

**CMS Gas Transmission Company**

**v.**

**Argentine Republic**

**(ICSID Case No. ARB/01/8)  
(Annulment Proceeding)**

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**DECISION OF THE *AD HOC* COMMITTEE ON THE APPLICATION FOR  
ANNULMENT OF THE ARGENTINE REPUBLIC**

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**Members of the *ad hoc* Committee**

Judge Gilbert Guillaume, President  
Judge Nabil Elaraby  
Professor James R. Crawford

**Secretary of the *ad hoc* Committee**

Mr. Gonzalo Flores

*Representing the Claimant:*

Ms. Lucy Reed  
Mr. Reza Mohtashami  
Ms. Daina Bray  
Freshfields Bruckhaus Deringer LLP  
New York, NY 10022

and

Mr. Nigel Blackaby  
Freshfields Bruckhaus Deringer LLP  
Paris, France

and

Dr. Guido Santiago Tawil  
Dr. Héctor Huici  
Dr. Ignacio Minorini Lima  
M. & M. Bomchil  
Buenos Aires, Argentina

*Representing the Respondent:*

Dr. Osvaldo César Guglielmino  
Procurador del Tesoro de la Nación  
Buenos Aires, Argentina

and

Professor Philippe Sands, QC  
Ms. Alison MacDonald  
Matrix Chambers  
Grays' Inn  
London, U.K.

*Date of dispatch to the parties: September 25, 2007*

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## DECISION

### A. Introduction

1. On 8 September 2005, the Argentine Republic (Argentina) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) an application in writing, requesting the annulment of an Award dated 12 May 2005 rendered by the Tribunal in the arbitration between CMS Gas Transmission Company (CMS) and the Argentine Republic.

2. The Application was made within the time provided in Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). In it, Argentina sought annulment of the Award on two of the five grounds set out in Article 52(1) of the ICSID Convention, specifically that the Tribunal had manifestly exceeded its powers and that it failed to state the reasons on which it was based.

3. The Application also contained a request, under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the Arbitration Rules), for a stay of enforcement of the Award until the Application for Annulment was decided.

4. The Secretary-General registered the Application on 27 September 2005 and on the same date, in accordance with Rule 50(2) of the Arbitration Rules, transmitted a Notice of Registration to the parties. The parties were notified that, pursuant to Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

5. By letter of 30 September 2005, the Claimant made a request under Arbitration Rule 54(2) for the stay of enforcement of the Award to be lifted unless Argentina provided adequate assurances as to the payment of the Award should the application for annulment fail.

6. By letter of 18 April 2006, in accordance with Rule 52(2) of the Arbitration Rules, the parties were notified that an *ad hoc* Committee (the Committee) had been constituted, composed of Judge Gilbert Guillaume, of French nationality, Judge Nabil Elaraby, of Egyptian nationality, and Professor James Crawford, of Australian nationality. The parties were also informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Committee.

7. By letter of 20 April 2006, the parties were notified that Judge Gilbert Guillaume had been designated President of the Committee.

8. By letter of 2 May 2006, the Centre sent to the parties copies of the declarations signed by each Member of the Committee pursuant to Arbitration Rule 52(2).

9. The parties disagreed on the effects of the provisional stay of enforcement of the Award over Argentina's option to purchase CMS's shares in Transportadora de Gas del Norte (TGN), as provided for in sub-paragraph 3 of the *dispositif* of the Award.

10. After due deliberation, the Committee decided that, since the payment of compensation has been stayed, the condition precedent to the transfer of shares in TGN for the time being could not be met and thus the time limit set forth in the Award for such transfer must be considered as likewise provisionally stayed. The decision of the Committee was notified to the parties by the Secretariat on 10 May 2006.

11. By letter of 16 May 2006, the Argentine Republic requested that the provisional stay of enforcement of the Award be continued until the Committee had the opportunity to hear both parties on the matter. By letter of that same date, the Claimant reiterated its request that the stay be discontinued unless adequate assurances were provided by the Argentine Republic that it would comply with the Award in the event its annulment application was rejected.

12. By letter of 17 May 2006, the Committee informed the parties of its decision to continue the stay of the Award until 5 June 2006 (the date previously fixed for the first session of the Committee with the parties).

13. The first session of the Committee was held, as scheduled, with the agreement of the parties, on 5 June 2006, at the premises of the World Bank in Paris, France, and several issues of procedure were agreed and decided. During the session, both parties addressed the Committee on the question of the continuance of the stay of enforcement of the Award.

14. After having heard the parties' arguments, the Committee requested a written statement on behalf of the Argentine Republic, to be filed within seven days, with respect to its compliance with the Award under the ICSID Convention if the Award were not annulled. It further decided that it would be open to CMS to comment within the further seven days on such statement. At the same time, it decided to continue the stay of enforcement of the Award until it had taken a decision.

15. In accordance with the Committee's directions, the Argentine Republic submitted on 12 June 2006, a written statement signed by Dr. Osvaldo César Guglielmino, Argentina's Attorney-General, in which it stated that:

"The Republic of Argentina hereby provides an undertaking to CMS Gas Transmission Company that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event annulment is not granted."

16. In a letter dated 19 June 2006, CMS contended that Dr. Guglielmino's letter did not provide additional comfort, that it must be viewed in context and that it did not bind Argentina.

17. On the invitation of the Committee, on 26 June 2006 Argentina submitted a copy of the decision rendered by its Supreme Court in *Ekmedjián v. Sofovich*.<sup>1</sup>

18. By letter dated 27 June 2006, Argentina expressed the view that the matters raised by CMS in its letter of 19 June 2006 did not require any further response. It did,

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<sup>1</sup> Argentina, Supreme Court, *Ekmedjian, Miguel Ángel v. Sofovich, Gerardo y otros*, Fallos: 315:1492 (7 July 1992).

however, provide a copy of the Argentine regulations relating to the power of the *Procurador del Tesoro de la Nación Argentina*.

19. By letter dated 30 June 2006, CMS made further comments and submitted to the Committee relevant passages of the Argentine Constitution.

20. After considering the parties' written and oral arguments on the matter and due deliberation, the Committee issued on 1 September 2006 its *Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award*.

21. In its Decision, the Committee ordered that the stay of execution be continued pending its decision on Argentina's application for annulment without the need for Argentina to provide a bank guarantee. In the Committee's view, Argentina had demonstrated that CMS would not be prejudiced by the grant of a stay, other than in respect of the delay which is, however, incidental to the Convention system of annulment and which could be remedied by the payment of interest in the event the annulment application was unsuccessful.

22. In accordance with the timetable set forth by the Committee during the 5 June 2006 session, Argentina filed its Memorial on Annulment on 13 September 2006.

23. By letter dated 15 September 2006, the law firm of Mayer, Brown, Rowe and Maw LLP informed the Committee that it would no longer represent the Argentine Republic in this proceeding.

24. By letter dated 22 September 2006, CMS claimed that 48 of the 60 legal and factual authorities referred to in Argentina's Memorial were missing. By letter dated 29 September 2006, the Argentine Republic responded, stating that the authorities referred to in CMS' letter were in the public domain and easily available to the Claimant. The Argentine Republic noted that it did enclose with its Memorial the Argentine legal authorities cited, which would not be of easy access to non-Argentine lawyers.

25. Through letter from the Secretary of the Committee dated 12 October 2006, the Committee, noting that, in fact, the documents in question were publicly available,

invited CMS to indicate, by 13 October 2006, which of the legal authorities Argentina referred to in its Memorial it would need to receive, and instructed Argentina to provide copies of such documents to counsel for CMS in Buenos Aires, by 18 October 2006. By letter dated 13 October 2006, counsel for CMS informed the Committee that they had been able to collect all of the legal authorities referred to in Argentina's Memorial.

26. On 21 December 2006, CMS filed its Counter-Memorial on Annulment; the Argentine Republic filed its Reply on 22 January 2007, and CMS filed its Rejoinder on 22 February 2007.

27. After consultation with the parties, the President of the Committee held a preliminary organizational telephone conference call with counsel for both parties on 19 March 2007. The conference call was attended by Ms. Lucy Reed, Mr. Nigel Blackaby and Dr. Guido Santiago Tawil, on behalf of CMS and by Dr. Gabriel Bottini, on behalf of the Argentine Republic. During the conference call the parties agreed on the manner in which the hearing on annulment would be conducted. These agreements were reflected in a letter from the Secretary of the Committee to the parties dated 20 March 2007.

28. As agreed, a 2-day hearing was held at the World Bank offices in Paris on 27-28 March 2007, at which counsel for both parties presented their arguments and submissions, and responded to questions from the Members of the Committee. Present at the hearing were the Members of the Annulment Committee: Judge Gilbert Guillaume, Judge Nabil Elaraby and Professor James Crawford; the Secretary of the Committee: Mr. Gonzalo Flores; CMS' representatives: Ms. Lucy Reed, Mr. Nigel Blackaby, Dr. Lluís Paradell, Mr. Reza Mohtashami and Ms. Daina Bray of Freshfields Bruckhaus Deringer LLP; Dr. Guido Santiago Tawil and Dr. Ignacio Minorini Lima of M. & M. Bomchil and Ms. Sharon McIlroy and Mr. Thomas Miller of CMS Gas Transmission Company; and representatives of the Argentine Republic: Dr. Osvaldo César Guglielmino, Procurador del Tesoro de la Nación Argentina, Dr. Gabriel Bottini, Dr. Ignacio Torterola, Dr. Jorge Barraguirre, Dr. Ignacio Pérez Cortés, Dr. Diego Gosis, Dr. Verónica Lavista and Dr. Juan José Zurro, from Argentina's Procuración del Tesoro de la Nación and Professor Philippe Sands, QC and Ms. Alison MacDonald of Matrix Chambers.

29. The President of the Committee declared the proceeding closed on September 21, 2007. During the course of the proceedings, the Members of the Committee deliberated by various means of communication, including meetings in Paris on 15 May and 3 July 2007, and have taken into account all pleadings, documents and testimony before them.

**B. The Dispute**

30. In order to put an end to the economic crisis of the late 1980s, Argentina adopted in 1989 an economic recovery plan which included a privatization program of government-owned industries and public utilities. For that purpose, it enacted Reform of State Law N° 23.696 of August 1989, Currency Convertibility Law N° 23.928 of March 1991 and Decree N° 2.128/91 pegging the Argentine currency to the United States dollar.

31. Within this framework, Gas Law N° 24.076 of May 1992, implemented by various decrees, established the legal framework for the privatization of the gas industry and regulated the transport and distribution of natural gas. The Law established a new regulatory regime with ENARGAS, the public regulatory agency of the gas industry, supervising the proper functioning of the industry, and in particular determining the tariffs charged by the transporters to the distributors.

32. Gas del Estado, a national State-owned monopoly, was thus divided into two transportation companies and eight distributor companies to be privatized. Transportadora de Gas del Norte was one of the companies established as a result of this restructuring. In December 1992, TGN was granted a license to transport gas in Argentina through the operation of the North and Central West pipelines in conformity with Decree 2.255/92.

33. At the same time, Argentina sold 70% in TGN to a consortium of investors. It placed 5% in an Employee share program and retained 25%. This 25% was purchased in 1995 by CMS Gas Argentina, a wholly owned subsidiary of CMS Gas Transmission Company. In 1999, CMS Gas Argentina purchased from third parties a further 4.42% share in TGN.

34. As recalled by the Tribunal,<sup>2</sup> in CMS's view, under the regime established by those laws and decrees and by the license granted to TGN, 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 United States Producer Price Index (US-PPI). As noted again by the Tribunal, Argentina had a different understanding of the nature and legal effects of those various instruments.

35. Towards the end of the 1990s a serious economic crisis began to unfold in Argentina. The representatives of the gas companies agreed twice, subject to certain conditions, in January 2000 and July 2000, to defer the US PPI adjustment of the gas tariffs. However an Argentine court issued in August 2000 an injunction for the suspension of the second agreement and on several occasions ENARGAS later confirmed the continuing freeze of the US-PPI adjustment.

36. In late 2001, the crisis deepened and, on 6 January 2002, Law N° 25.561 declared a public emergency. Under that Law the right of licensees of public utilities to adjust tariffs according to the US PPI was terminated, as well as the calculation of tariffs in dollars. The tariffs were redenominated in pesos at the rate of one peso to one dollar.<sup>3</sup>

37. In July 2001, ICSID had already received from CMS a request for arbitration relating mainly to the decisions taken in August 2000 concerning the application of the PPI to tariffs of the gas industry. The arbitral tribunal was duly constituted in January 2002. In its memorial of July 2002, CMS extended its claim to cover the measures taken later by Argentina, and in particular those adopted in January 2002.

38. By decision taken on 17 July 2003, the Tribunal decided that the whole dispute was "within the jurisdiction of the Center and the competence of the Tribunal".<sup>4</sup> Then, in an Award of 12 May 2005, the Tribunal rejected CMS' claims of expropriation under Article IV and of discriminatory and arbitrary treatment under Article II(2)(b) of the

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<sup>2</sup> *CMS v. Argentina* (2005) 44 *ILM* 1205, 1211 (para. 57) ("Award").

<sup>3</sup> From March 2002 onwards the official exchange rate for the peso was in the region of 3-3.85 per US\$1, a devaluation of more than 60%.

<sup>4</sup> *CMS v. Argentina (Jurisdiction)* (2003) 7 *ICSID Reports* 494, 521-522 (para. 131) ("Jurisdictional Decision").

Argentina-US Bilateral Investment Treaty (the BIT).<sup>5</sup> On the other hand it ruled that Argentina had “breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II(2)(a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty”.<sup>6</sup> It did not accept Argentina’s “defenses” based on necessity and article XI of the BIT. It awarded CMS compensation of US\$133.2 million.

39. In sub-paragraphs 3 and 4 of its *dispositif* the Tribunal added:

“3. Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US\$2,148,100. The Respondent shall have up to one year after the date this Award is dispatched to the parties to accept such transfer.

4. The respondent shall pay the Claimant simple interest at the annualized average rate of 2.51% of the United States Treasury Bills for the period August 18, 2000 to 60 days after the date of this Award, or the date of the effective payment if before, applicable to both the value loss suffered by the Claimant and the residual value of its shares established in 2 and 3 above. However, the interest on the residual value of the shares shall cease to run upon written notice by Argentina to the Claimant that it will not exercise its option to buy the Claimant’s shares in TGN. After the date indicated above, the rate shall be the arithmetic average of the six-month US Treasury Bills rates observed on the afore-mentioned date and every six months thereafter, compounded semi-annually”.

The Tribunal specified that “[e]ach party shall pay one half of the arbitration costs and bear its own legal costs.”<sup>7</sup> It dismissed all other claims.

40. Argentina asks the Committee to annul this Award.

### **C. The Grounds for Annulment**

41. Before entering into the examination of the case, the Committee will first recall the basis on which it must deal with the submissions of Argentina. Under Article 52 of the ICSID Convention, each Party may request annulment of an award on one or more of the following grounds:

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<sup>5</sup> Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991 (in force 20 October 1994).

<sup>6</sup> Award, sub-para. 1 of the *dispositif*.

<sup>7</sup> *Ibid.*, sub-para. 5 of the *dispositif*.

- “(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.”

42. In the present case, Argentina identifies a large number of perceived defects in the Tribunal’s jurisdictional findings, in its findings relating to Articles II(2)(a), II(2)(c) and XI of the BIT and to necessity under customary international law, as well as in the calculation of the damages. It submits that the Award must be annulled because, on many of those grounds, the Tribunal manifestly exceeded its powers (Article 52(b)) or failed to state the reasons on which it based its decisions (Article 52(e)).

43. Both parties recognize that an *ad hoc* committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention. That basic proposition was specified, for example, by the *ad hoc* Committee in *Vivendi v. Argentina*<sup>8</sup> and has been confirmed by other *ad hoc* committees.<sup>9</sup> Argentina, however, submits that “the present case was the first award in the large group of ICSID arbitrations currently pending against Argentina”.<sup>10</sup> It stresses the importance of the problems raised by those arbitrations. It concludes that “the extraordinary implications of the Tribunal’s decision mandate close scrutiny of its reasoning by the Annulment Committee.”<sup>11</sup>

44. At the outset, the Committee must recall that, in the ICSID system, annulment has a limited function. As stated in *MTD v. Chile (Annulment)*, a committee

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<sup>8</sup> *CAA & Vivendi Universal v. Republic of Argentina* (2002) 6 ICSID Reports 340, 357-8 (paras. 62, 64) (“*Vivendi*”).

<sup>9</sup> See *Klöckner Industrie-Anlagen GmbH & Others v. United Republic of Cameroon* (1985) 2 ICSID Reports 95, 119-120 (para. 61) (“*Klöckner*”); *Amco Asia Corporation and Others v. Republic of Indonesia I* (1986) 1 ICSID Reports 509, 515 (para. 23); *Maritime International Nominees Establishment v. Republic of Guinea* (1989) 4 ICSID Reports 79, 87 (para.5.04), 88 (para. 5.08) (“*MINE*”); *Amco Asia Corporation & Others v. Republic of Indonesia* (1992) 9 ICSID Reports 9, 39 (para. 7.19), 51 (para. 8.08); *Wena Hotels v. Arab Republic of Egypt* (2002) 6 ICSID Reports 129, 135 (para. 18) (“*Wena Hotels*”); *CDC Group v. Republic of the Seychelles* (2005) 11 ICSID Reports 237, 248-250 (paras. 34-37); *Patrick Mitchell v Democratic Republic of Congo*, Decision of 1 November 2006, para. 21; *MTD Equity & MTD Chile v. Republic of Chile*, Decision on Annulment, 21 March 2007, para 52 (“*MTD v. Chile*”); *Hussein Nuaman Soufraki v. United Arab Emirates*, Decision on Annulment, 5 June 2007, para. 20.

<sup>10</sup> Argentina’s Annulment Memorial, para. 10.

<sup>11</sup> *Ibid.*, paras. 4, 10.

“cannot substitute its determination on the merits for that of the Tribunal. Nor can it direct a Tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one. A more interventionist approach by committees on the merits of disputes would risk a renewed cycle of tribunal and annulment proceedings of the kind observed in *Klöckner* and *AMCO*.”<sup>12</sup>

45. As Argentine noted, the present arbitration was the first of a long series relating to the Argentine crisis of 2001-2002. Accordingly the Committee will seek to clarify certain points of substance on which, in its view, the Tribunal made manifest errors of law. It remains to be seen, however, whether as a consequence the award should be annulled.

**(a) Manifest excess of powers**

46. In the present case, Argentina first submits that the Tribunal “manifestly exceeded its powers by exercising jurisdiction over claims by a company’s shareholder for income lost by the company.”<sup>13</sup> It also contends that it did so “by authorizing CMS, which was not a party to any of the applicable instruments, to claim a breach of obligations” under Article II(2)(c) of the treaty, the so-called “umbrella clause”.<sup>14</sup>

47. As the *ad hoc* Committee in *Klöckner I* said:

“Clearly, an arbitral tribunal’s lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an “excess of powers” under Article 52 (1)(b).”<sup>15</sup>

48. Argentina further submits that the Tribunal manifestly exceeded its powers in transforming the “fair and equitable” and “umbrella” clauses of the BIT into strict liability provisions. According to Argentina, it did so also “by failing to give effect to Treaty Article XI”.<sup>16</sup> Moreover Argentina contends that the Tribunal manifestly exceeded its powers in rejecting Argentina’s defense of necessity under customary

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<sup>12</sup> *MTD v. Chile*, para. 54.

<sup>13</sup> Argentina’s Annulment Memorial, p. 25.

<sup>14</sup> *Ibid.*, p. 34.

<sup>15</sup> *Klöckner*, para. 4.

<sup>16</sup> Argentina’s Annulment Memorial, p. 52.

international law.<sup>17</sup> More generally it submits that the Tribunal failed to apply the governing law.<sup>18</sup>

49. It is well established that the ground of manifest excess of powers is not limited to jurisdictional error. A complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention can also constitute a manifest excess of powers

50. However *ad hoc* Committees have sought to distinguish between failure to apply the law and error in its application. For instance the Committee in the *MINE* case stated that:

“[A] tribunal’s disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.

Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment.”<sup>19</sup>

51. As the Committee in *MTD v. Chile (Annulment)* said:

“An award will not escape annulment if the tribunal, while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be ‘manifest’, not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.”<sup>20</sup>

52. When considering the submissions of Argentina concerning the Tribunal’s findings under Articles II(2)(a), II(2)(c) and XI of the BIT and under customary international law, the Committee will keep those distinctions in mind.

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<sup>17</sup> Ibid., paras. 170-180.

<sup>18</sup> Ibid., paras. 181-205.

<sup>19</sup> *MINE*, paras. 5.03-5.04.

<sup>20</sup> *MTD Chile*, para. 47.

**(b) Failure to state reasons**

53. Argentina submits that the Tribunal in its decision on jurisdiction and in its finding relating to the BIT and customary international law of necessity as well as in its calculation of damages, failed to state the reasons on which the award is based, contrary to Article 52 (e) of the ICSID Convention.<sup>21</sup>

54. Committees have frequently applied this provision. The Committee in the *Vivendi* case stated in this respect:

“[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. ... Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.

In the Committee’s view, annulment under Article (52)(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal’s reasons could more truly be said to be but a reflection of such conflicting considerations.”<sup>22</sup>

55. Committees in other annulment cases have expressed similar views. Thus the Committee in the *MINE* case stated that:

“[T]he requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion, even if it made an error of fact or of law. The minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.”<sup>23</sup>

“[T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that,

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<sup>21</sup> Argentina’s Annulment Memorial, paras. 166-171, 206-223.

<sup>22</sup> *Vivendi*, paras. 64-65.

<sup>23</sup> *MINE*, para. 5.09.

and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e)...”<sup>24</sup>

56. In *Wena Hotels*, the Committee added:

“Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal’s reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal’s reasoning. This goal does not require that each reason be stated expressly. The tribunal’s reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.”<sup>25</sup>

“It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal’s decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the *ad hoc* committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal’s conclusions can be explained by the *ad hoc* Committee itself.”<sup>26</sup>

57. The Committee agrees, and will consider Argentina’s submission based on Article 52(1)(e) on this basis.

#### **D. CMS’s *Jus Standi***

##### **(a) The Award**

58. The Tribunal analyzed the objections by Argentina to CMS’s *jus standi* in observing in its decision on jurisdiction that those objections raised two issues: “First ... whether a shareholder can claim for its rights in a foreign company independently from the latter’s rights and, if so, whether these rights refer only to its status as shareholder or also to substantive rights connected with the legal and economic performance of its investment. Second ... whether the Claimant satisfies the jurisdictional requirements of

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<sup>24</sup> Ibid., para. 5.08.

<sup>25</sup> *Wena Hotels*, para. 81.

<sup>26</sup> Ibid., para. 83.

the Convention and the BIT”,<sup>27</sup> particularly whether the alleged dispute “arises directly from the investment”.<sup>28</sup>

59. The Tribunal examined the first question under Argentine legislation, general international law, the ICSID Convention and the Argentina-United States BIT.<sup>29</sup> It concluded that Argentine legislation was not relevant in this respect.<sup>30</sup> It found “no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned.”<sup>31</sup> It arrived at the same conclusion with respect to the ICSID Convention.<sup>32</sup> Finally it decided that CMS had a “direct right of action” as shareholder under the BIT.<sup>33</sup>

60. Passing to the second point, the Tribunal reaffirmed that “the rights of the Claimant can be asserted independently from the rights of TGN and those relating to the License...”<sup>34</sup> It added that “the Claimant has a separate cause of action under the Treaty in connection with the protected investment...”<sup>35</sup> It concluded that the dispute arose directly from the investment.<sup>36</sup>

61. On both grounds the Tribunal decided that CMS had *jus standi*.

**(b) The Parties’ submissions**

62. Argentina submits that “the Tribunal lacked jurisdiction over the case because CMS was claiming compensation for alleged breaches of rights belonging not to it, but to TGN.”<sup>37</sup> In its view “the Tribunal manifestly exceeded its powers by exercising jurisdiction over claims by a company’s shareholder for income lost by the company.”<sup>38</sup>

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<sup>27</sup> Jurisdictional Decision, 502 (para. 41).

<sup>28</sup> Ibid.

<sup>29</sup> Ibid., 502-508 (paras. 42-65).

<sup>30</sup> Ibid., 502 (para. 42).

<sup>31</sup> Ibid., 504 (para. 48).

<sup>32</sup> Ibid., 506 (para. 56).

<sup>33</sup> Ibid., 508 (para. 65).

<sup>34</sup> Ibid., 508 (para. 68).

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Argentina’s Annulment Memorial, para. 68.

<sup>38</sup> Ibid., 25.

63. In this respect Argentina first contends that the Tribunal “erroneously affirmed the non-applicability of Argentine law in the jurisdictional phase.”<sup>39</sup> It notes that the Tribunal “nevertheless went on to refer to that law in its process of decision.”<sup>40</sup> It adds that in doing so, the Tribunal failed to apply the relevant provisions of Argentine law which specify the rights of shareholders.<sup>41</sup>

64. Criticizing the conclusions of the Tribunal under general international law, Argentina submits that

“in its process of decision, the Tribunal was trying to determine whether shareholders have a direct right of action, when it should have considered (and never did) whether CMS was *invoking its own rights in the proceedings*. In order to determine the latter, it is obviously material whether the investor is a party to a concession agreement or a license agreement with the host State. The Tribunal had limited jurisdiction over that part of the investment dispute that concerned CMS’ rights as shareholder; it did not have jurisdiction over any part of any investment dispute concerning the rights of the party to the concession agreement or License.”<sup>42</sup>

65. Passing to the issue of *jus standi* under the ICSID Convention, Argentina underlines that, before the Tribunal, “CMS was concerned not with its rights as shareholder, but with the alleged ‘dismantling’ of a tariff regime that granted rights to TGN, not to CMS.”<sup>43</sup> According to Argentina, this was an “indirect claim” which clearly falls outside ICSID’s jurisdiction as attested by the *travaux préparatoires* and by Article 25(2)(b) of the ICSID Convention.<sup>44</sup>

66. Argentina concludes that the Tribunal did not have the power to go beyond the “outer limits” of ICSID’s jurisdiction set out in Article 25 of the ICSID Convention, even if the 1991 BIT authorized it to do so (which Argentina does not accept).<sup>45</sup> “If the

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<sup>39</sup> Ibid., para. 77.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., para. 82 (emphasis in the original).

<sup>43</sup> Ibid., para. 86.

<sup>44</sup> Ibid., paras. 86-93.

<sup>45</sup> Ibid., para. 92.

Tribunal had followed the applicable rules of treaty interpretation, as reflected in the 1969 VCLT, it would have avoided the manifest excess into which it fell.”<sup>46</sup>

67. CMS submits that, “[a]s the Tribunal correctly determined, national law is not ‘determinant’ in establishing the *jus standi* of CMS in the present case.”<sup>47</sup> It adds that the Tribunal’s holding with respect to Argentine law is *obiter dicta*. It affirms that “no part of CMS’s dispute concerned TGN’s contract rights as such. Conversely, all aspects of the dispute concerned CMS’s own rights as a protected investor” under the BIT and “as a betrayed investor in Argentina’s gas privatization.”<sup>48</sup> It states that “investment treaty case law overwhelmingly recognizes the right of action of shareholders to complain of acts prejudicial to their shareholding that may be directed at the company in which the shares are held.”<sup>49</sup> It adds that article 25(2)(b) of the ICSID Convention has “no impact upon the autonomous right of a shareholder in a company incorporated in the host State to pursue its own BIT claim independently from the local company.”<sup>50</sup> Thus the Tribunal correctly analyzed the claim and rightly decided that it had jurisdiction on all aspects of the dispute.

**(c) The Committee’s view**

68. The Committee first recalls that the jurisdiction of the Centre is determined not by Article 42(1) of the ICSID Convention but by Article 25. The competence of the Tribunal is governed by the terms of the instruments expressing the parties’ consent to ICSID arbitration, *i.e.* in the present case the Argentina-United States BIT. In consequence, as the Tribunal correctly decided, “the applicable jurisdictional provisions are only those of the Convention and the BIT, not those which might arise from national legislation.”<sup>51</sup> Argentine law is irrelevant in this respect, as recognized in the Award and

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<sup>46</sup> Argentina’s Annulment Memorial, para. 92, citing Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331.

<sup>47</sup> CMS’ Annulment Counter-Memorial, para. 25.

<sup>48</sup> *Ibid.*, para 31.

<sup>49</sup> CMS’ Annulment Rejoinder, para. 21.

<sup>50</sup> *Ibid.*, para. 28.

<sup>51</sup> Jurisdictional Decision, 502 (para. 42).

in many other ICSID decisions.<sup>52</sup> The observations which were made in passing by the Tribunal on the piercing of the corporate veil in Argentine law<sup>53</sup> are thus *obiter dicta*.

69. With respect to general international law, the Committee notes that the parties advanced different interpretations of the judgments rendered by the International Court of Justice in the *Barcelona Traction* case<sup>54</sup> and the *ELSI* case.<sup>55</sup> Those cases were concerned with diplomatic protection under customary international law and not with the protection of the rights of investors under treaties relating to the protection of investments.<sup>56</sup> As specified by the Tribunal, those judgments are not “directly relevant to the present dispute”.<sup>57</sup> Moreover, as noted in the Jurisdictional Decision of 17 July 2003, nothing in general international law prohibits the conclusion of treaties allowing “claims by shareholders independently from those of the corporation concerned... even if those shareholders are minority or non-controlling shareholders.”<sup>58</sup> Such treaties and in particular the ICSID Convention must be applied as *lex specialis*.<sup>59</sup>

70. Under Article 25(1) of that Convention:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

71. Article 25 of the ICSID Convention did not attempt to define “investment.” Instead this task was left largely to the terms of bilateral investment treaties or other

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<sup>52</sup> See e.g. *Azurix Corporation v. Argentine Republic* (2003) 43 *ILM* 262, 276 (para. 72) (“*Azurix*”); *Siemens AG v. Argentine Republic* (2004) 44 *ILM* 138, 161-162 (para. 141); *Continental Casualty Company v. Argentine Republic*, Decision on Jurisdiction, 22 February 2006, para. 82 (“*Continental Casualty*”).

<sup>53</sup> Jurisdictional Decision, 502 (para. 42).

<sup>54</sup> *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970, p. 3.

<sup>55</sup> *Case concerning Elettronica Sicula S.p.a. (United States of America v. Italy)*, ICJ Reports 1989, p. 15.

<sup>56</sup> This distinction was clearly recognised by the International Court in *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Preliminary Objections)*, Judgment of 24 May 2007, paras. 87-88.

<sup>57</sup> Jurisdictional Decision, 503 (para. 44).

<sup>58</sup> *Ibid.*, 504 (para. 48).

<sup>59</sup> *Ibid.*

instruments on which jurisdiction is based. In the present case, this definition is provided for by Article I(1) of the Argentina-United States BIT which states:

“(a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

...

- (ii) A company or shares of stocks or other interests in a company or interests in the assets thereof.”

72. The Committee notes that this definition of “investment” is very broad, as already observed by various ICSID Tribunals in comparable cases.<sup>60</sup> Such a definition remains however compatible with the object and purpose of the ICSID Convention.

73. The Committee observes in particular that, as regard shareholder equity, the BIT contains nothing which indicates that the investor in capital stock has to have a majority of the stock or control over the administration of the company. Investments made by minority shareholders are covered by the actual language of the definition, as also recognized by ICSID arbitral tribunals in comparable cases.<sup>61</sup>

74. One must add that whether the locally incorporated company may itself claim for the violation of its rights under contracts, licenses or other instruments, in particular under Article 25(2)(b) of the ICSID Convention, does not affect the right of action of foreign shareholders under the BIT in order to protect their own interests in a qualifying investment, as recognized again in many ICSID awards.<sup>62</sup>

75. Thus in the present case, and as decided by the Tribunal, CMS must be considered an investor within the meaning of the BIT. It made a capital investment in TGN covered by the BIT. It asserted causes of action under the BIT in connection with that protected

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<sup>60</sup> See e.g. *AES Corporation v. Republic of Argentina*, Decision on Jurisdiction, 26 April 2005, para. 88; *Azurix*, para. 73; *Enron Corporation v. Republic of Argentina*, Decision on Jurisdiction, para. 44 (“*Enron*”); *Sempra Energy International v. Republic of Argentina*, Decision on Jurisdiction, 11 May 2005, para. 93 (“*Sempra Energy*”).

<sup>61</sup> See e.g. *Camuzzi International S.A. v. Republic of Argentina*, Decision on Jurisdiction, 11 May 2005, para. 81; *Enron*, para. 44; *LG&E v. Republic of Argentina*, Decision on Liability, 3 October 2006, para. 78; *Sempra Energy*, para. 93.

<sup>62</sup> See e.g. *Continental Casualty*, para. 86; *Enron*, para. 49.

investment. Its claims for violation of its rights under the BIT were accordingly within the jurisdiction of the Tribunal. This is without prejudice to the determination of the *extent* of those rights, a question to which the Committee will return.

76. For these reasons, the Committee concludes that there is no manifest excess of powers in this respect.

## **E. Fair and Equitable Treatment**

### **(a) The Award**

77. CMS asserted before the Tribunal that Argentina had breached the provisions of Article II(2)(a) of the BIT according fair and equitable treatment to investments covered by the Treaty. The Tribunal stated that “a stable legal and business environment is an essential element of fair and equitable treatment”<sup>63</sup> and observed that “[t]he measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made.”<sup>64</sup> It concluded that those measures “resulted in the objective breach of the standard laid down in Article II(2)(a) of the Treaty.”<sup>65</sup>

### **(b) The Parties’ submissions**

78. Argentina first submits that the Tribunal failed to determine the scope of international and domestic law as it applied to the dispute. It disregarded the Argentine law theory of “*imprévision*” and the Argentine doctrine of “*contract revision*”.<sup>66</sup> Instead, it relied on a single French judgment, the decision of the Conseil d’Etat in *Gaz de Bordeaux*.<sup>67</sup> It thus failed to carry out any proper analysis of the situation in Argentine law.

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<sup>63</sup> Award, para. 274.

<sup>64</sup> Ibid., para. 275.

<sup>65</sup> Ibid., para. 281.

<sup>66</sup> Argentina’s Annulment Memorial, paras. 189-200.

<sup>67</sup> Conseil d’Etat, *Compagnie Générale d’Eclairage de Bordeaux*, Rec. 125, 30 March 1916.

79. Argentina adds that “the Tribunal failed to interpret the 1991 Treaty and proceeded to give an award based on an unreasoned and unexplained assumption that investors have an enforceable legitimate expectation of total stability in the economy of the host State, irrespective of the circumstances.”<sup>68</sup> It “took no account of Argentina’s legitimate right to regulate by way of general measures adopted in the public interest...”<sup>69</sup> It did not “evaluate the propriety of the challenged measures in the light of the dire emergency facing Argentina...”<sup>70</sup> It held, “essentially, that investors have an enforceable legitimate expectation of total stability in the economy of the host State irrespective of the circumstances.”<sup>71</sup> It applied Article II(2)(a) in a mechanical manner and transformed that Article into a strict liability clause.<sup>72</sup> It did not give reasons for such a decision and it also manifestly exceeded its powers.

80. CMS contends that the Tribunal did not manifestly exceed its powers in holding that Argentina had violated Article II(2)(a) of the Treaty. It submits that “Argentina’s challenge is nothing more than a repeat of its defense at first instance and an appeal of the Tribunal’s finding on the merits.” It submits that the Award applied Argentine law as appropriate. In its application of the BIT, the Tribunal did not ignore the “context” and did not “apply the fair and equitable treatment standard in a vacuum”.<sup>73</sup> “Far from equating fair and equitable treatment with strict liability, the Tribunal recognized that a ‘rebalancing’ between Argentina and CMS was required due to the changing economic circumstances and that no such rebalancing had taken place – to the detriment of CMS.”<sup>74</sup> CMS adds that the Tribunal provided adequate reasons for its holding on this point.

**(c) The Committee’s view**

81. Article II(2)(a) of the BIT provides: “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.”

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<sup>68</sup> Argentina’s Annulment Reply, para. 43.

<sup>69</sup> Ibid., para. 44.

<sup>70</sup> Argentina’s Annulment Memorial, para. 117.

<sup>71</sup> Ibid., para. 123.

<sup>72</sup> Ibid., paras. 123-124.

<sup>73</sup> CMS’ Annulment Counter-Memorial, para. 52.

82. The Tribunal observed that this Treaty “like most bilateral investment treaties, does not define the standard of fair and equitable treatment...”<sup>75</sup> In the light of the Preamble to the Treaty, the Tribunal stated that “a stable legal and business environment is an essential element of fair and equitable treatment.”<sup>76</sup> It added that this standard “is inseparable from stability and predictability”.<sup>77</sup> According to the Tribunal, the legal framework existing at the time of the investment does not need to be frozen, “as it can always evolve and be adapted to changing circumstances”, but it cannot be “dispensed with altogether when specific commitments to the contrary have been made”.<sup>78</sup>

83. Passing to the dispute, the Tribunal referred to its previous findings about the tariff regime. It analyzed the general principles of Argentine law applicable in this respect, mentioning the *Gaz de Bordeaux* decision as a landmark decision which was at the origin of the theory of “*imprévision*”.<sup>79</sup> It added however that it did not need to look into general principles of law to find an answer as to how the contract in this case could have been adjusted to new economic realities.<sup>80</sup> It observed that the pertinent mechanisms were embodied in the Law and the License itself and that those mechanisms had not been used.

84. The Tribunal concluded that “[t]he measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made.”<sup>81</sup> It added that “the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision.”<sup>82</sup> It concluded that Article II(2)(a) of the BIT had been breached.

85. In the Committee’s view, this part of the Award is adequately founded on the applicable law and the relevant facts. The Tribunal proceeded to a detailed analysis of

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<sup>74</sup> Ibid., para. 59.

<sup>75</sup> Award, para. 273.

<sup>76</sup> Ibid., para. 274.

<sup>77</sup> Ibid., para. 276.

<sup>78</sup> Ibid., para. 277.

<sup>79</sup> Ibid., paras. 200-227.

<sup>80</sup> Ibid., para. 228.

<sup>81</sup> Ibid., para. 275.

<sup>82</sup> Ibid.

the rights of the Claimant,<sup>83</sup> of the “reality of the Argentine economy” at the time of the crisis, of the measures then taken and of their consequences,<sup>84</sup> before concluding that the fair and equitable standard had been violated.<sup>85</sup> Contrary to what Argentina contends, the Tribunal evaluated the legality of the challenged measures in the light of all the circumstances of the case and did not transform Article II(2)(a) into a strict liability clause. The Committee has no jurisdiction to control the interpretation thus given by the Tribunal to that Article,<sup>86</sup> still less to reconsider its evaluation of the facts. It is sufficient for the Committee to hold that the Tribunal did not manifestly exceed its powers.

## **F. The Umbrella Clause**

### **(a) The Award**

86. The Tribunal first recalled that according to CMS, the BIT had been breached by Argentina under Article II(2)(c) of the Treaty, which provides that each party “shall observe any obligation it may have entered into with regard to investments” (the so called “umbrella clause”).<sup>87</sup> The Tribunal stated that it “will not discuss the jurisdictional aspects involved in the Respondent’s argument, as these were dealt with in the decision on jurisdiction.”<sup>88</sup> It went on to decide that “the obligation under the umbrella clause of Article II(2)(c) of the Treaty had not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty.”<sup>89</sup>

### **(b) The Parties’ submissions**

87. Argentina submits that neither the Republic of Argentina, nor any of its instrumentalities, assumed any obligation to CMS, apart from the provisions of the 1991

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<sup>83</sup> Ibid., paras. 127-151.

<sup>84</sup> Ibid., paras. 53-67, 152-166.

<sup>85</sup> Ibid., para. 281.

<sup>86</sup> The Committee would only note that the fair and equitable standard has been invoked in a great number of cases brought to ICSID arbitration and that there is some variation in the practice of arbitral tribunals in this respect. See Christoph Schreuer, “Fair and Equitable Treatment in Arbitral Practice” (2005) 6 *Journal of World Investment and Trade* 357.

<sup>87</sup> Award, para. 296.

<sup>88</sup> Ibid., para. 299.

Treaty itself.<sup>90</sup> Therefore CMS could invoke no obligation under Article II(2)(c) of the Treaty. It stresses that nonetheless the Tribunal authorized CMS to claim for a breach of obligations under the umbrella clause in a manifest excess of powers and without giving any reason.<sup>91</sup>

88. CMS submits that it did not claim for breach of TGN's tariffs rights as such, but for breach of the assurances given it as regards the tariff regime resulting from "the legal instruments relating to the gas privatization, including the License" issued to TGN.<sup>92</sup> Those assurances "constituted undertakings that Argentina was bound to observe under the Umbrella Clause."<sup>93</sup> In the light of findings made in other parts of the award, the Tribunal rightly decided that Argentina did not observe its obligations under that Article. There is no manifest excess of powers and no lack of reasoning.<sup>94</sup>

**(c) The Committee's view**

89. Article II(2)(c) of the BIT provides that "Each Party shall observe any obligation it may have entered into with regard to investments." It is accepted that by "obligations" is meant legal obligations. Although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause contained in the BIT.<sup>95</sup>

90. CMS stated categorically before the Committee that its claim was not predicated on any Argentine law right of CMS to compliance with the terms of the License.<sup>96</sup> Moreover, this is in conformity with what the Committee understands to be Argentine law. Under that law, the obligations of Argentina under the License are obligations to TGN, not to CMS, and CMS has no right to enforce them.

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<sup>89</sup> Ibid., para. 303.

<sup>90</sup> Argentina's Annulment Memorial, para. 96.

<sup>91</sup> Ibid., para. 97.

<sup>92</sup> CMS' Annulment Rejoinder, para. 32.

<sup>93</sup> Ibid., para. 32.

<sup>94</sup> Ibid., paras. 34-36.

<sup>95</sup> See *MTD v. Chile*, paras. 67-69.

<sup>96</sup> See Hearing on annulment proceedings, 27 March 2007, 206-209, 242-244; also CMS' Annulment Rejoinder, para. 15.

91. During the hearings, CMS referred to the possibility that an investor might acquire an international law right to compliance with undertakings with regard to investments. But it finally accepted that this was not the basis of its claim before the Tribunal or of the Tribunal's own reasoning.<sup>97</sup>

92. In the end, CMS relied on a literal interpretation of Article II(2)(c). It contended that Argentina entered into legal obligations under the License, which were obligations "with regard to investments" under that Article. Although CMS was not entitled as a minority shareholder to invoke those obligations of Argentina under Argentine law (not being the obligee), the effect of Article II(2)(c) was to give it standing to invoke them under the BIT.

93. In paragraph 303 of the Award, the Tribunal concluded that "the obligation under the umbrella clause of Article II(2)(c) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty."

94. It is implicit in this reasoning that the Tribunal may have accepted the interpretation of Article II(2)(c) referred to in paragraph 92 above. But the Tribunal nowhere addressed this point expressly. Instead it repeatedly referred back to the Decision on Jurisdiction of 17 July 2003, where this specific matter was not dealt with at all.<sup>98</sup> Further, the Tribunal's extended discussion of whether CMS had a right to compliance with the terms of the License and of the Argentine Gas Law<sup>99</sup> would have been unnecessary if the basis of its decision was that Article II(2)(c) gave CMS standing to invoke obligations owned to TGN.

95. Moreover there are major difficulties with this broad interpretation of Article II(2)(c).

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<sup>97</sup> Hearing on annulment proceedings, 27 March 2007, 246; 28 March 2007, 514.

<sup>98</sup> See Award, paras. 132, 148, 299, and cf. Jurisdictional Decision, para. 65.

<sup>99</sup> Award, paras. 127-151.

- (a) In speaking of “any obligations it may have *entered into* with regard to investments”, it seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT itself (*i.e.* under the law of the host State or possibly under international law). Further they must be specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State.
- (b) Consensual obligations are not entered into *erga omnes* but with regard to particular persons. Similarly the performance of such obligations or requirements occurs with regard to, and as between, obligor and obligee.
- (c) The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.*, the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.
- (d) The obligation of the State covered by Article II(2)(c) will often be a bilateral obligation, or will be intrinsically linked to obligations of the investment company. Yet a shareholder, though apparently entitled to enforce the company’s rights in its own interest, will not be bound by the company’s obligations, *e.g.* as to dispute settlement.
- (e) If the Tribunal’s implicit interpretation is right, then the mechanism in Article 25(2)(b) of the ICSID Convention is unnecessary wherever there is an umbrella clause.
- (f) There is no discussion in the award of the *travaux* of the BIT on this point, or of the prior understandings of the proponents of the umbrella clause as to its function.

96. In the end it is quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN. It could have done so by the above interpretation of Article II(2)(c), but in that case one would have expected a discussion of the issues of interpretation referred to above. Or it could have decided that CMS had an Argentine law right to compliance with the obligations, yet CMS claims no such right; and Argentine law appears not to recognize it.<sup>100</sup>

97. In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point. It is not the case that

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<sup>100</sup> See above, paragraph 90.

answers to the question raised “can be reasonably inferred from the terms used in the decision”;<sup>101</sup> they cannot. Accordingly, the Tribunal’s finding on Article II(2)(c) must be annulled for failure to state reasons.

98. In these circumstances it is not necessary for the Committee to decide whether it would have been a manifest excess of powers for the Tribunal to decide that Article II(2)(c) allows CMS to enforce the Argentine law rights of TGN.

99. Although the Tribunal’s finding of liability must be annulled, it does not follow that the Award as a whole is affected. As the *Vivendi* Annulment Committee found,<sup>102</sup> severable parts of an award which are not themselves annulled will stand, a situation expressly contemplated in Article 52(3) of the ICSID Convention.

100. In the present case the Tribunal’s award of damages was made on the basis of independent findings of breach of Article II(2)(a) and (c) of the BIT. Indeed the Tribunal itself noted that “the umbrella clauses invoked by the Claimant do not add anything different to the overall Treaty obligations which the Respondent must meet if the plea of necessity fails.”<sup>103</sup> Thus the Committee’s finding on the umbrella clause does not entail the annulment of the Award as a whole. It entails only annulment of the provisions of paragraph 1 of the operative part of the Award under which the Tribunal decided that “[t]he Respondent breached its obligations... to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty.”

## **G. State of Necessity under Customary International Law and Article XI of the BIT**

### **(a) The Award**

101. The Tribunal recorded that “Argentina has contended in the alternative that in the event the Tribunal should come to the conclusion that there was a breach of the Treaty the Respondent should be exempted from liability in light of the existence of a state of

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<sup>101</sup> *Wena Hotels*, para. 81.

<sup>102</sup> *Vivendi*, para. 68.

<sup>103</sup> Award, para. 378.

necessity or state of emergency.”<sup>104</sup> Argentina invoked the existence of such a state under both customary international law and Article XI of the BIT. The Tribunal noted that in doing so, Argentina raised “one fundamental issue”<sup>105</sup> which it examined under customary international law before doing so under the BIT.

102. The Tribunal considered that Article 25 of the Articles of the International Law Commission (ILC) on State Responsibility<sup>106</sup> “adequately reflects the state of customary international law on the question of necessity.”<sup>107</sup> Under that article:

“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.”

103. The Tribunal then undertook the task of finding whether the Argentine crisis met the various requirements of Article 25. It expressed doubts as to whether “an essential interest” of the State was involved in the matter and whether there was in this case a “grave and imminent peril”.<sup>108</sup> It added that the measures taken by Argentina “were not the only steps available” to safeguard its interest and concluded that the conditions set out under paragraph 1(a) of Article 25 were not met.<sup>109</sup>

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<sup>104</sup> Ibid., para. 304.

<sup>105</sup> Ibid., para. 308.

<sup>106</sup> Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Resolution 56/83, 14 December 2001.

<sup>107</sup> Award, para. 315.

<sup>108</sup> Ibid., paras. 319-322.

<sup>109</sup> Ibid., para. 324.

104. By contrast the Tribunal decided that neither an essential interest of the United States<sup>110</sup> nor an essential interest of the international community as a whole<sup>111</sup> had been seriously impaired by the measures taken by Argentina. Accordingly it stated that the plea of necessity would not be precluded by paragraph 1(b) of Article 25.<sup>112</sup>

105. Passing to paragraph 2 of that Article, the Tribunal examined whether the object and purpose of the BIT excluded necessity. It arrived to the conclusion that “the Argentine crisis was severe but did not result in total economic and social collapse”<sup>113</sup> and that in such a situation the “Treaty will prevail over any plea of necessity.”<sup>114</sup>

106. The Tribunal further observed that Argentina’s “government policies and their shortcomings significantly contributed to the crisis”<sup>115</sup> and that consequently state of necessity was precluded by paragraph 2(b) of Article 25.

107. Finally the Tribunal observed that all the conditions governing necessity under Article 25 must be cumulatively satisfied.<sup>116</sup> It concluded that “the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts.”<sup>117</sup>

108. Then the Tribunal noted that “[t]he discussion on necessity and emergency is not confined to customary international law as there are also specific provisions of the Treaty dealing with this matter.”<sup>118</sup> In this respect it first recalled that Article XI of the BIT provides:

“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.”

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<sup>110</sup> Ibid., para. 358.

<sup>111</sup> Ibid., paras. 325, 358.

<sup>112</sup> Ibid., para. 358.

<sup>113</sup> Ibid., para. 355.

<sup>114</sup> Ibid., para. 354.

<sup>115</sup> Ibid., para. 329.

<sup>116</sup> Ibid., para. 331.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid., para. 332.

109. In this respect the Tribunal first determined that “there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI.”<sup>119</sup> It added that “[a]gain, the issue is then to establish how grave an economic crisis must be so as to qualify as an essential security interest, a matter discussed above.”<sup>120</sup>

110. Then the Tribunal, in the light of a lengthy discussion of the question by the Parties and their experts, expressed the view that “the clause of Article XI of the Treaty is not a self-judging clause”.<sup>121</sup> Accordingly it decided that the judicial review it had to perform under that clause was a “substantive review”.<sup>122</sup>

**(b) Argentina’s submissions**

111. Argentina recalls that before the Tribunal it relied both on Article XI of the BIT and on the doctrine of necessity reflected in Article 25 of the ILC’s Articles on State Responsibility. It adds “[i]t is self-evident that these arguments are related but juridically distinct.”<sup>123</sup> It stresses that “the Tribunal has conflated the Article XI argument and the necessity argument and failed to distinguish between treaty and customary claims.”<sup>124</sup> By treating these arguments as identical, the Tribunal “has fallen into fundamental error.”<sup>125</sup> It incorporated “into the interpretation and application of Article XI the approach imposed by the law of responsibility but without any explanation as to why that is the proper approach.”<sup>126</sup> In doing so it entirely failed to carry out the task of interpreting Article XI and ignored the language of that Article.

112. Argentina further contends that the Tribunal wrongly decided that Article XI is not “self-judging” and that it must proceed to a substantive review of the measures taken. It adds that having determined that Article XI required such a review, the Tribunal failed

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<sup>119</sup> Ibid., para. 359.

<sup>120</sup> Ibid., para. 361.

<sup>121</sup> Ibid., para. 373.

<sup>122</sup> Ibid., para. 374.

<sup>123</sup> Argentina’s Annulment Memorial, para. 125.

<sup>124</sup> Ibid., para. 126.

<sup>125</sup> Ibid., para. 127.

<sup>126</sup> Ibid., para. 131.

to carry it out, or at least to carry out the good faith review proposed by Argentina.<sup>127</sup> Nowhere in the Award did the Tribunal carry out any “analysis of whether the measures in question had been ... necessary to maintain public security and its essential security interests in the circumstances that prevailed.”<sup>128</sup>

113. Argentina adds that the Tribunal also failed to state reasons for its rejection of Argentina’s defense of necessity under customary international law and that again on that point it manifestly exceeded its authority.<sup>129</sup> In this regard, it recalls that “[t]he Tribunal rejected Argentina’s alternative defense of necessity under customary international law on the basis that two of the factors set forth in Article 25 of the ILC’S Draft Articles on State Responsibility were not satisfied: the measures were not the only steps available, and Argentina itself contributed to the crisis.”<sup>130</sup>

114. According to Argentina, the Tribunal based its decision on the first point “on the mere *existence* of different opinions on issues of economic policy, without considering whether the other alternatives were feasible.”<sup>131</sup> Moreover it nowhere addressed the impact of either resorting to the adjustment mechanisms provided in the Gas Law and License, or taking no action in response to the emergency.<sup>132</sup>

115. Furthermore the Tribunal asserted that Argentina substantially contributed to the crisis in two ambiguous sentences without engaging into any real analysis of the alleged “shortcomings” in government policies.<sup>133</sup>

**(c) CMS’ submissions**

116. CMS submits that, contrary to what Argentina contends, the Tribunal did not manifestly exceed its powers and that there was no failure to state reasons. It stresses that “[t]o the extent there is any conflating of matters in connection with Article XI and

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<sup>127</sup> Ibid., paras. 136-144.

<sup>128</sup> Ibid., para. 155.

<sup>129</sup> Ibid., para. 180.

<sup>130</sup> Ibid., para. 170.

<sup>131</sup> Ibid., para. 175 (emphasis in original).

<sup>132</sup> Ibid., para. 176.

<sup>133</sup> Ibid., para. 178.

necessity under customary international law, it is Argentina and not the Tribunal that is at fault”<sup>134</sup> According to CMS the Tribunal considered both defenses step by step, separately, in the order in which Argentina pleaded them.<sup>135</sup>

117. CMS moreover contends that the Tribunal correctly rejected Argentina’s defense on necessity under customary international law in stating that Argentina’s measures were not the only steps available to it and that Argentina contributed to the crisis.<sup>136</sup> It adds that the Committee has no authority under Article 52 of the ICSID Convention to reconsider the Tribunal’s findings of fact.<sup>137</sup>

118. CMS further notes that “after having already rejected Argentina’s defense under customary international law, and after having concluded that Article XI is not self-judging, the Tribunal correctly reverted to customary international law standards as applicable in an analysis of Article XI.”<sup>138</sup> “[H]aving found that Argentina had failed to satisfy the conditions for establishing that a state of necessity existed, there was no need for the Tribunal to duplicate the same analysis in connection with its review of Article XI.”<sup>139</sup> In any case a review of whether the Tribunal correctly interpreted or applied Article XI in its determination of Argentina’s defense is beyond the scope of the Committee’s mandate.<sup>140</sup> “It is sufficient to note that the Tribunal did – step by step and methodically, whether rightly or wrongly – interpret and apply Article XI in light of customary international law and on the basis of the parties’ submissions.”<sup>141</sup>

**(d) The Committee’s view**

119. The Committee will first deal with Argentina’s arguments relating to failure to state reasons under Article 52(e) before examining its submissions based on manifest excess of powers under Article 52(b).

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<sup>134</sup> CMS’ Annulment Counter-Memorial, para. 81.

<sup>135</sup> Ibid., para. 91.

<sup>136</sup> Ibid., paras. 115-121.

<sup>137</sup> Ibid., para. 120.

<sup>138</sup> Ibid., para. 84.

<sup>139</sup> Ibid., para. 82.

<sup>140</sup> Ibid., para. 91.

<sup>141</sup> Ibid.

(i) *Failure to state reasons*

120. The Committee observes that, in Section D of the Award, the Tribunal dealt with Argentina's defense based on state of necessity or emergency under customary international law before examining Article XI of the BIT.

121. The Tribunal considered that Article 25 of the ILC's Articles on State Responsibility reflects customary international law in that field and examined one by one the conditions enumerated in that Article. It took a decision on each of them giving detailed reasons. It arrived to the conclusion that two of those conditions were not fulfilled, recalled that all conditions must be cumulatively satisfied and concluded that the requirement of necessity under customary international law had not been fully met. In that part of the Award, the Tribunal clearly stated its reasons and the Committee has no jurisdiction to consider whether, in doing so, the Tribunal made any error of fact or law.

122. With respect to the defense based on Article XI of the BIT, the Tribunal examined the Parties' arguments and concluded first that "there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI."<sup>142</sup> Then it addressed the debate which the parties had chosen to engage in as to whether Article XI is self-judging. The Tribunal concluded that under Article XI it had the authority to proceed to a substantive review and that "it must examine whether the state of necessity or emergency meet the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness."<sup>143</sup>

123. The problem is, however, that the Tribunal stopped there and did not provide any further reasoning at all in respect of its decision under Article XI. To some extent this can be understood in the light of the arguments developed at the time both by Argentina and CMS. Argentina, on the basis of an expert opinion of Professor Anne-Marie

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<sup>142</sup> Award, para. 359.

<sup>143</sup> Ibid., para. 374.

Slaughter,<sup>144</sup> contended before the Tribunal that Article XI was “self-judging” and that as a consequence the Tribunal had to limit itself to consider whether it acted in good faith in invoking this Article. The expert appointed by CMS, Professor José E. Alvarez, in his statement, opposed that thesis and added that Article XI “must be read in the light of ... the well established derogation for necessity now codified in Article 25 of the ILC’s Articles on State Responsibility.”<sup>145</sup> Endorsing that opinion at the hearing, CMS submitted that “Article XI is not self-judging and... its invocation is subject to satisfaction of the test of necessity under international law.”<sup>146</sup> Argentina took the same approach, conflating “state of emergency” and “state of necessity” and adding that state of necessity is included in Article XI.<sup>147</sup>

124. Along those lines, the Tribunal evidently considered that Article XI was to be interpreted in the light of the customary international law concerning the state of necessity and that, if the conditions fixed under that law were not met, Argentina’s defense under Article XI was likewise to be rejected.<sup>148</sup> Accordingly, having considered the arguments eventually developed by the Parties with respect to Article XI, it did not find it necessary to revert to its previous assessment concerning the application of customary international law and to repeat the conclusions it had arrived at during the course of examination of Argentina’s first defense.

125. The motivation of the Award on this point is inadequate. The Tribunal should certainly have been more explicit in specifying, for instance, that the very same reasons which disqualified Argentina from relying on the general law of necessity<sup>149</sup> meant that the measures it took could not be considered “necessary” for the purpose of Article XI either.

126. Both Parties however understood the Award in that sense and, before the Committee, CMS noted that the Tribunal incorporated into its interpretation of Article XI

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<sup>144</sup> Statement by Professor Anne Marie Slaughter, Hearing on Merits, 18 August 2004, 1844-1847.

<sup>145</sup> Statement by Professor José E. Alvarez, 17 March 2004, para. 32.

<sup>146</sup> Hearing on Merits, 9 August 2004, 110.

<sup>147</sup> Ibid., 295, 300.

<sup>148</sup> See Award, paras. 308, 374.

<sup>149</sup> Ibid., 320, 323, 324, 329, 355, 356.

the approach it had adopted to the law of state responsibility.<sup>150</sup> Argentina did not contest that point and only complained that the Tribunal did not “proceed to carry out the substantive examination” which it rightly held was required.<sup>151</sup>

127. In the Committee’s view, although the motivation of the Award could certainly have been clearer, a careful reader can follow the implicit reasoning of the Tribunal as indicated in paragraph 124 above. On this point, therefore, the submission of Argentina cannot be upheld.

(ii) *Manifest excess of powers*

128. As indicated above the Tribunal, as likewise the parties, assimilated the conditions necessary for the implementation of Article XI of the BIT to those concerning the existence of the state of necessity under customary international law. Moreover, following Argentina’s presentation,<sup>152</sup> the Tribunal dealt with the defense based on customary law before dealing with the defense drawn from Article XI. Argentina submits before the Committee that in doing so, the Tribunal on both points manifestly exceeded its powers.

129. The Committee observes first that there is some analogy in the language used in Article XI of the BIT and in Article 25 of the ILC’s Articles on State Responsibility. The first text mentions “necessary” measures and the second relates to the “state of necessity”. However Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.

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<sup>150</sup> Hearing on Annulment Proceedings, 27 March 2007, 179-182.

<sup>151</sup> Argentina’s Annulment Memorial, para. 131.

<sup>152</sup> Argentina’s Merits Counter-Memorial, paras. 716-742; Argentina’s Merits Reply, paras. 841-996; Hearing on Merits, 9 August 2004, 100-112, 295-296.

130. Furthermore Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. It requires for instance that the action taken "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", a condition which is foreign to Article XI. In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25, as the Parties in fact recognized during the hearing before the Committee.<sup>153</sup> On that point, the Tribunal made a manifest error of law.

131. Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.

132. In doing so the Tribunal made another error of law. One could wonder whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility. But in any case, the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI.

133. If state of necessity means that there has not been even a *prima facie* breach of the BIT, it would be, to use the terminology of the ILC, a primary rule of international law. But this is also the case with Article XI. In other terms, and to take the words of the International Court of Justice in a comparable case, if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been "no breach" of the BIT.<sup>154</sup> Article XI and Article 25 thus construed would cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25.

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<sup>153</sup> Hearing on Annulment Proceedings, 27 March 2007, 339-340; 28 March 2007, 69-70, 177.

<sup>154</sup> *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment on Merits, 6 November 2003, para 34.

134. If, on the contrary, state of necessity in customary international law goes to the issue of responsibility, it would be a secondary rule of international law – and this was the position taken by the ILC.<sup>155</sup> In this case, the Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina’s responsibility could be precluded in whole or in part under customary international law.

135. These two errors made by the Tribunal could have had a decisive impact on the operative part of the Award. As admitted by CMS, the Tribunal gave an erroneous interpretation to Article XI. In fact, it did not examine whether the conditions laid down by Article XI were fulfilled and whether, as a consequence, the measures taken by Argentina were capable of constituting, even *prima facie*, a breach of the BIT. If the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground.

136. The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.

## **H. Temporary Character of Necessity and Consequences for Compensation**

### **(a) The Award**

137. After having decided that the requirements of necessity under customary international law and Article XI of the BIT had not been met and having rejected Argentina’s defense in this respect, the Tribunal considered the consequences to be

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<sup>155</sup> See the discussion reported in *ILC Ybk 1999* vol II(2), 73-74, 85; ILC, Commentary to Part 1, Chapter V, paras. (2)-(4), (7).

drawn for those conclusions as far as compensation was concerned. It recalled that under Article 27 of the ILC's Articles on State Responsibility:

“The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) the question of compensation for any material loss caused by the act in question.”

The Tribunal declared itself “satisfied that Article 27 establishes the appropriate rule of international law on this issue.”<sup>156</sup> It added that “[e]ven if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.”<sup>157</sup> It concluded that “any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.”<sup>158</sup>

138. Passing to the determination of the compensation due, the Tribunal calculated it on the basis of the damages suffered by CMS from 2000 to 2027.<sup>159</sup>

**(b) Argentina's submissions**

139. Argentina submits that Article 27 of the ILC's Articles on State Responsibility “does not require the payment of compensation for measures subject to the defense of necessity.”<sup>160</sup> According to Argentina, this text only contemplates the possibility of such a compensation in certain cases and does not attempt to specify in which circumstances compensation could be payable. It adds that, in the present case, the matter is governed by Article XI of the BIT, which necessarily excludes compensation.<sup>161</sup>

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<sup>156</sup> Award, para. 390.

<sup>157</sup> Award, para. 382. The Tribunal had already decided that the crisis period came to an end “sometime between late 2004 and early 2005” (para. 250).

<sup>158</sup> Award, para. 392.

<sup>159</sup> Award, para. 419.

<sup>160</sup> Argentina's Annulment Memorial, para. 162.

<sup>161</sup> Ibid., para. 161.

140. Argentina moreover contests “the Tribunal’s view that the period of necessity was temporary”<sup>162</sup> and contends that “The tribunal entirely failed to consider the possibility that the continuing stability following the crisis *depended upon the continuation* of precisely the type of measures at issue in the case before it ... Furthermore, the Tribunal’s view that the period of necessity was temporary cannot be reconciled with its award of damages for harm allegedly incurred *during* the period of necessity.”<sup>163</sup>

141. Thus, according to Argentina, the Award must on that point be annulled for manifest excess of power.

**(c) CMS’ submissions**

142. CMS submits that “Argentina’s requested review of the Tribunal’s finding as to the temporary nature of the emergency falls outside the Committee’s mandate for several reasons.”<sup>164</sup> In fact “[t]he Tribunal’s discussion of this issue constituted *obiter dicta* ... and could not be identified as a manifest excess of power.”<sup>165</sup> Moreover “it is not open to the Committee to second-guess the factual findings of the Tribunal.”<sup>166</sup>

143. CMS also contends that “the Tribunal’s consideration of Argentina’s obligation to pay compensation retroactively in the event of a state of necessity was *obiter dicta*, in light of the Tribunal’s prior rejection of Argentina’s defenses based on Article XI and customary international law.”<sup>167</sup> Moreover, on this point, the Award is consistent with both Parties’ positions before the Tribunal.

**(d) The Committee’s view**

144. In paragraphs 379 to 394 of the Award, the Tribunal analyzed Article 27 of the ILC’s Articles on State Responsibility concerning the temporary nature of necessity and the conditions under which compensation might be due even if necessity is established.

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<sup>162</sup> Ibid., para. 160.

<sup>163</sup> Ibid., para. 160.

<sup>164</sup> CMS’ Annulment Counter-Memorial, para. 93.

<sup>165</sup> Ibid., para. 94.

<sup>166</sup> Ibid., para. 96.

<sup>167</sup> Ibid., para. 100.

145. The Committee observes that Article 27 covers cases in which the state of necessity precludes wrongfulness under customary international law. In the present case, the Tribunal rejected Argentina's defense based on state of necessity. Thus Article 27 was not applicable and the paragraphs relating to that Article were *obiter dicta* which could not have any bearing on the operative part of the Award.

146. However the Committee finds it necessary to observe that here again the Tribunal made a manifest error of law. Article 27 concerns, *inter alia*, the consequences of the existence of the state of necessity in customary international law, but before considering this Article, even by way of *obiter dicta*, the Tribunal should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI. The answer to that question is clear enough: Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period.

147. Moreover the Committee notes that Article 27 itself is a "without prejudice" clause, not a stipulation. It refers to "the question of compensation" and does not attempt to specify in which circumstances compensation could be due, notwithstanding the state of necessity.<sup>168</sup>

148. Paragraphs 379 to 394 of the Award being *obiter dicta*, it remains to be seen on which basis the Tribunal decided that compensation was due by Argentina to CMS for the damage suffered by it from 2000 to 2027.

149. The Tribunal had already decided that Argentina had breached its international obligations under Article II(2)(a) and Article II(2)(c) of the BIT. It also decided that in the present case there was no state of necessity and did so in terms which, by necessary inference, excluded also the application of Article XI. Thus, under the well-known principle of international law recalled in Article 1 of the ILC Articles, Argentina was responsible for the wrongful measures it had taken.

150. The Committee concludes that, whatever may have been the errors made in this respect by the Tribunal, there is no manifest excess of powers or lack of reasoning in the part of the Award concerning Article XI of the BIT and state of necessity under customary international law.

## **I. Compensation**

### **(a) The Award**

151. The Tribunal, in the absence of an agreed form of restitution, determined in paragraphs 409 to 469 the amount of compensation due by Argentina to CMS. For that purpose it decided to resort to the standard of fair market value and to calculate that value in using the discounted cash flow method. It noted that the expert chosen by CMS was the only one who estimated the value loss suffered by CMS on its TGN's shares. It took that estimation as a starting point, but appointed its own experts and in the light of their report modified on a number of points the initial estimation. After that modification, it arrived "at a DCF loss valuation of US\$133.2 million for the Claimant on August 17, 2000, representing the compensation owed in that regard by the Respondent to the Claimant at that date".<sup>169</sup> It decided that Argentina must pay that amount. It added that:

"Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US\$2,148,100. The Respondent shall have up to one year after the date this Award is dispatched to the parties to accept such transfer."<sup>170</sup>

The Tribunal then fixed the interest to be paid.<sup>171</sup>

### **(b) The Parties' submissions**

152. Argentina submits that the Tribunal failed "to explain why a percentage of a value of the *company* should be the basis for granting compensation to a *shareholder* in a case where there has been no expropriation. The Award goes on to put this principle into

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<sup>168</sup> See the ILC's commentary on Article 27, paras. (1), (6): *Yearbook of the International Law Commission* 2001, vol. II(2), 209, 211.

<sup>169</sup> Award, para. 468.

<sup>170</sup> Ibid., sub-para. 3 of the *dispositif*.

<sup>171</sup> Ibid., paras. 470-471.

practice without any adequate explanation for the figures chosen.”<sup>172</sup> Moreover, according to Argentina, the Tribunal contradicted itself in deciding that no expropriation had taken place and in using the standard of compensation applicable in case of expropriation.<sup>173</sup> It made its calculation without giving the reasons of many of its assumptions. “[T]he Award provides no reasons for the conclusion that CMS – rather than simply TGN – had the right to calculate tariffs in dollars, obtain PPI tariff adjustments, and benefit from the purported stabilization clause in the License.”<sup>174</sup>

153. CMS, for its part, stresses that the Tribunal highlighted its reasons for adopting the fair market value standard for a breach of Article II of the BIT and clearly explained the methodology it used for that purpose in the light of the various experts’ reports.<sup>175</sup> Moreover, no contradiction can be noted in the Award, the substance of which cannot be reviewed by the Committee.<sup>176</sup>

**(c) The Committee’s view**

154. The Committee observes that the Award is one of the most detailed decisions on damages in ICSID case-law. Under the title “Remedies”, the Tribunal considered the matter in 25 pages. It declared itself “persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of [compensation known as the] fair market value.”<sup>177</sup> It specified that “[w]hile this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses.”<sup>178</sup> In doing so, the Tribunal clearly explained its reasons and did not contradict its decision dismissing CMS’s claim of expropriation.

155. The Tribunal then listed the various methods which could be retained to calculate the fair market value and concluded for reasons given in paragraphs 411 to 417 of the

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<sup>172</sup> Argentina’s Annulment Reply, para. 99.

<sup>173</sup> Ibid., para. 101.

<sup>174</sup> Ibid., para. 100.

<sup>175</sup> CMS’ Annulment Counter-Memorial, paras. 170-173.

<sup>176</sup> Ibid., paras. 173-174.

<sup>177</sup> Award, para. 410.

<sup>178</sup> Ibid.

Award that the discounted cash flow method (DCF) was the one “that should be retained.”<sup>179</sup>

156. Passing to the evaluation of the damages, the Tribunal carefully examined the reports of the experts chosen by both parties, in the light of the report of its own experts. It used the “direct equity value” method to compute the value of the firm and its securities.<sup>180</sup> Starting from the assumptions which were the basis of CMS’s expert report, it modified them on a number of points in specifying the reasons of each modification. In particular, it examined two different DCF scenarios: one in the “no regulatory change” context (“without pesification”) and the other for the post-measures “new regulatory context” (“with pesification”).<sup>181</sup> This last scenario was to take into account the impact of Argentina’s crisis on TGN’s performance in the absence of the measures complained of by CMS. Thus and contrary to what is contented by Argentina this element was taken into consideration.

157. The Committee accordingly concludes that there was no lack of reasoning or contradiction in the reasoning with respect both to the standard of compensation retained by the Tribunal and to the calculation of damages made by it.

## **J. Conclusion**

158. Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist. As stated already (paragraph 136 above), in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal.

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<sup>179</sup> Ibid., para. 411.

<sup>180</sup> Ibid., paras. 430-433.

<sup>181</sup> Ibid., para. 422.

159. In the event Argentina's application for annulment must be upheld as far as the umbrella clause is concerned. The other claims of Argentina are dismissed.

160. As a consequence the stay of enforcement maintained by the Decision of the Committee of 1 September 2006 is automatically lifted as from the date of the present Decision, in accordance with Arbitration Rule 54(3). Consequently, payment by Argentina of the sum awarded is again obligatory: see paragraph 15 above, and this reactivates the Award's stipulation<sup>182</sup> that, on payment of the amount due plus an additional US\$2,148,100, CMS' shares in TGN are to be transferred to Argentina. Pursuant to Article 44 of the ICSID Convention (as applied to annulment proceedings by Article 52(4)), the Committee decides that Argentina has 228 days from the date this Decision is dispatched to the Parties to accept the transfer of ownership of CMS' shares in TGN, as provided for in sub-paragraph 3 of the *dispositif* to the Award.

161. The ruling on the costs of the proceedings before the Tribunal stands. It remains to deal with the question of the costs of the annulment proceedings, as to which the Committee has a discretion. In all but one of the concluded annulment proceedings, Committees have held that ICSID costs should be borne equally by the Parties.<sup>183</sup> In the circumstances of the present case the Committee proposes to follow the existing practice.

162. The costs of the Parties' own representation during the annulment proceedings are likewise within the Committee's discretion. In view of the decision of partial annulment, and having regard to all the circumstances, the Committee decides to make no order as to the costs of representation before it.

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<sup>182</sup> Award, sub-para. (3) of the *dispositif*, and see paragraph 10 above.

<sup>183</sup> See *MTD v. Chile*, para. 110 (fn 139).

**K. Decision**

163. For the foregoing reasons, the Committee decides:

(1) Sub-paragraph 1 of the *dispositif* of the Award is annulled as far as it provided that “The Respondent breached its obligations... to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty.”

(2) The other claims of the Argentine Republic are dismissed.

(3) Argentina has 228 days after the date this Decision is dispatched to the Parties to accept the transfer of ownership of CMS shares in TGN as provided for in sub-paragraph 3 of the *dispositif* to the Award.

(4) Each Party shall bear one half of the costs incurred by the Centre in connection with this annulment proceeding.

(5) Each Party shall bear its own costs of representation in connection with this annulment proceeding.

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JUDGE GILBERT GUILLAUME  
President of the Committee  
Date: 21 August 2007

[signature]

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JUDGE NABIL ELARABY  
Member  
Date: 12 July 2007

[signature]

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PROFESSOR JAMES CRAWFORD  
Member  
Date: 12 July 2007