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International Arbitration Case Law

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EL PASO ENERGY INTERNATIONAL COMPANY V. THE ARGENTINE REPUBLIC (ICSID CASE NO. ARB/03/15) DECISION ON JURISDICTION

Case Report by Charles B. Rosenberg**
Edited by Loukas Mistelis***

A Decision on Jurisdiction rendered on April 27, 2006, under the Argentina-United States bilateral investment treaty, and in accordance with the ICSID Convention and Arbitration Rules.

Tribunal: Professor Lucius Caflisch (President), Professor Brigitte Stern, Professor Piero Bernardini

Claimant's counsel: Mr. R. Doak Bishop, KING & SPALDING; and Mr. José A. Martinez de Hoz (Jr.), PÉREZ ALATI, GRONDONA BENITES, ARNTSEN & MARTÍNEZ DE HOZ (JR.).

Defendant's counsel: Dr. Osvaldo César Gugliemino, PROCURADOR DEL TESORO DE LA NACIÓN.

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1. *Facts of the Case*

El Paso Energy International Company ("El Paso" or "Claimant"), a U.S. corporation, owned an indirect controlling shareholding in Servicios El Paso SRL ("Servicios") and indirect non-controlling shareholdings in Companías Asociadas Petroleras SA ("CAPSA"), CAPEX SA ("CAPEX"), Central Costanera SA ("Costanera") and Gasoducto del Pacífico SA ("Pacífico"). Servicios, CAPSA, CAPEX, Costanera and Pacífico were involved in the energy industry in Argentina.

El Paso contends that a series of measures taken by the Government of Argentina amounted to an expropriation of El Paso's investments in Argentina. These measures included:

- Argentina enacted Decree No. 1570/2001 in December 2001, which restricted the withdrawal of bank deposits and exchange and transfers abroad.
- Argentina enacted Law No. 25.561 in January 2002, which: (i) abolished the one-to-one exchange rate between the dollar and peso; (ii) re-denominated certain foreign currency payment obligations in pesos; (iii) authorized the President of Argentina to renegotiate certain government contracts; (iv) froze all electricity prices and related indexation mechanisms; (v) converted all prices and tariffs into pesos at an exchange rate of one-to-one; and (vi) prohibited distribution companies from suspending the performance of their obligations, despite the unilateral revision of their public contracts by the Government.
- Argentina enacted a number of regulatory measures in February 2002, including: (i) Decree No. 214/2002, which transformed all outstanding foreign currency obligations into pesos obligations; (ii) Decree No. 310/2002, which established a 20% export duty on crude oil and a 5% export duty on refined products; (iii) Decree No. 867/2002, which enabled the Secretary of Energy to establish quotas for crude oil and liquid petroleum gas; and (iv) Decree No. 1090, which excluded companies from the re-negotiation of concessions that had sued the Government on account of the new enactments.[1]

[1] Award ¶¶ 24-25.

El Paso maintains that these measures adversely affected El Paso's investments in Argentina. In particular: (i) Servicios suffered losses because its substantial debt with a foreign bank was not subjected to mandatory pesification; (ii) CAPEX no longer had the resources to meet its financial and contractual obligations; (iii) CAPSA lost CAPEX, its main asset; (iv) Costanera's business was adversely affected by the pesification of capacity payments, spot market prices and term contracts; and (v) Pacífico's ability to freely use its revenues resulting from export sales was inhibited due to the forced repatriation and pesification and the need for prior authorization for the re-transfer abroad of export earnings.[2]

On June 6, 2003, El Paso filed a request for arbitration alleging that Argentina violated the following provisions of the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America (the "BIT"): Articles II(2)(a) (fair and equitable treatment), II(2)(b) (arbitrary and discriminatory measures), II(2)(c) (umbrella clause), IV (expropriation), V (transfers) and XII (matters of taxation) of the BIT. El Paso also maintained that Argentina violated other rules of international law, the hydrocarbon concessions and contracts, and the Argentine Constitution.

2. *Legal Issues Discussed in the Decision*

(a) What issues are deemed to be of a jurisdictional nature? (paras. 40-46)

The Tribunal remarked that its task at the jurisdictional level is to determine whether the issues to be considered fall within the parameters of jurisdiction laid out by the BIT; it is not one of examining whether Claimant's allegations are well-founded on the merits.[3] This is because in the early phase of jurisdiction, the Tribunal deals with "the nature of claims or contentions and not with their well-foundedness."[4] Moreover, the ICSID Arbitration Rules do not allow a tribunal to "declare its jurisdiction conditionally . . . in the event that the Claimant in the merits phase can prove the facts that clearly prove jurisdiction and competence of the Tribunal."[5] Accordingly, the Tribunal found that it must decide whether Claimant's allegations, if true, denote violations of the BIT and

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[2] Award ¶ 30.

[3] Award ¶¶ 42-45 (citing the *Oil Platforms* case (Iran v. United States), Jurisdiction, Judgment of December 12, 1996; *Amco v. Indonesia*, Decision on Jurisdiction, ICSID Case No. ARB/81/1, September 25, 1983; and *Siemens AG v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/02/8, August 3, 2004).

[4] Award ¶ 45.

[5] *Id.*

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therefore fall within the Tribunal's competence under Article 25 of the ICSID Convention.

(b) Is the dispute of a "legal" nature? (paras. 47-88)

The Tribunal concluded that this dispute is of a "legal" character, pursuant to Article 25(1) of the ICSID Convention.

First, after noting that the nature of the dispute must be determined on objective grounds,[6] the Tribunal found that this dispute is clearly of a legal character since "Claimant has formulated its pretensions in legal terms and on the basis of existing law . . . [and] Respondent has answered in terms of law."[7] The Tribunal noted that the question of whether Claimant's claims are well-founded in substance is to be decided later at the merits stage.

Second, the Tribunal found "that, at first sight, it has jurisdiction over treaty claims and cannot entertain purely contractual claims which do not amount to claims for violations of the BIT."[8] However, it would not be enough for Argentina to assert that the dispute is of a contractual nature to disqualify it as a legal dispute. According to the Tribunal, "[w]hat matters at present is whether the claims, as formulated, fit into the categories of claims over which the ICSID has jurisdiction under the terms of the BIT and the Washington Convention."[9] The Tribunal found that the measures taken by Argentina afforded Claimant with a claim under the BIT because such measures affected Claimant's ownership of shares and legal and contractual rights, which qualify as "investments" under the BIT.

Third, the Tribunal found that the umbrella clause in Article II(2)(c) of the BIT – which provides that "Each Party shall observe any obligation it may have entered into with regard to investments" – does not change the Tribunal's conclusion that it has no jurisdiction over purely contractual claims, and that it can only entertain treaty claims.[10] The Tribunal, distinguishing the State as a merchant from the State as a sovereign, refused to adopt a broad interpretation that the umbrella clause *ipso jure* transformed all contractual undertakings into

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[6] Award ¶ 60 (citing the ICJ's Advisory Opinion in *Interpretation of Peace Treaties*).
[7] Award ¶ 62.
[8] Award ¶ 65.
[9] Award ¶ 64.
[10] Award ¶ 70.

international law obligations.[11]

As a preliminary matter, the Tribunal clarified the standard for interpreting a BIT as follows: "a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[12] Against this backdrop, the Tribunal, endorsing the reasoning of the tribunal in *SGS v. Pakistan*, held that it had jurisdiction over treaty claims and cannot entertain purely contractual claims that do not amount to a violation of the standards of protection of the BIT.[13] In other words, "the umbrella clause does not extent to any contract claims when such claims do not rely on a violation of the standards of protection of the BIT, namely, national treatment, MFN clause, fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory measures, protection against expropriation or nationalisation either directly or indirectly . . . ."[14] Furthermore, in light of Article VII(1)(a) of the BIT – which defines an "investment dispute" as "a dispute between a Party and a national or company of the other Party arising out of or relating to an investment agreement between that Party and such national or company" – the Tribunal found that a violation of an investment agreement between Argentina and a U.S. company would also be deemed a violation of the BIT and thus give rise to a BIT claim.[15]

In endorsing the reasoning of the *SGS v. Pakistan* tribunal, the Tribunal rejected the reasoning of the *SGS v. Philippines* tribunal, which had emphasized that the umbrella clause would have no real meaning if it did not elevate contract claims into treaty claims. According to the present Tribunal:

> "[T]he interpretation given in *SGS v. Philippines* does not only deprive one single provision of far-reaching consequences but renders the whole Treaty completely useless: indeed, if this interpretation were to be followed . . . it would be sufficient to include a so-called 'umbrella clause' and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT. If any violation of any legal obligation of a State is *ipso facto* a violation of the

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[11] Award ¶¶ 79-80.
[12] Award ¶ 70.
[13] Award ¶¶ 84-85.
[14] Award ¶ 84.
[15] Award ¶ 81.

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> treaty, than that violation needs not amount to a violation of the high standards of the treaty of 'fair and equitable treatment' or 'full protection and security'."[16]

In sum, the present Tribunal opted to follow the reasoning employed by the tribunals in *SGS v. Pakistan*, *Salini v. Jordan*, and *Joy Machinery v. Egypt*, rather than the reasoning employed by the tribunals in *SGS v. Philippines*, *Eureko v. Poland*, and *Noble Ventures v. Romania*, with respect to the interpretation of the umbrella clause.[17]

(c) Does the dispute arise directly out of an investment? (paras. 89-100)

The Tribunal concluded that the dispute had arisen directly out of an investment within the meaning of Article 25(1) of the ICSID Convention. The Tribunal rejected Argentina's contention that the alleged infringements of the BIT must be specifically aimed at the investment.

The Tribunal pointed out that in the context of commitments assumed by the host state, general measures of economic policy may have a "specific" effect by violating specific commitments. Therefore the Tribunal reasoned that the phrase "a dispute arising directly out of an investment" in Article 25(1) of the ICSID Convention cannot be interpreted as meaning that the dispute can only result from a measure "directed to" the investment. The Tribunal noted that the adverb "directly" in the phrase is not related to the link between the measure and the investment, but rather to the link between the dispute and the investment. Thus the link required between the measure and the investment cannot be gauged simply by asserting that the measures taken are "general" or that the State's commitments are not "specific" because "general" measures may have highly specified effects, like the destruction of an investment through expropriation.[18]

(d) Does the claim have to be limited with respect to tax measures? (paras. 101-116)

The Tribunal concluded that it has jurisdiction over tax matters, but only insofar as the tax measures are linked with: (i) expropriation, pursuant to Article IV of the BIT; (ii) transfers, pursuant to Article V of the BIT; or (iii) the observance and

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[16] Award ¶ 76.
[17] Award ¶¶ 71-82.
[18] Award ¶ 99 (citing *GAMI v. Mexico*).

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enforcement of terms of an investment agreement or authorization, as referred to in Articles VII(1)(a) and (b) of the BIT.

Article XII(2) of the BIT provides that the dispute settlement provision of the BIT does not apply to matters of taxation except: (a) if the matter is connected with, or amounts to, an expropriation under Article IV of the BIT; (b) if the matter is related to the compliance with and enforcement of an investment agreement or authorization; or (c) if the matter pertains to transfers pursuant to Article V of the BIT. The Tribunal was of the view that, *prima facie*, the imposition of export withholdings may amount to the expropriation of specific legal and contractual rights. Thus the claims relating to export withholdings practiced by Argentina are within the "exception to the exception" provided for in Article XII(2)(a) of the BIT and fall within the Tribunal's competence. The Tribunal also found that Claimant made out a *prima facie* case that there is an investment agreement and, therefore, Claimant could rely on the "exception to the exception" in Article XII(2)(c) of the BIT.

Accordingly, the Tribunal concluded that it has jurisdiction over the tax matter, which is "part and parcel" of the dispute relating to expropriation under Article IV of the BIT and to the observance and enforcement of an investment agreement under Article VII(1)(a) of the BIT. In other words, the only claims that the Tribunal could consider at the merits stage are the tax claims based on the existence of an expropriation and on the violation of an investment agreement or authorization. All other claims are beyond the competence of the Tribunal.

(e) Does Claimant have a legitimate interest authorizing it to file a claim with ICSID? (paras. 117-139)

The Tribunal concluded that Claimant had *jus standi*.

First, the Tribunal rejected Argentina's argument that Claimant did not have *jus standi* because it no longer owned the shares constituting its investments. The Tribunal stated that there is no rule in the BIT, the ICSID Convention, or the case law that a claimant must retain its investor status during the examination of its international claims. In other words, there is no rule of continuous ownership of the investment. The Tribunal explained the rationale for there not being such a rule in the ICSID/BIT context:

> "[T]he issues addressed by those instruments are precisely those of confiscation, expropriation and nationalisation of foreign investments.

Once the taking has occurred, there is nothing left except the possibility of using the ICSID/BIT mechanism. That purpose would be defeated if continuous ownership were required."[19]

The Tribunal noted that El Paso still owned the investments on June 6, 2003 (when the claim was submitted to ICSID) and on June 12, 2003 (when the claim was registered by the ICSID Secretary-General). Although the Tribunal noted that "the proximity of those dates especially for the first sale may appear disturbing – preparation of the latter must have been well under way by 6 or 12 June – it does in no way warrant the conclusion that *prima facie* there is no claim falling under ICSID jurisdiction."[20]

Second, the Tribunal rejected Argentina's argument that Claimant did not have *jus standi* because it was only an indirect minority shareholder. The Tribunal ruled that Argentina's argument was inadmissible, pursuant to Rule 41(1) of the ICSID Arbitration Rules, because it was presented too late: "[n]o references of the kind mentioned by the Respondent at the Hearings nor, more generally, references to minority shareholders' claims may be found in the Respondent's Memorial on Jurisdiction."[21] But even if such objection was admissible, the Tribunal concluded that it would fail because shares owed in a local company are "investments" within the meaning of the BIT; it is irrelevant whether the shares are majority or minority shares.

3. Decision

The Tribunal held that the dispute was within the jurisdiction of ICSID and within the competence of the Tribunal.

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[19] Award ¶ 135.
[20] Award ¶ 136.
[21] Award ¶ 138.