School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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ENRON CREDITORS RECOVERY CORP. AND PONDEROSA ASSETS, L.P.
V.
THE ARGENTINE REPUBLIC

(ICSID CASE NO. ARB /01/3)

ANNULMENT DECISION,

Case Report by Orlando F. Cabrera C.[**]
Edited by Dyalá Jiménez[***]

An Annulment Decision rendered on July 30, 2010 under the Treaty between the United States of America and the Argentine Republic ("Argentina") Concerning the Reciprocal Encouragement and Protection of Investment (the "BIT") and in accordance with the ICSID Convention and Arbitration Rules.

***Ad hoc* Committee:**	Dr. Gavan Griffith Q.C. (President), Judge Patrick Lipton Robinson and Judge Per Tresselt
Claimant's Counsel:	Mr. R. Doak Bishop, Mr. Craig S. Miles of King & Spalding and Dr. Guido Santiago Tawil of M&M Bomchil, Abogados
Defendant's Counsel:	Until January 26, 2010: Dr. Osvaldo César Guglielmino, Procurador del Tesoro de la Nación; from January 27, 2010: Dr. Joaquín Pedro da Rocha, Procurador del Tesoro de la Nación

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1. Facts of the case

Starting in 1989, Argentina undertook a program of privatisation of State-owned companies, including the gas transportation and distribution sectors. Shortly thereafter, as part of the economic policies, the Argentine peso was fixed at par with the United States dollar in 1991.[1]

US companies Enron Corporation and Ponderosa Assets LP relied on the then-existing regulatory framework in making the decision to invest in *Transportadora de Gas del Sur* ("TGS") upon its privatisation, especially in the conditions that tariffs would be calculated in US dollars; that tariffs would be subject to semi-annual adjustment according to changes in the US Produce Price Index ("PPI"); that there would be no price freeze applicable to the tariff system or that if one was imposed the licensee had a right to compensation; that the license would not be amended by the Government in full or part except with the prior consent of the licensee; that the licence agreement would be for 35 years with the possibility of a 10-year extension.[2]

The economic crisis of Argentina initiated in 1999, and in 2002 Argentina enacted 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. In addition, the Emergency Law authorised the Government to devalue the peso. The free market rate applied to all transactions and PPI adjustments were definitely abolished.[3]

The Emergency Law led Argentina to begin a renegotiation process of public utility contracts affected by these measures. Enron Corporation (now Enron Creditor's Recovery Corporation) and Ponderosa Assets (jointly, the "Claimants") filed a claim against Argentina before the ICSID in 2001. Enron Corporation and Ponderosa Assets' position was that these measures did not allow TGS to secure international financing and led to a loss of revenue and decreased value of the regulated business of TGS. The business of TGS consisted of both the regulated sector of gas transportation and the non-regulated sector of production of liquified natural gas. Argentina's position was that TGS must be considered as a business as a whole; that the revenues of the non-regulated sector in fact significantly increased in US dollars in the period 1993-2004, and that TGS benefited from the devaluation.[4]

The Claimants maintained that the various measures complained of resulted in the violation of specific commitment, which had been determinative of the

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[1] Annulment Decision ¶ 38.
[2] Annulment Decision ¶¶ 39-41.
[3] Annulment Decision ¶¶ 48-49.
[4] Annulment Decision ¶¶ 50-52.

decision to invest in TGS. The Claimants maintained that the measures complained of amounted to breaches of the guarantees provided under the BIT.[5]

Argentina argued that the calculation of the tariffs in US dollars could last only as long as the Convertibility Law was in force; that if investors relied on the information conveyed by private consulting firms, such as that contained in the information Memorandum, this could not be attributed to the Government which expressly disclaimed any responsibility for such information; that the Government had the duty to take into account the interests of the consumers in regulating a national public service; that the Government's responsibility was excluded both under the Argentine legislation and jurisprudence on emergency, and under the rules of customary international law, and BIT provisions governing the state of necessity.[6]

On February 21, 2008, Argentina filed an application before ICSID for the annulment of the award dated May 22, 2007, rendered in the case of *Enron Corporation and Ponderosa Assets, L.P. v. Argentina* (the "Award"). In the Award, the Tribunal found that Argentina had breached the Fair and Equitable Treatment and the Umbrella Clause of the BIT as a result of the failure to comply with the legislative and regulatory provisions governing gas transportation and distribution. Such failure affected the Claimants' investment in its local subsidiary TGS.[7]

Argentina sought the annulment of the award based on the following three of the grounds of Art. 52(1) of the ICSID Convention: manifest excess of powers, serious departure from a fundamental rule of procedure, and failure to state reasons. The a*d hoc* Committee annulled the award only in part finding as follows:

- The Tribunal did not fail to state the reasons for which it determined Claimants' right to pursue a claim as shareholders of TGS[8];
- The Tribunal did not manifestly exceed its powers in finding that Claimants had *ius standi* to bring the BIT claim against Argentina for measures affecting their investment in TGS[9];
- The Tribunal did not manifestly exceed its powers nor fail to state the reasons in deciding that it had jurisdiction over the breaches of the BIT, notwithstanding the forum selection clause in the license agreement between Argentina and TGS[10];
- The Tribunal's decision did not seriously depart from a fundamental rule of procedure when it decided to admit evidence and to close the proceedings[11];

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[5] Annulment Decision ¶ 53.
[6] Annulment Decision ¶¶ 54-57.
[7] Annulment Decision ¶ 1.
[8] Annulment Decision ¶¶ 107-111.
[9] Annulment Decision ¶ 127.
[10] Annulment Decision ¶¶ 147-150.
[11] Annulment Decision ¶¶ 178, 192-197 and 210-211.

- The Tribunal did not manifestly exceed its powers nor fail to state the reasons when it applied the ICSID Convention, the BIT, International Law, and Argentine law to ascertain what were the guarantees offered by Argentina to the Claimants' investments and whether those guarantees had been dismantled[12];
- The Tribunal did not manifestly exceed its powers in finding that Argentina violated the fair and equitable treatment clause of the BIT[13];
- The Tribunal did not manifestly exceed its powers nor fail to state the reasons upon which it based its decision when it determined that Argentina breached the umbrella clause of the BIT[14];
- The Tribunal manifestly exceeded its powers and failed to state sufficient reasons for its decision when it decided that Argentina could not rely on the state of necessity principle and Art. XI of the BIT.[15]

2. *Legal issues discussed in the decision*

2.1 The grounds for annulment

(a) The Role of an ad hoc *Committee (¶¶ 63 – 66)*

An *ad hoc* committee is not a court of appeal and cannot consider the substance of the dispute, but it can only determine whether the award should be annulled on one of the grounds set forth in Art. 52(1) of the ICSID Convention.[16]

(b) Manifest Excess of Powers (¶¶ 67 – 69, 112 – 127 and 393 – 395)

A manifest excess of powers by a tribunal exists when it lacks jurisdiction. It also occurs when the tribunal disregards the applicable law or bases the award on a law other than the applicable law under Art. 42 of the ICSID Convention, but not when it incorrectly applies the applicable law. Furthermore, it is an express requirement of Art. 52(1)(b) of the ICSID Convention that the error must be "manifest", not arguable, and a misapprehension of the content of a particular rule is not enough.[17]

The *ad hoc* committee will annul the decision only where the tribunal has *manifestly* exceeded its power. The uncertainty or doubt regarding the jurisdiction of the tribunal must be settled by the tribunal itself in exercise of its *compétence-compétence* under Art. 41(1) of the ICSID Convention. Art. 52(1)(b)

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[12] Annulment Decision ¶¶ 232-236, 246, 265, 279, 283, 291-293 and 344.

[13] Annulment Decision ¶¶ 311-315.

[14] Annulment Decision ¶¶ 327, 332, 341-346.

[15] Annulment Decision ¶¶ 377-378, 384, 393-395 and 405.

[16] Annulment Decision ¶¶ 63-66, 237 – citing annulment decisions in *MCI Power v. Ecuador*, *Azurix v. Argentina* and *MTD Equity v. Chile.*

[17] Annulment Decision ¶¶ 67-68, 124-125, 146-147, 218-220, 232-235, 246, 265, 277, 279, 286, 291-292, 312-315, 344-346, 377, 384, 393-395 – citing the annulment decisions in *Azurix v. Argentina, MCI Power v. Ecuador, MTD Equity v. Chile, Soufraki v. United Arab Emirates* and *Amco 1 v. Indonesia.*

does not provide a mechanism for *de novo* consideration of, or an appeal against, an award of a tribunal under Art. 41(1).[18]

In this case, as regards the *ius standi* issue, the Tribunal did not decide the dispute based on equitable considerations but rather based on the applicable law.[19] The distinction claimed by Argentina between regulated and non-regulated activities was unfounded; the Committee held that the distinction was only relevant to the decision on damages, and not for the issue of *ius standi*.[20]

(c) Serious Departure from a Fundamental Rule of Procedure (¶¶ 70 – 71)

For this ground of annulment, the emphasis is clearly placed on the term "rule of procedure," that is, on the manner in which the tribunal proceeded, not on the content of its decision. Additionally, the departure from that rule of procedure must be "serious", in the sense that it must have caused the tribunal to reach a result substantially different from what it would have awarded had such a rule been observed, or in the sense that it was such as to deprive a party of the benefit or protection which the rule was intended to provide.[21] It is not for an annulment committee to second-guess a tribunal in the exercise of its discretion, unless a particular exercise of discretion amounts to a serious departure from a fundamental rule of procedure.[22]

(d) Failure to State Reasons (¶¶ 72 – 77)

Failure to state reasons for purposes of this provision has been considered in the case law to be a failure to deal with questions submitted to the tribunal. The tribunal has a duty to deal with each of the questions submitted, but it is not obliged to comment on all arguments of the parties in relation to each of those questions.[23] In some cases where the tribunal fails to deal with a question submitted to it, the appropriate remedy may be an application for a supplementary decision, pursuant to Art. 49(2) of the ICSID Convention. This ground of annulment is applicable only in clear cases when the tribunal has failed altogether to state reasons for its decision on a particular question, not in a case where there has been a failure to state correct or convincing reasons.[24]

The requirement that an award must be reasoned implies that it must enable the reader to follow the bases of the tribunal on points of fact and law.[25] This requirement is satisfied as long as the drafting of the award enables the reader to

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[18] Annulment Decision ¶¶ 69, 121 and 405 – citing the annulment decision in *Azurix v. Argentina.*

[19] Annulment Decision ¶ 124.

[20] Annulment Decision ¶ 126.

[21] Annulment Decision ¶¶ 70-71, 178, 197, 210-212 – citing annulment decisions in *Vivendi v. Argentina*, *Azurix v. Argentina, MINE v. Guinea, MTD Equity v. Chile* and *Wena v. Egypt.*

[22] Annulment Decision ¶ 192.

[23] Annulment Decision ¶¶ 72, 110, 221-222, 341 and 375 – citing annulment decision in *MCI Power v. Ecuador.*

[24] Annulment Decision ¶¶ 73-74 and 384 – citing *MCI Power v. Ecuador.*

[25] Annulment Decision ¶¶ 74 and 378.

follow how the tribunal proceeded from point A to point B, and to its conclusions, even if it made an error of fact or of law.[26]

The tribunal's reasons may be implicit in the consideration and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.[27] Reasons may be stated succinctly or at length, depending at times on the legal background of the members of the tribunal.[28] Indeed, tribunals must be allowed a degree of discretion as to the way in which they express their reasoning. In short, the failure to state reasons means the award lacks an expressed rationale on a particular point, and that point must be necessary to the tribunal's decision.[29]

2.2 Indirect claims (¶¶ 105, 112 and 125)

Under customary international law and the ICSID Convention it is possible for a BIT to confer on shareholders the right to bring a claim for violation of rights in their capacity of shareholders of the vehicle company. Further, Art. 1 of the BIT allows such an indirect claim.[30] Since TGS was a vehicle through which the Claimants' investment in the privatization of the gas industry was channeled, according to the correct interpretation of the BIT, Claimants had *ius standi* to bring a claim in respect of any measure taken by Argentina affecting that investment.[31]

2.3 Forum Selection Clause (¶¶ 132 - 146)

A breach of contract may also amount to a breach of the BIT. When this is the case, a forum selection clause in the contract will not deprive an ICSID tribunal of jurisdiction to determine a claim for an alleged violation of a BIT based on a breach of that contract, if the conduct giving rise to the alleged breach – the fundamental basis of the claim – is independent of the alleged violations of the contract and sufficient to constitute a basis for a breach of BIT claim.[32]

2.4 Procedural Issues: Admission of Evidence and Closure of the Proceedings (¶¶ 170, 188, 208 – 211)

Neither the ICSID Convention nor the ICSID Arbitration Rules contain specific rules on the admissibility of evidence.[33] Regardless of the decision of a tribunal on the admission of evidence, such decision will only amount to an annullable

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[26] Annulment Decision ¶¶ 74, 107, 221, 262 and 279 – citing *MINE v. Guinea.*

[27] Annulment Decision ¶ 75 – citing annulment decisions in *Wena v. Egypt, Azurix v. Argentina* and *CMS v. Argentina.*

[28] Annulment Decision ¶¶ 94 and 100.

[29] Annulment Decision ¶¶ 76, 100, 148, 283 and 342 – citing *Vivendi v. Argentina.*

[30] Annulment Decision ¶ 105.

[31] Annulment Decision ¶¶ 112-125.

[32] Annulment Decision ¶¶ 142 and 146 – citing *Vivendi* Annulment decision and *SGS v. Pakistan* and *SGS v. Philippines* decisions on jurisdiction.

[33] Annulment Decision ¶ 170.

error if one of the grounds of Art. 52(1) of the ICSID Convention is established.[34] To admit a witness statement that was executed voluntarily does not constitute a serious departure from a fundamental of a rule of procedure.

Under ICSID Arbitration Rules 34(1) and 26(2) and (3) a tribunal has the power to accept the filing by a party of an expert report after the deadline fixed for such filing, if the Tribunal considers that there are good reasons for so doing.[35]

In addition, in the absence of a clear statement by Argentina that it would have challenged a member of the Tribunal and that the closure of the proceedings prevented it from doing so, the Committee could not find that the closure of the proceedings constituted a serious departure from a fundamental rule of procedure. Argentina even failed to provide details of the precise basis and circumstances of any challenge.[36]

2.5 Applicable Law (¶¶ 230 – 235)

Argentine law was relevant to the Tribunal's decision only in determining whether Argentina assumed obligations regarding the Claimants' investment through the Gas Law and its implementing legislation.[37]

2.6 Breach of the Fair and Equitable Treatment Clause (¶¶ 304 – 314)

Fair and equitable treatment in the BIT is not the same as the customary international law minimum standard. The content of the fair and equitable treatment clause is a question of interpretation of the BIT in accordance with the principles of treaty interpretation, in application to the facts of the case.[38]

2.7 Breach of the Umbrella Clause (¶¶ 325 – 331)

The Terms of the license agreement formed part of the implementing legislation. A violation of the provisions of the license agreement also amounted to a violation of the guarantees contained in the legislative framework and the assumed obligations with regard to investments, pursuant to the plain meaning of the language of the BIT.[39]

2.8 Emergency Situation (¶¶ 373 – 384 and 405)

It was necessary for the Tribunal, either expressly or *sub silentio,* to decide or assume answers to certain questions that should have arisen in order to apply the "only way" and "contributed to the situation of necessity" requirements of Arts. 25(1)(a) and 25(2)(b) of the International Law Commission (ILC) Articles,

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[34] Annulment Decision ¶ 178.
[35] Annulment Decision ¶ 188.
[36] Annulment Decision ¶¶ 208-210.
[37] Annulment Decision ¶¶ 230 – 235.
[38] Annulment Decision ¶¶ 304, 312 and 314.
[39] Annulment Decision ¶¶ 325-331.

respectively.[40] In determining that the measures adopted were not the "only way" and that Argentina "contributed to the situation of necessity", the Tribunal did not apply customary international law but instead relied on an expert opinion on an economic issue.[41] Furthermore, it was not apparent from the reasoning in the Award how or why the Tribunal came to its conclusion, as it failed to state reasons for its decision.[42] In addition, the Tribunal was not clear in its finding that the requirement in Art. 25(1)(b) of the ILC to rely on the principle of necessity was not satisfied.[43]

The Tribunal's findings that the requirements of Art. 25 of the ILC Articles were not met by Argentina formed the basis of the Tribunal's finding that Argentina was precluded from relying on Art. XI of the BIT. Since the Tribunal erred on its interpretation of Art. 25 of the ILC Articles, the last finding regarding Art. XI of the BIT must be annulled.[44]

2.9 Conclusions (¶¶ 406 – 414)

The Tribunal's finding that Argentina is precluded from relying on Art XI of the BIT and on the principle of necessity under customary international law was annulled. Such findings were essential to the Tribunal's disposition of the case. This means that the Tribunal could have found that Argentina was not liable for any breach of the BIT.[45]

It is inappropriate to annul an entire award where the decision on annulment affects only a part of an award. Liability and quantum of compensation are two discrete issues, but a decision on the latter must follow the decision on the former. It is therefore unproblematic in theory to annul the portion of an award dealing with quantum of compensation but to leave intact the portion dealing with liability.[46]

Nonetheless, there can be no payment of compensation in the absence of any liability. Therefore, the Tribunal's decision regarding damages was annulled due to the annulment of the Tribunal's finding on liability.[47]

2.10 Costs and Stay of Proceedings (¶¶ 418-427)

The Committee has discretion to allocate between the parties the expenses incurred in connection with the proceedings, the fees and expenses of the members of the Committee, and the charges for the use of the facilities of the

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[40] Annulment Decision ¶¶ 373 – 393.
[41] Annulment Decision ¶¶ 377and 393.
[42] Annulment Decision ¶ 378.
[43] Annulment Decision ¶ 384.
[44] Annulment Decision ¶ 405.
[45] Annulment Decision ¶¶ 406 – 407.
[46] Annulment Decision ¶¶ 412 – 413.
[47] Annulment Decision ¶ 414.

Centre.[48] Past decisions on costs on annulment proceedings, as well as the circumstances of the case, led to the Committee to determine that the costs of the proceedings are to be borne equally between the parties. Indeed, the costs of each party were comparable and Argentina succeeded in part.[49]

The stay of enforcement of the Award was lifted with the decision of the Committee, and the parts of the award not annulled were incapable of enforcement.[50]

3. Decision

The *ad hoc* Committee pursuant to Art. 52(1)(b) of the ICSID Convention annulled: i) the finding of the Tribunal and associated reasoning that Argentina was precluded from relying on Art. XI of the BIT and ii) the finding that Argentina was precluded from relying on the principle of necessity under customary international law. Consequently, the ad hoc Committee annulled the decision of the Tribunal that Argentina breached its obligations to accord the investor fair and equitable treatment and to observe the obligations entered into with regard to the investment.

Finally, the ad hoc Committee annulled the decision of the Tribunal that: "The Respondent shall pay the Claimants compensation in the amount of US$106.2 million" and the payment of interest on such compensation. The ad hoc Committee dismissed all other requests in the application for annulment of Argentina and decided that each party bear half of the annulment costs incurred by the Centre and its own litigation costs for the annulment proceeding.

[48] Annulment Decision ¶ 418.
[49] Annulment Decision ¶¶ 424-425.
[50] Annulment Decision ¶ 427.