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ENRON CREDITORS RECOVERY CORP. AND PONDEROSA ASSETS, L.P. V. THE ARGENTINE REPUBLIC (ICSID CASE NO. ARB /01/3): CASE SUMMARY

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The case focuses on the claims resulting from certain tax assessments purportedly imposed by Argentienan provinces on a gas transportation company in which the claimants invested in various corporate arrangements. Additionally, it addresses the government's purported refusal to permit tariff adjustments in line with the US Producer Price Index. Equity and gas transportation businesses have specific contractual rights under the operation license and technical assistance agreement when it comes to the investment. Argentina and the United States have a bilateral investment treaty, and its provisions will be used. The following case will be governed by the ICSID rules.

Facts and claims of the investor

1. Enron Corporation and Ponderosa Assets, L.P., two businesses that were founded in accordance with US laws in the states of Delaware and Oregon, are plaintiffs. Ponderosa Assets, L.P. is owned and controlled by Enron Corporation, which has its headquarters in Houston, Texas. They owned an indirect equity stake in TGS, an Argentine gas business founded during Argentina's privatization process in the early 1990s and awarded a gas transportation license signed by the government and TGS that lasted for 35 years, until 2027.
2. Argentina's legislative framework for gas transportation included features intended to draw in foreign investment, such as the following: semi-annual tariff adjustments based on changes in the US Producer Price Index; the promise that there would be no price freezes applicable to the tariff system; and the calculation of tariffs in US dollars converted into pesos for billing purposes at the prevailing exchange rate (the Argentine peso was fixed at par with the US dollar as part of the broader economic policy).
3. The claimants owned their shares through a local Compañía de Inversiones de Energía S.A., or "CIESA." The size of the claimant's stake changed between 1992 and 1999, reaching 35.5% in that year. The respondent's argument, however, was that Enron only

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owned 19.5% of TGS. Divergence resulted from the fact that a loan guarantee made up a portion of Enron's contribution to CIESA, which became a significant point of contention when discussing damages.

4. Decree 669/00, which provides for the proper compensation of the deferred rise with interest, approved agreements between the government and industry to postpone the PPI adjustment of tariffs in view of the approaching economic crisis and popular opposition.
5. The Argentine Ombudsman requested a judicial injunction on August 18, 2000, which halted the adjustments of PPI and Decree 669/00. The injunction remained in effect until the date of the arbitral award.
6. In order to deal with the escalating economic crisis, Argentina passed the "Emergency Law" on January 2, 2002. This law eliminated the authority to calculate tariffs in US dollars and converted them to pesos at a fixed exchange rate to one peso (pesification). It also eliminated PPI adjustments, which caused the peso to devalue, further reducing TGS's actual earnings and the company's worth.
7. In accordance with the 1991 Argentina-US Bilateral Investment Treaty, claimants brought ICSID arbitration procedures, saying that the elimination of PPI adjustments "pesification" amounted to expropriation of their investment and other BIT violations.
8. The plaintiffs persisted in arguing that the Emergency Law resulted in a decline in the value of TGS's regulated company of over US$1 billion and that the lack of PPI adjustments in 2000–01 caused a loss of income of US$15.8 million.
9. In order to acquire a 19.5% direct interest in TGS, the plaintiffs transferred their indirect ownership interest in TGS to Petrobras in 2005. The claimants essentially withdrew from TGS when they sold their 15.2% stake to the investment fund D.E. Shaw, with the option to purchase the remaining 4.3%.

Findings on Merits

A. Applicable law

The law that applies to this case has also been a point of contention between the parties. The claimants believe that, in accordance with Article 42(1) of the Convention, Argentina's law prevails in this situation if the parties cannot agree, just as international law does in light of that Article's second clause. However, the Claimants contend that domestic law only applies to factual issues, such as the type of guarantees given to them. According to the claimants, the Treaty serves as the primary lexspecialis between the parties, but other international legal

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principles that are not in conflict with the Treaty also play a part. These include customary rules that stipulate a minimum treatment for covered investments and rules pertaining to treaty interpretation. The Claimants are correct in their argument regarding the importance of international law.

Like many contemporary legal systems, the Argentine Republic's own legal system places a strong emphasis on treaties under Articles 27 and 31 of the Constitution. According to the constitution, treaties are one of the sources that constitute "the supreme law of the Nation." It follows that the treaty norm will take precedence over any contradictory domestic law rule in the event of a disagreement. Article 27 of the Vienna Convention on the Law of Treaties, which states that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty," provides a solution to this problem in addition to being the result of the Constitution's provisions. In keeping with this function of international law, regulatory documents have also specifically mentioned the Treaty's investment protection (Decree 669/00).

The Tribunal held that both Argentine law and international law, including the Argentina-US BIT, "have a complementary role to perform" and that it will apply both national and international law "to the extent pertinent and relevant to the decision of the various claims submitted," in accordance with Article 42(1) of the ICSID Convention, in the absence of parties' agreement regarding applicable law. The Tribunal found no incompatibility between Argentine law and international law "as far as the basic principles governing the [issues in this case] are concerned," but it did highlight that in the event of a dispute between a treaty rule and a domestic law norm, the former will take precedence. (paragraphs 206–199).

B. Treaty Violations Found

Prior to considering the BIT claims, the Tribunal determined that the Respondent was accountable under Argentine law, which is one of the laws that apply to the dispute, for failing to uphold its obligations under the License. The Tribunal found no justification for the non-compliance. Crucially, the Tribunal also stated that although the economic crisis in Argentina did not "amount to a legal excuse," "just as it is not reasonable for the licensees to bear the entire burden of such changed reality, nor would it be reasonable for them to believe that nothing happened in Argentina since the License was approved." (paragraphs 231-232)

1. Fair and Equitable Treatment (FET)

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On a number of grounds, including failing to act in good faith, abusing its rights, renouncing assurances made, changing regulatory approvals and conditions, and failing to provide a stable and predictable legal environment, the Claimants have contended that the Respondent has also violated the standard of fair and equitable treatment established under Article II(2)(a) of the Treaty.

After examining how the treaty FET norm and the customary international law minimal standard relate to one another, the Tribunal came to the conclusion that the former may call for more treatment than the latter. The Tribunal also ruled that a crucial component of the FET requirement was the "stable framework for the investment," which safeguarded investor expectations based on the terms provided by the State and relied upon by the investor when making an investment decision.

The legal and business framework that existed at the time of the investments and that the Claimants had a legitimate basis to rely on was unquestionably altered by the actions in question, the Tribunal concluded. Therefore, regardless of whether the Respondent had acted in good faith, the Tribunal determined that there was an objective violation of the FET requirement under the BIT. (paragraphs 251-268)

2. Umbrella Clause

In accordance with the "umbrella clause" of Article II(2)(c) of the Treaty, the Claimants have also submitted a claim before this Tribunal alleging that the Respondent violated the commitments it made with respect to the investment. The foundation of this claim is the idea that the protection in question is a manifestation of the duty to uphold the principle pactasuntservanda.[1]

"[e]ach party shall observe any obligation it may have entered into with regard to investments," stated the BIT's "umbrella clause." The Tribunal concluded that both contractual and statutory obligations made "with regard to investments" were included in the common sense of the term "any obligation." The Tribunal determined that the Respondent had breached the BIT umbrella clause by failing to fulfill its legislative requirements for the investment as well as its obligations under the contract (License).(paras.269-277)

[1]Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 Recueil desCours 267, 347 (1982), as cited in Claimants' Memorial, para. 316.

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C. Rejected Claims

1. Expropriation

The main argument in this arbitration is that the actions taken since the beginning of 2000, especially those that followed in 2002 under the Emergency Law, have directly and indirectly expropriated the claimants' investments in violation of the protection provided by Article IV of the Treaty.

Since all of these rights were specifically derogated by the Emergency Law, the Claimants contend that the Respondent has directly expropriated their rights to tariff adjustment and calculation under the License, as well as their right to be free from a tariff freeze.The Respondent disputes the assertion, claiming that no property rights have been transferred for the government's or consumers' advantage and that expropriation would not exist without redistribution.;

In this case, the Tribunal did not find any instances of direct or indirect expropriation. According to the Tribunal, if at least a portion of property rights had not been transferred to another beneficiary—specifically, the State—there could not be any direct form of expropriation. Regarding the issue of indirect or creeping expropriation, the Tribunal acknowledged that it might result from a variety of actions and that their combined effects needed to be evaluated.However, the Tribunal was not persuaded that indirect expropriation had taken place based on the facts presented in this case. (paras.234-250)

2. Arbitrariness and Discrimination

The claimants contend that because the measures implemented are discriminatory and arbitrary, there has also been a violation of Article II(2)(b) of the Treaty. The claim of arbitrariness is predicated on the contention that such actions violated the law, lacked proportionality, and undermined the claimants' rights and reasonable expectations. The allegation of discrimination is based on the belief that the restrictions disproportionately affected the gas industry, which is primarily held by foreigners. Regarding each of these characteristics, the Claimants provide a lengthy list of detailed actions.

In the current case, the Tribunal did not find any instances of discrimination or arbitrariness. A finding of arbitrariness, according to the Tribunal, necessitated a clear impropriety that was not evident in Argentina's conduct, which were not wholly surprising given the circumstances,

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albeit being far from ideal. Regarding discrimination, the Tribunal reached a similar result. The Tribunal recognized that it was not impossible to have different solutions for different sectors of the economy without being discriminatory and did not find any arbitrary, illogical, or ridiculous differentiation in the treatment of the Claimants in comparison to other entities or sectors. (paras.278-283)

3. Full Protection and Security

The Claimants contend that, in violation of Article II(2)(a) of the Treaty, their investment has not been fully protected and secured. The claimants depend on the more expansive interpretation of this condition, which was created specifically in CME, where the norm was connected to the investment's legal protection in addition to its physical security.

The Tribunal concluded that the Claimant had not claimed that officials, employees, or installations had not received complete protection and security. Additionally, the overall argument of a potential lack of security and protection within the larger framework of the legal and political system had not been sufficiently established or even supported for the objectives of(paras.284-287)

D. Respondent's Plea of Emergency and Necessity

Due to the severity of its economic crisis in the early 2000s, Argentina claimed exemption from obligation under (1) domestic law, (2) customary international law, and (3) the BIT on the basis of national emergency or state of need. After reviewing the reasons in the context of the regulations Argentina had invoked, the Tribunal determined that the Argentinean measures did not fully satisfy the required circumstances and requirements outlined in those regulations. As a result, the Tribunal rejected the emergency and necessity defense. (paras.288-342)

Findings on Damages

Law Applicable to the Determination of Damages

There was disagreement between the parties on which statute would be given more weight in determining damages. Because there is no agreement to the contrary, the claimants believe that Argentina's law will apply in this case in accordance with Article 42(1) of the ICSID Convention[2], just as international law does in light of that Article's second sentence. In light of

[2] Article 42(1) of Convention on the settlement of investment disputes between States and nationals of other States, 1966

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this, the claimants believe that treaty law will work as the lexspecialis, adding that international law, which is not applicable under domestic law, will only apply to factual matters and have limited impact.

Regarding the role of the various legal sources listed in Article 42[3], the Respondents have provided a different interpretation. They believe that domestic law will apply to factual matters in addition to playing a substantive role in determining the investor's rights based on local law. Additionally, the parties have agreed on a forum selection clause that grants jurisdiction to a domestic court, which the Tribunal should not discount given that this action would not exclude the scope of the treaty or general international law. (paragraph 204)

The Tribunal agrees with the Respondent that domestic law will apply much more broadly in this case, as inferred from the parties' pleadings and arguments, where Argentine law predominates. The most significant factor is that the license in question is subject to Argentinean law and must be strictly interpreted in that context. The Tribunal believes that both domestic and international law will be complimentary in this case because the Claimants have put a high value on the applicability of international law. Nonetheless, if a treaty law and a conflicting domestic law clash, the treaty law will take precedence[4]. Both the Argentine Constitution and Article 27 of the Vienna Convention on the Law of Trea ties[5] make reference to this.

In addition, the Tribunal determined that only international law will be used to determine the damages.

claims of the investor

Three categories are used by the claimants to seek redress. In addition to full compensation for other treaty violations, the expropriation victims are entitled, first and foremost, under Article of the Treaty to full compensation based on the fair market value of the expropriated investment, which was alternatively calculated on August 31, 2000[6] and December 31, 2000[7]}.

[3] *Supra* n.1
[4] Article 27 and 31 of the Constitution of Argentina, 1853
[5] Article 27 of the Vienna Convention on the Law of Treaties,1969
[6] The date of the issuance of the first injunction concerning the US PPI.
[7] The immediate date prior to the enactment of the emergency lawvin Argentina.

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Three approaches[8] were used to calculate this: book value, unjust enrichment, and the discounted cash flow methodology (DCF). (paragraph 346).

Second, the claimants are requesting the management fees that they are entitled to as a result of the EPCA and TGS[9] Technical Assistance Agreement. Thirdly, the claimants want to be compensated for the revenue they lost since US PPI adjustments for 2000–2001 were unavailable. (paragraph 347).

Since the anticipated future cash flow from management fees to Enron, which amounts to US$48.7 million updated to November 2004 and US$34.8 million of December 2001, is not shown in TGS financial statements, the claimants argue that the management fees will be calculated using the DCF technique. (paragraph 349). Based on the total of the adjustments rejected, the claimants have calculated damages from unpaid PPI adjustments to be $15.8 million USD.~[10]

In response, the Respondents contested the claims on a number of grounds. The first was that the claims were deemed illusory due to the high return on investment based on pre-crisis and current stock prices, and that the damages were caused by TGS and CIESA's aggressive financial policies, particularly because of the high leverage of TGS' foreign currency debt (352), as well as the fact that country risk was already factored into the tariff calculation. In addition to the fact that DCF was not the proper approach for evaluation, the Respondents disagreed with other methodological presumptions that supported the Claimants' valuation. It should be mentioned that Petrobas already had the TAA in 2004.

The claim for PPI damages has been denied by the respondents, who contend that it disregard s the agreements that were made in January and June 2000 that suspended PPI adjustments 11 2 and that the claimants never contested. (paragraph 359)

[8] A. DCF-(August 31, 2000 at US$243,775,916 November 2004 at US$382,016,802).
B. book value- (US$337,549,800 and US$472,823,217)
C. unjust enrichment approach- (December 31, 2001, US $579,475,694(purchase price) to US $582,018,216 (wealth transfer))

[9] The Claimants in their reply (para 677) have stated that this constitutes delayed compensation and should be included in computations of historical profitability or damages.

[10] While the loss was included in the August 2000 valuation, the same was written off from TGS books and is thus not taken into account for the valuation on December 2001.

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C. Approach to Compensation

As stated by the Permanent Court of International Justice in the Chorzów case, the Tribunal has held that the "appropriate standard of reparation under international law is compensation for the losses suffered by the affected party" in the absence of BIT provisions that would specify the damages to which the investor is entitled in the event of a breach of the fair and equitable standard or of the umbrella clause. (paragraph 359)

Myers[11] was cited by the Tribunal to reiterate the discretion to determine a specific measure of compensation within the general guiding principle that "compensation should undo the material harm inflicted by a breach of an international obligation." The Tribunal also noted that other Tribunals dealing with compensation for the fair and equitable treatment breaches have confirmed and reiterated this principle. (paragraph 360)

Because it was fairly well aware that this standard applied in cases of expropriation, the Tribunal held that in this particular case, compensating for the difference in the "fair market value" of investment resulting from the BIT breaches was the appropriate approach. The Tribunal also noted that the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin, and in those cases, the standard of compensation can also be similar on one or the other side of the line. Finally, the Tribunal noted the cumulative nature of the breaches in this particular case. (paragraphs 361–363)

D. General Objections of the Respondent

The Tribunal has gone one step further and dismissed the Respondent's claims on the immediately mentioned grounds.

Historical returns on investment

According to the Tribunal, the historical return on investment was actually irrelevant for determining damages because the concerned claims referred to the impact of the measures on the value of the business, which did not take into consideration past performance or returns in this regard. This was the main reason why the Respondents opposed compensation: "The historical return that the Claimants had obtained on the investment in question was significantly

[11] *S.D. Myers, Inc. v. Canada*, UNCITRAL Arbitration Proceeding, Partial Award of November 13, 2000, paras.311-315; *Metalclad Corporation v. United Mexican States*, (ICSID Case No.ARB(AF)/97/1), Award of August 30, 2000, para. 122; MTD, para. 238

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higher than that which was considered in the determination of tariffs in relation with the cost of capital" (para. 369).

Leverage policy

Argentina had argued vehemently that TGS's aggressive leverage policy had made it more vulnerable to the deteriorating economic conditions, which had a negative impact on the company's equity value, which is typically much higher. The government could not be held responsible for this, according to Argentina. According to the Tribunal, the TGS' leverage was deemed reasonable by industry standards and was quite close to the standards that the regulator had allowed.

There was no discernible difference between TGS's actual leverage and the ideal leverage that ENARGAS took into account. added that before the actions, the stock market did not view such leverage as a threat to the company, and that the stock exchange price only experienced a significant decline following the imposition of tariffs. Accordingly, the Tribunal determined that the measures, not the leverage, were to blame for the value decline (paragraphs 373–375).

Country risk

The Respondents maintained a firm stance that Claimants could not pretend to charge higher tariffs for a risk and then argue that such risk should not be borne by them if the risk materialized. They argued that a premium had been included in the tariff calculation to account for the risk of devaluation, tariff freeze, and pesification, collectively as a country risk (para 120).

The Tribunal rejected the aforementioned reasoning in its conclusions regarding culpability on the grounds that country risk, also known as default risk, was only tied to the danger of a particular country defaulting on its foreign debt and was unrelated to the risk of currency devaluation. (paragraph 149) These conclusions were later restated during the damages phase, when the Tribunal declared that the risk of tariff freezes and pesifications was not included in the "country risk" and that the claimants should be reimbursed for the impact of these actions (paragraph 378).

VALUATION

In assessing the value of the Claimant’s investment in TGS, the Tribunal focused on both the equitable value of the investment prior to government measures and its present value. The

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Tribunal considered several valuation methods but rejected stock market value, book value, and enhancement techniques as they failed to accurately reflect the value of TGS as a going concern.

Valuation Methodology:

The Tribunal dismissed stock market value, citing liquidity issues and a limited number of exchanges that distorted the company's true worth. Similarly, the book value approach was deemed inadequate since it failed to account for TGS's ongoing operations and the broader market conditions. Unrealistic enhancement techniques, which focused on unjustifiable improvements, were also excluded. Instead, the Tribunal found the Discounted Cash Flow (DCF) method to be the most suitable for determining the value of TGS. DCF is a widely used global method that accounts for future cash flows, but the Tribunal cautioned that it could be speculative. The Tribunal also adjusted the DCF analysis to reflect the economic realities of Argentina's crisis and the specific impacts on TGS's regulated business. For present value, the Tribunal relied on the price at which D.E. Shaw purchased shares in TGS in 2006, as it was considered a more accurate reflection of the current market value than the DCF calculation proposed by the Claimants.

Shareholding and Liabilities:

The Claimants held a 35.5% indirect shareholding in TGS, part of which was financed through a loan guarantee by Enron for CIESA's debt. In 2005, Enron released its guarantee of CIESA's debt, reducing its direct shareholding to 19.5%. To calculate the net value of the Claimants' stake as of December 2001, the Tribunal used the 35.5% figure but deducted Enron's share in CIESA's liabilities. This net figure was then compared to the sale value to D.E. Shaw in 2006 to estimate the present value of the Claimants' investment.

Regulated vs. Non-Regulated Businesses:

TGS operated two business segments: regulated (gas transportation) and non-regulated (LNG generation). The Respondent argued that the valuation should include both segments, citing the non-regulated business's growth. However, the Tribunal focused exclusively on the regulated business for valuation, based on Argentine legislation that required TGS to keep the accounts of both sectors separate. The Tribunal also noted that the government measures targeted only the regulated sector, making the non-regulated business irrelevant for the purpose of this valuation.

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Pre-Pesification and Present Value:

The Tribunal selected 31 December 2001 as the valuation date, before the pesification of tariffs took effect. It adjusted the DCF analysis to reflect the economic situation in Argentina at the time. The pre-pesification value of the Claimants' interest in the regulated business was calculated at US$129 million. For the present value, the Tribunal relied on the sale to D.E. Shaw, resulting in an adjusted value of US$38.6 million in 2001 terms. The difference, which amounted to US$90.4 million, was attributed to the pesification of tariffs.

Additional Claims and Final Compensation:

The Tribunal rejected the Claimants' claim for damages related to the Technical Assistance Agreement (TAA) with EPCA, as the charges under the TAA were not deemed deferred compensation. The Tribunal awarded US$15.8 million for tariff freeze damages in 2000-2001, and the total damages amounted to US$106.2 million, including US$90.4 million for post-2001 impacts.

Interest and Costs:

Interest on the damages was awarded at LIBOR plus 2% per year, compounded semi-annually from 1 January 2002. Each party bore its own legal costs, and arbitration costs were shared equally.

This detailed analysis allowed the Tribunal to accurately assess the Claimants' losses and determine appropriate compensation, considering both historical and present economic circumstances.

Implications

In the context of a violation of non-expropriation standards, the Tribunal adhered to the standard of restitution established by the PCIJ in the *Chorzów Factory* case, which mandates full compensation for the loss caused by the violation. The tribunal's role is to determine the appropriate method of restitution, with a focus on compensating for the material damage incurred. In this case, the Tribunal rejected the argument that the country risk, including the impact of actions on the investment, was already factored into the expected returns, particularly in the context of a foreign debt default. The burden of proof rested on the party claiming that their losses were worsened by factors unrelated to the violation, such as the investor's adoption

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of an aggressive leverage policy.

The tribunal also utilized the fair market value approach to assess damages, typically used in expropriation cases, as the violation of fair and equitable standards could have similar consequences to expropriation. The tribunal calculated damages by determining the difference between the investment's fair market value before the breach and its present value. While various valuation techniques, including the book value method and unjust enrichment approach, were rejected, the Discounted Cash Flow (DCF) method was deemed most appropriate for assessing the value of a going concern. This method reflects a company's ability to generate future profits.

The tribunal also considered the impact of the Argentinean economic crisis on the valuation and sought to distribute the burden of losses between the state and the claimants in a balanced way. The DCF analysis was adjusted to account for assumptions and variables that reflected the economic reality, with market capitalization serving as a reference to verify these assumptions. The valuation date was set before the breach, and additional damages caused by earlier measures were separately compensated.