School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

Academic Directors: Ignacio Torterola
*Loukas Mistelis**

PAN AMERICAN ENERGY LLC AND BP ARGENTINA EXPLORATION COMPANY V. THE ARGENTINE REPUBLIC (ICSID CASE NO. ARB/03/13)
DECISION ON PRELIMINARY OBJECTIONS

Case Report by Charles B. Rosenberg**
Edited by Loukas Mistelis***

A Decision on Preliminary Objections rendered on July 27, 2006, under the Argentina-United States bilateral investment treaty, and in accordance with the ICSID Convention and Arbitration Rules.

Tribunal:	Professor Lucius Caflisch (President), Professor Brigitte Stern, Professor Albert Jan van den Berg
Claimant's counsel:	Mr. R. Doak Bishop, KING & SPALDING; Mr. José A. Martinez de Hoz (Jr.), PÉREZ ALATI, GRONDONA BENITES, ARNTSEN & MARTÍNEZ DE HOZ (JR.); and Mr. Richard J. Spies.
Defendant's counsel:	Dr. Osvaldo César Guglielmino, PROCURADOR DEL TESORO DE LA NACIÓN.

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Charles B. Rosenberg is the international arbitration law clerk to The Honorable Charles N. Brower. He can be reached at charles.b.rosenberg@gmail.com.

*** Loukas Mistelis is co-Director of International Arbitration Case Law (IACL).

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1. Facts of the Case

BP America Production Company ("BP America") is a U.S. corporation that owns and controls BP Argentina Exploration Company ("BP Argentina"), another U.S. corporation. BP America indirectly and BP Argentina directly own the majority of the equity interests of Pan American Energy LLC ("PAE"), a U.S. company with a branch registered in Argentina ("PAE Branch"). PAE owns all of the equity interests in the following three Argentine companies: Pan American Continental SRL ("PAE Continental"), Pan American Sur SRL ("PAE Sur") and Pan American Fueguina SRL ("PAE Fueguina") (collectively, the "Argentine Companies").

The Argentine Companies and PAE Branch together constituted the second largest oil and gas producer in Argentina. They are the holders of a number of hydrocarbon production concessions, exploration permits and production contracts in Argentina.

Claimants contend that the Government of Argentina enacted a number of measures in the hydrocarbon and electricity sector that affected: (i) the exemption of hydrocarbon exports from export duties; (ii) the limitation of the royalty rate to 12%; (iii) the right to freely export hydrocarbons and to transfer funds abroad; (iv) the right to effect sales and purchases in dollars; (v) the freedom to contract impeded by the elimination of adjustment mechanisms; (vi) the ability to depreciate, for tax purposes, investments funded in dollars at the same level as prior to "pesification;" and (vii) the possibility to mitigate losses caused by "pesification" through tax measures.[1]

On May 23, 2003, PAE and BP Argentina filed a request for arbitration alleging that Argentina's measures violated the following provisions of the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America (the "BIT"). On December 17, 2003, BP America and the Argentine Companies also submitted a request for arbitration against Argentine. The parties agreed to consolidate the two cases into one set of proceedings.

Claimants allege that Argentina violated the following provisions in the BIT: Articles II(2)(a) (fair and equitable treatment, full protection of and security, and

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[1] Award ¶ 27.

minimum standard of treatment), II(2)(b) (abstention from arbitrary or discriminatory interference), II(2)(c) (umbrella clause), IV (expropriation), V (freedom of transfers of currency) and XII (guarantees in tax matters) of the BIT. Claimants also allege that Argentina violated general international law, other rules of international rule (such as *pacta sunt servanda*) and Argentine law.

2. *Legal Issues Discussed in the Decision*

(a) What issues are deemed to be of a jurisdictional nature? (paras. 43-51)

The Tribunal remarked that its task at the jurisdictional level is to determine whether the issues to be considered fall within the parameters of jurisdiction laid out by the BIT; it is not one of examining whether Claimants' allegations are well-founded on the merits.[2] This is because in the early phase of jurisdiction, the Tribunal deals with "the nature and scope of claims and not with the question of whether they are to succeed."[3] Accordingly, the Tribunal found that it must decide whether Claimants' claims, if well founded, may denote violations of the BIT and therefore fall within ICSID's jurisdiction and the Tribunal's competence under Article 25 of the ICSID Convention and the BIT.

(b) Does the dispute arise directly out of an investment? (paras. 63-70)

The Tribunal concluded that the dispute had arisen directly from an investment within the meaning of Article 25(1) of the ICSID Convention.

The Tribunal noted that general measures of economic policy taken by the host State are in principle not within the purview of Article 25(1) of the ICSID Convention. However, general measures may have a specific effect "if they appear to violate specific commitments . . . or if they have a specific impact on the investment."[4] The Tribunal therefore found that the phrase "arising directly out of an investment" in Article 25(1) of the ICSID Convention cannot be interpreted as "directed to."

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[2] Award ¶¶ 44-50 (citing the *Oil Platforms* case (Iran v. United States), Jurisdiction, Judgment of December 12, 1996; *Amco v. Indonesia*, Decision on Jurisdiction, ICSID Case No. ARB/81/1, September 25, 1983; *Siemens AG v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/02/8, August 3, 2004; and *Enron and Ponderosa Assets v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/01/3, January 14, 2004).

[3] Award ¶ 51.

[4] Award ¶ 64.

The Tribunal clarified that it is not enough for Argentina to state that general measures are complained of to exclude ICSID's jurisdiction; rather, the core question is the existence of specific commitments that these general measures might violate. The Tribunal held that in the jurisdictional phase it was sufficient for Claimants to contend that some specific commitments related to their investment were violated by specific or general measures: "[t]he standard to be used, therefore, is whether the Claimants have made out, *prima facie*, a good case for there being a 'dispute arising directly from an investment'."[5] The Tribunal concluded that Claimants have made out this *prima facie* case.

(c) Is the dispute of a "legal" nature? (paras. 79-82, 91-93, 96-116)

The Tribunal concluded that this dispute is of a "legal" character, pursuant to Article 25(1) of the ICSID Convention.

First, after noting that the nature of the dispute must be determined on objective grounds,[6] the Tribunal clarified that what matters at the jurisdictional phase of the proceedings is "whether the Parties, to justify their claims, are basing themselves on law."[7] The Tribunal concluded that this dispute is clearly of a legal character since "Claimants have framed their pretensions in legal terms and on the basis of law, and have been answered by Respondents in legal terms."[8] The Tribunal noted that the question of whether Claimants' claims are well-founded in substance is to be decided later at the merits stage.

Second, the Tribunal found "that, at first sight, it has only jurisdiction over treaty claims, and cannot entertain purely contractual claims which do not amount to a violation of the BIT."[9] However, it would not be enough for Argentina to assert that the dispute is of a contractual nature to disqualify it as a legal dispute.

Third, the Tribunal found that the umbrella clause in Article II(2)(c) of the BIT – which provides that "Each Party shall observe any obligation it may have entered into with regard to investments" – does not change the Tribunal's conclusion that it has no jurisdiction over purely contractual claims, and that it

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[5] Award ¶ 69.
[6] Award ¶¶ 74, 80 (citing the ICJ's Advisory Opinion in *Interpretation of Peace Treaties*).
[7] Award ¶ 81.
[8] *Id.*
[9] Award ¶ 91.

can only entertain treaty claims.[10] The Tribunal, distinguishing the State as a merchant from the State as a sovereign, refused to adopt a broad interpretation that the umbrella clause *ipso jure* transformed all contractual undertakings into international law obligations.[11]

As a preliminary matter, the Tribunal clarified the standard for interpreting a BIT as follows: "a balanced interpretation is needed, taking into account both the State's sovereignty and its responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[12] Against this backdrop, the Tribunal, endorsing the reasoning of the tribunal in *SGS v. Pakistan*, held that it had jurisdiction over treaty claims and cannot entertain purely contractual claims that do not amount to a violation of the standards of protection of the BIT.[13] In other words, "the umbrella clause does not extend its jurisdiction over any contract claims when such claims do not rely on a violation of the standards of protection of the BIT, [*i.e.*,] national treatment, MFN clause, fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory measures, protection against expropriation or nationalisation either directly or indirectly . . . ."[14] Furthermore, in light of Article VII(1)(a) of the BIT – which defines an "investment dispute" as "a dispute between a Party and a national or company of the other Party arising out of or relating to an investment agreement between that Party and such national or company" – the Tribunal found that a violation of an investment agreement between Argentina and a U.S. company would also be deemed a violation of the BIT and thus give rise to a BIT claim.[15]

In endorsing the reasoning of the *SGS v. Pakistan* tribunal, the Tribunal rejected the reasoning of the *SGS v. Philippines* tribunal, which had emphasized that the umbrella clause would have no real meaning if it did not elevate contract claims into treaty claims. According to the present Tribunal:

> "[T]he interpretation given in *SGS v. Philippines* does not only deprive one single provision of far-reaching consequences, but renders the whole

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[10] Award ¶ 99.
[11] Award ¶¶ 108-109.
[12] Award ¶ 99.
[13] Award ¶ 113.
[14] Award ¶ 112.
[15] Award ¶ 109.

> Treaty completely useless: indeed, if this interpretation were to be followed . . . it would be sufficient to include a so-called 'umbrella clause' and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT. If any violation of any legal obligation of a State is *ipso facto* a violation of the treaty, than that violation needs not amount to a violation of the high standards of the treaty of 'fair and equitable treatment' or 'full protection and security'."[16]

In sum, the present Tribunal opted to follow the reasoning employed by the tribunals in *SGS v. Pakistan*, *Salini v. Jordan*, and *Joy Machinery v. Egypt*, rather than the reasoning employed by the tribunals in *SGS v. Philippines*, *Eureko v. Poland*, and *Noble Ventures v. Romania*, with respect to the interpretation of the umbrella clause.[17]

(d) Does the claim have to be limited with respect to tax measures? (paras. 131-139)

The Tribunal concluded that it has jurisdiction over tax matters, but only insofar as the tax measures are linked with: (i) expropriation, pursuant to Article IV of the BIT; (ii) transfers, pursuant to Article V of the BIT; or (iii) the observance and enforcement of terms of an investment agreement or authorization, as referred to in Articles VII(1)(a) and (b) of the BIT.

Article XII(2) of the BIT provides that the dispute settlement provision of the BIT does not apply to matters of taxation except: (a) if the matter is connected with, or amounts to, an expropriation under Article IV of the BIT; (b) if the matter is related to the compliance with and enforcement of an investment agreement or authorization; or (c) if the matter pertains to transfers pursuant to Article V of the BIT. The Tribunal was of the view that, *prima facie*, the imposition of export withholdings could possibly amount to the expropriation of specific legal and contractual rights. Moreover, an expropriation claim linked to a tax matter would bring in the fair and equitable treatment protection in Article II of the BIT, provided that there is a direct or indirect expropriation. Thus the claims relating to export withholdings practiced by Argentina are within the "exception to the exception" provided for in Article XII(2)(a) of the BIT and fall within the Tribunal's competence. The Tribunal also found that Claimants made out a *prima facie* case that Claimants' hydrocarbon production concessions, exploration

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[16] Award ¶ 105.

[17] Award ¶¶ 100-108.

permits and production contracts in Argentina could be "investment agreements" within the meaning of Articles VII(1)(a) and XII(2)(c) of the BIT.

(e) Can Claimants refuse to accept the Courts of Argentina as the exclusive forum? (paras. 154-161)

The Tribunal concluded that Claimants are not bound to accept the Courts of Argentina as the exclusive forum.

First, the Tribunal rejected Argentina's argument that Claimants had made a choice in favor of the Argentinean courts, pursuant to Article VII of the BIT, when PAE, through PAE Branch, initiated proceedings against Forestal Santa Bárbara before the Supreme Court of Argentina related to a private dispute regarding concessions for hydrocarbon transportation granted in Argentina. According to Argentina, PAE had initiated proceedings in Argentina to prevent a U.S. court's interference and establish that conflicts over hydrocarbon concessions must be submitted to Argentine tribunals.

The Tribunal noted that it should "not assume lightly that choices of forum have been made by claimant parties in favour of the host State's juridical system."[18] The Tribunal reasoned that "[i]f the contrary were true, there would be little use in setting up international arbitral procedures for investment disputes."[19] According to the Tribunal, two conditions are necessary to assume that a choice of forum had been made: (i) identity of the parties; and (ii) identity of the causes of action. The Tribunal found that in this case there was neither identity of the parties nor identity of the cause of action. In the local claim, the Government of Argentina is not a party (despite the fact that it appeared as *amicus curiae*). The cause of action is also different: "[t]he local claim is not based on an alleged violation of the BIT, even though the BIT was referred to in passing."[20]

Second, the Tribunal rejected Argentina's argument that Claimants' choice created an estoppel. Argentina had contended that Claimants had made a choice in favor of the host State's federal court, which Argentina subsequently relied on.

The Tribunal explained that the principle of estoppel "is detrimental reliance by one party on statements of another party, so that reversal of the position

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[18] Award ¶ 155.
[19] *Id.*
[20] Award ¶ 157.

previously taken by the second party would cause serious injustice to the first party."[21] None of that has been shown by Argentina in this case. The Tribunal analyzed Argentina's estoppel argument against the three conditions identified by the ICJ in the *Temple of Preah Vihear* case: (i) a clear statement of fact by one party; (ii) the statement is voluntary, unconditional and authorized; and (iii) reliance in good faith by another party on the statement to that party's detriment or to the advantage of the first party.[22] The Tribunal doubted that there was a clear statement of fact by one party; indeed it was unclear if a statement was made at all "by one party." There being no statement, the "voluntary, unconditional and authorized" characteristics could not be present. Finally, the Tribunal found that Argentina, which was not a party to the local dispute, cannot be said to have relied on the choice supposedly made by Claimants under Article VII of the BIT and to have suffered a disadvantage from this supposed choice.

(f) Is the claim hypothetical? (paras. 177-180)

The Tribunal rejected Argentina's argument that Claimants' claim should be dismissed because its damages were based on mere speculation. The Tribunal found that Claimants have, *prima facie*, demonstrated that some damage has occurred.

First, the Tribunal noted that many investment disputes arise from situations with continuing adverse effects on the claimants. Such effects will have to be taken into account by the tribunal called upon to deal with those disputes. Second, the Tribunal remarked that it is not possible to limit its competence to damage that is real and averred at the time at which the issue of jurisdiction is being examined. If it were otherwise, the part of the case related to damage that has not yet materialized but may have materialized by the merits stage would never be decided, save for an unnecessary new arbitration. Doubts are permitted only in respect of claims patently and entirely based on conjecture, which could be considered abusive. According to the Tribunal, this clearly is not the case here.

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[21] Award ¶ 159.

[22] Award ¶¶ 151, 160.

(g) Do Claimants have jus standi? (paras. 209-222)

The Tribunal concluded that Claimants had *jus standi*. As a preliminary matter, the Tribunal ruled that Argentina's *jus standi* objection was not an issue belonging to the merits; rather it was properly examined in the jurisdictional stage.[23]

First, the Tribunal found that Claimants can, *ratione temporis*, be considered investors pursuant to the BIT. Claimants established their investor status under the BIT and their standing to file a claim by providing copies of the relevant concessions, permits and contracts. Claimants also showed that PAE, BP America, and BP Argentina are U.S. companies and that they control the Argentine Companies and PAE Branch directly or indirectly. Thus, as Claimants have shown that they are investors under the BIT either as shareholders (*i.e.*, the U.S. companies) or as holders of contracts, concessions and permits (*i.e.*, the Argentine Companies and PAE Branch), the Tribunal concluded that Claimants have *jus standi*.

Second, the Tribunal noted that the Argentine Companies are owned and controlled by U.S. companies and can, therefore, also bring claims under Article 25(2)(b) of the ICSID Convention and Articles VII(3)(a)(i) and (8) of the BIT. The Tribunal found that the BIT deviates from *Barcelona Traction*, in that it allows claims based on direct or indirect shareholdings of nationals of one Contracting State in companies of another Contracting State.[24]

Third, the Tribunal rejected Argentina's concern that foreign shareholders, in recovering their investment, do so at the prejudice of other domestic or foreign shareholders, creditors and employees. The Tribunal remarked: "This may be true; but it does not empower this Tribunal to stray from the path traced by the Contracting Parties in their BIT, which unquestionably protects shareholdings."[25]

3. Decision

The Tribunal rejected all of Argentina's Preliminary Objections and held that the dispute was within the jurisdiction of ICSID and the competence of the Tribunal.

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[23] Award ¶¶ 209-10.
[24] Award ¶¶ 200, 217.
[25] Award ¶ 220.