CASES

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CAMUZZI INTERNATIONAL SA *v.* ARGENTINE REPUBLIC[1]

(ICSID Case No. ARB/03/2)

Decision on Objections to Jurisdiction. 11 *May* 2005

(*Arbitration Tribunal*: Orrego Vicuña, *President*; Lalonde and Morelli Rico, *Members*)

[1] The Claimant was represented by Mr R. Doak Bishop. The Respondent was represented by Dr Osvaldo César Guglielmino, Dr Cintia Yaryura, Dr Gisela Makowski and Dr Gabriel Bottini.

SUMMARY: *The facts*: — In November 2002, Camuzzi International SA ("Camuzzi" or "the Claimant") instituted arbitration proceedings against the Argentine Republic ("Argentina" or "the Respondent") under a bilateral investment treaty between Argentina and the Belgo-Luxembourg Economic Union ("the BIT").[2]

Camuzzi participated in a privatization programme embarked upon by Argentina in 1989, which included the gas sector. Camuzzi invested in two natural gas distribution companies: Sodigas Sur SA and Sodigas Pampeana SA. These companies held majority shares in two natural gas distribution companies: Camuzzi Gas del Sur SA ("CGS") and Camuzzi Gas Pampeana SA ("CGP"), which were licensed by Argentina to supply and distribute natural gas in the country.

The dispute arose after Argentina suspended the licensee companies' tariff increases. According to the Claimant, in addition to this the subsidies granted had not been reimbursed and certain other measures were taken, which were prejudicial to Camuzzi. The Claimant argued that these measures resulted in a breach of the guarantees made by Argentina pursuant to law and the licences, and constituted a violation of the BIT.

In 2003, the Claimant and the Respondent agreed to set up a single Tribunal to hear both the Claimant's request and a request submitted concurrently by another shareholder in CGS and CGP, Sempra Energy International ("Sempra"). Sempra's request was decided separately.

The Respondent challenged the jurisdiction of the Tribunal on the following grounds: there was no legal dispute since the measures complained of were not directly related to an investment but were connected to the licence; no national of another contracting State had been directly harmed; the claim was premature; the Claimant lacked *jus standi*; the Claimant had not established that it qualified as an investor; the dispute had been submitted to other tribunals; Article 1(2)(b) of the BIT was not sufficient to establish the jurisdiction of the Tribunal; and the Claimant could not be considered to be exercising foreign control over the companies, as required by Article 25(2)(b) of the ICSID Convention.

The Claimant contended that all the requirements for establishing the Tribunal's jurisdiction were fully met: it was a legal dispute between a national of Luxembourg, on the one hand, and Argentina, on the other hand; the dispute concerned losses that affected the interests Camuzzi had in the companies through which the investments had been made; the interests involved constituted an investment; and the harm and losses suffered by the Claimant amounted to a violation of the BIT.

Held (unanimously): — The Tribunal had jurisdiction over the dispute.

(1) The law applicable to the decision on jurisdiction was not Article 42(1) of the ICSID Convention, which applied solely to the merits of the dispute. To reach a determination on jurisdiction, only Article 25 of the ICSID Convention and the terms of the BIT had to be applied (paras. 15–17).

[2] The Treaty for the Promotion and Reciprocal Protection of Investments between Argentina and the Belgo-Luxembourg Economic Union was signed on 28 June 1990 and entered into force on 26 August 1992. The text of the BIT is available in Spanish at www.unctad.org/sections/dite/iia/docs/bits/belg_lux_argentina_esp.pdf.

(2) Article 25(2)(b) of the ICSID Convention covered two situations. The first was where the criterion of nationality was satisfied and a company having the nationality of a contracting State different from the one that was a party to the dispute was eligible to petition ICSID. The second was where the criterion of nationality was not satisfied but the company incorporated in the contracting State had the right to complain if it was subject to foreign control and in so far as this had been agreed between the States concerned (paras. 30–1).

(3) There had been no agreement between the Respondent and the Claimant relating to the application of Article 25(2)(b) of the ICSID Convention, but this did not mean the Claimant was precluded from bringing a claim. The case related to a national of Luxembourg who had made an investment by purchasing shares in a national company of Argentina, which was lodging a claim on its own behalf under the definition of investment adopted by the BIT. In addition, the BIT expressly referred to minority or indirect shareholders, which was intended to ensure that even an investor who did not exercise control over a company could exercise its right to claim (para. 32).

(4) Even if the BIT was interpreted as requiring the investor to have control over the company, there was a possibility of joint control among various claimants and partners. With respect to foreign investors of different nationalities, acting under different treaties, their participations could be combined for purposes of control if the context of the initial investment or other subsequent acquisitions resulted in their operating jointly. In this case, there were elements demonstrating that Camuzzi and Sempra were exercising joint control (paras. 38–43).

(5) There was a legal dispute arising directly from the Claimant's investment. There was a difference between the parties concerning not only facts but mainly law and the claim arose from the alleged violation of the rights and guarantees under the BIT. The dispute arose directly from the Claimant's investment in the companies incorporated in Argentina (paras. 54–6).

(6) Even though particular aspects of the meaning and scope of the rights relating to the assets were governed by the laws of Argentina, as regarded jurisdiction the applicable law was that of the ICSID Convention and the BIT (para. 57).

(7) The facts did not support Argentina's claim that the damage to the Claimant was indirect. Whether the measures in dispute could have a general effect or an effect that directly affected the investor was a determination that had to be made in connection with the merits and not at the jurisdictional stage (paras. 59–60, 67).

(8) The Claimant had *jus standi*. Article 1(2)(b) of the BIT extended protection to investors, including minority or indirect shareholders, regardless of whether or not they controlled the company. The claim was founded on both the contract with the licensees, expressed in the licence and other acts, and the BIT. The BIT included an "umbrella clause", which created an even closer link between the contract, the context of the investment and the BIT (paras. 80–90).

(9) The problem of double recovery for the same harm was an issue belonging to the merits of the dispute (para. 91).

(10) With respect to the objection that renegotiation was in progress, it was not the task of an arbitral tribunal to take views on renegotiation proceedings which pertained exclusively to the parties. Questions regarding the meaning of

admissibility, and determination and quantification of losses, belonged to the merits of the claim. Asymmetry and unequal treatment in case of affirmation of jurisdiction between the company and its foreign shareholders was not a pertinent objection (paras. 97–101).

(11) The Claimant was not prevented from taking action before the Tribunal despite a forum selection clause of the licence, which provided only for action before domestic courts. A dispute relating to the interpretation of a treaty could be submitted to the mechanisms of that treaty. It was a basic principle that a dispute could originate in a contract and simultaneously have an effect on a treaty. A contract-related dispute could be submitted to the local forum and a dispute under the treaty could be submitted to an arbitral tribunal. Under the BIT, if a dispute was submitted to local jurisdiction and was not resolved within the time limit prescribed by the BIT, the Claimant could submit it to arbitration, which required the discontinuance of any national court action in progress (paras. 109–19).

(12) To bring a claim before ICSID consent to ratify the ICSID Convention was not sufficient; a separate declaration was required by means of a treaty or other acts making such consent unequivocally clear. The BIT embodied the expression of consent for resorting to arbitration in case a dispute arose between the investor and the State with respect to the guarantees ensured under the BIT. The BIT was self-sufficient for this purpose and the option of resorting to dispute resolution was exercised by the investor by the simple fact of expressing its own consent (paras. 131–2).

(13) The rules for a correct interpretation of the BIT were those of the Vienna Convention on the Law of Treaties. Treaty interpretation was not the exclusive task of States, but was also the duty of tribunals called to settle a dispute, particularly when the tribunals interpreted the meaning of the terms used in a treaty (paras. 133–5).

(14) Diplomatic protection was inappropriate under the bilateral treaty system. It involved concepts and mechanisms very different from those available in the system of international investment protection, which had devised a mechanism that was separate from the role of the State of the investor's nationality, but not from that of the State host to the investment (paras. 138–9).

The following is the text of the Decision on Objections to Jurisdiction:

DECISION ON OBJECTIONS TO JURISDICTION (11 MAY 2005)

A. PROCEEDINGS

1. On November 8, 2002, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received from Mr R. Doak Bishop a Request for Arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention" or "Convention") on behalf of Camuzzi International SA ("Camuzzi") against the Argentine Republic. The request relates to disputes with the Argentine Republic regarding

measures adopted by the Argentine authorities which, it is argued, have changed the general regulatory framework established for foreign investors in a way which the Claimant asserts severely affects Camuzzi's investment in two natural gas distribution companies which together serve seven Argentine provinces. In its request, Camuzzi cites the provisions of the Treaty for the Promotion and Reciprocal Protection of Investments between Argentina and the Belgo-Luxembourg Economic Union of 1990 (the "Bilateral Agreement on Investments" or "Treaty").[1]

2. On November 18, 2002, in accordance with Rule 5 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), the Centre acknowledged receipt of the request and, on November 19, 2002, sent copies thereof to the Argentine Republic and the Embassy of Argentina in Washington, DC.

3. On February 27, 2003, the Acting Secretary-General of the Centre registered the request in accordance with Article 36(3) of the ICSID Convention. On the same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to form the Arbitration Tribunal as soon as possible.

4. On March 4, 2003, the Claimant and the Respondent agreed to set up a single Tribunal to hear the request for arbitration of Camuzzi International SA and another request submitted concurrently by Sempra Energy International ("Sempra"), also a shareholder in the gas distribution companies. Sempra's request has been decided separately. The parties also agreed that the Tribunal would comprise one arbitrator appointed jointly by Sempra and Camuzzi, one arbitrator appointed by the Argentine Republic, and a third arbitrator, who would serve as the President of the Arbitral Tribunal, who would be appointed by the Secretary-General of ICSID.

5. On March 10, 2003, the Claimant appointed Mr Marc Lalonde, a Canadian national, as an arbitrator. On April 3, 2003, the Argentine Republic appointed as an arbitrator Dr Sandra Morelli Rico, a national of Colombia.

6. After consulting with the parties, the Acting Secretary-General of ICSID appointed Professor Francisco Orrego Vicuña, a Chilean national, as President of the Arbitral Tribunal. On May 5, 2003, the Acting Secretary-General of ICSID, in accordance with Rule 6(1) of the Rules of Procedure for ICSID Arbitration Proceedings (Arbitration Rules), notified the parties that all the arbitrators had accepted their appointments and that the Tribunal had consequently been deemed to be constituted and the proceedings deemed to begun on that same date. On the same day, in accordance with Rule 25 of the ICSID Administrative and Financial Regulations, the parties were informed that Mr Gonzalo Flores, Senior Counsel ICSID, would serve as Secretary of the Arbitral Tribunal. Subsequently, by letter of July 1, 2004, the Deputy Secretary-General of ICSID informed the Arbitral Tribunal and the parties that Mr Flores would be replaced by Mr Francisco Ceballos Godínez, Counsel, ICSID. Mr Ceballos Godínez having left ICSID in March 2004, Mr Gonzalo Flores was reappointed as Secretary of the Tribunal.

[1] Treaty between the Argentine Republic and the Belgo-Luxembourg Economic Union on the Promotion and Reciprocal Protection of Investments of June 28, 1990, in force as from August 26, 1992.

7. In view of the fact the two cases in question were conducted concurrently and following the same procedure, in the interest of brevity the Tribunal will not repeat the information already provided in the decision on jurisdiction in the case of *Sempra Energy International* v. *Argentine Republic* in respect of procedural matters, and reference is invited to what is stated there.

Participation of the Claimant in the Privatization Process

8. The Claimant in this dispute, like other companies which have submitted requests for arbitration against the Argentine Republic before ICSID, participated in a vast privatization program that the country embarked upon in 1989, which included the gas sector among others. The privatization of this sector was carried out by means of the Gas Law and related instruments.[2]

9. Camuzzi owns 56.91% of the share capital of Sodigas Sur SA ("Sodigas Sur") and Sodigas Pampeana SA ("Sodigas Pampeana"). In its turn, Sempra, the company which requested the concurrent arbitration proceedings mentioned above, owns 43.09% of Sodigas Sur and Sodigas Pampeana. The latter two Argentine companies, in turn, hold 90% and 86.09%, respectively, of the shares in Camuzzi Gas del Sur SA ("CGS") and Camuzzi Gas Pampeana SA ("CGP"), each of which, in its capacity as a "Licensee", is a natural gas distribution company. Both CGS and CGP each holds a license granted by the Argentine Republic to both supply and distribute natural gas in seven provinces of that country.

Origins of the Dispute

10. The dispute originated in the suspension of the licensee companies' tariff increases based on the US producer price index and the subsequent pesification of these tariffs pursuant to Law No. 25561. In addition, the Claimant asserts that subsidies granted have not been reimbursed and that certain taxes and levies that have been introduced by some Argentine provinces, as well as other measures relating to the payment for services, labor restrictions, and the transfer of tax costs, are prejudicial to it. All the foregoing, in the Claimant's opinion, results in a breach of the guarantees granted by the Argentine Republic pursuant to law and the licenses, and in a violation of the measures of protection to foreign investments provided for under the Treaty.

B. OBJECTIONS TO JURISDICTION

11. The Argentine Republic has filed objections to the jurisdiction of the Tribunal on the grounds that in this case there is no legal dispute, that the measures complained of are not directly related to an investment, that no national of another contracting State has been directly harmed, that the claim is premature, that the Claimant lacks *jus standi*, that the Claimant has not established that it qualifies as an investor, and that the dispute has been submitted to other tribunals.

[2] Law 24.076 of 1992 on the privatization of the gas sector and Decree 1738/92 of 1992 on application of the gas law.

12. The Respondent party also asserts that the fact that Article 1(2)(b) of the Treaty defines as investments "shares, stocks and any other form of holding, including minority or indirect holdings, in the companies . . . " is not sufficient to establish the jurisdiction of an ICSID Tribunal. Moreover, in its opinion, the requirements of Article 25(1) of the Convention have to be met regarding the existence of a legal dispute arising directly from the investment and involving a contracting State with the national of another contracting State. It further asserts that for a juridical person incorporated in a State to be considered a national of another contracting State, it must be subject to foreign control in accordance with Article 25(2)(b) of the Convention.

13. The Respondent has emphasized the fact that the Claimant's claim is connected with the License and not directly to the investment. If there were a violation, it is argued, it would affect only the licensees – CGS and CGP – but not Sodigas Sur or Sodigas Pampeana, which are only shareholders in the licensees. Nor would domestic companies owned or controlled by Camuzzi have been affected, which would moreover not meet the requirements of Article 25(2)(b) of the Convention.

14. The Claimant is of the view that all the requirements for establishing the Tribunal's jurisdiction are fully met: it is a legal dispute between a national of Luxembourg and the Argentine Republic concerning losses that affect the interests it has in the companies through which the investments were channeled and the licensees; the interests involved constitute an investment defined and protected by the BIT; and the harm and losses at issue amount to a violation of the BIT's guarantees.

Applicable Law

15. In order to examine these arguments, the Tribunal first has to determine the law applicable to the decision on jurisdiction, a matter that the parties discussed at the hearing. In the Argentine Republic's argument, as the parties have not agreed on any applicable law they have no option but to resort to the second part of Article 42(1) of the Convention, which calls for the application of domestic legislation and international law. In this context, the argument follows, no court of the Argentine Republic would accept a petition of this sort or allow piercing of the corporate veil.

16. The Claimant is of the view that this provision applies solely to the decision concerning the merits of the dispute, and that for a determination on jurisdiction it is only necessary to apply the Convention and the Treaty.

17. The Tribunal shares the conclusion reached in *Azurix* to the effect that Article 42(1) applies to the merits of the dispute and that to reach a determination on jurisdiction only Article 25 of the Convention and the terms of the Treaty must be applied.[3]

18. On this basis, the Tribunal will examine now each of the objections presented and the opposing arguments, following for this purpose the same order in which they were presented by the Argentine Republic.

[3] *Azurix Corp.* v. *Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, paras. 48–50, 43 *ILM* 262 (2004) (hereinafter *Azurix*).

First Objection: Non-controlling Shareholder

Opinion of the parties

19. The Argentine Republic puts forward as an objection to jurisdiction, first, that Camuzzi does not meet the nationality requirement established in Article 25(2)(b) of the Convention because, in its capacity as shareholder in the companies participating in CGS and CGP, it cannot substitute itself in the latter's rights. Accordingly, the Respondent affirms, the denationalization referred to in that article does not occur. Camuzzi, it argues, could only take legal action if its rights as shareholders had been affected, which is not the case.

20. Referring to the *Vacuum Salt* case,[4] which interpreted and applied the provisions of Article 25(2)(b) of the Convention as to the meaning of foreign control, the Respondent argues that what is meant is an "exclusive" control which enables at least blocking changes in the company, a circumstance which does not occur in this case. In the light of the background events and situations leading up to the Convention, it is also affirmed that that article must be understood as referring to foreign nationals that have a "dominant interest"[5] and that, in response to proposals aimed at eliminating the control requirement, some delegations insisted that it be maintained.[6] It is further noted that, in the opinion of one author, this concept presumes "effective control or a dominant position and not merely participation".[7]

21. The Claimant argues, to the contrary, that control is not a requirement for the protection of investments in the system of bilateral treaties on this matter, and refers in this connection to the *Lanco*,[8] *CMS*,[9] *Azurix*,[10] and *Enron*[11] cases. Neither, it is argued, does the Convention define the concept of foreign control and the *Vacuum Salt* case did not exclude the fact that control could be exercised by minority shareholders if they did in fact wield a substantive influence in the company's decisions.

22. Apart from the question of whether minority or indirect shareholders are entitled to protection under the Treaty, a point that will be analyzed separately, the Claimant argues that in this case Camuzzi and Sempra, the Claimant in the concurrent arbitration proceedings, have both separate and joint control in the

[4] *Vacuum Salt Products* v. *Republic of Ghana* (ICSID Case No. ARB/92/1), Award of February 16, 1994, 9 *ICSID Rev. – FILJ* 72 (1994) (hereinafter *Vacuum Salt*).
[5] Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Vol. IV, 1969, p. 48, as cited in the Memorial on Jurisdiction of the Argentine Republic, Note 4 (hereinafter Memorial on Jurisdiction).
[6] Documents Concerning the Origin and the Formulation of the Convention on Settlement of Investment Disputes between States and Nationals of other States, Vol. IV, 1969, p. 171, as cited in Memorial on Jurisdiction, Note 5.
[7] Memorial on Jurisdiction, para. 18, with reference to Schreuer, Christoph H., *The ICSID Convention: A Commentary*, Cambridge University Press (2001), p. 315.
[8] *Lanco International Inc.* v. *Argentine Republic* (ICSID Case No. ARB/97/6), Preliminary Decision on Jurisdiction of December 8, 1998, 5 *ICSID Rep*. 367 (hereinafter *Lanco*).
[9] *CMS Gas Transmission Company* v. *Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Objections to Jurisdiction of July 17, 2003, 42 *ILM* 788 (2003) (hereinafter *CMS*).
[10] *Azurix*.
[11] *Enron Corporation and Ponderosa Assets LP* v. *Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction of January 14, 2004, www.asil.org/ilib/Enron.pdf (hereinafter *Enron I*).