International Centre for Settlement of Investment Disputes
Washington, D.C.

Sempra Energy International
(Claimant)

v.

Argentine Republic
(Respondent/Applicant)

(ICSID Case No. ARB/02/16)
(Annulment Proceeding)

Decision on the Argentine Republic's Request for Annulment of the Award

Members of the *ad hoc* Committee
Mr Christer Söderlund, President
Sir David A.O. Edward, QC
Ambassador Andreas J. Jacovides
Secretary of the *ad hoc* Committee: Mr Gonzalo Flores

***Representing Sempra Energy International*:**

Mr R. Doak Bishop, King & Spalding LLP
Mr Craig S. Miles, King & Spalding LLP
Mr Roberto Aguirre Luzi, King & Spalding LLP
Mrs Silvia Marchili, King & Spalding LLP
Mrs Kerrie A. Nanni, King & Spalding LLP

Representing the Argentine Republic:

Until 26 January 2010:
Dr. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina

From 27 January 2010:
Dr. Joaquín Pedro da Rocha
Procurador del Tesoro de la Nación Argentina

Date of dispatch to the Parties: 29 June 2010

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ABBREVIATIONS USED IN THIS DECISION

Arbitration Rules	Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes
Argentina	Argentine Republic
Award	*Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Award of 28 September 2007
BIT	Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991
CGP	Camuzzi Gas Pampeana S.A.
CGS	Camuzzi Gas del Sur S.A.
Claim Memorial	Claim Memorial submitted by Sempra in the arbitration proceeding on 3 September 2003
CMS	*CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8)
Convertibility Law	Law No. 23.928 of 27 March 1991
Counter-Memorial	Counter-Memorial submitted by the Argentine Republic in the arbitration proceeding on 1 August 2005
Counter-Memorial on Jurisdiction	Counter-Memorial on Jurisdiction submitted by Sempra in the arbitration proceeding on 4 March 2004
Decision on Jurisdiction	*Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Jurisdiction of 11 May 2005
The Emergency Law	Law No. 25.561 of 6 January 2002
Gas Decree	Decree 1738/92 of 1992 on the implementation of the Gas Law
Gas Law	Law No. 24076, partially enacted on 9 June 1992
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes

ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC Articles	ILC Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001
LG&E Decisions	*LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1)
License(s)	Distribution Licenses of Distribuidora de Gas del Sur S.A. and Distribuidora de Gas Pampeana S.A., approved by Decree No. 2451 and Decree No. 2456, respectively, of 18 December 1992
Licensee(s)	Camuzzi Gas Pampeana S.A. and Camuzzi Gas del Sur S.A.
Local Companies	Sempra's partly-owned and indirectly held companies CGS and CGP
PPI	United States Producer Price Index
Rejoinder	Rejoinder submitted by the Argentine Republic in the arbitration proceeding on 5 December 2005
Reply	Reply submitted by Sempra in the arbitration proceeding on 28 September 2005
Schreuer	Christoph Schreuer *et al.* The ICSID Convention, A Commentary (second edition), 2009
Sempra	Sempra Energy International
Umbrella Clause	Article II(2)(c) of the Argentina – US BIT, according to which "[e]ach Party shall observe any obligation it may have entered into with regard to investments."
VCLT	The Vienna Convention on the Law of Treaties

INTRODUCTION

1. On 25 January 2008, the Argentine Republic filed with the Secretary-General of the International Centre for Settlement of Investment Disputes an application requesting annulment of the 28 September 2007 Award, rendered by the tribunal in the arbitration proceeding between Sempra and Argentina (hereinafter jointly referred to as "the Parties"). The Application for Annulment was made within the time period provided in Article 52(2) of the ICSID Convention.

2. In its Application, Argentina sought annulment of the Award on four of the five grounds set out in Article 52(1) of the ICSID Convention, specifically claiming that:

   (i) The Tribunal was not properly constituted (ICSID Convention, Article 52(1)(a));

   (ii) The Tribunal manifestly exceeded its powers (ICSID Convention, Article 52(1)(b);

   (iii) There had been a serious departure from a fundamental rule of procedure (ICSID Convention, Article 52(1)(d)); and

   (iv) The Award had failed to state the reasons on which it was based (ICSID Convention, Article 52(1)(e)).

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

4. The Secretary-General of ICSID registered the Application on 30 January 2008 and on the same date, in accordance with ICSID Arbitration Rule 50(2), transmitted a Notice of Registration to the Parties. The Parties were also notified that, pursuant to ICSID Arbitration Rule 54(2), enforcement of the Award was provisionally stayed.

5. By letter of 15 September 2008, in accordance with ICSID Arbitration Rule 52(2), the Parties were notified by the Centre that an *ad hoc* committee ("the Committee") had been constituted, composed of Mr Christer Söderlund, from Sweden, Sir David A.O. Edward, QC, from the United Kingdom, and Ambassador Andreas J. Jacovides, from Cyprus, each of them appointed by their respective countries to the ICSID Panel of Arbitrators. On the same date the Parties were informed that Mr Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Committee.

6. On 16 September 2008, Sempra filed a request to lift the provisional stay of enforcement of the Award.

7. By letter of 25 September 2008, the Parties were notified that Mr Christer Söderlund had been designated President of the Committee.

8. By letter of 10 October 2008, the Committee proposed to hold a first session by telephone conference on 21 October 2008. A provisional agenda for the session was attached to the letter. The Parties were also notified that the Committee had decided to continue the provisional stay of enforcement of the Award until 8 December 2008, the date fixed by the Committee to hear the Parties' oral pleadings on stay.

9. The first session of the Committee was held, as proposed, on 21 October 2008 by telephone conference. At the session, Sempra was represented by Messrs Craig S. Miles and Roberto Aguirre Luzi and by Ms Kerrie A. Nanni, from the law firm of King & Spalding LLP (Houston). The Argentine Republic was represented by Dr Gabriel Bottini and Dra Gisela Makowski from *Procuración del Tesoro de la Nación Argentina*.

10. During the first session: (a) the Parties expressed their agreement that the Committee had been duly constituted, in accordance with the ICSID Convention and the ICSID Arbitration Rules, and confirmed that they had no objections to any of its members; (b) several issues of procedure were agreed and decided; and (c) the Committee informed the Parties of its decision to continue the provisional stay of enforcement of the Award until a decision on this matter was taken by the Committee. Scheduling arrangements which could not be agreed during the course of the first session were resolved by the Parties shortly after.

11. In accordance with the Parties' agreement, Argentina filed its observations on the continuation of the stay of enforcement of the Award on 7 November 2008 and Sempra filed its observations on 21 November 2008.

12. On 8 December 2008, a hearing was held at the seat of the Centre in Washington D.C., at which the Parties presented oral arguments on the matter of *stay of enforcement*. Present at the hearing were: the Members of the Annulment Committee: Mr Christer Söderlund, Sir David A.O. Edward, QC, and Ambassador Andreas J. Jacovides; the Secretary of the Committee: Mr Gonzalo Flores; Sempra's representatives: Messrs R. Doak Bishop, Craig S. Miles and Roberto Aguirre Luzi of King & Spalding LLP (Houston); Mr Mark Clodfelter and Ms Maria Kostytska Scala, of Winston & Strawn LLP (Washington, D.C.) and Mr Dave O. Smith of Sempra Energy International; and representatives of the Argentine Republic: Dr Gustavo Adolfo Scrinzi, *Sub-Procurador del Tesoro de la Nación Argentina*, Dr Gabriel Bottini, Dr Ignacio Torterola,

Dr Alejandro Turyn and Dr Alejandro Agustín Vásquez Azpilicueta, from Argentina's *Procuración del Tesoro de la Nación*. Messrs Bishop, Miles, Aguirre Luzi and Clodfelter addressed the Committee on behalf of Sempra. Messrs Scrinzi, Bottini and Torterola did so on behalf of Argentina.

13. On 18 December 2008, Sempra wrote to the Committee, claiming that Argentina had "again refused to change its interpretation of its obligations under Articles 53 and 54 of the ICSID Convention", referring to the *Vivendi ad hoc* committee's request for a "comfort letter"[1] and to Argentina's response to that committee of 28 November 2008. By letter of 29 December 2008 Argentina declared its readiness to provide comments on Sempra's 18 December submission while, at the same time, describing its letter to the Vivendi *ad hoc* committee as "self-explanatory".

14. By letter of 30 January 2009, Argentina notified the Committee of its intent to adduce additional written testimony into the proceeding. By letter dated 6 February 2009, Sempra objected, emphasizing that the proposed testimony had been presented to the Sempra Tribunal which had conclusively disposed of it. In a reply letter of 20 February 2009, Argentina opined that the proposed testimony should be admitted as it had a bearing on the allegation that a serious departure from a fundamental rule of procedure had occurred in the Sempra arbitration.

15. On 3 March 2009, Argentina filed its Memorial on Annulment.

16. The Committee issued its *Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award* on 5 March 2009. In its decision, the Committee granted a continuation of the stay of enforcement of the Award subject to the condition that Argentina place in escrow an amount of USD 75 million. The Committee's decision further provided that, if Argentina failed to place the sum required in escrow within 120 days from the date of the issuance of the decision, the Committee might – at the request of Sempra – order termination of the stay of enforcement with or without providing an opportunity for Argentina to make up for any failure in payment.

17. The Committee further decided on Argentina's request to adduce additional evidence on 31 March 2009. In its decision, the Committee, invoking ICSID Arbitration Rule 34(1), according to which "[t]he tribunal shall be the judge of the admissibility of any evidence [--]" and ICSID Arbitration Rule 53, according to which "[t]the provisions of

[1] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007 (4 November 2008).

these Rules shall apply *mutatis mutandis* to any procedure relating to [---] annulment of an award and to the decision of the [---] Committee", confirmed its power to rule on the admissibility of any evidence invoked by a party to annulment proceedings.

18. The Committee, however, noting that the ambit of its review was strictly limited to questions of law relating to the grounds for annulment exhaustively listed in the Convention, rejected Argentina's application to adduce additional testimony. Specifically, the Committee considered that the proposed evidence could not contribute to elucidating whether or not the Tribunal dealt with certain evidentiary matters in such a manner as to constitute a serious departure from a fundamental rule of procedure.

19. On 4 May 2009, Sempra filed its Counter-Memorial on Annulment.

20. By letter of 13 May 2009, Sempra requested that the stay of enforcement be lifted. The reason invoked for the request was that Argentina had not agreed to, let alone offered, any escrow agreement, as provided in the Committee's 5 March decision.

21. In particular, Sempra referred to paragraph 119 of the Committee's decision, which provided:

> In the event where Sempra considers the escrow arrangement offered by Argentina as unsatisfactory, Sempra may bring this matter to the Committee's attention by submitting a notice at the relevant time, but no later than 30 (thirty) days before expiry of the time limit set forth above. Argentina shall be entitled to submit comments and take corrective action by reason of such notice. If the Committee considers that the escrow arrangement is unsatisfactory – despite corrective action, if any – the Committee may terminate the stay pursuant to Rule 54(3) of the ICSID Arbitration Rules.

22. By letter of 22 May 2009, the Committee invited Argentina to offer comments on Sempra's letter of 13 May 2009.

23. In a communication of 1 June 2009, Argentina made reference to discussions said to have taken place between Argentina and "counsel for Sempra" in the *Enron* case[2], *inter alia*, concerning a proposal to put an escrow agreement in place as a condition for continuing the stay in

[2] *Enron Creditors Recovery Corporation* (formerly Enron Corporation) and *Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) – Annulment Proceeding. The law firm of King & Spalding LLP (Houston) represents the claimants in both annulment proceedings.

those annulment proceedings. Argentina had explained that such an arrangement as proposed would create "unacceptable risks of attachment" to Argentina, pointing to the contingency of other creditors attaching Argentina's entitlement to lift the amount in escrow, should its application for annulment be granted. Argentina noted, in particular, that the *ad hoc* committee in the *Enron* annulment proceedings had, for reasons given in paragraph 42 of that committee's decision of 20 May 2009, granted a continuation of the stay without conditions. Argentina requested this Committee to do likewise.

24. By letter of 10 June 2009, Sempra expressed its disagreement with the *Enron* committee's reasoning on the point of third-party attachment risk, emphasizing that, taking such a risk into account "encourages recalcitrant debtors [---] to continue repudiating their international monetary obligations", and questioning why Sempra should suffer the consequences of "Argentina's unilateral decision to renege on its prior international monetary obligations".

25. In the same letter, Sempra reiterated its request that the Committee lift the stay of enforcement, noting that Argentina had not only failed to "offer" an escrow arrangement but had not even responded to a draft escrow agreement proposed by Sempra, let alone committed any funds into such escrow.

26. By letter of 17 June 2009, the Committee stated that it would consider the Parties' arguments on the matter of the ongoing stay and issue a decision in respect of the Sempra's request that the stay now be lifted. Further, the Committee invited the Parties to communicate "any new development or other circumstances, which may be relevant for the matters presently pending".

27. On 29 June 2009, the Argentine Republic filed its Reply on Annulment.

28. By letter of 16 July 2009, Sempra asked the Committee to lift the stay of enforcement of the Award. Argentine immediately filed a response on 17 July 2009.

29. The Committee issued its *Decision on Sempra Energy International's Request for the Termination of the Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules)* on 7 August 2009. The Committee terminated the stay of enforcement of the Award, dismissing Argentina's argument that the placing of funds in escrow (or issuing a letter of credit) would cause prohibitive cost and create an "unacceptable risk of attachment to Argentina". In doing so, the Committee noted that: (a) the circumstances invoked by Argentina did not amount to economic hardship that would constitute a valid consideration when deciding whether to continue or terminate the stay

(as already decided in its 5 March decision; paragraphs 77-79); and (b) that it does not "see as its function to create safeguards against the possibility of third-party creditors generally obtaining satisfaction in respect of outstanding claims.[...] [s]uch contingencies are outside the scope of considerations which an *ad hoc* committee should take into account". Argentina not having complied with the condition imposed by the Committee for continuing the stay for the duration of this proceeding, the stay of enforcement of the Award was terminated.

30. On 13 August 2009, Sempra filed its Rejoinder on annulment.

31. A 3-day hearing was held at the seat of the Centre in Washington, D.C. on 1-3 September 2009, 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 and its Secretary. On behalf of Sempra attended: Messrs R. Doak Bishop, Craig S. Miles and Roberto Aguirre Luzi and Mrs Silvia Marchili, Kerrie A. Nanni and Carol Tamez of King & Spalding LLP (Houston); and Messrs Dave O. Smith and Santiago Albarracín, from Sempra Energy International. On behalf of the Argentine Republic attended: Dr Osvaldo César Guglielmino, Procurador del Tesoro de la Nación Argentina, Dr Gustavo Adolfo Scrinzi, Sub-Procurador del Tesoro de la Nación Argentina, Dr Gabriel Bottini, Dr Diego Gosis, Dra Veronica Lavista, Dra Viviana Kluger and Dr Nicolás Duhalde, from Argentina's *Procuración del Tesoro de la Nación* and Dr Domenico di Pietro, from Chiomenti Studio Legale. Messrs Bishop, Miles and Aguirre Luzi addressed the Committee on behalf of Sempra. Messrs Scrinzi, Bottini, Gosis, di Pietro and Ms Lavista did so, on behalf of the Argentine Republic.

32. The Committee declared the proceeding closed on 7 May 2010. During the course of the proceedings, the Members of the Committee deliberated by various means of communication, including a meeting at The Hague on 14 – 16 December 2009, and have taken into account all pleadings, documents and testimony before them.

THE DISPUTE

33. In 1989 Argentina introduced a privatization programme in order to revitalize its economy and put an end to the then ongoing economic crisis. An important facet of this program was the introduction of a legal and regulatory framework by way of the Convertibility Law, introduced in 1991, together with an implementing decree, fixing the Argentine peso (ARS) to the US Dollar (USD) at the exchange rate of one to one.

34. In 1992, the natural gas industry was restructured, and the government-owned company *Gas del Estado* was privatized. In this connection, the Gas Law was introduced together with its implementing regulations in the form of the Gas Decree. Within the framework of this regulatory regime, a number of companies were formed for purposes of distribution of gas for residential and commercial users. Sempra invested in two of these gas companies by acquiring an indirect shareholding amounting to 43.09% of Sodigas Pampeana's and Sodigas Sur's shares, which, in turn, are the holders of 90% and 86,09%, respectively, of the shares of Camuzzi Gas Pampeana S.A. ("CGP") and Camuzzi Gas del Sur ("CGS"), *i.e.* the "Licensees", two Argentine companies which have been granted licenses for the distribution of gas (hereinafter the "License(s)") in 1996.

35. In December 2001 a financial crisis erupted in Argentina, and in the period 2001-2002 the Government of Argentina undertook a number of measures which, in the view of Sempra, constituted a wholesale abrogation and repudiation of significant rights and entitlements under the Licenses and other entitlements under the regulatory environment, that had been established within the framework of the Argentine privatization program. Essentially, these rights concerned the Licensees' entitlement to calculation of tariffs in USD and their semi-annual adjustment on the basis of the US Producer Price Index ("PPI").

36. In January 2002, the Emergency Law was enacted, the currency board system was abrogated, the Argentine economy was pesified – including public service agreements and licences – and all contracts and relationships then in force were, according to the Emergency Law, to be adapted to the new context.

37. On the basis of the above-stated circumstances, Sempra filed, on 11 September 2002, a Request for Arbitration under the ICSID Convention, invoking the US-Argentina Bilateral Investment Treaty ("BIT").

38. On 31 December 2003, Argentina filed objections to the Centre's jurisdiction and the competence of the Tribunal. On 11 May 2005 the Tribunal issued its Decision on Jurisdiction, wherein it held that the dispute fell under the jurisdiction of the Centre and the competence of the Tribunal.

39. A merits phase in the arbitration followed, and the Award on the merits was dispatched to the Parties on 28 September 2007. In the Award it was held that Argentina had breached the fair and equitable standard and the Umbrella Clause of the BIT. On these bases, Sempra was awarded damages.

40. On 25 January 2008 Argentina requested the annulment (and stay of enforcement) of the Award.

THE GROUNDS FOR ANNULMENT

A brief summary of Argentina's Annulment Application

41. In this annulment proceeding, Argentina has raised a number of issues with regard to the arbitral proceeding and the Award, each of which, on Argentina's case, have been dealt with in such a way as to constitute one or more grounds for annulment of the Award in its entirety. The issues raised by Argentina concern the *jus standi* of Sempra to bring claims relating to the Licenses and related rights; alleged impropriety in dealing with Argentina's proposal for the disqualification of the members of the Tribunal; matters relating to the admission of certain fact witnesses in the arbitration proceeding; interpretation of various terms of the Licenses; and the way in which the Tribunal dealt with the fair and equitable treatment standard and the Umbrella Clause of the BIT.

42. Finally, as explained in greater detail below, Argentina raised arguments in respect of the way that the Tribunal dealt with emergency under Argentine law, necessity under customary international law and preclusion on the basis of Article XI of the BIT.

43. In its application for annulment, Argentina invoked (as already noted in paragraph 2 above) the following grounds for annulment as provided for in the ICSID Convention:

1. The Tribunal was not properly constituted (Article 52(1)(a) of the ICSID Convention).
2. The Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention).
3. There has been a serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention).
4. The Award failed to state the reasons on which it was based. (Article 52(1)(e) of the ICSID Convention).

THE ARBITRAL PROCEEDING

44. In the arbitration Sempra argued that the measures adopted by Argentina in the period 2000 – 2002, initiated by the enactment of the Emergency Law and leading to the pesification of tariffs under that law, the abrogation of the PPI adjustment of tariffs, the unilateral modification of the Licenses without compensation and related matters, amounted to abrogation and repudiation of most of the rights it had under the regulatory framework.

45. On this basis, Sempra claimed that Argentina was in breach of specific commitments made to the investors in violation of the applicable legal regulatory norms and the specific guarantees provided under the BIT, seriously impairing the value of its investments.

46. The conduct of Argentina constituted, in Sempra's view, wrongful expropriation of its investment as well as breach of the fair and equitable treatment standard, including legitimate expectations, by measures characterized by arbitrary and discriminatory treatment and failure to provide full protection and security, as well as also breaching the BIT's Umbrella Clause. In sum, according to Sempra, all of the protections offered under the BIT had been breached.

47. Argentina denied that there had been any breach in respect of the measures it undertook and which have been complained of by Sempra. The legal and regulatory framework governing the privatization provided for the Licensees' right to fair and reasonable tariffs and the right to calculate tariffs in USD could be applied only as long as the Convertibility Law was in force. Moreover, information that the investors relied on when making their investments was conveyed by private consulting firms and was not attributable to Argentina, which had expressly disclaimed responsibility for such information.

48. In Argentina's view, the legal and regulatory framework had also been strictly upheld when adopting the measures complained of and none of those measures amounted to a breach of the Licenses or the BIT. In any event, Argentina maintained that its responsibility, both under domestic as well as international law concerning necessity, whether customary or treaty-based, is excluded.

49. Against the overall scenario described above, Sempra dealt with a number of specific measures undertaken by Argentina in the context of the economic, social and political difficulties gradually emerging in Argentina at the end of the 1990s and the measures undertaken by Argentina commencing in December of 2001 and gathering momentum in the following year.

The first claim: PPI adjustment of tariffs.

50. According to Sempra, adjustments of the tariffs based on the PPI ("PPI adjustments") were suspended from 1 July 2000, and permanently.

51. Argentina denied that the measures undertaken were in any way in breach of any undertaking, but simply represented a reasonable adjustment to the Argentine economy in a situation of recession and deflation, making the adjustments to the license terms justified.

52. The Tribunal held that the Licensees had been entitled to PPI adjustments, and that these adjustments had been abrogated by Argentina.

The second claim: Pesification of tariffs under the Emergency Law

53. On 6 January 2002 Argentina enacted the Emergency Law, which essentially entailed the abrogation of the Licensees' right to calculate tariffs in USD and the conversion of tariffs at a fixed rate of exchange of one USD to one ARS.

54. According to Argentina, the calculation of tariffs in USD was linked to the Convertibility Law, which, in turn, was subordinated to the overreaching policy goal that tariffs should be fair and reasonable.

55. Sempra contends that the abrogation of these rights constituted violations of the protections offered by Argentina, in particular, in respect of the fair and equitable treatment standard and the Umbrella Clause.

56. The Tribunal, basing itself on an examination of the legal and the regulatory framework, concluded that there was indeed a right for Sempra to calculate tariffs in USD, that this was a central feature of the tariff regime, and that this right was abrogated.

The third claim: The breach of the Licenses' stability clauses.

57. Sempra's claim in this respect refers, in particular, to contractual provisions of the Licenses prohibiting the freezing of prices, and the duty of the Licensor not to amend the basic rules of the Licenses without written consent of the Licensees. The non-observance of these commitments constituted, in Sempra's view, a breach of the Umbrella Clause in the BIT.

58. Argentina argued that the prohibitions referred to were binding only for the executive branch of government and that any measure arising from congressional action would not fall foul of this prohibition.

59. The Tribunal, noting that the matter at hand did not concern the State's right to adjudicate or legislate, but whether the terms of the Licenses gave a right to damages, dismissed Argentina's argument.

The fourth claim: Failure to reimburse subsidies

60. The fourth claim advanced by Sempra concerns the failure of Argentina to reimburse certain subsidies promised to the Licensees, essentially

CGS. Additionally, Sempra considered that such subsidies were to be calculated in USD as being *in lieu* of higher tariffs.

61. Argentina denied the claim invoking its attempts to regularize the payments of subsidies and the proposition that the situation now is back to normal. As the subsidies, in Argentina's view, have always been paid in ARS, no conversion into USD is warranted.

62. The Tribunal concluded that Argentina recognized the amount of subsidies owing before 31 December 2001, and that the monies due must be compensated with the parity exchange value of the ARS to USD at that time.

The fifth claim: Interference with the collection of bills and related matters

63. Sempra argued that a number of measures have caused interference in collection of bills and that other suspensions and impositions have impacted negatively on the operations of the Local Companies.

64. Argentina rejected the significance of any such measure as being limited and exceptional and, in any event, later reversed.

65. The Tribunal considered that it did not find much merit in these "peripheral" claims, but that it was prepared to consider them in the context of Sempra's overall claim for compensation.

The matter of treaty breaches

66. The Tribunal held, essentially, that Argentina had not breached the standard of protection established in Article IV(1) of the BIT (expropriation or equivalent).[3] The Tribunal held, however, that "[t]he measures in question"[4] had, beyond any doubt, substantially changed the legal and business framework, under which the investment was decided and implemented and that, as a consequence, the fair and equitable treatment standard of Article II(2)(a) of the BIT had been breached.

67. As for Sempra's argument relating to breach of the Umbrella Clause, the Tribunal, opining that the Licenses were "the ultimate expression of a series of complex investment arrangements made with a specific intention of channeling the influx of capital",[5] concluded that, indeed, the Umbrella Clause in Article II(2)(c) of the BIT was also breached.

68. As for Sempra's assertion that it had been the victim of arbitrary and discriminatory action from the side of Argentina, the Tribunal

[3] Award, para 286
[4] Award, para 303
[5] Award, para 312

concluded that the treatment afforded to Sempra did not appear to have been discriminatory or arbitrary in comparison to measures meted out to other entities or sectors in Argentina and did not, therefore, constitute a breach of the BIT's protection from arbitrariness and discrimination (Article II(2)(b)).

69. As for the claim concerning full protection and security, the Tribunal noted that this particular standard has evolved in the context of physical protection but that also, in given cases, a broader interpretation could be justified. However, the Tribunal saw no reason on the basis of the circumstances of the present case to thus extend this standard of protection and, therefore, rejected Sempra's claim under Article II(2)(a) of the BIT.

Argentina's defence based on necessity and preclusion under Article XI of the BIT

70. In the course of the arbitration, Argentina also raised the defense of necessity under Argentine law and customary international law as well as the question of preclusion under Article XI of the BIT (in that order).

71. The Tribunal held that the conditions under which emergency might be exercised and legally validated under Argentine law were not present, based on Argentine court precedents, and that "the very constitutional provisions which were subject to judicial control and which led to the definition of those conditions cannot be invoked to preclude a finding of wrongfulness".[6] Nor did the Tribunal – applying Article 25 of the ILC Articles as an expression of customary international law – find that the cumulative requirements set up by that provision were present in order to excuse wrongfulness. As for preclusion under Article XI of the BIT, the Tribunal held, as will be discussed in greater detail below, that the cumulative requirements for exoneration under Article 25 of the ILC Articles were not satisfied, making it unnecessary, in the view of the Tribunal, to undertake further judicial review under Article XI.

72. In summing up, the Tribunal held that Argentina had incurred liability for breach of the fair and equitable treatment standard as well as the Umbrella Clause, and ordered Argentina to pay compensation.

PROCEEDINGS BEFORE THE COMMITTEE

INTRODUCTORY COMMENTS

The scope of review to be undertaken by the Committee

73. An *ad hoc* committee may only determine whether (a) to annul the Award in whole or in part – rendering the Award (or part thereof) null and void for all intents and purposes, cancelling its *res judicata* effect –

[6] Award, para 330

or (b) let the Award stand. Annulment is distinct from an appeal. An *ad hoc* committee cannot substitute its own judgement on the merits for the decision of the Tribunal. Following a decision to annul an ICSID Award, the dispute may be resubmitted to new tribunal to obtain a decision on the merits.

74. Annulment review is limited to a specific set of carefully defined grounds (listed exhaustively in Article 52(1) of the ICSID Convention)[7]. New arguments or evidence on the merits will therefore be irrelevant for the annulment process, and therefore not admissible. It cannot be excluded, however, that evidence, particularly expert evidence, may exceptionally be accepted in annulment proceedings insofar it is specifically relevant for the annulment grounds listed in Article 52(1) of the Convention (insofar invoked by a party).

75. As for the interpretation of grounds for annulment there is compelling support for the view that neither a narrow nor a broad approach is to be applied.[8]

76. Nor is there any preponderant inclination "*in favorem validitatis*", *i.e.* a presumption in favour of the Award's validity.[9] In line with the consistent, but not invariable, practice of *ad hoc* committees, this Committee will not express any views on aspects of the Tribunal's reasoning on the merits.

77. It is standard practice for applicants seeking annulment to invoke more than one ground for annulment – as has been done in the present case. The Committee sees it as its task to gauge the circumstances invoked in support of each ground independently. The fact that a particular set of facts may have a bearing on more than one ground of annulment does not, as such, render any error alleged in support of anyone of those grounds of annulment any the more manifest.

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7 ICSID Arbitration Rule 50(1)(c)(iii) also confirms that these grounds are the sole grounds for annulment.

8 As explained by the *ad hoc* committee in the Klöckner arbitration, "*... application of the paragraph Article 52(1) of the Convention demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible with guarantees in order to achieve a harmonious balance between the various objectives of the Convention.*" (Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2), Decision on Annulment, 3 May 1985, p 3).

9 *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, para 22, that "[s]uch presumption [---] finds no basis in the text of Article 52 and has not been used by annulment committees".

78. Once an *ad hoc* committee has concluded that there is one instance of manifest excess of powers (or any other ground for annulment), which warrants annulment of the Award in its entirety, this will be the end of the *ad hoc* committee's examination. Since annulment of an award in its entirety necessarily leads to the loss of the *res judicata* effect of all matters adjudicated by the Tribunal, it is unnecessary to consider whether there are other grounds – whether in respect of the same matter or other matters – that may also lead to annulment.

79. On the other hand, an *ad hoc* committee will need to proceed differently where it decides not to annul the Award or decides to annul the Award only in part. In those instances it will be necessary for the *ad hoc* committee to examine all of the grounds invoked by the applicant in support of its application.

80. The question arises whether different considerations apply where the matters of the Centre's jurisdiction and the Tribunal's competence have been put in issue. In other words, if the affirmation of jurisdiction by the Tribunal is alleged to constitute a manifest excess of powers (or any other ground for annulment), does this question have to be addressed as a preliminary issue (and dismissed), before considering grounds of annulment invoked by the applicant in respect of other aspects of the Award or the arbitral proceedings? The argument for taking this course would be that, if the dispute fell outside the jurisdiction of the Centre and, therefore, outside the competence of the Tribunal, the conduct of the Tribunal in procedural and substantive respects would not be relevant.

81. The contrary argument would be that, since no decision of an *ad hoc* committee (or any reasoning underlying it) can have no effect other than upholding or (partially) annulling the Award, the reasons given by the *ad hoc* committee for its decision, while decisive for its conclusions, will not be binding on a new Tribunal upon resubmission of the case. Thus, if an *ad hoc* committee has found that a Tribunal's assertion of jurisdiction is the result of an error justifying annulment of the Award, a new tribunal may nevertheless declare itself competent to deal with the case.

82. In the present case, although the Committee has come to the conclusion that the Award must be annulled on another ground, it considers that, on balance, it is desirable that it should deal with Argentina's argument on jurisdiction as a preliminary matter.

JURISDICTION

Introduction

83. In the arbitration, Argentina disputed the Tribunal's jurisdiction on a number of grounds, *inter alia*, Sempra's lack of *jus standi*, arguing,

essentially, that Sempra's claims were connected to the Licensees and not directly to its investment, as any alleged violation complained of was susceptible of affecting the Licensees only.

84. Sempra contended that all requirements under the ICSID Convention and the BIT for the Tribunal's jurisdiction were present, *i.e.*, essentially, that there was a legal dispute between a national of the United States and Argentina concerning losses, that these affected the interest of Sempra in the Licensees, and that both parties have consented to ICSID arbitration.

85. Argentina, referring to the second part of Article 42(1) of the ICSID Convention, further argued that of the Tribunal should apply "domestic legislation and international law".[10] Sempra argued that it is the ICSID Convention and the BIT that should be applied to determine jurisdiction.[11]

86. The Tribunal confirmed[12] that Article 42(1) applies to the merits of the dispute only, so only Article 25 of the Convention and the terms of the BIT should be applied.

87. The Tribunal also found that also a non-controlling shareholder is an investor under the terms of the BIT. Further, the Tribunal held that Article 25(2)(b) of the Convention establishes an *optional* jurisdictional alternative and not, as argued by Argentina, an autonomous jurisdictional requirement.[13]

88. Furthermore, the Tribunal noted that, contrary to Argentina's argument, Sempra alleged that it had suffered a direct loss. The Tribunal also concluded that there was an (alleged) loss, arising directly to Sempra's investment, giving Sempra a cause of action under the BIT.

89. As for Argentina's claim that Sempra lacks *jus standi*, *i.e.* that it is bringing a derivative action on behalf of the Licensees, the Tribunal concluded that, on Sempra's case, it was pursuing its own rights under the BIT. The Tribunal concluded that a cause of action also accrues to a minority shareholder,[14] and that a cause of action lies under the BIT.[15]

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[10] Argentina's position is dealt with in the Tribunal's Decision on Jurisdiction, para 25
[11] Id, para 26
[12] Id, para 27
[13] This option evidently was open under Article VII(8) of the BIT.
[14] Decision on Jurisdiction, para 91.
[15] The matter of investors' *jus standi* under, *inter alia*, the US-Argentina BIT has been discussed also in other, previous ICSID cases, see e.*g*. *Enron v. Argentina* (ICSID Case No. ARB/01/3), Decision on Jurisdiction (2 August 2004), *CMS Gas Transmission Co. v. Argentina* (ICSID Case No ARB/01/8), Decision on Objections to Jurisdiction (17 July 2003), *AES Corp. v. Argentina* (ICSID Case No. ARB/02/17), Decision on Jurisdiction (26 April 2005), *LG&E Energy Corp. v. Argentina* (ICSID Case No. ARB/02/1), Decision on Objections to Jurisdiction (30 April 2004), *Lanco International v. Argentina* (ICSID Case No. ARB/97/6), Preliminary Decision on Jurisdiction (8 December 1998), *Azurix v. Argentina* (ICSID No. ARB/01/12), Decision on Jurisdiction, (8 December 2003), *Suez v. Argentina* (ICSID Case No.

90. The Tribunal held that claims submitted by Sempra were founded "on both the contract and the BIT".[16] In its Decision of Jurisdiction, it concluded that the dispute fell within the jurisdiction of the Centre and the competence of the Tribunal.

ARGENTINA'S REQUEST TO ANNUL IN RESPECT OF JURISDICTION

91. In this annulment proceeding, Argentina has raised two fundamental issues in support of its claim that the Tribunal has engaged in a manifest excess of powers in declaring jurisdiction to be vested in the Centre and itself competent to deal with the dispute. Firstly, the Tribunal accepted "the claim of a shareholder with respect to the alleged damage to rights belonging to the companies in which it held and holds shares". Secondly, Argentina raised the "potential problem that, in both situations, might arise in the event of double compensation".[17] In this latter respect, Argentina referred to the contingency that the subsidiaries themselves might have actionable claims, premised on the Licenses and other contractual rights, claims which are also comprised by the present claim by Sempra under the BIT. Argentina further contended that the Tribunal failed to appreciate the fact that the Licenses and other contractual rights were entered into between the Licensees and Argentina, and not with Sempra when considering Sempra's claims, while, at the same time, disregarding agreements between Argentina and the Licensees as *res inter alios acta.*

92. The fact that the Tribunal failed to state grounds for its Decision on Jurisdiction by which it accepted the jurisdiction of ICSID and its own competence also amounts, in the view of Argentina, to a failure to state reasons on which these decisions were based, which warrants annulment of the Award.

SEMPRA'S POSITION

93. Sempra has rejected Argentina's affirmations related to alleged absence of *jus standi* mainly on the following grounds.

ARB/03/17), Decision on Jurisdiction (16 May 2006), *Total S.A. v. Argentina* (ICSID Case No. ARB/04/01), Decision on Objections to Jurisdiction (25 August 2006), *Continental Casualty Company v. Argentina* (ICSID Case No. ARB/03/9), Decision on Jurisdiction (22 February 2006), *Gas Natural SDG* S.A. *v. Argentina* (ICSID Case No. ARB/03/10, Decision on Jurisdiction (17 June 2005), *Camuzzi International S.A. v. Argentina* (ICSID Case No. ARB/03/2), Decision on Jurisdiction (11 May 2005), *Compañía de Aguas del Aconquija S.A. & Vivendi Universal (formerly Générale des Eaux) v. Argentina ("Vivendi II")* (ICSID Case No. 97/3), Decision on Jurisdiction (14 November 2005), *Siemens v. Argentina* (ICSID Case No. ARB/02/8), Decision on Jurisdiction (3 August 2004), *El Paso Energy International Company v. Argentina* (ICSID Case No. ARB/03/15), Decision on Jurisdiction (27 April 2006).

16 Decision on Jurisdiction, para 101

17 Memorial on Annulment, para 48

94. The question whether a particular investment qualifies for protection is determined by the relevant instrument on investment protection, in this case the BIT. According to the Article I(ii) of the BIT, "shares of stock or other interests in a company or interests in the assets thereof" constitute, *inter alia*, investments within the meaning of that BIT.

95. According to Article 25(1) of the ICSID Convention "a national of another Contracting State" constitutes an investor under the Convention; hence, Sempra qualifies as such.

96. Sempra is claiming for its own rights under the BIT and is not pursuing a derivative action for the account of the Licensees. From this follows that Sempra is an investor which has made an investment under the BIT.

97. The potential of double recovery is not relevant for the question of jurisdiction. In any event, this risk is not present.

98. Damages claimed by Sempra, and awarded by the Tribunal, concern its own damages and not those of the Licensees.

99. The Tribunal's reasoning on the matter of jurisdiction is firmly based on the provisions of the Convention and the BIT; there is no excess of powers, let alone manifest, or failure to state reasons.

THE COMMITTEE'S CONCLUSION ON JURISDICTION

100. The jurisdiction of the Centre is determined by Article 25 of the ICSID Convention, and is governed by the terms of the instrument expressing the parties' consent to arbitration. In the present case, the relevant instruments are, in the case of Argentina, the BIT, and in the case of Sempra, its request for arbitration.

101. Because Article 25 of the Convention does not define "investment", that task was "left largely to the terms of bilateral investment treaties or other instruments on which jurisdiction is based".[18] The BIT provides in its Article I(i), *inter alia*:

> For the purposes of this Treaty,
>
> (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:
>
> [---]

[18] The quotation is taken from the *CMS* Annulment Decision, para 71.

> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value and directly related to an investment;
>
> [---]
>
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law.

102. The plain language of the BIT is evidence of the broad meaning of the term "investment" envisaged by the contracting parties when entering into the BIT. Notably, the definition explicitly includes "investment contracts", "shares of stock or other interests in a company", and "any right conferred by law or contract", "owned or controlled directly or indirectly".

103. The Committee is clearly of the opinion that Sempra is entitled to bring a claim under the ICSID Convention against Argentina in respect of damage allegedly caused to Sempra's "investment" in Argentina, *i.e.* its indirect, minority shareholdings in the Local Companies. The *Barcelona Traction* case, and the principle confirming the recognition under international law of the personality of juridical entities under municipal law, are irrelevant in the present BIT context. Shareholders may claim under the BIT – as distinct from what was the case in the *Barcelona Traction* case –simply because this BIT extends such rights to "investors" as defined therein, a right which does not exist under customary international law.

104. In the opinion of the Committee, the arguments advanced by Argentina in support of its objection to jurisdiction confuse two distinct issues. The first issue is whether Sempra is entitled to bring a claim under the ICSID Convention and the BIT in respect of alleged damage to its *investment* through loss caused to its partly and indirectly owned Local Companies, CGP and CGS, by impairment of Licenses and other valuable rights held by those subsidiaries. The second is whether acts or omissions on the part of Argentina with respect to CGP or CGS have in fact caused damage to Sempra's *investment* and, if so, what is the proper measure of that damage. The first issue is one of jurisdiction, while the second issue relates to the merits of the dispute. In the present case, if Sempra were to be found entitled to reparation for damage to its investment, the measure of damages would not necessarily be directly proportionate to any pecuniary loss or deficit suffered by CGP or CGS. That being an issue on the merits, the Committee does not consider it further.

105. For these reasons, the Committee concludes that the Tribunal has neither engaged in any manifest excess of powers nor failed to state reasons on the matter of the *jus standi* of Sempra.

EMERGENCY UNDER INTERNATIONAL LAW

ARGENTINA'S POSITION

Article XI of the BIT

106. Argentina has submitted that the Tribunal committed a manifest excess of powers by failing to apply Article XI of the BIT. Argentina has based its position on, essentially, the following circumstances.

107. In the Award, the Tribunal determined that Article XI is not self-judging and, consequently, it was incumbent on the Tribunal to carry out a substantial review of its applicability. However, the Tribunal held that Article XI does not establish conditions other than those that follow from the state of necessity under customary international law as enunciated in Article 25 of the ILC Articles. The Tribunal concluded – as follows from its Award[19] – that, having previously determined that the Argentine crisis did not meet the requirements of the state of necessity under customary international law, it would not undertake further judicial review under Article XI.

108. From this follows that the Tribunal failed to distinguish between Article XI of the BIT and the state of necessity under customary international law.

Differences between Article XI of the BIT and the state of necessity

109. Argentina has developed its position on the question of the Tribunal's alleged failure to apply Article XI of the BIT in the following way.

110. In the Award[20], the Tribunal considered that "[t]he BIT provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned" and that Article XI "does not set out conditions different from customary law in such regard".

111. However, Article XI of the BIT differs significantly from the state of necessity under customary international law, which is substantially contained in Article 25 of the ILC Articles. This fact requires that this difference is observed in view of the potentially different outcomes of an evaluation of Article XI as opposed to Article 25 of the ILC Articles,

[19] Award, paras 378 and 388
[20] Para 376

and more importantly, it makes it manifest that the Tribunal has failed to embark on an interpretation of Article XI.

112. The main differences between Article XI and the state of necessity under customary international law relate to the sphere of operation of these rules, to their nature and operation, their content, scope, and, as well as to their effects.

113. Article XI is a special conventional rule, while the state of necessity is a general rule of customary international law. Therefore, Article XI may only be invoked within the framework of the BIT. It is a specific provision, bilaterally agreed upon by the contracting States, which delimits the scope of the protections contained in that BIT. On the other hand, the state of necessity "can be invoked in any context against any international obligation",[21] except for obligations excluding the possibility of invoking the state of necessity.

114. The plea of necessity under customary international law is subsidiary to that of Article XI of the BIT. Article XI is a provision that delimits the scope of application of that BIT: "if it applies, the substantive obligations under the BIT do not apply".[22] By contrast, "Article 25 is an excuse, which is relevant only if it has been decided that there has otherwise been a breach of those substantive obligations under the BIT".[23]

115. Article XI is a primary rule, since it delimits the scope of the substantive obligations of the BIT itself. If the requirements under Article XI are met, there is no breach of the BIT. Article 25 is a secondary rule, since it provides discharge from responsibility of the State for internationally wrongful acts. It is a "'ground for precluding the wrongfulness of an act not in conformity with an international obligation', under certain strict conditions"[24]. The state of necessity does not extinguish or terminate the obligation, but excludes responsibility for its non-performance.

116. Therefore, only if conduct violates the BIT by infringing a standard of treatment and such conduct is not precluded under Article XI, can the question arise whether the responsibility of the State is excluded by virtue of the state of necessity.

117. Article XI does not include the stringent requirements of the state of necessity. There is no equivalent to the Article 25 standard of "grave

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[21] Quoted from the Continental Casualty Award, para 167; *Continental Casualty Company v. Argentina* (ICSID Case No. ARB/03/9), Award of 5 September 2008.
[22] CMS Annulment Decision, para 129
[23] Id., para 129
[24] Continental Casualty Award, para 166

and imminent peril" amongst the exceptions provided for in Article XI or to the requirement that the measure be "the only way for the State to safeguard" its interests, or that the State invoking the exception must not have contributed to the situation of necessity.

118. Finally, the preclusion under Article XI and the state of necessity differ as to their effects. In the case of the state of necessity, Article 27 of the ILC Articles provides that "[T]he invocation of a circumstance precluding wrongfulness ... is without prejudice to ... [t]he question of compensation for any material loss caused by the act in question". If, however, Article XI is found to apply, no compensation is payable since such provision excludes "the operation of the substantive provisions of the BIT"

Grounds for annulment

119. There are, in Argentina's view, three grounds for annulment in connection with the manner in which the Tribunal dealt with Article XI of the BIT, namely: (a) manifest errors of law; (b) manifest excess of powers; and (c) failure to state reasons.

120. Firstly, the Tribunal made manifest errors of law in equating Article XI of the BIT with the state of necessity under customary international law, in assuming that these provisions were on the same footing, and in applying the rule of Article 27 of the ILC Articles to Article XI. Secondly, the Tribunal manifestly exceeded its powers by its failure to apply Article XI. Finally, the Tribunal failed to explain the reasons why it could refrain from applying Article XI and instead apply rules on state of necessity under customary international law.

Manifest errors of law

121. The Tribunal made manifest errors of law when dealing with Article XI by declaring that "[s]ince the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI, given that this Article does not set out conditions different from customary law in such regard"[25].

122. By equating Article XI of the BIT with ILC Article 25, and assuming they were on the same footing, the Tribunal committed manifest errors of law.

[25] Award, para 388

123. In addition, the Tribunal also made another manifest error of law by applying the rule of ILC Article 27 to Article XI of the BIT.

124. Although Argentina admits, in principle, that a mere error of law is not a ground for annulment under Article 52 of the ICSID Convention, in certain circumstances, an error of law may be sufficiently serious to qualify as a manifest excess of powers for failure to apply the proper law.

125. The manifest errors of law that are present in the Award in the instant case, are sufficiently serious to amount to a manifest excess of powers in accordance with Article 52(1)b of the ICSID Convention for failure to apply the proper law.

Manifest excess of powers

126. Not only did the Tribunal make manifest errors of law in connection with Article XI of the BIT, but it also engaged in a manifest excess of powers by its failure to apply that provision. Applying Article XI entailed recognising its self-judging nature, thus respecting the decision of Argentina to take measures under cover of that article. However, if such article was deemed not to be self-judging, it would call for a substantive review of the measures adopted by Argentina in order to verify whether those measures satisfied the substantive standards for preclusion that are enunciated in this provision. The Tribunal did not accept the self-judging nature of Article XI of the BIT, nor did it perform a substantive review. The Tribunal simply replaced Article XI of the BIT with the state of necessity under customary international law which, as explained, differs substantially from the former as to its sphere of operation, nature and functioning, content, scope and effects. The Tribunal did not apply Article XI of the BIT, thus manifestly exceeding its powers.

The self-judging nature of the Article XI of the BIT

127. The Tribunal was called to apply Article XI, which provision, in Argentina's view, would apply in a situation such as the one that evolved in Argentina as from late 2001. This imposed on the Tribunal a duty to defer to Argentina's decision to take measures to maintain public order and protect its essential security interests, since Article XI is self-judging. The State invoking a provision such as Article XI of the BIT is the sole judge of its applicability to the contested measures. By disregarding the self-judging nature of Article XI, the Tribunal manifestly exceeded its powers.

Replacing Article XI with the state of necessity

128. In the Award the Tribunal concluded that Article XI of the BIT was not self-judging and that a substantive review was required.[26]

129. Such a substantive review would have, as its object, an examination of the standards contained in Article XI in order to ascertain whether the requirements of that provision were present. However, instead of proceeding to such substantive review, the Tribunal decided not to apply Article XI and replaced that provision with Article 25 of the ILC Articles, *i.e.* by a rule of customary international law.

130. The Tribunal even acknowledged explicitly that it would not apply Article XI by stating that there was no "need to undertake a further judicial review under Article XI"[27]. This declaration represents a conclusive indication of the manifest excess of powers, in which the Tribunal engaged in abstaining from applying this BIT provision.

131. The fact that Argentina also invoked the state of necessity in the arbitration did not allow the Tribunal to disregard Article XI of the BIT and to apply, in its place, Article 25 of the ILC Articles. The Tribunal should have undertaken an examination of the requirements of the state of necessity as a ground for precluding wrongfulness only if Article XI of the BIT was held not to apply, and a violation under that BIT had been established.

Failure to state reasons

132. The Tribunal failed to state reasons pursuant to Article 52(1)(e) of the ICSID Convention in respect of two fundamental issues regarding Article XI of the BIT. The Tribunal did not explain why the lack of a definition in that BIT of the substantive standard of "essential security interests" made it necessary to rely on the requirements of the state of necessity under customary international law. Nor did the Tribunal explain why Article XI did not establish conditions different from the requirements under customary international law set forth in Article 25 of ILC Articles.

133. In the Award, the Tribunal stated that in the absence of a definition of what is to be understood by an "essential security interest", the requirements of a state of necessity under customary international law, as expressed in Article 25 of the ILC Articles, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the BIT[28].

[26] Award, para 388
[27] Award, para 388
[28] Award, para 375

134. The Tribunal did not explain in the Award why the lack of a definition of "essential security interests" of Article XI led to the application of the requirements of the state of necessity under customary international law in place of the BIT provision.

135. In conclusion, by failing to explain why the lack of a definition of "essential security interests" in Article XI led to application of the requirements of the state of necessity instead of Article XI, the Tribunal failed to state the reasons on which it based its decision in the terms of Article 52(1)(e) of the ICSID Convention. The Award should therefore be annulled on this ground.

SEMPRA'S POSITION

136. Sempra has firmly rejected the notion that the Tribunal committed any excess of powers by any failure to interpret or apply Article XI of the BIT, or failed to state reasons for its conclusions in this regard. Nothing regarding the Tribunal's analysis of Argentina's Article XI and necessity defences constitutes a ground for annulment.

137. The Tribunal correctly interpreted and applied Article XI as well as Argentina's defence of necessity. It found that Argentina had means available other than the Emergency Law to address its economic crisis, and that it substantially contributed to the circumstances which gave rise to the economic crisis. Moreover, Argentina's annulment request is based on new arguments and material that post-date the Award. Therefore, these objections should be rejected.

138. The Tribunal's mission was to interpret and apply Article XI and Argentina's defence based on state of necessity under customary international law. This the Tribunal did. It analyzed Article XI and concluded that because of its lack of clarity, and the fact that it reflects customary international law, a state invoking Article XI must satisfy the same conditions required to invoke the defence of necessity. The Tribunal explained that it reached its interpretation of Article XI because: (i) the BIT's object and purpose requires a narrow interpretation of Article XI; (ii) Article XI does not contain any definition of the terms "essential security interests" or "necessary"; (iii) Article XI reflects customary international law; and (iv) relevant rules of international law should be used to interpret BIT provisions that either reflect customary international law or are not defined in the BIT. The Tribunal interpreted Article XI in accordance with relevant rules of treaty interpretation, as codified in Articles 31 and 32 of the VCLT.

139. As follows from the Award, the Tribunal rejected Argentina's defence based on Article XI because: (i) the Emergency Law was not necessary

to maintain "public order" or protect Argentina's "essential security interests", and (ii) there were other means available to maintain "public order" and to protect Argentina's "essential security interests".

140. The Tribunal found that "there was a severe crisis", but that this crisis had not "compromised the very existence of the State and its independence, thereby qualifying as one involving an essential state interest".[29] The Tribunal stated that "[q]uestions of public order and social unrest could be handled as in fact they were, just as questions of political stabilization were handled under the constitutional arrangement in force".[30]

141. The Tribunal concluded that (i) "there is no convincing evidence that the events were out of control or had become unmanageable" and (ii) that its task under the BIT was to find whether the Emergency Law was the "only" alternative to address the economic crisis.[31] The Tribunal held that "this does not appear to have been the case",[32] and therefore, there was more than one alternative to maintain "public order" or protect its "essential security interests"

142. The Tribunal rejected Argentina's argument that it had not contributed to the crisis. The Tribunal first concluded that a "State cannot invoke necessity if it has contributed to the situation giving rise to a state of necessity".[33] The Tribunal found this was an "expression of a general principle of law devised to prevent a party taking legal advantage of its own fault".[34] Thus, it did not just base its finding on Article XI or customary international law, but on a general principle of law. The Tribunal concluded that Argentina could not succeed in its defence under Article XI or the defence of necessity, if it had contributed to the situation of necessity, and based on the evidence produced by the Parties, the Tribunal concluded that in fact Argentina had made a "substantial contribution" to the state of necessity alleged by Argentina as its basis for invoking Article XI and the defence of necessity.

143. Additionally, in respect of the specific grounds invoked by Argentina for annulment of the Award, Sempra has submitted the following.

A manifest error of law is not a ground for annulment

144. In respect of Argentina's invocation of a manifest error of law, Sempra summarizes its case by noting that a manifest error of law is not a

[29] Award, para 348
[30] Award, para 348
[31] Award, paras 349-350
[32] Award, para 351
[33] Award, para 353
[34] Award, para 353

ground for annulment. Moreover, Sempra adds, even if manifest error of law could constitute a ground for annulment, it is not present in this context; the Tribunal interpreted the law correctly.

The Tribunal did not manifestly exceed its powers

145. Sempra relies on the fact that the Tribunal agreed that "[t]he requirement for a state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the ILC Articles, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the BIT". [35]

146. The Sempra Tribunal also rejected the criticism raised by Argentina against the way the *CMS* Tribunal addressed Article XI and necessity, concluding that the definition of necessity and the conditions for its operations are inseparable, having regard to the fact that it is under customary law that such elements have been defined.

147. As for Argentina's invocation of Article XI as *lex specialis*, the Tribunal accepted that "[i]t is no doubt correct to conclude that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law".[36] However, as the BIT text did not provide sufficient guidance, the Tribunal considered customary international law the most appropriate means to interpret the BIT provision.

148. The Tribunal held that the conditions under which Article XI of the BIT and the state of necessity under customary international law may be invoked are the same. The Tribunal reiterated this point when it rejected Argentina's self-judging argument by explaining that: "The judicial control must be a substantive one, and concerned with whether the requirements under customary law or the BIT have been met and can thereby preclude wrongfulness. [Because the Tribunal rejected the customary international law necessity defence] there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard".[37]

149. Sempra has also referred to the following circumstances. Article X of the BIT provides that "[t]his Treaty shall not derogate from: . . .
b) international legal obligations . . . that entitle investments or associated activities to treatment more favourable than that accorded by

[35] Award, para 375
[36] Award, para 378
[37] Award, para 388

this Treaty in like situations".[38] Thus, the BIT's object and purpose indicate an intent not to interpret particular BIT provisions in a manner that accords investments less protection than that provided under customary international law.

150. In addition, Sempra recalls, the BIT contains several gateways to international law, setting it as the floor below which treatment cannot be afforded, unless required under the BIT. For example, Article II(2)(a) of the BIT, provides that the treatment afforded by the BIT cannot be "less than that required by international law". Furthermore, Article 42 of the ICSID Convention imposes on the Tribunal a duty to apply international law. Thus, the BIT cannot be seen as a separate and independent instrument, but as a creature of the international law regime, which at the same time is the applicable law that governs the BIT.

151. Sempra does not agree either that Article XI and the defence of necessity under customary international differ in a number of fundamental ways as argued by Argentina. Moreover, Argentina did not present these arguments to the Tribunal, which should suffice to reject this claim.

152. Sempra does not accept Argentina's affirmation that the content of Article XI and Article 25 are different, and that there is no "textual link" to customary law in Article XI, on the grounds: (a) that there is no textual equivalent to "grave and imminent peril"; (b) that Article XI does not require that a "necessary" measure be the "only way" to achieve the covered purpose; and (c) that there is no requirement in Article XI that the State not have contributed to the situation necessitating the measure.

153. Article XI reflects customary international law, a self-contained regime which must be used to interpret Article XI. Also, various elements of Article XI actually reflect international law, and not just the state defence of necessity, but also distress and *force majeure*.

154. Article XI is limited to maintenance of peace, "essential security interests", and public order. Article 25, on the other hand, only provides that the State interest must be an "essential interest of the State", meaning that Article XI is not more expansive than customary law.

155. Sempra also does not accept Argentina's assertion that Article XI and Article 25 are different, the latter (but not the former) being without prejudice to compensation. It is, in any event, irrelevant to the question

[38] Award, para 431

whether the conditions under which Article XI and the customary necessity plea can be invoked are the same or not.

156. The Tribunal did not refrain from applying Article XI, but interpreted this provision as requiring a State invoking it to satisfy the same conditions as required to invoke the plea of necessity under customary law. The Tribunal interpreted one aspect of Article XI – the conditions under which it can be invoked – to be the same as those required by customary international law, and found, as a matter of fact, that Argentina failed to satisfy those conditions. No excess of powers, let alone any manifest excess of powers is involved.

Article XI is not self-judging

157. The Tribunal thoroughly examined Argentina's argument that Article XI is self-judging in character, and that it came to the well reasoned conclusion that this was not the case. Instead, it found that a substantive review was required. The Tribunal did not exceed its powers, and fully stated reasons for its decision.

There was no failure to state reasons

158. Sempra has emphasized that the Tribunal did not fail to state reasons regarding its analysis of Article XI of the BIT and considers Argentina's position on that issue inconsistent in that Argentina also considers that the Tribunal failed to apply Article XI. Sempra considers, however, that each step in the Tribunal's reasoning in respect of Article XI is lucid and consistent in that it clearly shows how the Tribunal concluded that[39] (1) Article XI did not define or provide the legal elements and conditions necessary for its application[40], (2) it was bound to look to analogous rules of customary law[41], (3) the conditions for the application of state of necessity under customary law were the same as the elements for the application of the terms of Article XI due to their similarities and the lack of clarity provided by the BIT for its application[42], and (4) the BIT and Article XI provide treatment that was not less than that of customary law. Therefore, there was no failure to state reasons.

[39] Sempra's rejoinder on annulment, para 328
[40] Award, paras 375, 378
[41] Award, para 375
[42] Award, para 376

CONSIDERATION OF THE FOREGOING ARGUMENTS BY THE COMMITTEE

Application of Article XI of the BIT

159. For reasons which will be discussed in greater detail later, the Committee finds that the Award must be annulled in its entirety on the basis of manifest excess of powers (Article 52(1)(b) of the ICSID Convention) in respect of failure to apply Article XI of the BIT. The question therefore arises whether it is necessary for the Committee to deal with other arguments advanced by Argentina in relation to the way in which the Tribunal dealt with Article XI. The Committee feels that it should deal with these arguments for the sake of completeness.

Manifest error of law

160. Argentina has argued that the Tribunal made "manifest errors of law" in respect of the way in which it dealt with Article XI. These manifest errors of law consisted in equating Article XI of the BIT with Article 25 of the ILC Articles.

161. Argentina also argued that the Tribunal committed a serious error of law, by considering the application of Article 27 to a possible duty of compensation of the State before, and indeed without, reviewing whether responsibility was precluded under Article XI. Additionally, in this respect, the application of Article 27 under customary international law constituted a manifest error of law. While admitting that a "mere error of law" is not a ground for annulment under Article 52(1) of the ICSID Convention, Argentina affirms that such error may be serious enough to reach to the level of a manifest excess of powers for failure to apply the proper law.[43]

162. As Argentina itself recognises, a serious error of law is not in itself a ground for annulment under Article 52(1) of the ICSID Convention. It is instead Argentina's contention that a serious error of law may, in certain circumstances, constitute a manifest excess of powers (and therefore be annullable on that ground).

163. It is correct – as also pointed out by Argentina – that certain *ad hoc* committees have dealt with this issue and opined, for instance, that incorrect application of law might constitute a manifest excess of powers if "it amounts to effective disregard of the applicable law".[44]

164. As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional

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[43] Annulment Memorial, para 426

[44] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) (Amco II), Decision on Annulment of 3 December 1992. Similar statements have been made by other *ad hoc* committees, *e.g.* the *MTD* Annulment Committee, which stated that annulment may be a consequence of the purported application of the relevant law, while in fact applying quite a different law (*MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Annulment Decision of 21 March 2007, para 47).

situation, be of such egregious nature as to amount to a manifest excess of powers.

165. In this case, the Committee has reached the conclusion that the Tribunal – in respect of Article XI of the BIT – has failed altogether to apply the applicable law and, by failing to do so, has committed a manifest excess of powers. This conclusion of the Committee precludes any question of manifest error in *applying* the applicable law. It is therefore unnecessary for the Committee to engage in any more precise discussion of where that specific line should be drawn between an error of law that justifies annulment and one that does not.

Failure to state reasons

Introduction

166. According to Article 48(3) of the ICSID Convention, "[t]he Award [---] shall state the reasons upon which it is based". The importance of this provision is highlighted by the fact that failure to state reasons constitutes a ground for annulment according to Article 52(1)(e).

167. The fact that a total absence of reasons merits annulment is clear, but such a situation is rarely, if ever, encountered in practice. Rather there will be an (alleged) absence of reasons for a particular aspect of an award, or otherwise insufficient, inadequate or possibly contradictory reasons. Difficulties arise when determining what standard should be applied in deciding whether a defect of reasoning should lead to annulment. While certainly "frivolous, perfunctory or absurd arguments by a tribunal"[45] may well be subject to annulment, such clear-cut cases do not abound. *Ad hoc* committees are faced with making the important distinction between finding, on the one hand, reasons which are reasonably comprehensible and consistent, demonstrating, on the whole, a logical and discernable line of thinking, and, on the other hand, "circumstances [where] there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point".[46]

Discussion

168. The Committee observes that the Tribunal dealt with Argentina's defence based on necessity under Argentine law, customary international law, and Article XI of the BIT in that order. In so doing, the Tribunal followed the order in which Argentina argued these defences. It is evident that the Tribunal gave a detailed account of its reasoning in respect of necessity under customary international law. In this regard the Tribunal noted that the ILC Articles, although not constituting a source of customary law still (as was accepted by the Parties) represents a fair expression of such law, and held that the conditions laid down in Article 25 of the ILC Articles were necessary

[45] Schreuer, ICSID Commentary (2009), page 997 (para 344).
[46] *CMS v. Argentina*, Decision on Annulment, para 97.

conditions for invoking an "essential security interest" under the BIT.[47] The Tribunal dedicated considerable attention to the question whether or not Article XI is self-judging (a point also extensively argued by Argentina) and arrived at a reasoned conclusion on that point. Having reasoned so far, the Tribunal held that judicial review of the invocation of Article XI, and the measures adopted, must be a substantive one, and concerned with whether the requirements under customary law or the Treaty were met and could thereby preclude wrongfulness.[48] The Tribunal reasoned that since the BIT itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity, criteria found in customary international law had to be applied. From the above overview it is clear how the Tribunal reasoned in order to reach the conclusion it did. Hence, there is no failure to state reasons.

Did the Tribunal's rejection of the proposition that Article XI is self-judging constitute an annullable error?

169. Argentina argues that by failing to appreciate that Article XI is self-judging, the Tribunal disregarded Argentina's discretion to take measures in order to maintain public order and protect its essential security interests. Therefore, by ignoring the fact that a state invoking Article XI is the sole judge of the appropriateness of the contested measures, the Tribunal manifestly exceeded its powers.

170. In the Committee's view, it is clear that there was no failure on the part of the Tribunal to consider the matter of whether Article XI is self-judging or not. On the contrary, it applied considerable attention to the subject (as evidently did the Parties), reaching the conclusion that Article XI is not self-judging, a conclusion that the Tribunal was perfectly entitled to reach.

171. Argentina censures the Tribunal for having "dogmatically" asserted what it considered to be the object and purpose of the BIT, without giving reasons and drawing its conclusions from that. Equally seriously, according to Argentina, the Tribunal reversed the logical sequence of the interpretative process by passing over the text of the relevant treaty provision itself in breach of Article 31(1) of the VCLT.

172. In addition, Argentina has argued extensively in favour of the self-judging nature of Article XI of the BIT, referring to a number of sources (expert testimony, official statements and other authorities). These arguments are, however, clearly appropriate to a review of the merits and cannot be considered by an *ad hoc* committee.

[47] Award, para 375
[48] Award, para 388

Manifest excess of powers

Introduction

173. As has been confirmed on numerous occasions there is a fundamental distinction between erroneous application of the law and a failure to apply the law. By way of example, the following statements by *ad hoc* committees may be mentioned. The MINE *ad hoc* committee stated:

> "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". [49]

174. The Amco (I) *ad hoc* committee stated:

> The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention. The *ad hoc* Committee has approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal. [50]

175. On Argentina's case, the Tribunal failed to apply Article XI of the BIT, and, by this failure, apart from a failure to state reasons, committed a manifest excess of powers.

176. It is clear that Argentina in the present case (as well as in *CMS*)[51] argued the plea of necessity under customary international law before proceeding to the matter of preclusion under Article XI. This sequence of argument is illogical as the question whether a state of necessity justifies exoneration from state responsibility will become an issue only where liability is not already precluded under Article XI of the BIT. As a general rule, a treaty will take precedence over customary international law.

177. One can certainly discuss Article 25 on the assumption (implicit or explicit) that Article XI does not lead to preclusion. If it is concluded (as in this case) that a justification for wrongfulness is not available under Article 25, the Tribunal would need to go back to Article XI in

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[49] *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4); Decision on Annulment of 22 December 1989, para 5.04.

[50] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/71/1), Decision on Annulment of 16 May 1986 (Amco I).

[51] Para 132 of the *CMS* Decision on Annulment.

> order to decide whether the assumption under which the Article 25 inquiry was pursued is valid in the circumstances. In this case, however, the Tribunal did not do that.

178. Argentina has argued that the Tribunal made "manifest errors of law" in respect of its failure to deal with Article XI of the BIT. This manifest error of law consisted in equating Article XI of the BIT with Article 25 of the ILC Articles.

179. Argentina further contends that the Tribunal committed a serious error of law by considering the application of Article 27 concerning a possible duty of compensation of the State before (or indeed without) reviewing whether responsibility was precluded under Article XI of the BIT. Additionally, in this respect, the application of Article 27 under customary international law constituted a manifest error of law. While admitting that a "mere error of law" is not a ground for annulment under Article 52(1) of the Convention, Argentina affirms that such error may be serious enough to reach to the level of a manifest excess of powers for failure to apply the proper law. [52]

The admissibility of Argentina's arguments

180. In argument before the Committee, Sempra contended that certain of the arguments advanced by Argentina on the first issue were new, in the sense that they had not been advanced before the Tribunal, which had not had an opportunity to consider them. They were therefore inadmissible in these annulment proceedings.

181. Sempra claims that Argentina presented[53] only two arguments concerning (1) the self-judging nature of Article XI, and (2) that the defence of necessity precluded liability and compensation. Further, Argentina did not differentiate between the state of necessity under customary international law, on the one hand, and preclusion under Article XI, on the other.

182. At paragraph 366, having quoted the terms of Article XI, the Tribunal sets out the arguments of Argentina as follows:

> 366. The Respondent, relying on the opinion of Dean Slaughter and Professor Burke-White, asserts that public order and national security exceptions have to be interpreted broadly in the context of this Article so as to include considerations of economic security and political stability. Moreover, the Respondent's experts understand this Article to be self-judging insofar as each party will be the sole judge of when the situation requires measures of the kind envisaged by the Article, subject only to a determination of good faith by tribunals that might be called upon to settle a dispute on this point [Footnote omitted]. In the Respondent's view, the gravity of

[52] Annulment Memorial, para 426
[53] Sempra's Counter-Memorial, para 373

> the crisis that it faced amply justified resorting to such measures, which can only be considered as having been adopted in good faith.

183. Argentina thus raised two issues. The first concerned the scope and application of Article XI. The second concerned the question whether Article XI is self-judging. The first issue is logically prior to the second.

184. The *ad hoc* Committee finds that, in so far as the arguments of Argentina can be said to be "new", they are a permissible development of Argentina's arguments on the first issue identified above and are therefore admissible.[54]

The Tribunal's findings

185. After setting out in greater detail the arguments of Argentina and of Sempra, the Tribunal proceeded to set out its own assessment of the arguments (reproduced here for ease of reference):

> 373. In weighing this discussion, the Tribunal must first note that the object and purpose of the Treaty is, as a general proposition, for it to be applicable in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the defined obligations cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.
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> 374. The Tribunal considers that there is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI. Essential security interests can eventually encompass situations other than the traditional military threats for which the institution found its origins in customary law. However, to conclude that such a determination is self-judging would definitely be inconsistent with the object and purpose noted. In fact,

[54] It may be noted that the matter of Article XI was dealt with by Argentina in its Counter-Memorial in the arbitration (AR39), Section XI in paras 647 – 659 (particularly in paragraph 654). In its Rejoinder (AR50), Argentina set out its defence under Article XI and distinguished it from the doctrine of necessity under customary international law (paras 432 – 635, *e.g.* para 633), affirming its position that invoking the above-mentioned article should not be confused with invocation of the state of necessity by explaining that "[t]hey do not constitute a defence as the state of necessity but an invocation of the provisions of the applicable BITs". This distinction is also addressed by paras 376 – 377 of the Award. From the above considerations it is clear – contrary to Sempra's allegations – that Argentina distinguished the application of Article XI of the BIT from the plea of necessity under customary international law.

the Treaty would be deprived of any substantive meaning.

375. In addition, in view of the fact that the Treaty does not define what is to be understood by an "essential security interest," the requirements for a state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty. Different might have been the case if the Treaty had defined this concept and the conditions for its exercise, but this was not the case.

376. The Tribunal notes that in the view of Dean Slaughter and Professor Burke-White, which the Respondent shares, the *CMS* award was mistaken in that it discussed Article XI in connection with necessity under customary law. This Tribunal believes, however, that the Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined. Similarly, the Treaty does not contain a definition concerning either the maintenance of international peace and security, or the conditions for its operation. Reference is instead made to the Charter of the United Nations in Article 6 of the Protocol to the Treaty.

377. The expert opinion of Dean Slaughter and Professor Burke-White expresses the view that the treaty regime is different and separate from customary law as it is *lex specialis*. As Professor Burke-White explained at the hearing, the consequence of this approach is that while Article XI requires only a good faith determination, under customary law the whole panoply of requirements laid down in Article 25 of the Articles comes into play. Moreover, Professor Burke-White stated that the U.S. and Argentina had "decided to accord investors greater protection than they would receive under customary international law, but simultaneously to guarantee to states, the States Parties greater protection to deal with threats to their national security."

378. It is no doubt correct to conclude that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. The problem here, however, is that the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing

such questions will thus be found under customary law. As concluded above, such requirements and conditions have not been fully met in this case. Moreover, the view of the Respondent's legal expert, as expressed at the hearing, contradicts the Respondent's argument that the Treaty standards are not more favorable than those of customary law, and at the most should be equated with the international minimum standard. The Tribunal does not believe that the intention of the parties can be described in the terms which the expert has used, as there is no indication that such was the case. Nor does the Tribunal believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle.

379. As explained by Dean Slaughter, the U.S. position has been gradually evolving towards support for self-judging clauses in respect of national security interests, and some bilateral investment treaties reflect this change, albeit not all of them. Yet, this does not necessarily result in the conclusion that such was the intention of the parties in respect of the Treaty under consideration. Truly exceptional and extraordinary clauses, such as a self-judging provision, must be expressly drafted to reflect that intent, as otherwise there can well be a presumption that they do not have such meaning in view of their exceptional nature.

380. In the case of the Treaty, nothing was said in respect of a self-judging character, and the elements invoked in support of this view originate for the most part in U.S. Congressional discussions concerning broader issues, or in indirect interpretations arising mainly with respect to the eventual application of model investment treaties used by the U.S. The Respondent's post-hearing brief has listed a number of discussions and statements which relate to the issue of a self-judging interpretation, but these items are contextual and do not specifically address the case of the Treaty in question.

381. Professor Burke-White also stated at the hearing that, in his understanding, the letter submitting the Treaty to the Argentine Congress did not say "anything about it being self-judging, nor anything about it being non-self-judging … this document does not speak to that issue." This expert also explained that while he had no evidence about the internal discussions within the Argentine Government as to the intent of the Treaty, there was such evidence in respect of the intent of the U.S. Government, and that given the "reciprocal nature

of the Treaty … the intent … would be for a self-judging interpretation of Article XI." This is, however, again a contextual interpretation that does not appear to meet the stricter requirements of Articles 31 and 32 of the Vienna Convention on the Law of Treaties in respect of treaty interpretation in the light of its context, or the resort to supplementary means of interpretation.

382. More to the point is a letter sent by an official of the United States Department of State on September 15, 2006 to a former official asked to testify in the context of a different arbitration, which the Respondent brought to the attention of the Tribunal on June 25, 2007. In this letter, it is stated that "notwithstanding the decision of the ICJ in the Nicaragua case, the position of the U. S. Government is that the essential security language in our FCN treaties and Bilateral Investment Treaties is self-judging, *i.e.*, only the party itself is competent to determine what is in its own essential security interests."

The Respondent is of the view that this confirms the interpretation given by it of the Treaty in this case. The Claimant, however, has opposed this understanding on the argument that the letter refers to an interpretation supposedly adopted as from 2006 and that in any event it does not refer to the Treaty with Argentina nor does it preclude liability or compensation.

383. The discussion noted above concerning the GATT and the Nicaragua decision, just like the *Oil Platforms* case, confirms that the language of a provision has to be very precise for it to lead to a conclusion about its self-judging nature. In those decisions, the fact that the language was not express turned out to be crucial to the rejection of arguments favoring a self-judging interpretation. So too, the International Court of Justice held in the *Gabcíkovo-Nagymaros* case, when referring to the conditions defined by the International Law Commission, that "the State concerned is not the sole judge of whether those conditions have been met."

384. The Tribunal must also note that not even in the context of GATT Article XXI is the issue considered to be settled in favor of a self-judging interpretation, and the very fact that such article has not been excluded from dispute settlement is indicative of its non-self-judging nature.

385. The same holds true of the U. S. Department of State letter referred to above in that it does not address any specific treaty, least that with Argentina. Furthermore, the fact that arbitration is the compulsory dispute settlement mechanism established in the Treaty

in question, like with GATT/WTO, could be rather indicative of the non-self-judging nature of the essential security interest clause. Not even if this is the interpretation given to the clause today by the United States would this necessarily mean that such an interpretation governs the Treaty. The view of one State does not make international law, even less so when such a view is ascertained only by indirect means of interpretation or in a rather remote or general way as far as the very Treaty at issue is concerned. What is relevant is the intention which both parties had in signing the Treaty, and this does not confirm the self-judging interpretation.

386. Moreover, even if this interpretation were shared today by both parties to the Treaty, it still would not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries. In fact, Article XIV of the Treaty provides that in case of termination, the investment will continue to be protected under its provisions "for a further period of ten years." So too, with reference to rights protected under the Energy Charter Treaty, the tribunal in *Plama* has held that any denial of advantages to which an investor might have rights "should not have retrospective effect," as such a situation would result in making legitimate expectations false at a much later date.

387. As an English court has recently held in respect of a claim of non-justiciability relating to a State challenge to the *OEPC* award, the fact that a treaty is concluded between States cannot allow the derogation of rights that belong to private parties. In that case, the issue concerned dispute settlement, and as a consequence the doctrine of non-justiciability was held not to apply.

388. In the light of this discussion, the Tribunal concludes that Article XI is not self-judging and that judicial review is not limited in its respect to an examination of whether its invocation, or the measures adopted, were taken in good faith. The judicial control must be a substantive one, and concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness. Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review

> under Article XI given that this Article does not set out conditions different from customary law in such regard.
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> 389. A judicial determination as to compliance with the requirements of international law in this matter should not be understood as suggesting that arbitral tribunals wish to substitute their views for the functions of sovereign States. Such a ruling instead simply responds to the Tribunal's duty that, in applying international law, it cannot fail to give effect to legal commitments that are binding on the parties, and must interpret the rules accordingly unless a derogation of those commitments has been expressly agreed to.
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> 390. The Tribunal explained above that it would consider the requirement of Article 25 of the Articles on State Responsibility, to the effect that the act in question not seriously impair an essential interest of the State towards which the obligation exists in the context of the Treaty obligations. In the light of the discussion above about changing interpretations, it does not appear that the Government's invocation of Article XI or of a state of necessity generally would be taken by the other party to mean that such impairment arises.
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> 391. Be that as it may, in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations, as was explained by the English court in the *OEPC* case noted above. The essential interest of the Claimant would certainly be seriously impaired by the operation of Article XI or a state of necessity in this case.

DISCUSSION

186. Investment arbitration under the ICSID regime (or any other type of arbitration whether institutional or *ad hoc*) is subject to the consent of the Parties. The State's consent to arbitration of investment disputes is given, in a very large number of cases, in a treaty, while the investor's consent is normally included in its request for arbitration. The scope, extent and conditions that apply to the procedural means of recourse and substantive protections offered to the investor are exclusively addressed by the treaty.

187. Where the treaty permits or excuses conduct adverse to the investor in specific circumstances enunciated in the treaty, it follows that the terms of the treaty itself exclude the protection to the investor that the treaty would otherwise have provided.

188. According to Article 31(1) of VCLT, the first point of reference for interpretation of a BIT provision is the "ordinary meaning" of the words of the treaty themselves.

189. In the present case, where the BIT provides the relevant treaty language, it is necessary first and foremost to apply the provisions of the BIT. Indeed, the Parties are in agreement that the BIT constitutes the applicable law.

190. Article 38 of the Statute of the ICJ lists "international conventions" as a primary source of international law. However, it is not primarily for this reason that the BIT has pre-eminence in the investor-state context of arbitration, but because the consent to submit to international dispute resolution is predicated on the very terms of the BIT.

191. Against that background, it is necessary to consider the relevant terms of the BIT and the way in which the Tribunal approached its application.

192. Article XI of the BIT provides as follows:

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the [p]rotection of its own essential interests.

193. Article XI does not specify who is to be the judge of whether the measures taken are "necessary" for one or more of the purposes specified – in other words, whether the State Party taking the measures is itself to be the judge of their necessity, in which event the provision is said to be "self-judging".

194. The Committee finds that the reasoning of the Tribunal does not distinguish clearly between the question whether Article XI is self-judging and the prior question as to its scope and application. Thus, at the outset in paragraph 374 of the Award, the Tribunal states that "there is nothing that would prevent an interpretation allowing for the inclusion of economic emergency in the context of Article XI" and that "essential security interests can eventually encompass situations other than the traditional military threats for which the institution found its origins in customary law". The Tribunal then goes on directly to say, "However, to conclude that such a determination is self-judging would definitely be inconsistent with the object and purpose noted. In fact, the Treaty would be deprived of any substantive meaning".

195. As regards the scope and application of Article XI, the Committee finds the following passages to be central to the reasoning of the Tribunal:-

> (1) in paragraph 376: "This Tribunal believes ... that the Treaty provision [*i.e.* Article XI of the BIT] is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined."
>
> (2) in paragraph 378: "It is no doubt correct to conclude that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. The problem here, however, is that the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing such questions will thus be found under customary law. As concluded above, such requirements and conditions have not been fully met in this case. ... Nor does the Tribunal believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle."
>
> (3) in paragraph 388: "In the light of this discussion, the Tribunal concludes that Article XI is not self-judging and that judicial review is not limited in its respect to an examination of whether its invocation, or the measures adopted, were taken in good faith. The judicial control must be a substantive one, and concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness. Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard."

196. In the opinion of the Committee, the reasoning of these passages compels the conclusion that the Tribunal did not deem itself to be required – or even entitled – to consider the applicability of Article XI, both because this provision did not deal with the legal elements necessary for the legitimate invocation of a state of necessity and because the Tribunal found that the Argentine economic crisis did not meet the customary international law requirements as set out in Article 25 of the ILC Articles.

197. First, as regards paragraph 376, the Committee accepts, of course, that it may be appropriate to look to customary law as a guide to the interpretation of terms used in the BIT. It does not follow, however, that customary law (*in casu*, Article 25 of the ILC Articles) establishes

a peremptory "definition of necessity and the conditions for its operation". While some norms of customary law are peremptory (*jus cogens*), others are not, and States may contract otherwise, as the Tribunal itself recognises in paragraph 378.

198. Second, Article XI differs in material respects from Article 25, as can be seen from the following comparison of the texts:

Article XI of the BIT	**Article 25 of the ILC Articles**
This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	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.

199. It is apparent from this comparison that Article 25 does not offer a guide to *interpretation* of the terms used in Article XI. The most that can be said is that certain words or expressions are the same or similar.

200. More importantly, Article 25 is concerned with the invocation by a State Party of necessity "as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State". Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore "wrongful". Article XI, on the other hand, provides that "This Treaty shall not preclude" certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's

international obligations and is not therefore "wrongful". Article 25 and Article XI therefore deal with quite different situations. Article 25 cannot therefore be assumed to "define necessity and the conditions for its operation" for the purpose of interpreting Article XI, still less to do so as a mandatory norm of international law.

201. Third, as regards paragraph 378, it is unclear what the Tribunal means by the statement that "the Treaty itself [*i.e.* the BIT] did not deal with the legal elements necessary for the *legitimate* invocation of a state of necessity. The *rule* governing such questions will *thus* be found under customary law" (emphasis added). Invocation of a state of necessity under the terms of a bilateral treaty need not necessarily be "legitimated" by a "rule" of international law. There may be no rule governing such questions. Still less is it obvious that the rule is to be found in a provision of customary law dealing with invocation of necessity as a justification for breach of an international obligation.

202. Fourth, again as regards paragraph 378, even if it be the case that "international law is not a fragmented body of law as far as basic principles are concerned", it does not follow either: (i) that "necessity is *no doubt* one such basic principle" in the sense that it must be interpreted and applied in exactly the same way in all circumstances, or (ii) that international law will become "fragmented" if States contract otherwise. While there may be certain norms of international law, including customary law, which would render it unlawful under international law for States to agree to adopt a provision inconsistent with those norms, this is not such a case. *Jus cogens* does not require parties to a bilateral investment treaty to forego the possibility of invoking a defence of necessity in whatever terms they may agree. The terms on which they agree may be thought to be politically or economically unwise, but this does not render them unlawful.

203. Fifth, as regards paragraph 388, for the same reasons, the statement that "judicial control must be ... concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness" begs the question. The prior question is whether there is wrongfulness. As noted above, Article 25 deals with a situation where a State Party is in breach of a Treaty obligation and seeks to justify its breach by a plea of necessity. Article 25 sets out the restrictive conditions in which such a plea may be admitted. Article XI of the BIT, on the other hand, expressly provides that the BIT "shall not preclude the application by either Party of measures necessary" for certain reasons or purposes.

204. It is true that the BIT does not prescribe who is to determine whether the measures in question are or were "necessary" for the purpose so invoked – whether, in other words, Article XI is or is not self-judging.

But if the measures in question are properly judged to be "necessary", then there is no breach of any Treaty obligation. In that event, it is not the case that "judicial control must be ... concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness".

205. So the question arises whether the error in law so identified constitutes an excess of powers. Excess of powers is normally invoked where it is claimed that the Tribunal has failed to apply the applicable law, and a line of decisions in ICSID practice confirms that failure to apply the applicable law may amount to an excess of powers, whereas erroneous application of the law does not constitute a basis for annulment.[55]

206. It will therefore be necessary to determine whether the error in question amounts (i) to a failure to apply the law, in which event the award of the Tribunal may be annulled, or (ii) to a misapplication of the law, in which event the award, although to that extent defective, will not be annulled.

207. In this case, the Committee finds that the following sentence in paragraph 388 of the Award demonstrates that the Tribunal failed to apply the applicable law:

> Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard.

208. The Tribunal has held, in effect, that the substantive criteria of Article XI simply cannot find application where rules of customary international law – as enunciated in the ILC Articles - do not lead to exoneration in case of wrongfulness, and that Article 25 "trumps" Article XI in providing the mandatory legal norm to be applied. Thus, the Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law.

209. The Committee is therefore driven to the conclusion that the Tribunal has failed to conduct its review on the basis that the applicable legal norm is to be found in Article XI of the BIT, and that this failure constitutes an excess of powers within the meaning of the ICSID Convention.

[55] See above, paras 173 - 174

210. It remains to be considered whether the excess of powers so found is "manifest".

The excess of powers must be "manifest"

211. In order for excess of powers to require annulment of an Award, the excess must be "manifest". In order to ensure that this qualification is satisfied, it should be noted, as a first step, that it is necessary to observe the basic requirement of the VCLT to seek the "ordinary meaning" of the relevant term. In a literal sense "manifest" is something which is "plain", "clear", "obvious", "evident" *i.e.* easily understood or recognized by the mind.[56]

212. It would appear that *ad hoc* committees have applied either a two step approach determining first whether there is an excess of powers and, if so, whether that excess was manifest, or an approach starting from a *prima facie* assessment of the presence of any manifest excess and, if the finding is negative, stop the examination there. The Committee favours the two-step approach, as excess of powers is a *sine qua non* for the need to gauge the manifestness of the excess, and allows a more cogent analysis of what constitutes a breach, on one hand, and, on the other, what makes it manifest.

213. Whether an excess of power satisfies the qualitative criterion of being manifest has been the object of scrutiny in a large number of decisions. All of these decisions have, in different language, expressed the opinion that in order for an excess of powers to be manifest, it must be quite evident without the need to engage in an elaborate analysis of the text of the Award.[57]

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[56] Schreuer, ICSID Commentary (2009), page 938 (para 135)

[57] The following examples of *ad hoc* committees which have grappled with the concept of the qualifying criterion of "manifest" in the context of a manifest excess of powers may be recalled in this relation.

"The ad hoc Committee considers that the term "manifest" is a strong and emphatic term referring to obviousness. In its dictionary meaning, "manifest" is substantially equivalent to "clear", "plain", "obvious", "evident":

> "what is clear can be seen readily;
> what is obvious lies directly in our way, and necessarily arrests our attention;
> what is evident so clearly as to remove doubt;
> what is manifest is very distinctly evident" (*Soufraki v. UAE*, para 39).

"The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens, the excess of power is no longer manifest." (*Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, 5 February 2002, para 25).

"… even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal's conduct, if susceptible of argument 'one way or the other', is not manifest" (*CDC Group plc v.*

214. For reasons dealt with above, the Committee has concluded that the Tribunal engaged in an excess of powers by its total failure to apply Article XI of the BIT.

215. Proceeding to the qualitative criterion of "manifest", the Committee takes the following considerations into account.

216. In paragraph 378 of the Award, the Tribunal opines that because the BIT did not deal with the legal elements necessary for the legitimate invocation of a state of necessity, the rule governing such questions will thus be found under customary law. This implies that, according to the Tribunal's reasoning, where the rules of customary law do not legitimate treaty application, the treaty provision cannot be applied. This conclusion is reinforced by the following sentence in the Award, which explains that "such requirements and conditions have not been fully met in this case".

217. In other words, the fact that customary international law, as enunciated by the ILC Articles, does not confer exoneration from wrongfulness was held by the Tribunal to imply that it need not take the inquiry any further. This is further confirmed in the Tribunal's conclusion that for the reasons just mentioned "there is no need to undertake a further judicial review under Article XI".[58]

218. On the basis of the above, the Committee considers that it is obvious from a simple reading of the reasons of the Tribunal that it did not identify or apply Article XI of the BIT as the applicable law, and that it failed to do so on the assumption that the language of this provision was somehow not legitimated by the dictates of customary international law.

219. The excess of powers on the part of the Tribunal is therefore manifest.

Articles II(2) (a) and X of the BIT

220. For the sake of completeness, the Committee wishes to address the argument of Sempra relating to Articles II(2)(a) and X of the BIT. Sempra relies on these provisions of the BIT in support of the proposition that the BIT cannot be seen as other than an integral part of

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Republic of Seychelles (ICSID Case No. ARB/02/14), Decision on Annulment, 29 June 2005, para 41).

[58] Award, para 388

the international law regime, the Committee wishes to make the following observations.

221. There is nothing in the materials, and particularly not in the Award, that indicates that the significance, if any, of Articles II (MFN Treatment and a national treatment) and Article X (non-derogation) have been argued by the Parties or discussed by the Tribunal in the context of the arbitral proceedings. This is, however, not determinative of the issue. In the present annulment proceeding, the Committee has no reason to discuss whether these provisions could have had a role to play in the application of Article XI (since this provision of the BIT, according to the Committee's finding, was not applied at all). For that reason, Articles II and X simply do not enter into the considerations that the *ad hoc* Committee needs to take into account in order to reach this conclusion. The reason for annulment is that Article XI was not applied, not that it was applied in any particular way, whether affected or not by the Articles II and X of the BIT.

Exercise of a discretionary right to annul?

222. The effect of the Tribunal's treatment of necessity as a matter solely of customary international law is that Argentina has effectively been deprived of its procedurally assured entitlement to have its right of preclusion laid down in Article XI of the BIT – the applicable law in this respect – subjected to legal scrutiny. For this reason, as annulment may be a matter of discretion, the Committee has concluded that, in this case, the Award must be annulled.

CONCLUSION

223. Summarising the Committee's discussion above, it arrives at the conclusion that the Award of 28 September 2007 in ICSID Case No. ARB/02/16 shall be annulled on the ground of manifest excess of powers.

COSTS

224. According to Article 61(2) of the ICSID Convention, a Tribunal shall (absent party agreement) decide how and by whom fees and expenses of the members of the Tribunal and the charges and fees of the Centre shall be paid, such decision forming part of the Award. Article 52(4) extends the application of this provision to annulment proceedings.

225. Neither the Convention nor its Rules and Regulations give any guidelines as to the application of this provision. The principal alternatives are (1) the application of the rule that the costs follow the event ("loser pays") or (2) equal sharing of costs.

226. It is fair to say that a majority of *ad hoc* committees have opted for the latter principle, although a recent tendency towards the former principle may be noted.

227. This *ad hoc* Committee considers that it is in line with equitable principles to let the rule that the costs-follow-the-event apply to those costs of the annulment proceeding that have been incurred by the Centre, *i.e.* in respect of the fees and expenses of the members of the *ad hoc* Committee and the charges, fees, and out-of-pocket expenses incurred by the Centre.

228. For this reason, Sempra shall be ordered to reimburse Argentina the total amount of the costs of the Centre – as finally determined – to the extent that these have been advanced by Argentina, with each Party bearing the expenses for its own representation and its related party costs.

DECISION

229. In consideration of the foregoing, the Committee unanimously decides to:

Annul the Award of 28 September 2007 on the ground of manifest excess of powers (Article 52(1)(b) of the Convention) owing to the failure of the Arbitral Tribunal to apply Article XI of the BIT between the United States and the Argentine Republic concerning Reciprocal Encouragement and Protection of Investment of 14 November 1991: such annulment applies necessarily to the Award in its entirety, pursuant to Article 52(3) of the Convention.

Order Sempra to reimburse to the Argentine Republic all of the expenses incurred by the Centre in connection with the Annulment proceeding, including the fees and expenses of the arbitrators.

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[*signed*]

Christer Söderlund
President of the Committee
Date:10 June 2010

[*signed*]
David A.O. Edward
Member
Date:2 June 2010

[*signed*]
Andreas J. Jacovides
Member
Date:24 May 2010