CASES

LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.[1] v. Argentine Republic (ICSID Case No. ARB/02/1)

Introductory Note

The decisions on jurisdiction and liability in *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc v. Argentine Republic* (ICSID Case No. ARB/02/1), reproduced below with the parties' agreement, constitute the second pronouncement by an ICSID Tribunal with respect to the Argentine Republic's emergency measures adopted between 2001–2002, in particular the Public Emergency and Exchange Regime Reform Law ("the Emergency Law") of January 7, 2002.[2] Several other ICSID tribunals, dealing with proceedings involving the Emergency Law, have issued decisions on jurisdiction.[3] Only

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[1] On January 26, 2006, the Claimants informed the Tribunal that LG&E Energy Corp. and LG&E Capital Corp. changed their name to E.ON.US LLC and E.ON.US Capital, respectively.

[2] The first case was *CMS Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8). The Decision of the Tribunal on Objections to Jurisdiction (July 17, 2003) and the Award (May 12, 2005) are available at www.worldbank.org/icsid/cases/awards.htm.

[3] *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic* (ICISD Case No. ARB/01/3), Decision on Jurisdiction (Ancillary Claim) (August 2, 2004); *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Objections to Jurisdiction (May 11, 2005); *Camuzzi International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/2), Decision on Objections to Jurisdiction (May 11, 2005); *Camuzzi International v. Argentine Republic* (ICSID Case No. ARB/03/7), Decisión del Tribunal de Arbitraje sobre Excepciones a la Jurisdicción (June 10, 2005); *Gas Natural SDG. S.A. v. Argentine Republic* (ICSID Case No. ARB/03/10), Decision of the Tribunal on Preliminary Questions on Jurisdiction (June 17, 2005); *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Jurisdiction (February 22, 2006); *Saur International v. Argentine Republic* (ICSID Case No. ARB/04/4), Decisión del Tribunal de Arbitraje sobre Excepciones a la Jurisdicción (February 27, 2006); *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic* (ICSID Case No. ARB/03/5), Decisión sobre Jurisdicción (April 27, 2006); *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Jurisdiction (April 27, 2006); *Suez Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17);

two cases have yet decided on the merits of the dispute.[4]

On January 31, 2002, ICSID registered a request for arbitration brought by three U.S. companies providing services in the energy sector, LG&E Energy Corp, LG&E Capital Corp. and LG&E International Inc. (the Claimants), against the Argentine Republic. The Claimants invoked the provisions of the November 14, 1991 Treaty between the United States of America and the Argentine Republic for the Encouragement and Reciprocal Protection of Investment (the BIT), which entered into force on October 20, 1994. According to the Claimants, certain measures adopted by Argentina, in particular the adoption of the Emergency Law of 2002, modified the regulatory environment under which the Claimants invested in three natural gas distribution enterprises in Argentina (Distribuidora de Gas del Centro S.A., Gas Natural BAN S.A., and Distribuidora de Gas Cuyana S.A.). The Claimants contended that these measures constituted a breach of Argentina's undertakings under the BIT: (a) to accord foreign investors a fair and equitable treatment; (b) not to impair, by arbitrary or discriminatory measures, the use and enjoyment of these investments; (c) to observe any obligation Argentina may have entered into with regard to investments (the "umbrella clause"); and (d) not to expropriate, directly or indirectly, Claimants' investment (except in certain circumstances and meeting certain requirements).

In accordance with the parties' agreement, the Tribunal was to consist of three arbitrators, one appointed by each party and the third, presiding, arbitrator, appointed by the ICSID Secretary-General in accordance with the procedure adopted by the parties. The Tribunal was constituted on November 13, 2002 and was composed of Dr. Albert Jan van den Berg (Dutch national); Judge Francisco Rezek (Brazilian national) and Dr. Tatiana B. de Maekelt (Venezuelan national), who served as the President of the Tribunal.

Decision on Jurisdiction

Pursuant to ICSID Arbitration Rule 41(1), Argentina raised six objections to jurisdiction: (a) the Claimants lacked *jus standi* mainly because, according

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Decision on Jurisdiction (May 16, 2006); *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic* (ICSID Case No. ARB/03/13), Decision on Preliminary Objections (July 27, 2006); *BP America Production Company and others v. Argentine Republic* (ICSID Case No. ARB/04/8), Decision on Preliminary Objections (July 27, 2006); *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* (ICSID Case No. ARB/03/19), Decision on Jurisdiction (August 3, 2006); *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Jurisdiction (August 25, 2006). Most of these decisions have been published at *www.worldbank.org/icsid/cases/awards.htm*.

[4] *CMS Transmission Co. v. Argentine Republic* (ICSID Case No.ARB/01/8), Award (May 12, 2005); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability (October 3, 2006).

to Argentine law and international law, shareholders and corporations have a distinct legal personality and do not allow shareholders to file claims for indirect damages; (b) the dispute did not arise directly out of an investment as required by Article 25 of the ICSID Convention, because the dispute concerned general measures taken by the Argentine Government; (c) the claim was inadmissible, because it did not need the requirements set forth in Article VII(8) of the BIT; (d) the six month period for amicable negotiations between the parties under the BIT had not elapsed as regards the additional claim brought by the Claimants after they submitted their request for arbitration to ICSID; (e) the disputes submitted by the Claimants involved the performance or breach of the licenses and therefore belonged in the sphere of jurisdictional commitments between the Federal Government and the Licensees; and (f) the original dispute had already been submitted to the Argentine federal courts, and this precluded international arbitration according to the BIT.[5]

The Tribunal decided to hear the Respondent's objections to jurisdiction as a preliminary matter in accordance with ICSID Arbitration Rule 41(4). In its decision on jurisdiction of April 30, 2004, reproduced below, the Tribunal pointed out that, while the parties in their jurisdictional arguments made reference to the merits of the dispute, the Tribunal would only consider those arguments that were relevant to decide the Respondent's objections to jurisdiction. In doing so, the Tribunal considered four criteria: (a) whether the Claimants had *jus standi*; (b) whether the dispute was a legal dispute arising directly out of an investment; (c) whether the parties had given their written consent to submit their dispute to ICSID arbitration; and (d) whether the other requirements under the ICSID Convention and the BIT were met.

Regarding the first criterion, the Tribunal held that the Claimants should be considered foreign investors even though they did not directly operate their investment in Argentina but acted through companies constituted for that purpose. Following *CMS v. Argentina*, the Tribunal held that the rights of the Claimants can be ascertained independently from the rights of the licensees and that the Claimants had a separate cause of action under the BIT in connection with the protected investment.

With respect to the second criterion, the Tribunal concluded that the investment dispute brought by the Claimants complied with the requirements provided in the BIT (Article VII) and that *prima facie* the Claimants' claims were based on alleged breaches of the BIT with respect to their investment,

[5] Argentina has raised this or similar objections to jurisdiction in all of the ICSID cases where Claimants have already filed their memorials on the merits. To date, each of the Arbitral Tribunals that have heard Argentina's objections to jurisdiction have rejected them.

rejecting in this way Argentina's argument that the Claimants' claims were to be equated to claims under the license agreement and therefore could not be heard by the Tribunal. Regarding Argentina's argument that the Claimants' dispute concerns a general measure taken by the Government of Argentina, the Tribunal employed the *CMS* Tribunal's *obiter dictum* by rejecting jurisdiction over measures of general economic policy, but accepting jurisdiction "to examine whether specific measures affecting the [Claimants'] investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts."[6]

In regard to the Tribunal's third criterion, the Tribunal held that Article VII of the BIT contained the Claimants' and Argentina's written consent to submit their disputes to ICSID arbitration. Relying on *Lanco v. Argentina*,[7] the Tribunal concluded that the BIT allowed the Claimants to submit their investment disputes to ICSID and they were not restricted by the fact that the Licensees had resorted to the local tribunals.

As to the fourth criterion, the Tribunal concluded that the Claimants' additional claim brought after the request for arbitration was submitted, was part of the original claim and for reasons of efficiency it need not be addressed in a separate proceeding. The Tribunal further concluded that the Claimants' additional request also complied with the requirements of Article 46 of the ICSID Convention concerning additional claims. Furthermore the Tribunal considered irrelevant the fact that the licensees were in a process of negotiation with the Argentine Government. According to the Tribunal, the licensees could do so "from their own (corporate) perspective." As in *CMS v. Argentina*, the Tribunal held that the effect that such negotiations could have on the Claimants' investment may form part of the Tribunal's consideration of the merits of the case. Based on the above findings, the Tribunal rejected all of the objections to jurisdiction brought by Argentina and declared itself to have jurisdiction to hear the case.

Decision on Liability

The Tribunal then moved to hear the parties' arguments with respect to the merits of the dispute. On October 3, 2006, the Tribunal rendered a decision on liability, bifurcating liability and *quantum*.

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[6] *CMS Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction (July 17, 2003), para. 33.

[7] *Lanco Internacional Inc. v. Argentine Republic* (ICSID Case No. ARB/97/6), Preliminary Decision of the Tribunal (December 8, 1998), para. 31.

The Tribunal's decision on liability follows other ICSID tribunals with regard to the interpretation given to standards such as "fair and equitable treatment," "discriminatory measures" and the so-called "umbrella clause." However, the decision distinguishes itself in particular from *CMS v. Argentina,* with respect to the state of necessity defense raised by Argentina in both cases.[8]

Unlike the *CMS* Tribunal, the *LG&E* Tribunal accepted Argentina's argument that the country was in a state of necessity at least for a certain period for which reason it should be (at least partially) exempted from responsibility. The Tribunal held that the evidence put before it showed that from December 21, 2001 until April 26, 2003, Argentina was in a period of crisis "during which it was necessary to enact measures to maintain public order and protect its essential security interest." The Tribunal concluded that during this period the protections afforded by Article XI of the BIT were triggered to maintain order and control civil unrest.[9] Although the Tribunal considered the protections afforded by Article XI of the BIT as sufficient to excuse Argentina from liability, the Tribunal noted that the state of necessity defense under international law (Article 25 of the International Law Commission's Draft Articles on State Responsibility) also supported the Tribunal's conclusion.

Regarding the other allegations raised by the Claimants, the Tribunal, following *CMS v. Argentina*, rejected the argument that Argentina's measures amounted to an expropriation in breach of the BIT. In doing so, the Tribunal considered the economic impact of the measures, the degree of interference with Claimants' use and enjoyment of their investment and the duration of the measures. The Tribunal found, however, as the *CMS* Tribunal did, that Argentina breached its obligations to accord Claimants a fair and equitable treatment and its obligations under the umbrella clause. The Tribunal also concluded that while Argentina's measures may not have been arbitrary, they were discriminatory in nature and thus, in breach of the BIT.

The decisions on jurisdiction and liability in this case were issued in English and Spanish. Both decisions are posted in PDF format on the ICSID's website at <www.worldbank.org/icsid>. The decision on quantum remains pending before the Tribunal.

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[8] See *CMS Transmission Co. v. Argentine Republic* (ICSID Case No. ARB/01/8), Award (May 12, 2005), paras. 304-394.

[9] Article XI of the BIT reads: "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 maintenance or restoration of international peace or security, or the protection of its own essential security interests."