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A Case Study on the Resolution of International Investment Disputes Caused by Aggravation of Political and Economic Situation of the Host State - Focusing on the case of CMS Gas Transmission Company v. Argentine Republic*

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I. Introduction

International arbitrations between investors and host States under investment treaties have significantly increased over the past decade.[1] The

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most frequently invoked arbitration organization for such disputes has been the International Centre for the Settlement of Investment Disputes ("ICSID").[2] Virtually all of such claims were filed by private investors against governments, the large majority of which were developing or transition economies.[3]

The overnight failure of its economic system of Argentine Republic ("Argentina") was an especially unwelcome development for the dozens of multinational corporations that had made significant investments in Argentine industries and public utilities.[4] Following Argentina's financial collapse in 2001, Argentina enacted emergency legislation[5] in order top depeg its currency to the U.S. dollar, which resulted in affecting the value and profitability of numerous investments, some of which were fully or partially owned by foreign investors now seeking compensation against Argentina under bilateral investment treaties (BITs).[6]

In light of these developments, this Comment explores the ICSID case of *CMS Gas Transmission Company v. Argentine Republic,*[7] awarded on May

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1) See ISCID's List of Pending Cases in <http://www.worldbank.org/icsid/cases/pending.htm and List of Concluded Cases in <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited October 10, 2007). Also see Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions," 73 Fordham L. Rev 1521, 1538-39 (2004).

2) For ICSID, see its internet homepage at <http://www.worldbank.org/icsid>. ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") of 1965. ICSID began its operations in October 1966. Further generally see David R. Sedlak, "ICSID's Resurgence In International Investment Arbitration: Can the Momentum Hold?," 23 Penn St. Int'l L. Rev. 147, 158 (2004).

3) See <http://www.worldbank.org/icsid/cases/cases.htm>.

4) Paolo Di Rosa, "The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues," 36 U. Miami. Inter-Am. L. Rev. 41, 42 (2004).

5) Jayson J. Falcone, "Argentina's Plight - An Unusual Temporary Solution to a Sovereign Debt Crisis," 27 Suffolk Transnat'l L. Rev. 357, 361 (2004).

6) Luke Eric Peterson, "Camuzzi Files Second Investment Treaty Claim Against Argentina," Investment L. & Pol'y Wkly. News Bull., May 9, 2003, http:// www. iisd.org/pdf/2003/investment_investsd_may9_2003.pdf.

7) ICSID Case No. ARB/01/8, available at <http://www.worldbank.org/icsid/cases/CMS_Award.pdf>.

12, 2005, where the Claimant, CMS Gas Transmission Company, is a company established under the laws of the State of Michigan, United States and invested in Argentina. It purposes to give for various enterprises some useful guidelines required under currently prevailing environment of the Free Trade Agreements ("FTA") in Korea.

For this end, following this Introduction, the Part II of this Comment first describes the relevant facts of the case including the some background for readers' understanding and the Part III summaries the claimant's requests and the decisions rendered by the Arbitral Tribunal in the Award. The Part IV addresses the issue of determinating laws applicable to the merits of dispute in case that the parties of the case have not chosen a governing law. The Part V takes a close look into the main issues of CMS case, which are: Whether were there indirect expropriation of the investment? Have the Argentine government breached the obligation fair and equitable treatment? Can the umbrella clauses provide the Claimant with relevant protections? Finally, the VI concludes this comment.

II. Facts of the Case[8)]

1. Background - Argentine Economic Reforms and Privatization Program

In 1989, the Argentina embarked on economic reforms, which included the privatization of important industries, including the sector of gas transportation in question, and the participation of foreign investment. The basic instruments governing these economic reforms were the Law on the Reform of the State of 1989[9)], the Law on Currency Convertibility of 1991[10)]

8) These facts are based on the description in the Award of ICSID Case No. ARB/01/8, paras. 53-67.
9) Law No. 23.696 of 1989 on the Reform of the State.
10) Law No. 23.928 of 1991 on Convertibility.

and the Decree No. 2128/91 fixing the Argentine peso at par with the United States dollar.

Within this framework, Gas Law[11] was enacted to govern the privatization of the gas industries and established the basic rules for the transportation and distribution of natural gas. The law was implemented by Gas Decree.[12]

Under the new legislation, Gas del Estado, a State-owned entity, was divided into two transportation companies and eight distribution companies. Transportadora de Gas del Norte ("TGN") was one of the companies created for gas transportation.[13] On base of the Model License[14] establishing the basic terms and conditions for the licenses that each new company would be granted by the Argentine government, TGN was granted a license for a period of thirty-five years, subject to extension for another ten years on the fulfillment of certain conditions.[15]

2. CMS's Participation in TGN

CMS's participation in TGN began in 1995 under a 1995 Offering Memorandum[16] leading to the purchase of the shares held by the Argentine government at that time. CMS's acquisition amounted to total 29.42% of TGN's shares.

Under those new legislation and regulations, as well as the license, in the Claimant's view, the tariffs including the gas tariff binding upon CMS were to be calculated in dollars, conversion to pesos was to be effected at the time of billing and the tariffs would be adjusted every six months in accordance with the United States Producer Price Index (US PPI). However,

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11) Law No. 24.076 of 1992 on the Privatization of the Gas Sector (Gas Law).
12) Decree No. 1738/92 on the Implementation of the Gas Law (Gas Decree).
13) Decree No. 1189/92 establishing TGN and other companies.
14) This Model License was approved by the Decree No. 2255/92.
15) This license was granted by Decree No. 2457/9212.
16) Offering Memorandum of July 7, 1995.

the Respondent has a different understanding of the nature and legal effects of these various instruments.

3. Argentina's Measures in the Period 1999-2002 and the Emergence of the Dispute

In response to a serious economic crisis the end of the 1990's, the Argentine government and the representatives of the gas companies agreed in late 1999 to a temporary suspension of the US PPI adjustment of the gas tariff, deferring the adjustment due for a period of six months (January 1 - June 30, 2000). The agreement provided that costs of the deferral would be recouped in the period of July 1, 2000 – April 30, 2001 for indemnification of income losses therefrom. It was understood that this arrangement would not set a precedent or amend the legal framework governing the licenses. This agreement was approved by ENARGAS, the public regulatory agency of the gas industry.[17]

Soon thereafter, however, it became apparent that the agreement would not be implemented and, on July 17, 2000, another agreement was entered into for a new deferral of the tariff adjustment. freezing US PPI earlier deferral and lost income. Income lost as a result of the new deferral was to be gradually recovered and US PPI adjustments were to be reintroduced as from June 30, 2002. Decree No. 669/2000 embodied the new arrangements while recognizing that the US PPI adjustment constituted "a legitimately acquired right" and was a basic premise and condition of the contracts concerned.[18]

In late 2001, the economic crisis of Argentina deepened and significant capital flight from Argentina followed; The Argentine government introduced the "corralito" drastically limiting the right to withdraw deposits from bank accounts. Default was declared and at last Emergency

17) ENARGAS Resolution No. 1471, January 10, 2000.
18) Decree No. 669/2000, August 4, 2000, with particular reference to Preambular paragraph 5.

Law[19] was enacted on January 6, 2002, 17 declaring a public emergency until December 10, 2003[20] and introducing a reform of the foreign exchange system.

The Emergency Law introduced the second type of measures that underlie the dispute in the present case. Thus, the currency board which had pegged the peso to the dollar under the 1991 Convertibility Law was abolished, the peso was devalued and different exchange rates were introduced for different transactions. The right of licensees of public utilities to adjust tariffs according to the US PPI was terminated. The respective tariffs were redenominated in pesos at the rate of one peso to the dollar. The same rate was applied to all private contracts denominated in dollars or other foreign currencies.[21]

III. Claimant's Requests and Tribunal's Award

1. Claimant's Requests

The Claimant requested the Tribunal to grant full compensation recovering the fair market value of the investment calculated immediately before the date of expropriation, with interest paid at the rate of six-month certificates of deposit in the United States, compounded semi-annually, while the Claimant undertook to relinquish title to its shares to the Argentine government upon payment of compensation. The Claimant submitted that the fair market value amounted to be US$ 261.1 million in the event that the Argentine government decides to take title to CMS's

19) Law No. 25.561, January 6, 2002 (Emergency Law).

20) Extensions of this period were later introduced.

21) It was later clarified by Decrees No. 689/2002 and 704/2002, dated May 2, 2002, that the Emergency Law did not apply to gas exports or the tariffs for its transportation, which consequently were exempt from the conversion to pesos.

shares in TGN, or US$ 243.6 million in the event that title to the share remains with CMS.[22]

2. Tribunal's Award

The Arbitral Tribunal awarded as follows:[23]

(1) The Respondent breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II(2)(a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty.
(2) The Respondent shall pay the Claimant compensation in the amount of US$ 133.2 million.
(3) Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US$ 2,148,100. The Respondent shall have up to one year after the date this Award is dispatched to the parties to accept such transfer.
(4) The Respondent shall pay the Claimant simple interest at the annualized average rate of 2.51% of the United States Treasury Bills for the period August 18, 2000 to 60 days after the date of this Award, or the date of effective payment if before applicable to both the value loss suffered by the Claimant and the residual value of its shares established in 2 and 3 above. However, the interest on the residual value of the shares shall cease to run upon written notice by Argentina to the Claimant that it will not exercise its option to buy the Claimant''s shares in TGN. After the date indicated above, the rate shall be the arithmetic average of the six-month U.S. Treasury Bills rates observed on the afore-mentioned date and every six months thereafter, compounded semi-annually.

22) Award of ICSID Case No. ARB/01/8, paras. 395-396.
23) Award of ICSID Case No. ARB/01/8, pp. 139-140.

(5) Each party shall pay one half of the arbitration costs and bear its own legal costs.

(6) All other claims are herewith dismissed.

IV. Laws Applicable to the Merits

1. ICSID Convention's Provision

The parties in present case have not chosen a particular law applicable to the merits of the dispute. So, in accordance with Article 42(1) of the ICSID Convention providing the choice-of-law rule determining the law to be applied by the Tribunal, "[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable."

2. Parties' Arguments

The Claimant however has argued that only the Treaty and international law are applicable to the dispute, while the law of the host State "plays only a marginal role, relevant only as a matter of fact," that is, Argentine law is relevant only in the context of factual matters such as with regard to the nature of the assurances made to CMS.[24] In this respect, the Claimant relied on the case of *Tecmed v. Mexico* to show that the act of a State must be characterized as internationally wrongful if in breach of an international obligation, "even if the act does not contravene the State's internal law …"[25]

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24) Award of ICSID Case No. ARB/01/8, paras. 108-111.

25) *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (Case No. ARB (AF)/00/2) (Tecmed), Award of May 29, 2003, para 56, available at <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>

The Respondent put forth the view that, in the absence of an agreement, the Tribunal must examine and apply the domestic legislation of Argentina, particularly since the investor, like any national investor, is subject to domestic law and the License is specifically governed by Argentine law. The Respondent invoked first the need to apply the Argentine Constitution, and further argued that no investment treaties prevail over the Constitution.[26]

3. Ruling of the Tribunal

In view of the Tribunal, a more pragmatic and less doctrinaire approach has emerged recently, allowing for the application of both domestic law and international law if the specific facts of the dispute so justifies; both sources have a role to play.

The Annulment Committee in *Wena v. Egypt* held in this respect:

"Some of these views have in common the fact that they are aimed at restricting the role of international law and highlighting that of the law of the host State. Conversely, the view that calls for a broad application of international law aims at restricting the role of the law of the host State. There seems not to be a single answer as to which of these approaches is the correct one. The circumstances of each case may justify one or another solution… What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit."[27]

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26) Award of ICSID Case No. ARB/01/8, paras. 112-114.

27) *Wena Hotels Limited v. Arab Republic of Egypt, ad hoc* Committee Decision on Application for Annulment of February 5, 2002, 41 ILM 933 (2002), at 941.

In this case of CMS, considering close interaction between the legislation and the regulations governing the gas privatization, the License and international law, as embodied both in the Treaty and in customary international law, the Tribunal ruled that all of these rules are inseparable and will, to the extent justified, be applied.[28]

V. Issues in the Merits

1. Indirect Expropriation of the Investment

(1) Provisions of the Treaty

The expropriation may not only be direct but also be indirect. The latter results from depriving the owner/investor "… in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[29] Such an expropriation might be entirely independent of the State's intention.[30]

In this regard, Article IV(1) of the Treaty provides that

"Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2)."[31]

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28) Award of ICSID Case No. ARB/01/8, para. 117.

29) *Metalclad Corporation v. United Mexican States (Case No. ARB(AF)/97/1 (Metalclad)* 40 *ILM 55 (2001)*, para. 103; CMS Memorial, at 71-72.

30) *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 CTR 219 (1984-II).*

31) The Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Art. IV(1), Nov. 14, 1991,

(2) Parties' Arguments

In the Claimant's view, the measures adopted by the Argentine government stemmed less from the prevailing economic conditions than from the political antagonism which the government had developed towards foreign investors generally and towards some companies in particular whether because of electoral strategies or ideological connotations of successive governments; the measures adopted during the period 2000-2002 resulted in indirect and creeping expropriation of acquired rights in the form of legal commitments, assurances and guarantees expressly offered to the investor; the value of its assets has been wiped out; and it cannot enjoy the economic benefits reasonably expected of the investment.[32]

The Respondent, Argentine government, opposing the expropriation claim first argued that not only had there been no transfer of property of any kind but that none of the measures taken had amounted to an interference which could be compared to or resulted in an expropriation, because the commitments by the Argentine government arose not from the government's undertakings, but from the Information Memorandum prepared by private consultants;[33] TGN had continued to operate normally and had full use of its property; neither had the State derived any benefit from the measures taken, thus meeting the standard set in the *Lauder v. Czech Republic* case when denying the occurrence of expropriation.[34]

Emphasis was placed by the Respondent on the argument that neither had there been substantial deprivation of the fundamental rights of ownership nor had these rights been rendered useless; the Argentine government did not manage the day-to-day operations of the company, no

32) For more detailed assertions of the Claimant, see the Award of ICSID Case No. ARB/01/8, paras. 253-256.

33) For more detailed assertions of the Respondent, see the Award of ICSID Case No. ARB/01/8, paras. 257-259.

34) *Ronald S. Lauder v. Czech Republic (Lauder), UNCITRAL Final Award of September 3, 2001,* <http://www.mfcr.cz/static/Arbitraz/en/FinalAward.doc>, para. 203; *S. D. Myers, Inc. v. Government of Canada, Partial Award of November 13, 2000, <http://www.dfait-maeci.gc.ca/tnanac/documents/myersvcanadapartialaward_final_13-11-00.pdf>, para. 280.*

officers or employees of the company was under arrest; the payment of dividends had not been interfered with; the directors and managers of the company were appointed by the company; and the investor had full ownership and control of the investment.[35]

(3) Ruling of the Tribunal

The Tribunal framed[36] that the essential question is "therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation." In the *Metalclad* case, the tribunal held that this kind of expropriation relates to incidental interference with the use of property which has "the effect of depriving the owner, in whole or in significant part, of the use or reasonable-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[37] Similarly, the Iran-United States Claims Tribunal has held that deprivation must affect "fundamental rights of ownership,"[38] a criteria reaffirmed in the *CME v. Czech Republic* case.[39]

Denying the occurrence of indirect expropriation in this case, the Tribunal ultimately held that the Government of Argentina has not breached the standard of protection laid down in Article IV(1) of the Treaty, and noted:

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35) For this the Respondent referred to the *Pope & Talbot Inc. v. Government of Canada (Pope & Talbot)*, Interim Award of June 26, 2000, para. 100, available at <http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF>,

36) In this regard, the Tribunal referred to the definition in the *Lauder* case that "The concept of indirect (or "de facto", or "creeping") expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property." Lauder, <http://www.mfcr.cz/static/Arbitraz/en/FinalAward.doc>, para. 200.

37) *Metalclad, 40 ILM 55 (2001), para. 103.*

38) *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 CTR* 219 (1984-II), at 225; see also *Phelps Dodge Corp. v. Islamic Republic of Iran, 10 CTR 121 (1986-I).*

39) *CME, <http://www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf>, para. 688.*

"The Government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in that case, is not present in the instant dispute. In fact, the Respondent has explained, the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment."[40]

2. Breach of Fair and Equitable Treatment

(1) Provisions of the Treaty

The second substantive standard of protection provided to investors under the Treaty was that of fair and equitable treatment. The principle of fair and equitable treatment is a cornerstone of the evolving international law on the protection of investors and their investments."[41] This standard requires the host country to act in a consistent manner, free from ambiguity and in total transparency, without arbitrariness and in accordance with the principle of good faith. On the other hand, the standard is case specific and requires a flexible approach, such that "it offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures that have been taken against its interest."[42]

Article II(2)(a) the Treaty provides "[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."[43]

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40) Award of ICSID Case No. ARB/01/8, para. 263.

41) See Peter Muchlinski, "'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard," 55 Int'l & Comp. L.Q. 527 (2006).

42) Id. at 530-31; Harout Samra, "Five Years Later: The CMS Award Placed in the Context of the Argentina Financial Crisis and the ICSID Arbitration Boom," 38 U. Miami Inter-Am. L. Rev. 667, p. 690.

(2) Parties' arguments[44]

Under the provision just cited, the Claimant asserted that Argentina had breached the fair and equitable treatment standard and had not ensured full protection and security to the investment, particularly insofar as it had profoundly altered the stability and predictability of the investment environment, an assurance that had been key to its decision to invest.[45]

According to the Claimant's argument, the uncertainty characterizing the period 2000-2002 and the final determinations under the Emergency Law that dismantled all the arrangements in reliance on which the investment had been made are the main events that resulted in the breach of this standard.

However, in the Respondent's view, the standard of fair and equitable treatment is too vague to allow for any clear identification of its meaning and, in any event, it only provides for a general and basic principle found in the law of the host State which at the same time is compatible with an international minimum standard. Further the Respondent argued that the standard is not different from the international minimum standard, that is an "investor should not be dealt with in a manner that contravenes international law."[46]

Argentina believed that none of the measures adopted breaches the standard or for that matter international law as the legislative prerogatives

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43) Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. II(2)(a), Nov. 14, 1991.

44) For more detailed arguments between the Claimant and the Respondent, see the Award of ICSID Case No. ARB/01/8, paras. 267-272.

45) For its assertion, the Claimant further cited precedent cases, where it was held that "[The Government] breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest."(<*http://www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf*>, para. 611); and that the fair and equitable treatment "… requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment …"(*Técnicas Medioambientales Tecmed, S.A. v. Mexico* of May 29, 2003, <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>).

46) *Robert Azinian and others v. United Mexican States* (Case No. ARB(AF)/97/2) (Azinian), Award of November 1, 1999, 14 ICSID Review--FILJ 538 (1999).

of the State cannot be frozen in time and the Emergency Law is just one such exercise of its prerogative. In the Respondent's view, stability did not mean immobilization and the measures adopted were the solution necessary to prevent greater social damage and poverty. It is further argued that there was ample precedent upholding the legality of devaluation, both under domestic and international law, with particular reference to the situation in the United States in the 1930s. It was also asserted that the Claimant had not proved any damage in connection with its allegation of breach of this standard and the compensation claimed under this item could not in any way be assimilated to that corresponding to expropriation, as the Claimant requests.

(3) Ruling of the Tribunal

The Tribunal summarized that the key issue is whether the measures adopted in 2000-2002 breached the standard of protection afforded by Argentina's undertaking to provide fair and equitable treatment.[47] The Tribunal, therefore, concluded that the measures adopted resulted in the objective breach of the standard laid down in Article II(2)(a) of the Treaty, as in the eyes of the Tribunal "[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."[48]

3. Protection under Umbrella Clause

47) The Award of ICSID Case No. ARB/01/8, paras. 273.

48) *Técnicas Medioambientales* case, available at <*http://www.worldbank.org/icsid/cases/ laudo-051903%20-English.pdf*>.

(1) Provisions of the Treaty

Article II(2)(c) of the Treaty provides a umbrella clause which fairly prevalent in BITs that each party "shall observe any obligation it may have entered into with regard to investments." Nevertheless umbrella clauses have been subject to varying interpretations in ICSID arbitrations.[49] Could this clause provide the Claimant another ground on which the protection and guarantees of the Treaty have been breached by the Respondent?

(2) Parties' Arguments

In this respect, the Claimant argued that the umbrella clause of the Treaty has been breached as a result of the measures adopted by the Argentine government and particularly the dismantling of the tariff regime and related matters.[50]

But the Respondent argued that no commitments were made under the law, and those that were made under the License were purely contractual; not all contract breaches amount to a breach of the Treaty; hence cannot be protected under a clause of this kind.[51]

(3) Ruling of the Tribunal

In Tribunal's view, the Respondent was correct in arguing that not all contract breaches result in breaches of the Treaty. The standard of protection of a treaty will be engaged only when there is a specific breach of the treaty rights and obligations or a violation of contract rights protected under the treaty. It is because commercial disputes arising from a contract have been distinguished from disputes arising from the breach of treaty standards and their respective causes of action.[52]

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49) Harout Samra, "Five Years Later: The CMS Award Placed in the Context of the Argentina Financial Crisis and the ICSID Arbitration Boom," 38 U. Miami Inter-Am. L. Rev. 667, p.687,

50) See the Award of ICSID Case No. ARB/01/8, paras. 296-297.

51) See the Award of ICSID Case No. ARB/01/8, para. 298.

There were in particular two stabilization clauses contained in the License that have significant effect when it comes to the protection extended to them under the umbrella clause. The first is the obligation undertaken not to freeze the tariff regime or subject it to price controls.[53] The second is the obligation not to alter the basic rules governing the License without TGN's written consent.[54][55]

Therefore the Tribunal concluded that the obligation under the umbrella clause of Article II(2)(c) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty.[56]

VI. Conclusion

As seen above, in present case, while the Tribunal affirmed that any indirect expropriation can occur from incidental interference depriving the foreign investor of the use or reasonable-to- be-expected economic benefit even if not necessarily to the obvious benefit of the host State, the Tribunal denied the occurrence of indirect expropriation in this case by holding that the Government of Argentina has not breached the standard of protection laid down in the Treaty.

However, regarding the issue of fair and equitable treatment, the Tribunal, finding Argentina's breach of obligations, affirmed that the foreign investor can expect the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, which can give the foreign investor certain degree of

52) See the Award of ICSID Case No. ARB/01/8, para. 299.
53) License, Clause 9.8.
54) License, Clause 18.2.
55) See the Award of ICSID Case No. ARB/01/8, para. 302.
56) See the Award of ICSID Case No. ARB/01/8, para. 303.

foreseeability.

Further, addressing the effect of the umbrella clause, the Tribunal recognized (i) the obligation of the host State undertaken not to freeze the tariff regime or subject it to price controls and (ii) the obligation not to alter the basic rules governing contracts between the foreign investor and the host State without the first's written consent. However, the protection under the umbrella clause is available only when there is a specific breach of rights and obligations under BIT or a violation of contract rights protected under BIT.

As noted, ICSID arbitration of international investments under BIT law increases, signing that foreign investor rights are being protected throughout the world. It is generally recognized in international law that compensation is designed to cover any "financially assessable damage including loss of profits insofar as it is established."[57] According to the decision in the landmark case Lusitania, "the fundamental concept of 'damages' is ··· reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole."[58] The loss suffered by the claimant is the general standard commonly used in international law in respect of injury to property, including often capital value, loss of profits and expenses.[59]

However, a closer look into the character and nature of these disputes reveals otherwise. The claims demand compensation for losses in value or profitability resulting from state measures that, under one reasonable view, fall squarely within the purview of a state's sovereign right to regulate.[60]

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57) Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, (January 28, 2002), Article 36.2.

58) *Lusitania, RIAA, Vol. VII, 1923, p. 32, at 39.*

59) James Crawford, The International Law Commission's Articles on State Responsibility, 2002, at 225, para. 21.

60) Víctor R. Salgado, "The Case against Adoping BIT Law in the FTAA Framework," 2006 Wis. L. Rev. 1025, p.1066.

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ABSTRACT

A Case Study on the Resolution of International Investment Disputes Caused by Aggravation of Political and Economic Situation of the Host State - Focusing on the case of *CMS Gas Transmission Company v. Argentine Republic*

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This Comment explores the ICSID case of *CMS Gas Transmission Company v. Argentine Republic*,[61] awarded on May 12, 2005. The Part II of this Comment first describes the relevant facts of the case including the some background for readers' understanding and the Part III summaries the claimant's requests and the decisions rendered by the Arbitral Tribunal in the Award. At Part IV, the Comment addresses the issue of determinating laws applicable to the merits of dispute in case that the parties of the case have not chosen a governing law, and at Part V, takes a close look into three main issues of (i) the indirect expropriation of the investment, (ii) the breach of fair and equitable treatment and (iii) the protections under umbrella clauses.

In this *CMS* case, we see first that while the Tribunal affirmed that any indirect expropriation can occur from incidental interference depriving the foreign investor of the use or reasonable-to-be-expected economic benefit even if not necessarily to the obvious benefit of the host State, the Tribunal denied the occurrence of indirect expropriation in this case by

61) ICSID Case No. ARB/01/8, available at <http://www.worldbank.org/icsid/cases/CMS_Award.pdf>.

holding that the Government of Argentina has not breached the standard of protection laid down in the Treaty.

Secondly, however, regarding the issue of fair and equitable treatment, we see that the Tribunal, finding Argentina's breach of obligations, affirmed that the foreign investor can expect the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, which can give the foreign investor certain degree of foreseeability.

Thirdly and finally, we see that, on base of the effect of the umbrella clause, the Tribunal recognized the obligation of the host State undertaken not to freeze the tariff regime or subject it to price controls and not to alter the basic rules governing contracts between the foreign investor and the host State without the first's written consent. However, the protection under the umbrella clause is available only when there is a specific breach of rights and obligations under BIT or a violation of contract rights protected under BIT.

Key Words : ICSID Arbitration, Investment Dispute, Indirect Expropriation, Fair and Equitable Treatment, Umbrella Clauses.