

CASES

El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15)

Introductory Note

In its Decision on Jurisdiction issued on April 27, 2006, the Tribunal composed of Prof. Lucius Caffisch as President of the Tribunal (Swiss), Prof. Piero Bernardini (Italian) and Prof. Brigitte Stern (French), upheld jurisdiction over the claims brought by El Paso Energy International Company (“El Paso” or the “Claimant”) against the Argentine Republic.

The request for arbitration was brought by El Paso, a company incorporated in the State of Delaware. El Paso claimed to have relied on the legal framework provided by the Argentine Government, in order to invest in four Argentine companies involved in the electricity and hydrocarbons industries. These companies were *Compañías Asociadas Petroleras S.A. (CAPSA)*, *Capex, S.A. (Capex)*, *Servicios El Paso S.R.L. (Servicios)* and *Central Costanera S.A. (Costanera)*.

El Paso argued that after it made its investment in Argentina, the government and some of its agencies adopted a series of measures violating international law and the 1991 Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (Argentina-U.S. BIT).

Argentina raised four objections to the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal in analyzing the objections answered the following four questions: “(i) Is the dispute of a “legal” nature?; (ii) Does it “arise directly out of an investment”?; (iii) Is the claim to be limited with regard to tax measures? (iv) Is there a legitimate legal interest justifying the filing of a claim with the ICSID?”

With regard to the first question, the Tribunal held that the nature of the dispute must be determined based on objective grounds. In this case the arguments of the Claimant and of the Respondent were formulated as relying

on existing law and therefore, according to the Tribunal, the dispute could be qualified as a “legal” one.

A second aspect of Argentina’s objections regarding the existence of a legal dispute referred to Article II(2)(c) of the Argentina-U.S. BIT and the interpretation of the umbrella clause. The Tribunal analyzed in detail whether the Article should be considered as an umbrella clause which *ipso jure* transformed all contractual undertakings into international law obligations and, accordingly, had the possibility to elevate any breach of such obligations into treaty claims. For this purpose, the Tribunal considered other decisions dealing with this matter and concluded that the umbrella clause in the Argentina-U.S. BIT did not extend its jurisdiction over any claims stemming solely from the breach of a contract between the investor and the Argentine government, when such claims did not amount to a violation of the standards of protection of the BIT.

With respect to the objection raised by the Respondent that the dispute did not arise directly out of an investment, the Tribunal noted that general measures of economic policy taken by a host State were not within the jurisdiction of ICSID tribunals. However, in the instant case the Tribunal concluded that the general measures taken by Argentina might possibly be said to have violated specific commitments assumed by the host State *vis-à-vis* the investor and rejected Argentina’s objection.

In answering the third question with regard to tax measures, the Tribunal concluded that the Claimant established *prima facie* that there is indeed an “investment agreement,” and that therefore the Tribunal had jurisdiction over tax matters associated with the dispute but only insofar as the tax measures were linked with: (a) expropriation, pursuant to Article IV; (b) transfers, pursuant to Article V; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII(1)(a) or (b).

Finally the Tribunal addressed the last objection raised by the Respondent on the alleged lack of *jus standi* due to the sale of Claimant’s shares in the local companies. In this respect the Tribunal concluded that based on the BIT, the ICSID Convention and the relevant case-law cited during the proceeding, there is no rule of continuous ownership of the investment in order for an investor to file a claim before an ICSID Tribunal.

The case on the merits in this case is still pending before the Centre. The text of the Decision on Jurisdiction issued in English and Spanish is reproduced with the parties’ consent and is also posted in PDF format on ICSID’s website at <www.worldbank.org/icsid>.

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