calculation of damages. Argentina invoked the Tribunal's excess of power (Art. 52(b))¹² and failure to state reasons (Art. 52(e)) as grounds of annulment for the defects.¹³

Citing the *Vivendi* and *MTD* Tribunals, the Committee's prefaced its decision underlining the limited grounds for an ICSID Annulment, which can extinguish a *res judicata*, but cannot create a new one on the merit.¹⁴ Further, in assessing Argentina's submission, the Committee noted that manifest excess of power included both jurisdictional errors and a complete failure to apply the law, but distinguished between failure to apply the law and error in its application.¹⁵

The decision of the Committee is particularly interesting on two issues respects. First, the Committee disagreed with the Tribunal's conclusions that Argentina was in breach of the umbrella clause in Art. II(2)(c). Argentina argued that neither it nor any of its instrumentalities had assumed any obligations towards CMS beyond the Treaty itself, but that its obligations were towards TGN. Thus, the Claimant could no invoke any obligation under the umbrella clause. CMS asserted that its claim was based on a breach of the assurances given it as regards to the tariffs, and not on the breach of TGN's tariffs rights as such. The Committee sided with Argentina and found that it was unclear how the Tribunal had arrived to its conclusions that CMS could enforce the obligations of Argentina to the TNG. The Committee held the Award had a significant lacuna which made it impossible for the reader to follow the reasoning and annulled the Tribunal's finding on Article II(2)(c) for failure to state reasons. However, the Committee concluded that its conclusion would not have an impact on the decision on damages was made on the basis of independent findings of breach of Article II(2)(a) and (c) of the Treaty.¹⁶

On similar facts and based upon the same umbrella clause, other tribunals, including *Enron* and *Sempra*, had reached the same conclusion of the CMS Tribunal.¹⁷ The award in *Sempra* is not yet *res judicata*, and it will be interesting to see whether the Committee's decision will prompt a request for annulment from Argentina.

A second interesting conclusion of the Committee pertains to the necessity plea. In CMS, Argentina had claimed that in the event that the Tribunal concluded that there had been a breach of the Treaty, it should be exempt from liability in light of the existences of a state of necessity or state of emergency under both international customary law and Art. XI of the Treaty. The Tribunal had found that Art. 25 of the Articles of the ILC on State Responsibility – generally considered as reflecting customary law – set strict conditions for the applicability of the necessity plea, which had to be cumulatively satisfied.¹⁸ These conditions were not met by Argentina, in part because Argentina had contributed to the creation of the emergency and because the measures taken to address the crisis were not the only steps available.¹⁹ The Tribunal also expressed doubts as to whether “an essential interest” of the State was involved and whether there was “a grave and imminent” peril to such interest.²⁰ The Tribunal also found that Art. XI was not self-judging and a substantial review was necessary.²¹

In the annulment proceedings, Argentina had claimed that the Tribunal had wrongly conflated the Article XI arguments and the necessity argument and failed to distinguish between treaty and customary law. The Committee partially agreed with Argentina's view and found that the Tribunal had failed to provide reasons for its decision under Article XI. In the eyes of the Committee, the Tribunal should have specified that the same reasons that disqualified Argentina from relying on the general law of necessity also barred it from applying Art. XI. The Committee however concluded that a careful reader could follow the implicit reasoning of the Tribunal (and in any case that the Parties understood the Award). It therefore rejected Argentina's claim for annulment.²²

The Committee, however, found that the Tribunal had made several errors of law when examining necessity. First, the Tribunal had mistakenly applied the same four conditions of the state of necessity under international customary law to the Treaty provision. However, the two provisions are different both in terms of operation and content. The Tribunal had also made a second error of law because it should have taken a position on the relationship between customary and Treaty law and decide whether both were applicable, rather than assuming that Article XI and Art. 25 were on the same footing. To the Committee, Art. 25 could only be subsidiary to the exclusion based on Article XI. The Committee concluded that the Tribunal had given an erroneous interpretation to Article XI.²³

However, given the limitations of Art. 52 of the Convention, the Committee again found that no manifest excess of power was found. It concluded that the Tribunal applied Art. XI of the Treaty, although it did so cryptically and defectively, and that it could not substitute its interpretation to the one of the Tribunal.²⁴

Finally, the Committee found another manifest error of law in the Tribunal's findings on the temporary character of necessity and consequences for compensation. The Committee held that the Tribunal should have considered what would have been the possibility of compensation under the Treaty if the measures taken by Argentina had been covered by Art. XI. The Committee considered that Art. XI would have excluded the operation of the substantive provisions of the Treaty and thus eliminate the possibility of compensation being payable during that period.²⁵ These conclusions, however, would have not altered the finding of the Tribunal. The Committee concluded that there was no manifest excess of power or lack of reasoning in the part of the Award concerning Art. XI of the BIT and state of necessity under international customary law.

The remarks of the Committee that it found errors of law must be read within the Committee's initial proviso that it would "seek to clarify certain point of substance"²⁶ in the Award, regardless of their consequence on the Award. Moreover, the Committee's interpretation of the relationship between treaty and customary law for the necessity plea will inform subsequent Tribunal and Committee's interpretation. Given that many other cases with similar legal questions and factual patterns are pending, the Committee's view on the matter is likely to be of consequence.

On the other issues at stake in the case, the Committee upheld the conclusion of the Tribunal on the issue of *ius standing* of CMS and found that the applicable jurisdictional provisions were only those of the ICSID Convention and the Treaty, and that Argentina's law was irrelevant. The Treaty covered investments made by minority shareholders, and thus CMS had to be considered an investor within the meaning of CMS so that its claims were within the jurisdiction of the Tribunal.²⁷

The Committee also ascertained Argentina's claims on fair and equitable treatment under Art. II(2)(a) of the Treaty and disagreed with Argentina's contention that the Tribunal had given investors an enforceable expectation of total stability in the economy of the host State. The Committee concluded that the Award was adequately founded on the applicable law and relevant facts and that it had no jurisdiction to control the interpretation given by the Tribunal to that Article.²⁸

Finally, on the issue of damages, the Committee concluded that the Award was one of the most detailed decisions on damages in ICSID case-law and rejected Argentina's contention that the Tribunal had failed to state reasons in that respect.²⁹

ENDNOTES

- 1 *CMS v. Argentina* (2005) 44 ILM 1205.
- 2 The Convention only allows for five grounds for annulment. Art. 52(1) reads: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
 - (a) that the Tribunal was not properly constituted;
 - (b) that the Tribunal has manifestly exceeded its powers;
 - (c) that there was corruption on the part of a member of the Tribunal;
 - (d) that there has been a serious departure from a fundamental rule of procedure; or
 - (e) that the award has failed to state the reasons on which it is based."
- 3 Decision, ¶ 45.
- 4 *Id.*
- 5 Decision, ¶¶ 30-40.
- 6 Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991 (entry in force: 20 October 1994).
- 7 *CMS. Argentina (Jurisdiction)* (2003) 7 ICISD Reports 494, (ILM?).
- 8 Decision, ¶¶ 38-39.
- 9 "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."
- 10 "Each Party shall observe any obligation it may have entered into with regard to investments."
- 11 "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection

- of its own essential security interests.”
- 12 Argentina’s submissions that the Tribunal manifestly exceeded its powers related to five issues: first, the Tribunal’s decision to exercise jurisdiction over claims by a company’s shareholder for income lost by the company; second, a misreading of the umbrella clause (Art. II(2)(c) of the Treaty; third, the failure to apply Article XI of the Treaty and thus transforming the “fair and equitable” and “umbrella” clause of the Treaty into strict liability provisions; fourth, rejecting Argentina’s defense of necessity under international customary law; and sixth, failure to apply the governing law. Decision, ¶¶ 46–48.
- 13 Argentina’s submission that the Tribunal had failed to state reasons concerned two findings of the Tribunal: its finding on the Treaty and customary international law of necessity, and the calculation of damages. Before delving into the analysis of the Award, the Committee clarified that many other Committees had already looked at the issue and held that annulment for failure to state reasons should only occur in clear cases, when the reasoning on certain points of fact and law cannot be followed. Decision, ¶¶ 53.
- 14 Decision, ¶¶ 41–45, citing *CAA & Vivendi Universal v. Republic of Argentina* (2006) and *MTD Equity and MTD Chile v. Republic of Chile* (Annulment) (2007) (“*MTD*”).
- 15 Decision ¶¶ 46–52. The Committee cited other *ad hoc* Committees in support of this distinction, including *Maritime International Nominees Establishment v. Republic of Guinea* (1989) (“*MINE*”) and *MTD*.
- 16 Decision, ¶¶ 86–100.
- 17 *Enron Corporation and Ponderosa Assets v. Argentina Republic* (2007) and *Sempra Energy International v. Argentine Republic* (2007). In another case against Argentina, the Tribunal rejected the argument of the Claimant (a US water services company) based on an alleged breach of the same umbrella clause, because the Claimant was not itself a party to any of the contracts which it had alleged Argentina to have breached. See *Azurix Corporation v. Argentine Republic* (2006), award presently submitted to annulment proceedings.
- 18 “Necessity: 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an 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.
- 19 Decision, ¶ 103.
- 20 Decision, ¶ 104.
- 21 Decision, ¶ 110.
- 22 Decision, ¶¶ 110–127.
- 23 Decision, ¶¶ 128–134.
- 24 Decision, ¶ 135.
- 25 Decision, ¶¶ 137–144.
- 26 Decision, ¶ 45.
- 27 Decision, ¶¶ 62–76.
- 28 Decision, ¶¶ 81–85.
- 29 Decision, ¶ 154.