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By
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I. INTRODUCTION

Faced with a financial crisis in 1989, Argentina instituted several privatization efforts in an attempt to resuscitate its floundering national economy.[1] A second fiscal downturn forced the Argentine government to rescind these privatization schemes in 2001.[2] Sempra Energy International ("Sempra"), an American company that had capitalized on Argentina's economic revitalization attempts by investing in several of Argentina's natural gas providers, challenged Argentina's bailout efforts and invoked arbitration proceedings, insisting that Argentina had violated the Bilateral Investment Treaty ("BIT") between Argentina and the United States.[3] The arbitrational tribunal ("Tribunal") agreed and issued a $75 million award in Sempra's favor.[4] On January 25, 2008, the Republic of Argentina ("Argentina") submitted a request with the International Centre for the Settlement of Investment Disputes ("ICSID") for the annulment of the Tribunal's award.[5] In its request for annulment, Argentina insisted that the Tribunal had been improperly constituted, had "manifestly exceeded its powers," had violated a fundamental procedural rule, and had failed to provide an adequate explanation for its decisions.[6] Upon ICSID's granting of a provisional stay of enforcement of the

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[1] Sempra Energy Int'l v. Argentina, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award of June 29, 2010 (Mr. Christer Soderlund, Sir David A.O. Edward, QC, Ambassador Andreas J. Jacovides) [hereinafter *Sempra*].

[2] *See id.* at 7.

[3] *See id.*

[4] *See id.*

[5] *Id.* at 1.

[6] *Sempra* at n.1 at 8.

Tribunal's Award, an *ad hoc* committee was convened to deliberate over Argentina's annulment application.[7] In ultimately determining that the Tribunal had "made a fundamental error in identifying and applying" the relevant law, the *ad hoc* committee held that the Tribunal had exercised a "manifest excess of powers" and annulled its Award.[8]

II. BACKGROUND AND PROCEDURAL SUMMARY

In 1989, Argentina implemented a privatization scheme in an effort to stimulate its struggling economy.[9] Coupled with this initiative was the Convertibility Law of 1991, which afforded the Argentine peso ("ARS") a one-to-one exchange rate with the United States Dollar ("USD").[10] In effect, the privatization program incentivized the reorganization of Argentina's natural gas industry in 1992, resulting in the creation of several major residential and commercial gas distributors.[11] Sempra, an American corporation, invested in two of these newly formed Argentinean gas companies, Sodigas Pampeana and Sodigas Sur, and acquired 43.09% of both distributors' shares.[12] These particular companies controlled 90% and 86.09%, respectively, of shares in two Argentine companies, Camuzzi Gas Pampeana S.A. and Camuzzi Gas del Sur (together, "Licensees"), which were conferred licenses for the provision of natural gas in 1996.[13]

Faced with yet another financial crisis in 2001, the Argentine Government acted quickly to ratify the Emergency Act of January 2002, essentially dissolving the Convertibility Law of 1991 while simultaneously phasing out the USD and

[7] *See id.* at 1.
[8] *Id.* at 44.
[9] *See id.* at 6.
[10] *See id.*
[11] *Sempra* at n.1 at 7.
[12] *See id.*
[13] *See id.*

reintroducing an ARS-based economy.[14] Sempra took exception to many of Argentina's bail-out measures, asserting that the revocation of the "Licensees' entitlement to calculation of tariffs in USD and their semi-annual adjustment on the basis of the US Producer Price Index ("PPI")" was tantamount to a "wholesale abrogation and repudiation of significant rights and entitlements" that the Licensees and Sempra had enjoyed under Argentina's previously privatized regulatory environment.[15] Consequently, Sempra filed a Request for Arbitration under the ICSID Convention, "invoking the US-Argentina Bilateral Investment Treaty ("BIT")" on September 11, 2002. [16] Argentina raised various jurisdictional objections; however, the ICSID Tribunal ultimately determined that the dispute was indeed governed under ICSID's jurisdiction.[17]

The Tribunal issued its Award on September 28, 2007, holding that Argentina had "breached the fair and equitable standard" along with the "Umbrella Clause" of the BIT and issuing damages to Sempra.[18] More specifically, the Tribunal first determined that the Licensees' rights and designations warranted their entitlement to calculate the PPI adjustments that Argentina had disallowed.[19] The Tribunal next decided that Sempra enjoyed a right to maintain its calculation of tariffs in USD – a "central feature of the tariff regime" that Argentina had discontinued.[20] The Tribunal then held that while Argentina had not explicitly breached the "standard of protection established in Article VI(1) of the BIT", its newly adopted measures (circa 2001-2002) had "substantially changed the legal and business framework under which [Sempra's] investment" was made.[21] As such, the Tribunal held that Argentina had violated the "fair and equitable

[14] *See id.*
[15] *Id.*
[16] *Sempra* at n.1 at 7.
[17] *See id.*
[18] *Id.*
[19] *See id.*
[20] *Id.*
[21] *Sempra* at n.1 at 7.

treatment standard of Article II(2)(a) [and the Umbrella Clause] of the BIT."[22] Objecting to this decision, Argentina submitted a request for annulment, along with a stay of enforcement of the Tribunal's award, on January 25, 2008.[23]

The award was "provisionally stayed" on January 30, 2008, upon which an *ad hoc* committee ("Committee") was convened to consider Argentina's annulment application.[24] In response to Sempra's request to "lift the stay of enforcement" of the Tribunal's award, the Committee decided to continue the stay until its hearing of the parties' oral arguments on December 8, 2008.[25] On March 5, 2009, the Committee prolonged the stay of enforcement of the Tribunal's award, stipulating that Argentina place $75 million USD in escrow.[26] According to this ruling, if Argentina failed to fulfill this requirement within 120 days, Sempra could request that the stay be terminated.[27] On May 13, 2009, after Argentina neglected to offer any sort of escrow agreement, Sempra asked that the Committee lift the stay.[28] Finally, after numerous disputes between the parties regarding various attachment risks and contingencies, the Committee "terminated the stay of enforcement" of the Tribunal's award and "dismiss[ed] Argentina's argument that the placing of funds in escrow . . . would cause prohibitive cost[s] and create an 'unacceptable risk of attachment to Argentina.'"[29] After months of deliberation, the Committee finally issued its "Decision on the Argentine Republic's Request for Annulment of the Award" on June 29, 2010.

[22] *Id.* at 10-11.
[23] *Id.* at 8.
[24] *Id.* at 1.
[25] *Id.* at 2.
[26] *See Sempra* at n.1 at 2.
[27] *See id.*
[28] *See id.* at 4.
[29] *Id.* at 5.

III. THE PARTIES' ARGUMENTS

A. The Argentine Republic's Arguments

Argentina raised four separate arguments in its application for annulment.[30] First, Argentina contended that the Tribunal had been improperly constituted under Article 52(1)(a) of the ICSID Convention.[31] Argentina then insisted that the Tribunal had "manifestly exceeded its powers" in violation of Article 52(1)(b) of the ICSID Convention.[32] Third, Argentina argued that the Tribunal had seriously departed "from a fundamental rule of procedure" in violation of Article 52(1)(d) of the ICSID Convention.[33] Finally, Argentina maintained that the Tribunal's award failed to identify the reasoning behind its provisions as required under Article 52(1)(e) of the ICSID Convention.[34]

Argentina's primary claim asserted that the Tribunal had "committed a manifest excess of powers" in its failure to apply Article XI of the BIT in its analysis.[35] In essence, Argentina argued, the Tribunal's determination that Argentina's economic distress could not properly be classified as a "state of necessity under customary international law," (Article 25 of the International Law Commission ("ILC") Articles) led to an impermissible failure to "undertake further judicial review under Article XI" of the BIT.[36] Here, Argentina asserted, the Tribunal overlooked the significant differences between Article XI of the BIT and the "state of necessity under customary international law."[37] Those differences

[30] *See id.* at 8.
[31] *See Sempra* at n.1 at 8.
[32] *Id.*
[33] *Id.*
[34] *See id.*
[35] *Id.* at 19.
[36] *Sempra* at n.1 at 19.
[37] *Id.*

involve the "nature, . . . operation, . . . content, scope, . . . and effects" of Article XI of the BIT as a "special conventional rule" and the "state of necessity" as a "general rule."[38] As such, the "state of necessity" is subordinate to Article XI of the BIT.[39] Argentina asserted that the Tribunal made "manifest errors of law in equating Article XI of the BIT with the state of necessity under customary international law" –mistakes that are "sufficiently serious" to constitute a "manifest excess of powers in accordance with Article 52(1)(b) of the ICSID Convention."[40]

Argentina also argued that in failing to recognize the "self-judging nature" of Article XI of the BIT and refusing to "perform a substantive review" of Argentina's financial measures, the Tribunal demonstrated a "manifest excess of powers."[41] Argentina insisted that the Tribunal incorrectly substituted Article XI of the BIT with the "state of necessity under customary international law," and neglected to acknowledge the fundamental operational, contextual, and consequential differences between the two doctrines.[42] According to the Argentinean government, Article XI of the BIT was applicable to its actions to restore its economy's financial solvency in 2001-2002.[43] Given Article XI's self-judging nature, the Tribunal had a "duty to defer to Argentina's decision to take measures to maintain public order and protect its essential security interests."[44] The Tribunal's failure to adhere to this duty constituted a "manifest excess of powers" and thus rendered its award subject to annulment.[45]

Argentina next contended that the Tribunal's award warranted annulment because it did not explicitly delineate its reasoning pursuant to Article 52(1)(e) of

[38] *Id.* at 20.
[39] *Id.*
[40] *Id.* at 21-22.
[41] *Sempra* at n.1 at 22.
[42] *Id.*
[43] *See id.*
[44] *Id.*
[45] *Id.* at 23.

the ICSID Convention.[46] First, Argentina claimed, the Tribunal did not explain why it relied exclusively on "the requirements of the state of necessity under customary international law."[47] The Tribunal also did not establish its grounds for equating Article XI of the BIT with Article 25 of the ILC Articles.[48] The Tribunal vaguely reasoned that the "lack of a definition of 'essential security interests' of Article XI of the BIT led to the application" of Article 25 of the ILC Articles, however, it failed to explain why.[49] As such, inferred Argentina, the Tribunal did not disclose its reasoning behind its award decision, as required by Article 52(1)(e) of the ICSID Convention, and its determination was therefore subject to annulment.[50]

B. *Sempra Energy International's Arguments*

Sempra maintained its initial rejection of Argentina's assertions and insisted that the Tribunal did not engage in a manifest excess of powers through its disregard of Article XI of the BIT.[51] Sempra argued that the Tribunal's interpretation of Article XI of the BIT was appropriate and that its determination that "Argentina had means available other than the Emergency Law to address its economic crisis" was proper and correct.[52] According to Sempra, the Tribunal's conclusion that Article XI lacked the requisite clarity for application to the circumstances at hand was well founded.[53] In fact, Sempra asserted, the Tribunal provided several explanations regarding its interpretation of Article XI of the

[46] *See Sempra* at n.1 at 23.
[47] *Id.*
[48] *See id.*
[49] *Id.* at 24.
[50] *See id.*
[51] *See Sempra* at n.1 at 24.
[52] *Id.*
[53] *See id.*

BIT.[54] First, the Tribunal stressed that the BIT's "object and purpose" necessitated a "narrow interpretation of Article XI."[55] The Tribunal next reasoned that Article XI lacked a definition of the terms "essential security interests" or "necessary."[56] The Tribunal then explained that "Article XI reflect[ed] customary international law" and that the use of applicable international rules of law is appropriate when BIT provisions are unclear, undefined, or indicative of "customary international law."[57] Thus, according to Sempra, the Tribunal properly rejected Argentina's defense stemming from Article XI of the BIT for two primary reasons. First, the hastily enacted Emergency Law was not necessary to "maintain 'public order' or protect Argentina's 'essential security interests.'"[58] Second and most importantly, "there were other means available" to achieve these economic goals.[59] Attributing to the Tribunal the task of determining "whether the Emergency Law was the 'only' alternative to address the economic crisis," Sempra indicated that the conclusion of the Tribunal suggested that Argentina had failed to supply "'convincing evidence that the events were out of control or had become unmanageable."[60] Sempra went further to maintain that the Tribunal, in concluding that Argentina itself had contributed to its economic crisis, had based its Article XI finding on a "general principle of law."[61]

Sempra acknowledged that more specific "'treaty regime[s]' should 'prevail over more general rules of customary law,'" yet maintained that because the text of the BIT failed to offer the Tribunal with adequate guidance, the Tribunal had appropriately "considered customary international law" the most apposite means to "interpret the BIT provision."[62] While Article XI of the BIT is

[54] *See id.*
[55] *Id.*
[56] *Sempra* at n.1 at 24.
[57] *Id.*
[58] *Id.* at 24-25.
[59] *Id.*
[60] *Id.* at 25.
[61] *Sempra* at n.1 at 25.
[62] *Id.* at 26.

restricted to "maintenance of peace, 'essential security interests,' and public order," Article 25 of the ILC Articles requires that the issue at hand "be an 'essential interest of the State.'"[63] According to Sempra's explanation of the two laws, Article XI of the BIT "is not more expansive than customary law."[64] Sempra insisted that rather than simply refraining from the application of Article XI, the Tribunal had "interpreted the provision as requiring a State invoking it to satisfy the same conditions as required to invoke the plea of necessity under customary law."[65] In its analysis of the applicability of Article XI, the Tribunal determined that the circumstances under which Article XI can be invoked are identical to "those required by customary international law."[66] According to the Tribunal, Sempra argued, Argentina had simply failed to submit evidence proving the existence of those conditions. "No excess of powers, let alone any manifest excess of power [was] involved."[67]

Finally, Sempra maintained that Article XI is not self-judging and that the Tribunal had provided adequate, "lucid, and consistent" reasons for its determinations.[68] As indicated by Sempra, the Tribunal's explanations "clearly show[ed]" the reasoning behind its four major conclusions.[69] First, the Tribunal decided that Article XI failed to provide or describe the "legal elements and conditions necessary for its application.[70] Second, the Tribunal reasoned that the review of equivalent or comparable "rules of customary law" was compulsory in this instance.[71] Third, the Tribunal found that the lack of clarity in Article XI of the BIT required a review of whether a pertinent application of "state of necessity

[63] *Id.* at 27.
[64] *Id.*
[65] *Id.* at 28.
[66] *Sempra* at n.1 at 28.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Sempra* at n.1 at 28.

under customary law" was used.[72] Finally, the Tribunal concluded that both statutes were "customary" and essentially interchangeable.[73]

IV. THE COMMITTEE'S HOLDING AND REASONING

The Committee ultimately determined that the Tribunal's award should be annulled in its entirety based upon its exhibition of a "manifest excess of powers" (in violation of Article 52(1)(B) of the ICSID Convention) in its decision regarding the inapplicability of Article XI of the BIT.[74] While the Committee acknowledged the mootness of Argentina's other contentions, given its acceptance of Argentina's primary argument insisting upon the Tribunal's exercise of a "manifest excess of powers," it agreed to address these other contentions "for the sake of completeness."[75]

In analyzing Argentina's "serious error of law" claim, the Committee recognized that a "serious error of law is not in itself a ground for annulment under Article 52(1) of the ICSID Convention" unless it is of an "egregious nature."[76] Here, however, the Committee's conclusion that the Tribunal had committed a "manifest excess of powers" precluded any inquiry regarding error as to the application of relevant law.[77] In addressing Argentina's claim regarding the lack of reasoning for the Tribunal's award, the Committee indicated that it was clear that the Tribunal had endeavored to provide a "detailed account of its reasoning" regarding "necessity under customary international law."[78] The Committee, in considering the Tribunal's deliberation process, determined that the Tribunal had allotted an appropriate amount of attention to the comparison between Article XI

[72] *Id.*
[73] *Id.*
[74] *Id.* at 29.
[75] *Id.*
[76] *Sempra* at n.1 at 29-30.
[77] *Id.* at 30.
[78] *Id.*

of the BIT and Article 25 of the ILC Articles.[79] As such, the Tribunal's conclusion that Article 25 represents a "fair expression" of customary law and that the Article's stipulated conditions were necessary for "invoking an 'essential security interest' under the BIT" was sufficiently reasoned.[80] The Tribunal's explanation regarding the applicability of the "criteria found in customary international law," given the BIT's failure to address the required legal components for the "invocation of a state of necessity," was clear and explicitly stated.[81] Rejecting Argentina's contention regarding the self-judging nature of Article XI of the BIT, the Committee held that the Tribunal appropriately disregarded Argentina's discretion in its attempt to preserve public order and "protect essential security interests."[82]

Despite Argentina's multiple failed contentions, the Committee affirmed its claim that the Tribunal had impermissibly failed to apply Article XI of the BIT and, as such, had engaged in a "manifest excess of powers" – an offense that rendered the Tribunal's award annullable.[83] According to the Committee, where a BIT supplies the pertinent treaty language, "it is necessary first and foremost to apply the provisions of the BIT."[84] As such, the BIT represents applicable law and must not be overlooked.[85] Article XI of the BIT indicates that the "Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the [p]rotection of its own essential interests."[86]

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[79] *See id.* at 31.
[80] *Id.* at 30-31.
[81] *Sempra* at n.1 at 31.
[82] *Id.*
[83] *Id.* at 32.
[84] *Id.* at 40.
[85] *See id.*
[86] *Sempra* at n.1 at 40.

In considering the language of the BIT, the Committee determined that the treaty is not expressly self-judging on its face.[87] The Tribunal had contradicted itself in its interpretation of Article XI by acknowledging the ability of an economic emergency to be included within the context of Article XI yet denying the Article's self-judging nature.[88] According to the Committee, the Tribunal did not even "deem itself to be required, or even entitled, to consider the applicability of Article XI."[89] The Tribunal's reference to and use of Article 25 of the ILC Articles as an example of customary international law and guidance as to the proper interpretation of terms within the BIT was reasonable.[90] However, it was neither equitable nor sensible for the Tribunal to use Article 25 to effectively preempt Article XI of the BIT.[91]

The Committee also struck down the Tribunal's decision to equate Article 25 with Article XI.[92] A direct comparison of the Articles demonstrated material differences, and as such, Article 25 certainly should not have been used as guidance in the Tribunal's interpretation of the terms used in Article XI.[93] "The most that can be said is that certain words or expressions are the same or similar."[94] While it is certainly true that "the BIT does not prescribe who is to determine whether the measures in question are or were 'necessary' for" the salvaging of Argentina's floundering economy (i.e. whether Article XI is "self-judging"), if the "measures in question are properly judged to be 'necessary,' then there is no breach of any Treaty obligation."[95]

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[87] *See id.*
[88] *See id.*
[89] *Id.* at 41.
[90] *See id.*
[91] *See Sempra* at n.1 at 42.
[92] *See id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 44.

Typically, an "excess of powers" claim is properly supported where it is alleged that the Tribunal failed to apply to relevant law.[96] The Committee found that the following sentence of the Tribunal's award demonstrated the Tribunal's failure to consider and apply the appropriate law:

> Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard.[97]

In effect, the Tribunal held that Article 25 effectively "trumps" Article XI with regard to the "mandatory legal norm" that must be applied in such a circumstance.[98] As such, the Tribunal essentially embraced Article 25 of the ILC Articles as the proper applicable law, in a complete dismissal of Article XI of the BIT. In doing so, the Tribunal "made a fundamental error in identifying and applying" the relevant law.[99] This error, a failure to recognize and employ the proper controlling law, "constitutes an excess of powers within the meaning of the ICSID Convention."[100]

This determination alone, however, did not require the annulment of the Tribunal's award.[101] The Committee held that in order for an "excess of powers"

[96] *Sempra* at n.1 at 44.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Sempra* at n.1 at 45.

claim to necessitate annulment, the excess must have been "manifest."[102] In this case, the Tribunal's conclusion that there "'[was] no need to undertake a further judicial review under Article XI'" was an obvious dereliction of the Tribunal's duty to inquire sufficiently as to the Treaty's applicability.[103] The Tribunal formed this determination on its baseless assertion that the language of the BIT was "somehow not legitimated by the dictates of customary international law."[104]

In conclusion, the Committee determined that because of the Tribunal's exercise of a "manifest excess of powers," its award was subject to annulment under the ICSID Convention.[105] The Committee expressly annulled the Tribunal's award and ordered Sempra to reimburse Argentina for its total ICSID expenditures.[106]

V. CONCLUSIONS

The case of *Sempra Energy International v. Argentina* is a prime example of the importance of a tribunal's thorough analysis and resulting application of relevant law, particularly where an existing BIT provides pertinent language regarding the settlement of potential disputes. The annulment of such a large award due to rather easily avoidable substantive errors imposes hardship on both parties. Furthermore, this case demonstrates the necessity of a check on the powers of arbitration tribunals. The convening of an *ad hoc* committee allows for an impartial review of a tribunal decision and enables an independent decisional body to identify any glaring errors or abuses of discretion. This measure grants losing parties a course of redress in response to a tribunal's improper granting of an award. Furthermore, establishing a supervisory entity within ICSID steers the review of a tribunal's decision away from the courts, essentially preserving

[102] *Id.*
[103] *Id.* at 46.
[104] *Id.*
[105] *Id.* at 47.
[106] *Sempra* at n.1 at 48.

arbitrational authority and avoiding any exacerbation of the already tenuous relationship between arbitral tribunals and the courts.