A FRIENDLY CONTROVERSY

A decision adopted by the ICSID appointed Annulment Committee in the case of CMS v. Argentina\(^1\) has recently partially annulled the tribunal’s award\(^2\) in that case on the specific question of its findings on the interconnection between contracts and treaties. Needless to say, this writer, who was the presiding arbitrator of the tribunal, has the greatest respect and admiration for his colleagues participating in the Annulment Committee, who in addition are his friends, and has the temerity of commenting on such decision only because some views expressed on it in public require explaining what the tribunal really had in mind.\(^3\)

Were an annulment procedure of Annulment Committee decisions available, a sort of international “cassation,” I submit that this very annulment decision would be itself a likely candidate for annulment. As there is no such recourse, the matter becomes one of pure academic interest. Yet even then its discussion might contribute to introduce additional elements for consideration in the recurrently more complex elaboration on the question by arbitrators, academics, and practitioners.\(^4\)

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\(^1\) CMS Gas Transmission Co. v. Argentine Republic, Annulment Decision, ICSID Case No. ARB/01/8 (Sept. 25, 2007).

\(^2\) CMS Gas Transmission Co. v. Argentine Republic, Award, ICSID Case No. ARB/01/8, Award (May 12, 2005).


\(^4\) See generally Campbell McLachlan et al., International Investment Arbitration 109-17 (2007); Stanimir A. Alexandrov, “Breaches of Contract and Breaches of Treaty. The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of
Four camps have been identified in comments concerning the approaches taken by recent decisions on the umbrella clause. The first examines whether it has been the intention of the parties to the instrument containing the umbrella clause to make the breach of contract a treaty breach.\(^5\) The second focuses on whether the contract breach has been committed in the exercise of sovereign authority as opposed to commercial reasons.\(^6\) A third view purports to internationalize investment contracts transforming contractual claims into treaty claims.\(^7\) They are all held to be wrong. The first camp is criticized because it would deprive the clause of content, requiring a breach of the treaty that would be in any event actionable under international law. The second camp is dismissed because a distinction between sovereign authority and commercial acts is unwarranted. And the third camp is rejected because internationalization of contracts is contrary to the governing law and confuses contracts and treaties.

Only, in that assessment, does a fourth view have merit because it allows for a substantive treaty claim to arise from a contract breach, but it does not convert a contractual claim into a treaty claim and does not change the proper law of the contract or its dispute settlement mechanisms.\(^8\) It has been rightly commented that such an approach does no more than confers jurisdiction upon the treaty tribunal that would be enabled to decide purely contractual breaches brought under the umbrella clause and, separately, treaty

Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*\(^5\) *J. World Inv. & Trade* 555 (2004).


\(^7\) *Fedax, NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Jurisdiction (June 11, 1997), and Award, ¶ 29 (Mar. 9, 1998).

\(^8\) *SGS Société Générale de Surveillance S.A. v. Republic of the Phillippines*, ICSID Case No. ARB/02/6, Jurisdiction (Jan. 29, 2004); *CMS, Annulment, supra* note 1; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, ¶¶ 46-62 (Oct. 12, 2005).